



Sharia law and the death penalty

Would abolition of the death penalty be unfaithful to the message of Islam?



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We promote alternatives to prison which support the rehabilitation of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

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Glossary

<i>Allah</i>	God (one of 99 names of God)	<i>Moharebeh</i>	Iranian definition of <i>hirabah</i> (waging war against God and society)
<i>Al-nasab</i>	An individual's lineage and offspring	<i>Muhsan</i>	Free adult Muslim who has previously enjoyed sexual relations in matrimony regardless of whether the marriage still exists
<i>Bulugh</i>	Age of criminal responsibility	<i>Qadhf</i>	Slander/defamation
<i>Diyya</i>	'Blood money' or financial compensation	<i>Qisas</i>	Retaliation or retribution
<i>Fard al-ayn</i>	Personal obligation	<i>Qiyas</i>	Individual reasoning and analogies
<i>Fatwa</i>	Juristic ruling concerning Sharia law issued by an Islamic scholar	<i>Quran</i>	Spoken and unalterable word of God
<i>Fiqh</i>	Interpretation of Islamic jurisprudence	<i>Rajm</i>	Stoning
<i>Fuqaha</i>	Islamic jurists (singular faqih)	<i>Riddah</i>	Apostasy
<i>Hadd</i>	Claim against God (singular) or fixed punishment	<i>Salat</i>	Prayer
<i>Hadith</i>	Stories and anecdotes of the Prophet Muhammad	<i>Sariqa</i>	Theft
<i>Hanafi</i>	Sunni school of jurisprudence	<i>Shafi'i</i>	Sunni school of jurisprudence
<i>Hanbali</i>	Sunni school of jurisprudence	<i>Shahada</i>	Muslim declaration that there is no god except Allah and that Muhammad is the messenger of Allah
<i>Hirabah</i>	Waging war against God and society	<i>Sharia</i>	Sharia law
<i>Hudud</i>	Claims against God (plural) or fixed punishment	<i>Shi'a</i>	Follower of Shi'ism, a branch, doctrine, school of Islam
<i>I'dam</i>	Taking life away (the word i'dam was never mentioned as such in the Quran, but only in newer legal terminology)	<i>Shubha</i>	Case of doubt
<i>Ijad</i>	Giving life	<i>Shura</i>	Process of deliberate consultation
<i>Ijma'</i>	Collective reasoning	<i>Shurb al-Khamr</i>	Drinking alcohol
<i>Ijtihad</i>	Scholarly discretion	<i>Sunnah</i>	Examples set by the Prophet Muhammad
<i>Imam</i>	Religious leader	<i>Sunni</i>	Follower of Sunnism, a branch, doctrine, school of Islam
<i>Ja'fari</i>	Shi'a school of jurisprudence	<i>Surah</i>	Chapter of the Quran
<i>Juz'iyyat</i>	'Particular' laws, usually contrasted with 'universals' (Kulliyat)	<i>Ta'zir</i>	Claims of state/society
<i>Khalifa</i>	Ruler (plural Khulafā)	<i>Ummah</i>	Nation, people (often referring to worldwide community of Muslims)
<i>Kulliyat</i>	The five fundamental or universal principles ('indispensables') in Islam	<i>'Uqubat</i>	Punishment
<i>Madhhabs</i>	Schools of Islamic law	<i>'Urf</i>	(Social) customs
<i>Mafasid</i>	Harm (for the individual and society)	<i>Zakat</i>	Charitable donations
<i>Maliki</i>	Sunni school of jurisprudence	<i>Zina</i>	Adultery
<i>Masalih</i>	Benefit (for the individual and society)		

Foreword

The death penalty is one of the core issues that Penal Reform International (PRI) has worked on for over two decades, in all parts of the world. During this time, PRI has witnessed the death penalty's abolition in a majority of the world's nations, but it continues to be used in most Muslim countries. One of the main reasons for this is the justification that it is permitted by the Quran, the Islamic holy text. As such, most nations that consider Islam to be the state religion permit the use of the death penalty. Our work has led us to find that this punishment is rooted in these countries' legal and political systems, with the influence of religious traditions indirectly affecting the use of the death penalty.

Although capital punishment is still widely supported in Islamic states and nations, there are growing groups of Muslims who support the abolition of the death penalty. This is for many reasons, including different interpretations of Quranic passages that deal with capital punishment, but also concerns that governments may use religion as a cover for other reasons to retain the death penalty: it can eliminate actual and potential enemies to government and disseminates fear in society while also encouraging a superficial sense of security.

We believe that by publishing this research paper we can contribute to a courageous debate on the issue, based on the real spirit of the Islamic penal code: that is to save lives, promote justice, and prevent corruption and tyranny.

..... Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom.

Quran (Surah Al-'An'am) 6:151

PRI highly values the work of Michael Mumisa, who has produced the final draft of this report. We also offer our sincere appreciation to Dr. Mohammad Habbash, who first drafted this publication and whose enlightened vision has helped shape this research. We also thank the many other Islamic scholars who reviewed the study.

PRI puts before readers this contribution to the international debate on the issue of the death penalty and Islamic law. We attempt to highlight the different Islamic jurisprudences, stressing that the views expressed in this research do not represent PRI's opinion or position. We hope that this paper will improve understanding of the different arguments and interpretations surrounding Sharia law and the death penalty, to allow everyone to participate in a reasoned and informed debate.

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Introduction

In many Islamic countries which continue to carry out executions, the death penalty has become a taboo subject. Governments frequently use Sharia to justify why they retain and apply capital punishment, and this can seem to close discussion on the subject. However, Sharia law is not as immutable on the death penalty as many scholars or states say.

Among the misconceptions about Sharia law is the belief that there is a clear and unambiguous statement of what the punishments are for particular offences. In fact, there are several different sources referring to punishments, and different schools of Sharia law give different weight to them. There is a belief that Islamic judges are required to impose a fixed and predetermined punishment for certain offences without discretion or without permitting mitigating evidence to be admitted into court. This is not true. Additionally, there is also the belief that Sharia law is widely used in national legislation and practice in Islamic countries, in the Middle East and North Africa (MENA) region and elsewhere. In fact, most countries in the MENA region maintain a dual system of secular courts and religious courts, in which the religious courts implement various aspects of Sharia law.

This publication aims to correct misapprehensions and to give readers an understanding of Islamic law and jurisprudence relating to the death penalty. It describes the sources of Sharia law and the relative importance of each source. It lays out the different offences that may attract the death penalty and the different views about each, showing that Sharia law does not explicitly compel Muslim states to apply the death penalty. It examines the offences and evidentiary requirements that are required for a death sentence under Sharia, finding that they are so restrictive that they make it almost impossible to impose such a punishment in practice.

Contrary to traditionalist interpretations of the Sharia that make the death penalty permissible for four proscribed offences (premeditated murder, adultery, apostasy and 'waging war against God'), Islam takes a much more flexible and lenient approach. It does not require the death penalty, but instead provides opportunities for it to be avoided. This publication examines each offence

in turn, reviewing the context in which it was established and the debates between schools of Islamic thought and jurisprudence. It also examines Sharia law in relation to other offences that may carry the death penalty in majority Islamic states, pointing out that many offences that carry the death penalty (such as drug offences and sorcery/witchcraft) cannot do so on the basis of Sharia. Finally, the paper looks at how the death penalty relates to other obligations in Islam, in particular the importance of family and how this relates to children of those sentenced to death.

Note

While this publication aims to reflect on the position of the death penalty as a punishment under Sharia law, it can in no circumstances be regarded as reflecting the position of Penal Reform International (PRI). PRI is of the opinion that the death penalty should be prohibited absolutely. PRI opposes the death penalty because it is a violation of two fundamental human rights, as laid down in the Universal Declaration of Human Rights:

- The right to life (Article 3)
- The right not to be tortured or subject to any cruel, inhuman or degrading punishment (Article 5)

The death penalty represents an unacceptable denial of human dignity and integrity. It is irrevocable, and given that criminal justice systems are open to error or discrimination, the death penalty will inevitably be inflicted on the innocent.

Many Islamic scholars have argued that international human rights do not apply to Islamic states as they are based on Western principles and ideologies. However, many basic human rights principles can find some similarity in Sharia law principles.

A cross-cultural approach which strengthens rather than undermines the universality of human rights should be the positive way forward. Indeed, as we will demonstrate, Sharia itself is based on the idea that some human values are common and universally shared by all people regardless of their cultures or religious traditions.

1. Basic Islamic principles

Introduction to Sharia law

In order to properly understand the application of the death penalty under Islam, it is important to first have a basic grasp of the various concepts which constitute Sharia law.

Sharia is believed to cover all aspects of a Muslim's life. For Muslims, it is the 'divine guidance' which, among other things, encompasses the moral code and religious law of Islam. Sharia governs many areas of a Muslim's behaviour, including those relating to crime, politics, taxes, inheritance, marriage, divorce, hygiene, diet, prayer, fasting and pilgrimage. It can be described as a system which is meant to guide how Muslims act in society and their interrelationship with those inside the Muslim faith as well as those outside of it.

Sharia law constitutes just a small portion of the message of Islam. Islamic scholars point out that out of the 6,236 verses in the Quran, only about 500 verses deal with aspects of law. Since the early development of Sharia law, Islamic jurists have always accepted and argued that the limited number of verses dealing with law lends the Sharia to multiple interpretations and re-interpretations.

The objectives of Sharia are to protect the 'five indispensables' (*al-daruriyyat al-khamsa*), which are the fundamental principles (*kulliyat*) which underlie the application of law in Muslim society.¹ Therefore all laws (*juz'iyyat*) were revealed in the Quran to preserve the five indispensables, which are:

- The protection of life (*al-nafs*)
- The protection of religion/faith
- The protection of offspring, or an individual's lineage (*al-nasab*)
- The protection of property
- The protection of an individual's intellect

To protect the five indispensables, Islam has established two approaches:²

1. Moral education, which emphasises the importance of cultivating *taqwa* (religious or God consciousness) so that people do not commit crimes because they believe that God is always aware of what they do, and that they will eventually face His judgement in the hereafter.

Be mindful of your duty to God. Lo! God is well acquainted with all that you do. (Quran 5:8)

2. Since religious or moral piety alone cannot guarantee law and order, Sharia law prescribes forms of punishment, which constitute the criminal justice systems of Islam.

Sharia law is also based on the foundational principle that the function of law in Islam, as both classical and contemporary Islamic jurists agree, is to 'accrue benefit' for the *masalih* (the individual as well as for the common good or public interest) while 'repelling harm'³ away from the *masalih* (this has significance with regards to the application of the death penalty). Sharia laws are simply a means to achieve that goal and not an end in themselves. The eminent jurist Abu Ishaq al-Shatibi explained the concept 'accrue benefit' as follows:

God established Sharia in order to advance masalih, and there is unanimous agreement on this. It was also agreed that the masalih which are taken into consideration are those relating to kulliyat [i.e. universal principles, the five 'indispensables' in Islam: protection of an individual's faith, life, intellect, offspring and property] and not those relating to juz'iyyat ['particular laws' which are merely a means to achieving the universals]...⁴

Similarly, 'repelling harm' means preventing anything that would undermine the indispensables or public interests (*masalih*). Thus, the death penalty was seen as a way of deterring crime and sin in Islam and repelling harm from the *masalih*. Whether that is still applicable in a modern-day society will be discussed in Chapter 3.

1 Al-Shatibi, *al-Muwafaqat*, Vol. 3, pp. 335-338.

2 Mohammed Salam Madkoar, 'Human Rights from an Islamic Worldview: An outline of Hudud, Ta'zir & Qisas', *Al-Muhajabah's Islamic Pages*, undated, accessed 28 October 2014 at <http://www.muhammad.com/docstorage/hudud.htm>.

3 Al-Izz Ibn Abd al-Salam, *Al-Qawa'id fi ikhtisar al-maqasid*, e.d. Iyad Khalid al-Taba', Beirut, Dar al-Fikr, pp. 32-34.

4 Al-Shatibi, Abu Ishaq, *al-Muwafaqat*, Vol. 1, Khobar, Dar Ibn 'Affan, 1997, p. 221.

Primary sources of Sharia law: The Quran and *sunnah* (*hadith*)

The Quran

All the schools of Islamic theology and law unanimously agree that the Quran is the primary source for all matters relating to theology and law. This is based on the belief among Muslims that the Quran is the exact word of God (*kalam Allah*) revealed to the Prophet Muhammad in pure Arabic through the Archangel Gabriel, and has remained unchanged and protected from human interpolation up to this day.

This, however, does not mean that all matters relating to law are explicitly mentioned in or directly derived from the Quran. In fact only a small fraction of Sharia laws can be said to have been directly derived from the Quran. The rest are based on interpretations of the *sunnah* or *hadith* (see below) and other secondary sources of Sharia law.

The Quran is arranged in 114 *Surah* or chapters of unequal length and numbered consecutively. In this publication, references to the Quran will be displayed chapter then verse (Quran XX:XX).

The *sunnah* (*hadith*)

The *sunnah* are examples set by the Prophet Muhammad. They are regarded by the majority of Muslims within both the Sunni and Shi'a traditions as the second primary source of Sharia law.

The Arabic term *sunnah* literally means 'a habitual practice', 'an established course of conduct', or 'normative tradition'. In its Islamic juristic usage, the term *sunnah* came to refer to the normative practices established by the Prophet Muhammad as a model to be followed by all Muslims: His verbal statements, actions, and tacit approval of other people's statements and actions, all of which were later established to be legal precedents. Since the Prophet was believed to be the prime interpreter of the message of the Quran, His statements and deeds came to constitute a source of both Sharia law and the interpretation of the Quran (*tafsir*). Hence the *sunnah* is considered to be primary Sharia law alongside the Quran.

Another term linked to the *sunnah* is *hadith*. The term *hadith* in Arabic literally means 'speech', or 'oral tradition'. Since the dominant method of transmitting reports containing the *sunnah* of the Prophet was oral, the term *hadith* was used to refer to that process of transmission. Eventually the two terms *sunnah* and *hadith* were used interchangeably.

While there is only one version of the Quran, there are different versions and collections of *hadiths*. The authenticity and history of the writing down and

compilation of *hadiths* have been areas of fierce debates among Muslims as well as among Western scholars of *hadith*. Due to the specific scope of this publication, we will not attempt to revisit the debates here. This has been sufficiently done by others.⁵ We will only refer to those aspects of the debates which have direct bearing on the present topic. However it is important to note the existence of spurious and dubious versions of *hadiths*. In this publication, we will be careful to accept and use only what is considered to be most authentic: those that could be traced with great certainty to the Prophet.

Secondary sources of Sharia law

Muslims, regardless of their theological affiliations, have always believed that the Quran was not revealed all at once as a complete text but that the verses of the Quran were revealed in the context of particular affairs or occasions over twenty-three years during the lifetime of Prophet Muhammad. This, it is believed, was because the Quran came to answer and solve the concrete problems of a constantly changing society.

The death of the Prophet marked an end to this process of gradual divine revelation (*wahy*). However, society did not cease to evolve and new problems and questions continued to emerge while the Prophet was no longer physically present to provide answers. The limited nature, both in number and subject matter, of the verses of the Quran, particularly those dealing with law and society, was immediately recognised by the early community of Muslims.

Subsidiary sources of Sharia law as well as new methods of deriving laws from the Quran and *sunnah* started developing. The following are some of the many sources which were introduced and continue to be used today by Muslims to derive laws in a constantly changing society.

Ijma' (general consensus)

In cases where no direct textual evidence exists in either the Quran or *sunnah* to address a new legal problem, new laws are developed on the basis of *ijma'* (general consensus). There are two ways this can happen:

1. Individual jurists develop a new law using an innovative and novel way of interpreting the existing primary sources of Sharia law (Quran and *sunnah*). Their new findings are then subjected to a referendum in order to establish *ijma'* (consensus).
2. Social consensus (*'urf*) on an issue already exists and this is then formally adopted as part of the new law after a referendum.

The condition in both cases is that the new law should not undermine the five indispensables of Islam.

⁵ For a very accessible and detailed overview of the debates see Herbert Berg, *The Development of Exegesis in Early Islam: The Authenticity of Muslim Literature from the Formative Period*, Routledge/Curzon, 2000.

According to the Quran (42:38), true Muslims are those who decide all their affairs by a process of mutual consultation. Islamic jurists and scholars are in agreement that an *ijma'* is not valid if it has not been established after a process of deliberative consultation (*shura*).

The Prophet Muhammad said: *My nation (ummah) will never agree upon an error!*⁶

Although there are debates among scholars that the term '*ummah*' in the above *hadith* is an exclusive term, and means scholars and other elite members of society, there is ample evidence to demonstrate that the Prophet meant to be inclusive, and that *ummah* means all members of society regardless of class, gender or race.⁷

There is also a general assumption among many Islamic jurists that, once established, an *ijma'* becomes universal and can never be abrogated by the same or subsequent generations. Historically, this has seen the concept of *ijma'* being used as a political tool to mobilise power and control. However, since *ijma'* is every Muslim society's attempt to address novel challenges relating to public interest, which differ and change according to time and geography, an *ijma'* may be overturned whenever circumstances change in society.⁸

Qiyas (analogical reasoning)

The term *qiyas* refers to the applicability of a law that is explicitly mentioned in the Quran or *sunnah* to a specific case not mentioned in the Quran or *sunnah*. This is done through a process of analogical reasoning which is based on identifying the existence of a common link (legal cause) between the original law (i.e. the one explicitly mentioned in the Quran or *sunnah*) and the new law for which there is no direct reference in the Quran or *sunnah*.

For example, the Quran explicitly mentions and prohibits the consumption of *khamr* (wine/alcohol) but does not mention new forms of intoxicating drugs such as cannabis or cocaine. A majority of Islamic jurists agree that behind every law mentioned in the Quran is a 'reason' or 'cause' known in Islamic legal terminology as an '*illat al-hukm*' ('the cause of or reason for the rule'). The job of a jurist is to investigate and identify that 'cause' in order to determine whether or not it is applicable to new legal cases for which no direct text or reference can be found in the Quran and *sunnah*. It was therefore agreed by Islamic jurists that the reason or cause behind the prohibition of *khamr* (wine/alcohol) in the Quran is its intoxicating quality. This means therefore that all the laws associated with *khamr* (wine/alcohol) in the Quran extend to all new substances which share the same intoxicating attribute.

Masalih al-Mursala (public good or public interest)

Masalih al-mursala is a juristic device that has been employed in developing Sharia laws in cases for which there exists no direct text in the Quran or *sunnah*. Sharia laws developed on the basis of *masalih al-mursala* take into consideration what is in the best interest of society. In Islamic legal theory, such *masalih al-mursala* (public interests) have the legal power to override 'particular' (*juz'iyya*) laws derived directly from the Quran and *hadith*, since such verses or *hadiths* reflect the *masalih* (public interests) of seventh century Muslim society, rather than in the interests of modern society.

Since *masalih* (public interests) change with time and geography, Sharia laws once developed to address the public interest of a specific society in the past must be changed and reformed to reflect the needs of a modern society. The concept of *masalih al-mursala* as a source of law is one of the most important legal options Muslims have adopted in order to accommodate social change and to justify legal reform.

The schools of Sharia law

Most of what is now known as Sharia law, referred to generally as *fiqh*, can be defined as a jurist's understanding or interpretation of the primary sources of law in Islam (the Quran and *sunnah*) in order to derive laws. This encompasses secondary laws derived through *ijma'*, *qiyas* and *masalih al-mursala*. Since 'interpreters are human beings', as Ali Ibn Abi Talib famously said, there are inevitably going to be differences of opinions among Islamic jurists. Such differences are a result of:

- a. methodologies adopted by individual jurists in interpreting and deriving Sharia laws from their primary sources;
- b. which sources jurists privilege over other sources;
- c. the time and geographical location of the jurists, and the specific needs and interests of their audiences or communities.

Thus, Sharia law has been a site of tension between the various schools of legal theory.

6 Different versions of this tradition exist in a number of *hadith* collections and classical legal texts. See Sunan Abu Dawud (*Hadith* No: 4253); Jalal al-Din al-Suyuti's al-Jami' al-Saghir (*Hadith* No: 1818).

7 The Prophet Muhammad famously declared, in what is now called The Medina Charter, that: 'The Jews of Banu Aws [a Jewish tribe in Medina] constitutes an *ummah* alongside the believers [Muslims] ... Their relationship shall be one based on mutual advice and consultation, and mutual assistance and charity rather than harm and aggression.' (See the *Sirah of Ibn Hisham*, Vol. 1, pp. 178-179; Ibn Kathir's *al-Bidaya wa-I-Nihaya*, Vol. 3, pp. 224-226; M. H. Haykal, *The Life of Muhammad*, American Education Trust, 1976, pp. 181-182.) The inclusion of a non-Muslim community in the Prophet's definition of *ummah* justifies the inclusion of non-Muslims living in Islamic countries in the processes of *ijma'*. There is ample evidence from Islamic sources to demonstrate that non-Muslims would often participate in the various *shura* (deliberative consultation) processes during the time of the Prophet when it was pertaining to issues affecting the whole society.

8 The eminent jurist Al-Bazdawi (d. 1089 CE) mentioned other circumstances under which an *ijma'* can be abolished by subsequent generations. See *Usul al-Bazdawi*, 1966, p. 247.

There are a number of schools of legal theory that will be referenced in this work. However, the five prominent schools are:

1. Hanafi⁹
2. Maliki¹⁰
3. Shafi'i¹¹
4. Hanbali¹²
5. Ja'fari¹³

One of the great doctrinal debates among all schools of jurisprudence today is whether the Quran and the *sunnah* are to be interpreted literally, or on the basis of the intent and purpose of the text, or both.¹⁴ This debate impacts on the application of the death penalty. As will be seen in Chapter 2, the offences which are death penalty applicable in Sharia law are not always clearly stated in the Quran. In some circumstances *fiqh* (interpretation of the primary sources of law in Islam) has been used to interpret what punishments should be applied in Islam for certain offences, raising some serious questions of doubt over their legitimacy under Sharia law, which will be further analysed below.

Islam and the fundamental right to life

As mentioned above, one of the five indispensables in Islam is the protection of life. This is recognised in the Quran, *hadith* literature, and other key Islamic texts. According to Islam, man is the central creature and the ultimate purpose of creation; effectively man is God's vicegerent on earth.

Your Lord said to the angels, 'I am appointing a vicegerent on earth'. (Quran 2:30)

This responsibility and function as God's 'vicegerent', so Muslims believe, makes human beings a degree higher than angels in the eyes of God.

Your Lord said to the angels: 'I am about to create a human being out of clay; when I have fashioned him and breathed of My spirit into him, kneel down before him in prostration'. (Quran 38:71-72)

Although the Quran accords human beings with the title of 'God's vicegerents' on earth, it denies them the licence to take any human life.

Islamic teachings describe the act of giving life (*ijad*) and taking it away (*i'dam*) as exclusively God's prerogative. Thus, the terms *ijad* and *i'dam* denote actions by God that human beings are not allowed to emulate.

Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land – it is as if he had slain mankind entirely. And whoever saves one – it is as if he had saved mankind entirely. (Quran 5:32)

The geographical and cultural landscape of seventh century Arabia in which the Quran and the religion of Islam emerged was a very violent and hostile one marked by endless tribal blood feuds. Indeed one of the 'noble' traits greatly valued in pre-Islamic society was that of *hamasa* (steadfastness in seeking revenge).

Thus, within such a violent and lawless context, the Quran permitted the taking of a life only 'by way of justice and law' as a measure for preventing cycles of violence. With the emergence of the new religion of Islam, life could only be taken if it had been explicitly sanctioned and specified under Sharia and not merely as part of blood feuds.

Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom. (Quran 6:151)

In most Muslim countries, therefore, the death penalty can be applied by courts as punishment for the 'most serious crimes' as set out in Sharia law.

9 India, Pakistan, Turkey and Central Asia are dominated by Muslims who subscribe to the Hanafi school of Sharia law.

10 Today the Maliki school of law can be found mostly among Muslims living in West Africa and North Africa.

11 Today followers of the Shafi'i school can be found in Malaysia, Indonesia, Brunei, Egypt, Yemen, Syria, Palestine and East Africa, to mention just a few countries.

12 Today the Hanbali school has the fewest followers among the world's Muslim population. The majority of Muslims who subscribe to the Hanbali school are found in Saudi Arabia and other Gulf countries. However, the numbers have been growing as a result of the *salafi* movement that has been spreading in Western countries, particularly among young Muslims and converts who are searching for a puritan Islam that is based only on the primary sources.

13 Today the Ja'fari school is dominant among Shi'a Muslims in Iraq, Iran, Lebanon, Pakistan, India and East Africa.

14 M. Cherif Bassiouni, 'Death as a penalty in the Sharia' in Peter Hodgkinson and William A. Schabas (eds.) *Capital Punishment: Strategies for Abolition*, Cambridge University Press, 2004, pp. 169-185, p. 170.

2. Crime and justice: application of the death penalty under Sharia law

Categories of penalties in Sharia law

There are three categories of penalties in Sharia law:

1. *Qisas* crimes: 'retaliation or retribution'
2. *Hudud* crimes: 'claims against God' (mandatory)
3. *Ta'zir* crimes: 'claims of the state/society' (discretionary)

Hudud crimes are considered the most serious under Sharia law, and *ta'zir* crimes the least serious.

The sources of Sharia law for each category of crime vary. Frequently, multiple sources of law have to be combined to complete the definition of a given crime, identify its elements and establish its evidentiary requirements. The Sunni and Shi'a jurisprudential schools differ as to some of the elements of the crimes contained in these three categories and their evidentiary requirements, making their study more challenging.

Qisas, *hudud* and *ta'zir* all include references to the death penalty as a punishment (*'uqubat*) for four particular offences (murder, adultery, apostasy and 'waging war against God'), which will be explored in more detail in this chapter.

Qisas crimes: Murder

Qisas (retaliation or retribution) laws follow the principle of 'an eye for an eye' or *lex talionis* and they cover murder or serious cases of intentional bodily harm. They are administered under strict conditions to fit with the sanctity of human life in Islam, and involve the following offences against the person:

- Intentional or premeditated murder (first-degree)
- Quasi-intentional murder (second-degree)
- Unintentional murder (manslaughter)
- Intentional injury (battery)
- Semi-intentional/unintentional injury

The forms of punishment mentioned in the Quran for *qisas* offences aim to seek justice and redress by their equivalence. Thus in the case of premeditated murder, the punishment as described in the Quran is death.

Believers, just retribution is prescribed for you in cases of killing: a free man for a free man, a slave for a slave, and a female for a female. If something [of his guilt] is remitted to a person by his brother, this shall be pursued with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Lord, and an act of His grace. He who transgresses thereafter shall face grievous suffering. There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing. (Quran 2:178-9) (emphasis added)

In this publication we shall focus on *qisas* laws in relation to murder, as this is the only *qisas* offence that gives rise to the presumption of a death penalty.

Qisas laws were introduced in a fragmented seventh century tribal Arabian society where state authorities did not yet exist to administer justice. *Qisas* laws were introduced as an attempt to impose limitations over tribal culture that promoted revenge and retribution. Under pre-Islamic tribal laws the guardians (*awliya'*) of a victim could demand justice not only from the perpetrator of the offence but also from other members of his family or tribe. In murder cases, for example, the family of the victim or his guardians could retaliate by killing the perpetrator and his family. This often resulted in years and generations of violent conflicts and revenge attacks between families and tribes.

Influential classical commentators on the Quran such as Al-Tabari (d. 923 CE)¹⁵ explained that *qisas* laws were revealed to reform the pre-Islamic culture of revenge:

*In the law of equity [qisas] there is [saving of] life to you, O ye men of understanding; That ye may **restrain yourselves**.* (Quran 2:179) (emphasis added)

In his famous commentary on the Quran, Al-Tabari wrote:

*Others [i.e. interpreters of the Quran] said: what this means is that there is a preservation of life for others [i.e. innocent members of the family or tribe] in qisas since no one else other than the killer should be killed, according to God's decision.*¹⁶

Al-Tabari goes on to explain that this verse (2:179) was in response to pre-Islamic tribal laws where the innocent could be killed for crimes committed by members of their families or tribes.

Although the Quran prescribes the death penalty as a punishment for murder, it does not specify any procedural laws governing what happens in a Sharia court in order to ensure a fair application of the law.

It does, however, make an explicit declaration on the importance of upholding justice in Islam.

*O ye who believe! **Stand out firmly for justice**, as witnesses to God, even as though it be against yourselves, or your parents, or your kin, and whether it be [a case against a] rich or poor [person]: for God must be given preference over them. Follow not the lusts [of your hearts], lest you swerve, and if you distort [justice] or decline to do justice, verily God is well-acquainted with all that ye do.* (Quran 4:135) (emphasis added)

Classical and medieval Islamic jurists (*fuqaha*) have, through *fiqh*, developed strict guidelines and conditions on how *qisas* laws should be implemented. These strict conditions reflect, in many respects, some of the established prohibitions and restrictions established under international law for the implementation of the death penalty.

Sharia law has a high burden of proof. This means that punishment should be averted if any suspicion or doubt arises, as it is considered preferable to err in granting a pardon, than to err in inflicting punishment. Therefore, for any offence that cannot be proved beyond a reasonable doubt, the court should find in favour of the defendant. This equates to the established legal maxim 'presumption of innocence' which is generally observed as a key element of the right to a fair trial (Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR)).

Sharia law also requires that a minimum of two witnesses must testify that they saw the offence take place. Circumstantial evidence cannot be admitted into Court for a finding of a *qisas* offence.

These conditions can be considered as equating to Safeguard 4 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (approved by the UN Economic and Social Council in 1984) which require that the death penalty can only be imposed 'when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts'.

Sharia law also has a strict requirement that a person cannot be accused of an offence if they are under the age of criminal responsibility known as *bulugh*. Although the Quran does not specify what this age is, Islamic jurists have interpreted it to mean 'age of physical puberty' or 'age of majority'. This has meant that in practice there are differences among jurists in all major schools of Sharia law regarding the exact age constituting *bulugh*. However, the Quranic ambiguity as well as the lack of general consensus (*ijma'*) on an agreed age demonstrates that *bulugh* could today be interpreted in terms of Article 37(a) of the Convention on the Rights of the Child (CRC), which all Muslim states have ratified. The CRC provides that people who were under the age of eighteen at the time the offence was committed must not face the death penalty. While almost all states have now abolished the death penalty for those under the age of 18, Iran, Saudi Arabia, Sudan and Yemen are known to have imposed death sentences and executions on people who were alleged to have committed the offence when they were under the age of 18.¹⁷

The lack of procedural guidelines in the Quran as to the implementation of the death penalty for *qisas* laws presents contemporary Islamic jurists with the opportunity to develop further safeguards and restrictions on how Sharia courts implement *qisas* laws. As the Quran and *hadiths* are silent on many modern-day concepts of justice with regards to due process and fair trial rights, Islamic jurisprudence (*fiqh*) can therefore derive laws on how to implement Sharia in a modern Islamic legal system. For example, Sharia law makes no clear provision for the right to appeal. At the same time Sharia law does not oppose such a right. Thus, an application of Sharia law which includes a right of appeal would not be incompatible with Islam.

Although most Islamic states employ state executioners, traditionally, the next of kin of the victim would carry out the execution.

15 Other eminent early commentators of the Quran (from within both the Sunni and Shi'a schools of law) who interpreted Quran 2:179 as a response to pre-Islamic Arab tribal laws are: Shaykh Abu Ja'far al-Tusi (d. 1067 CE) in his commentary *Al-Tibyan fi tafsir al-Qur'an*; Abu Ishaq Ahmad Ibn Muhammad al-Tha'labi (d. 1035 CE) in his commentary *Al-Kashf wa-l-bayan 'an tafsir al-Qur'an*; the Persian mathematician and commentator of the Quran Nizam al-Din Hasan al-Nisaburi (d. 1328/9 CE) in *Tafsir ghara'ib al-Qur'an*; Abu Hayyan al-Andalusi al-Gharnati (d. 1344 CE) of Granada (Spain) in *Al-Bahr al-muhit*; Abu Muhammad Ibn 'Atiyya (d. 1147 CE) of Grenada in *Al-Muharrar al-wajiz fi tafsir al-kitab al-'aziz*; and other scholars.

16 See *Tafsir al-Tabari*, Sura al-Baqara (Q2):179.

17 Human Rights Watch, *The last holdouts: Ending the juvenile death penalty in Iran, Saudi Arabia, Sudan, Pakistan and Yemen*, 10 September 2008.

And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly – We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]. (Quran 17:33)

This is because a *qisas* offence is treated as a common law tort or an offence against the person, rather than an offence against the state. While a Sharia judge can convict someone of a *qisas* offence, *qisas* is considered a rightful claim of the victim (or in cases of death, the victim's next of kin), and therefore it is for the victim or their family to determine the punishment.

Arguments against the death penalty for the offence of murder in Islam: victim forgiveness and restitution

Although the Quran very clearly makes provisions for the death penalty as a punishment for a *qisas* offence under the retaliatory principle 'an eye for an eye', it also makes provisions for an alternative course of action through victim forgiveness and restitution.

And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers. (Quran 5:45) (emphasis added)

The Quran encourages the victim (or their family) to forgive the perpetrator, and seek financial compensation (*diyya* – sometimes called 'blood money') as an alternative to demanding retribution through execution as an act of charity or in atonement for sins.

The provision for paying an indemnity, Muslims argue, provides a strong motive for encouraging the next of kin to pardon the offender, particularly because the indemnity is not treated as a mere pardon or a charitable payment. It is not considered as dishonourable to accept *diyya*; it is taken as a right as stipulated in the Quran. *Diyya* can, in many respects, be compared to the financial compensation which exists in many states' criminal and civil laws.

Traditionally, *diyya* was paid in terms of goods or animals rather than money. However, the Quran is silent as to how much *diyya* should be paid. Different schools of Sharia law have established different amounts.

Countries whose laws follow Sharia have enacted laws for *qisas* and *diyya*. In Yemen, for example, *diyya* for the murder of a woman is half that paid for the murder of a man.¹⁸ This is in direct contradiction to the verses

of the Quran and authoritative traditions of Prophet Muhammad which do not discriminate between men and women in *qisas* laws and other criminal cases. No single verse from the Quran or authentic *hadith* from the Prophet Muhammad exists to support the Yemeni legal position. The Yemeni position is based on a questionable narration recorded by the famous *hadith* expert Abu Bakr Ahmad ibn Husayn al-Bayhaqi (d. 1066 CE) in his *hadith* collection entitled *Sunan al-Kubra*.¹⁹ Al-Bayhaqi goes on to admit that this *hadith* is weak and unreliable as it does not meet the conditions of authenticity set down by Islamic jurists and *hadith* experts. He adds that in its chain of transmission is a narrator called Ubada Ibn Nasyi, who was classified by *hadith* experts as unreliable.

Libya allows for the commutation of death sentences to life imprisonment for those convicted of murder, if the next of kin pardon the convicted individual(s) and accept financial compensation.²⁰ The law stipulates that the amount of financial compensation is to be determined by the family of the murder victim.²¹ In practice, this means that negotiations can drag on for years, leaving individuals on death row uncertain about their future.²² In the United Arab Emirates, for example, 17 Indian migrant workers convicted of the murder of a Pakistani national had their death sentences commuted in September 2011 to two years' imprisonment, already served, and the payment of *diyya*, after the victim's family accepted 3.4 million AED (approximately US\$1 million) and dropped their request for retribution.²³ Other countries that permit the practice of *diyya* include Saudi Arabia, Iran, Iraq and Pakistan.

In Islamic jurisprudence (*fiqh*), *diyya* is treated as a preferred debt, taking priority over other debts, due from the convicted murderer when the next of kin agree to pardon him. However, unlike other *fiqh* rules on normal debt which accommodate room for delays, once an agreement has been reached on the amount of the *diyya*, the debt must be settled immediately without room for significant delays. It is taken from whatever property the murderer owns. Therefore, a charge is immediately placed on all his or her property until the indemnity has been paid in full. If the murderer does not have property, or does not have enough money, he or she may be assisted through *zakat*²⁴ (charity) funds.

Charitable donations [zakat] are only for the poor and the needy, and those who work in the administration of such donations, and those whose hearts are to be won over, for the freeing of people in bondage and debtors, and to further God's cause, and for the traveller in need. This is a duty ordained by God, and God is All-knowing, Wise. (Quran 9: 60)

18 Article 12 of the Penal Code, see Amnesty International, *Yemen: Submission to the UN Human Rights Committee*, UK, 2012, p. 6.

19 Al-Bayhaqi, *Sunan al-Kubra*, Vol. 8, pp. 95-96.

20 Law No. 6 of 1423, as amended by Law No. 7 of 1430.

21 Article 3 of Law No. 6 of 1423.

22 Amnesty International, *Libya: 'Libya of tomorrow': What hope for human rights?*, UK, 2010, p. 59.

23 Amnesty International, *Death sentences and execution in 2011*, UK, 2012, p. 44.

24 Muslims are obliged to give alms (*zakat*) to the poor.

It is indicative that, by permitting *zakat* to be used as a means of paying *diyya*, Islam encourages Muslim communities to assist those found guilty of murder to avert the *qisas* punishment.

In Sunni jurisprudence, the next of kin must agree on the application of *qisas*. If there is more than one next of kin, and only one of them chooses to pardon the convicted murderer, the state cannot enforce *qisas* even if the other next of kin demand the death penalty. Under such circumstances, the case will be settled by an alternative punishment. If the victim's heir is underage, *qisas* cannot be exercised until they have attained puberty and are deemed to be fit to exercise their part.

Muslim jurists argue that these and other mechanisms demonstrate that Sharia law's preference is always to forego the *qisas* punishment and to adopt alternative forms of punishment or a settlement between the convicted murderer and the victim's next of kin. If there is no next of kin, only then can the state act as prosecutor.

If the victim's family takes this course of action, an alternative discretionary (*ta'zir*) punishment can be enforced (usually imprisonment).

The system of victim forgiveness and restitution was established by Sharia law as a means of achieving justice without losing another life. According to the Quran, whoever is given a sentence of *qisas* and is spared death has a chance to repent and resume life in society.

If you punish, then punish with the like of that wherewith you were afflicted. But if ye endure patiently, verily it is better for the patient. (Quran 16:126)

The recompense for an injury is an injury equal thereto [in degree]: but if a person forgives and makes reconciliation, his reward is due from God: for [God] loves not those who do wrong. (Quran 42:40) (emphasis added)

The above Quranic verses, as well as others too numerous to cite here, encourage the victim's family to pardon the offender. Thus, according to the Quran, in the case of murder, justice can still be achieved without recourse to the death penalty.

In fact, Muslim jurists in both the Sunni and Shi'a schools of Sharia law hold that *qisas* should not be implemented until the relatives of the victim are fully informed that an execution represents an aggression on a human soul and therefore an aggression on God. This is because Sharia is based on the belief that God wants to promote life as well as justice, which are promoted through *qisas* as well as forgiveness. It means that from a Sharia point of view, justice can still be upheld by giving a pardon and receiving restitution, not just by the death penalty. In fact, the Prophet Muhammad, as well as generations of Islamic jurists after Him, considered forgiveness and restitution as the more honourable choice.

And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake – then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer – then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty – then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] – then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise. (Quran 4:92)

In fact, Sharia law appears to prioritise forgiveness over and above retribution as the appropriate means of achieving justice. In his famous collection of *hadiths* the eminent and influential Shi'a jurist Shaykh Al-Hurr al-Amili (d. c. 1692 CE) dedicated a chapter in his book on *qisas* to *hadiths* which privilege forgiveness over the application of *qisas* laws. He entitled the chapter: 'It is better for the next of kin to forgive [the perpetrator] in *qisas* cases, and to seek compensation [*diyya*], or other forms of compensation'.²⁵

Similarly, the Sunni jurist Shaykh Mansur Ibn Yunus al-Bahuti (d. 1641 CE) included a chapter on pardon in *qisas* cases in his influential Islamic legal text, still used today in Egypt and other Muslim countries, entitled *Kashf al-Qina'* (6 volumes). He wrote:

There is legal consensus [i.e. among Muslim jurists] that it is permissible to pardon [the guilty party] in qisas cases and that this option is better [than the application of qisas].

This is supported by the Quranic verse 2:178:

*And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord.*²⁶

He goes on to cite a famous *hadith* narrated by a companion (*Sahaba*) of the Prophet Muhammad and recorded in major Sunni collections of *hadith*:

*Whenever a qisas case was brought to the Prophet Muhammad, he would always order that the guilty party be pardoned.*²⁷

The Yemeni jurist, Muhammad al-Shawkani (1759–1834 CE), included a chapter on 'the merits of pardoning' the guilty party in *qisas*-related cases in his influential legal text entitled *Nayr al-Awtar*. He wrote:

*It is narrated on the authority of Abu al-Darda [a companion of the Prophet Muhammad] that he said: I heard the Prophet of God [Muhammad] saying '[w]hoever suffers some physical injury and pardons the offender, God will elevate him or her a degree higher and erase some of his or her sins'.*²⁸

25 See *Wasa'il al-Shi'a*, Chapter 57 (The Book on Qisas).

26 Mansur Al-Bahuti, *Kashf al-qina' 'an matn al-Iqna*, 13, Ministry of Justice (Saudi Arabia), 2008, p. 289.

27 Mansur Al-Bahuti, *Kashf al-qina' 'an matn al-Iqna*, 13, Ministry of Justice (Saudi Arabia), 2008, p. 289.

28 Al-Shawkani, *Nayr al-Awtar*, 'Chapter on the Merits of Forgiveness in Qisas'.

Thus, it would appear that the death penalty for murder is not the preferred punishment in Sharia law, but an exception. Islam's strong emphasis on forgiveness and restitution in *qisas* cases presents Islamic countries with a golden opportunity to make fundamental reforms to their criminal justice system, and establish a system that is based not on revenge or retribution, but one that is based on forgiveness. This would provide a legitimate basis to abolish the death penalty for murder which would still be faithful to the message of Islam.

Although the verses setting out the *qisas* punishment remain part of the Quran and have definitive import in Islamic crime and punishment, there is plenty of evidence confirming that the execution of a murderer is not the intention of Islam. The methods adopted by the Quran aimed at averting a death sentence demonstrate the importance of protecting life, including the life of a murderer.

It should be noted that, according to Islam, one's eternal punishment is ultimately in God's hands. Therefore, even if a person escapes justice in this world, according to the Quran, he or she will not be able to escape God's judgment in the Hereafter.

Verily the punishment of the Hereafter is greater if they did but know. (Quran 68:33)

Thus, while the Quran is clear that premeditated murder is a death penalty applicable offence, it also makes it clear that the Sharia encourages protecting the right to life. Islam, therefore, provides no bar to achieving the goal of abolition of the death penalty with regards to the offence of premeditated murder.

'Most serious crimes' threshold

It should be noted that *qisas* is the category of penalties in Sharia law that most closely reflects international standards on the application of the death penalty.

Article 6(2) of the ICCPR provides that for countries which have not abolished the death penalty 'sentence of death may be imposed only for the most serious crimes'. The 'most serious crimes' threshold has been interpreted restrictively, it being understood that their scope should not go beyond 'intentional crimes with lethal or other extremely grave consequences'.²⁹ The UN Human Rights Committee has found that the imposition of the death penalty for crimes that do not result in loss of life is incompatible with the ICCPR.³⁰ As clarified by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, the current international legal interpretation of the term 'most serious crimes' is limited to 'intentional killing'.³¹

Islamic countries that retain the death penalty for premeditated murder are therefore not in contravention of their international obligations as regards most serious offences.³² However, as will be discussed in the following section, the main concerns regarding the death penalty in Muslim countries are for offences which would not meet the 'most serious crimes' threshold.

Hudud crimes – 'claims against God'

The second category of crimes in Sharia law involves what are known as the *hudud* (or *hadd* – singular). *Hadd* means 'limit' in Arabic, and it indicates a 'fixed punishment'. *Hudud* crimes are therefore those that are punishable by a pre-established or mandatory punishment that has been laid down in the Sharia for a specific act. This, however, does not mean that they are immutable.

The six *hudud* offences are:

- *Zina* – adultery and fornication
- *Riddah* – apostasy
- *Hirabah* – 'waging war against God and society' or brigandage/banditry
- *Sariqa* – theft
- *Shurb al-Khamr* – drinking alcohol
- *Qadhif* – slander/defamation (meaning false accusation of any of these things)

According to some Islamic jurists, punishment by death is raised in the first three *hudud* offences:

- *Zina* – adultery
- *Riddah* – apostasy
- *Hirabah* – 'waging war against God and society' or brigandage/banditry

The other three *hudud* offences will not be discussed in detail as they are beyond the scope of this publication. The punishment for those three offences ranges from amputation to flogging.

It is in the category of *hudud* that the Sharia appears to be at loggerheads with international human rights law. First, the definition of *hudud* as 'mandatory punishment' conflicts with Article 6(1) of the ICCPR, that no one shall be 'arbitrarily deprived of his [or her] life'.³³

International law prohibits the mandatory imposition of the death penalty, as sentencing someone to death without taking into account the defendant's individual history (such as their mental and social characteristics) or the nature and circumstances of the particular offence, would equate to an arbitrary deprivation of life.

29 Safeguard 1 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (approved by the UN Economic and Social Council in resolution 1984/50 of 1984).

30 UN Human Rights Committee, 48th Session, *Concluding Observations: Iran*, 29 July 1993, CCPR/C/79/Add.25, para. 8.

31 UN General Assembly, 67th Session, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 9 August 2012, A/67/275, para. 37.

32 There may still be concerns about other international standards, such as fair trial guarantees or the prohibition on torture.

33 See for example UN Human Rights Committee, 82nd Session, *Pagdayawon Rolando v. Philippines*, *Communication No. 1110/2002*, 3 November 2004, CCPR/C/82/D/1110/2002, para. 5.2.

Furthermore, since by their very definition *hudud* laws are believed to be ‘mandatory’ and ‘fixed’ by God Himself, there is very little, if any, room for the right to appeal to a higher court as enshrined in Article 14(5) of the ICCPR. According to Islam, God Himself is believed to be the ‘highest court’.

According to many traditionalist Muslim scholars, *hudud* offences have a fixed punishment because they are deemed to be ‘the most serious crimes’; effectively, offences committed directly against God. This, however, is not true. There exists no textual evidence from Islam’s primary sources to support this theory. There is no rational way the consumption of alcohol or theft, for example, can be deemed to be more serious than murder and other *qisas*-related offences. Moreover, if it is true that they are offences committed directly against God, then they fall under the category of *huquq Allah* (‘Rights due to God’). Islamic theologians and jurists are in almost universal agreement that *huquq Allah* are less serious than the *huquq al-‘ibad* (‘Rights due to fellow human beings’) since human beings are not quick to forgive those who wrong them, while God says in numerous places in the Quran that He is quick to forgive. Perhaps it is due to the fact that *hudud* penalties are not tailored to the offence and there appears to be no room for mitigation that some Muslims have assumed that they are ‘the most serious crimes’ under Sharia.

The offences for which *hudud* applies (in particular adultery and apostasy) are also incompatible with international law, notably the ‘most serious crimes’ standard in Article 6(2) of the ICCPR.

The UN Human Rights Committee, the UN body tasked with monitoring the implementation and interpretation of the ICCPR, has interpreted ‘most serious crimes’ as not including apostasy.³⁴ The UN Commission on Human Rights, a subsidiary body of the UN Economic and Social Council (ECOSOC), replaced by the Human Rights Council in 2006, has interpreted ‘most serious crimes’ as not including non-violent acts such as religious practice, expression of conscience or sexual relations between consenting adults.³⁵

The policy goals of *hudud* offences were developed in the days of the Prophet and the first four succeeding *Khulafā* (plural of *Khalifa* or ruler), where they interpreted the elements of these offences and their evidentiary requirements. Each offence has specific elements and stringent evidentiary requirements, which will be detailed later in this chapter. Like *qisas* laws, a *haad* offence must be proven beyond a reasonable doubt. In general, a judge can only impose a *hadd* punishment if a person confesses, or there are enough witnesses to the offence. The usual number of witnesses is two, but in the case of adultery, four witnesses are required. Circumstantial

evidence is not allowed to be part of the testimony.³⁶ While Muslim scholars refer to evidentiary standards in different terms, they all agree that in case of doubt (*shubha*), the *hadd* penalty cannot be applied.

The Prophet said:

*Do your best to avoid mandatory punishments. If you can find a way out for the accused, let him go. It is better for the ruler to err in granting a pardon than to err in enforcing a punishment.*³⁷ (emphasis added)

Also, like *qisas*, the Quran and *hadiths* clearly indicate that God prefers forgiveness over punishment for *hudud* offences.

Anas ibn Malik reports:

*I was with the Prophet when a man came and said to him: ‘Messenger of God, I have committed an offence carrying a mandatory punishment, so punish me’. The Prophet did not ask him what he committed. Then it was time for prayer. The man offered his prayer with the Prophet. When the Prophet finished the prayer, the man went up to him and said: ‘Messenger of God, I have committed an offence carrying a mandatory punishment. Enforce God’s ruling on me’. The Prophet said: ‘Have you not prayed with us?’ The man said: ‘Yes’. The Prophet said: ‘God has forgiven you your sin’.*³⁸

There are differences in views between the four major Sunni schools of thought about sentencing and specifications for *hudud* offences. It is often argued that, since Sharia is God’s law and states certain punishments for each crime, they are immutable. However, with liberal movements in Islam expressing concerns about *hadith* validity, a major component of how Sharia law is created, questions have arisen about administering certain fixed punishments where broad scholarly consensus cannot be reached. This has serious implications for imposing the death penalty. Life is sacred to Islam. Sharia law must therefore be undeniably clear as to when it is acceptable to take a life through a *hadd* punishment.

Furthermore, there are different thoughts in the Arab world today as to the application of *hudud* offences. Some accept that as *hudud* is found in the Quran and *sunnah*, application is a prerequisite for a Muslim society. Others consider the application of *hudud* to be conditional upon the state of the society which must be just (for some, it has to be ‘ideal’) before these injunctions could be applied. This distinction is based on the important cautionary *hadith*: ‘guard against (*idra’u*) maximum penalties (*hudud*) by means of uncertainty (*shubuhah*)’. Essentially, do not convict if there is any doubt. Therefore, where a punishment is erroneously enforced, it would be in breach of Sharia law.

34 UN Human Rights Committee, 61st Session, *Concluding Observations: Sudan*, 19 November 1997, CCPR/C/79/Add.85, para. 8.

35 UN Commission on Human Rights, 61st Session, *The question of the death penalty: Human Rights Resolution 2005/59*, 20 April 2005, E/CN.4/RES/2005/59.

36 Ruud Peters, *Islamic Criminal Law in Nigeria*, Spectrum Books, 2001, p. 4.

37 Related by al-Tirmidhi in his *Sunan* (Chapter on mandatory punishments), 1344. It also occurs, but attributed to Aishah, in *Al-Istidhkar li-Madhabih Fuqaha’ al-Amsar*, Vol. 9, p. 11.

38 Related by al-Bukhari and Muslim, *Vis. al-Bukhari* 6823.

However, there are numerous examples of modern-day criminal justice systems in Muslim countries that do not respect basic fair trial procedures, which fundamentally leads to the uncertainty or doubt that is warned against. Where trials concerning the death penalty are unfair, justice becomes rare, and the judgement would be inherently suspicious. No legal system is infallible; there is always some risk of an injustice being carried out, and an innocent person being executed.

Zina: adultery

The death penalty for zina (adultery)

Adultery (*zina*) is strictly forbidden in Islam. Muslim jurists treat it as both a sin and a crime. The criminalisation of adultery predates Islam and can be traced back to a period as early as the Hebrew Bible (Deuteronomy 22:22).

The Quran deals with *zina* in several places. First is the general rule that commands Muslims not to commit *zina*:

Do not come near adultery. Indeed, it is ever abomination and an evil way. (Quran 17:32)

The penalty provided in the Quran for *zina* is flogging.

The adulterer and the adulteress found guilty of sexual intercourse – lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment. (Quran 24:2)

The penalty of stoning to death (*rajm*) most commonly associated with *zina* is not specifically mentioned in the Quran. The Quranic verse is clear in stating that the punishment (of flogging) is for adulterers, without any distinction between married or unmarried people, or virgins. Yet it is a widely held view among traditionalist commentators of the Quran that this verse applies only to unmarried men and women, while married men and women incur the punishment of stoning to death (in the Hanafi, Shafi'i, Hanbali, and Shi'a schools of Sharia law, stoning is imposed for married adulterers). This is based on various *hadith* references.

Nearly all *hadith* collections that have been central to the traditionalist legal argument, that the punishment for *zina* is execution, include the three following *hadiths*:

1. The first is that the Prophet enforced this punishment in a case of unlawful intercourse among Jews on the basis of the Torah.
2. The second is that Abu Hurayrah, a companion of the Prophet, stated that the Prophet, in a case of intercourse between a young man and a married woman, sentenced the woman to stoning and the young man to flogging and banishment for a year.

3. Umar Ibn al-Khattab asserted that there once was a revelation to the effect that those who were *muhsan* (free adult Muslims who have previously enjoyed legitimate sexual relations in matrimony, regardless of whether the marriage still exists) and had unlawful intercourse, are to be punished with stoning.

The second *hadith*, related by Abu Hurayrah, has been the basis of the *fiqh* doctrine that Sharia punished married adulterers by stoning them to death.

It is interesting to note that these *hadiths* preceded the Quran's provision for flogging, leading some scholars to say that the *hadiths* were overridden by the Quran, because in Islamic legal theory a *hadith* cannot abrogate a Quranic verse.

For this reason, the late Egyptian jurist and legal theorist, Muhammad Abu Zuhrah believed, as quoted by Yusuf al-Qaradawi and several other scholars, that stoning was only enforced in the Abrahamic traditions (Judaism and Christianity) which predate Islam, but was then abrogated by the relevant Quranic verse defining the punishment as flogging. They cite three pieces of evidence in their support:³⁹

1. The Quranic verse that says: 'If after their marriage, they [i.e. slave girls] are guilty of gross immoral conduct, they shall be liable to half the penalty to which free women are liable'. (Quran 4:25)
2. A report by al-Bukhari in his *Sahih* anthology quoting Abdullah ibn Awfa who was asked about stoning and whether it was done before or after the revelation of verse 24:2, said that it is perfectly possible that the use of stoning as a punishment for *zina* offences was practised before the revelation of the Quranic verse in *Surah 24* which abrogated it.
3. It is not logical that the *hadiths* which are cited to support stoning still remain in force after the relevant verse of the Quran abrogated it. If the punishment included stoning, then surely the revelations to the Prophet would have included this and it would have been inserted into the text.

Contemporary Islamic jurists and scholars further argue that the fact that the Quranic verse clearly states that *zina* be punished with flogging and not stoning implies that God purposefully did not want the punishment set out in the earlier *hadiths* to be included in the Quran. If its ruling (stoning) remained in force, surely it would have been included. There is no doubt that such a serious punishment, involving death in such a cruel, inhuman and unusual way, and without parallel in Islamic jurisprudence, can be based on *hadiths* that have been abrogated by the Quran. Thus, there is a strong argument

39 Shaikh Yusuf al-Qaradawi, *Diaries*, published on arabna.com website. Extracts from these diaries were published by the London-based daily newspaper, *Asharq Alawsat*, on 15 March 2006.

to say that *zina* should not be punished by death, and that if a Muslim state were to abolish the death penalty for *zina*, they would not be unfaithful to Islam.

Evidentiary requirements

However, some Islamic countries, such as Iran, Saudi Arabia and Yemen, still retain death by stoning as a punishment.

Given the severity of the punishment, the evidentiary requirements are very stringent. The Quran requires solid proof beyond doubt before convicting an individual, be it man or woman, of *zina*. This means that the judge is required to look for any means that may be used in favour of the offender to suspend the punishment.

The first requirement, according to Muslim jurists, is that the death penalty can only be imposed on a person who commits adultery if he or she was *muhsan*. According to Sharia, the person is *muhsan* if he/she is 'an individual who is free (not a slave) and who either has never committed an act of illicit intercourse or has consummated a lawful marriage to a free partner'.⁴⁰

There are two means to prove a person is *muhsan*, according to Sharia. One is recognition or confession. Most jurists agree that recognition by a person that he/she is *muhsan* is sufficient proof, provided that such recognition is given in detail, and not in general terms (meaning that the person clearly states that he or she had met the elements listed above). In addition, before accepting the person's recognition as sufficient proof, the judge, before imposing any penalty, shall make sure that the person who makes the confession is fully aware of the meaning of *muhsan* as well as the elements comprising it.

The second means to prove *muhsan* is through witnesses. The testimony of two men or one man and two women, who are known to be persons with integrity, constitutes sufficient proof. In such cases, however, the witnesses should not only testify to the fact of the marriage, but also to the existence of the other elements of *muhsan* as detailed above.

Once it is established that the person committing *zina* is *muhsan*, the next step would be to establish proof that the act of *zina* was committed.

Islamic jurists unanimously agree that proof can only be demonstrated in two ways.

First way:

A clear, free, and wilful confession by the person guilty of the act of *zina*. However, if that person retracts his/her confession, he/she is not punishable (barring the presence of witnesses, as indicated below), because there would no longer be any proof of the occurrence of the prohibited act.

In the case of a confession, it is recommended that the judge ignore the first three iterations of such a confession. The confession does not become legally binding unless it is repeated freely four different times. For the confession to be admitted, and therefore provide the basis for imposing the penalty, the accused must:

- undertake the confession by himself/herself (i.e. not through an agent);
- be beyond puberty at the time of the confession;
- be sane at the time of the confession;
- possess free will (i.e. not be a slave);
- possess full presence of mind and consciousness at the time of the confession;
- not be known to make false statements out of sarcasm or humour;
- confess to the act no fewer than four times;
- not revoke the confession before the penalty is imposed.

The confession itself must:

- be detailed, in which the confessor clearly states that full intercourse has occurred between the two accused of adultery;
- be only related to one adultery incident;
- be accompanied by a statement from the confessor reinforcing that he or she enjoys free will, is not subject to any duress, and is fully aware of the fact that Islam prohibits *zina*;
- be accompanied by a declaration from the confessor that no marital relationship existed at the time of the act between him or her and the other accused adulterer;
- take place in a court of law, during four different sessions.

In one of these cases, a woman came to the Prophet to confess her adultery. The Prophet asked if there were witnesses, but there were none. The Prophet insisted that the woman return four times to reiterate her confession. When she did that, the Prophet still insisted that she corroborate her confession with external evidence. She then confessed to being pregnant. The Prophet deferred execution until nine months after she gave birth (to ensure that the penalty would not affect her unborn child and to allow her to breast-feed the child). When she returned, the Prophet asked her if she wanted to recant her confession, but she confirmed it. He felt that He had no choice but to order the penalty. When His companions returned from the stoning, He asked them if they had heard her recant. They asked why, and He said that, if she had, they should have stopped the stoning.⁴¹

And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. And

40 'Muhsan', *Oxford Islamic Studies Online*, accessed 15 September 2014 at <http://www.oxfordislamicstudies.com/article/opr/t125/e1587>.

41 M. Cherif Bassiouni, 'Death as a penalty in the Sharia' in Peter Hodgkinson and William A. Schabas (eds.) *Capital Punishment: Strategies for Abolition*, Cambridge University Press, 2004, pp. 169-185, p. 181.

those are the defiantly disobedient, **except for those who repent thereafter and reform**, for indeed, Allah is Forgiving and Merciful. (Quran 24:4-5) (emphasis added)

Second way:

The second way that proof can be demonstrated is by testimony of four reliable Muslim male eyewitnesses, all of whom must have seen the act in its most intimate details at the same time, i.e. the penetration (like 'a stick disappearing in a kohl container').

Even if a man and a woman are found in a closed room, naked in a bed, in a position that implies adultery, it will not be considered adultery without four witnesses seeing the penis inserted.

The 'four witnesses'⁴² standard comes from the Quran itself, a revelation Muhammad announced in response to accusations of adultery levelled at his wife, Aisha:

*As for those of your women who are guilty of gross immoral conduct, call upon **four from among** you to bear witness against them.* (Quran 4:15) (emphasis added)

*Why did they [who slandered] not produce for it **four witnesses**? And when they do not produce the witnesses, then it is they, in the sight of Allah, who are the liars.* (Quran 24:13) (emphasis added)

Scholars have written long dissertations on who can be a witness. This has been summed up as the following conditions:

- the witnesses must be adult (beyond puberty);
- the witnesses must be sane;
- the witnesses must be male: women are not acceptable as witnesses. This is in honour to women, as adultery is considered a gross indecency;
- the witnesses must have integrity: persons who are known to indulge in sin or whose integrity is unknown are unacceptable as witnesses;
- the witnesses must be free, i.e. not a slave;
- the witnesses must be Muslim. The reason for this condition is that non-Muslims may not view adultery as a sin;
- the witnesses must personally testify (i.e. not through an agent);
- the four witnesses must all testify to the same act, taking place at the same time and location;
- all four witnesses must be together at the same place when they give their testimony;
- the witnesses must remain in sound condition (not die, absent themselves, be punished for false accusation) until the punishment has been administered;
- the witnesses must be known to be fair and possess a good reputation;
- the witnesses must not be involved in any kind of dispute with the accused;

- the witnesses must be aware of the concepts of marriage, penetration etc.

The testimony itself must:

- be presented before an independent judge;
- be oral;
- be clear;
- be presented in the presence of the accused;
- be timely: no unjustifiable lapse of time between the alleged act of *zina* and the testimony;
- include verification by the witness that he witnessed the act of penetration, and to present a detailed description of the act including mentioning the exact time and location of the incident.

Sharia obliges the judge to verify the witnesses accurately, and if any suspicion arises before or after, the person will not be accepted as a witness. If two witnesses testified that a particular witness lied to them before the consideration of a certain issue, his testimony would not be considered by the judge in order to avoid injustice, and therefore *zina* cannot be proved. If one of the four witnesses were confused, or there were inaccuracies as to the actual insertion, their testimony will be not accepted, and they will all be accused themselves of slander (*qadhf*), and therefore *zina* cannot be proved. Islam aims at accuracy and the elimination of suspicion. Accordingly, the principle is not to prove the accusation but to avert the punishment.

The requirement of four eyewitnesses (with all its restrictions and specifications) makes the crime almost impossible to prove except in highly unlikely cases where the act of *zina* was done publicly. In cases adjudicated by the Prophet, it was clear that the penalty should not be applied in cases of doubt, and that the satisfaction of the evidentiary requirements made proof of that crime very difficult, and therefore the punishment would rarely, if ever, be carried out.

An important point to raise is that a witness must be a person of integrity, and integrity requires that a person does not look on. A person can only testify to what one has seen with one's own eyes. If he therefore happens to see an act of gross indecency, or *zina*, this means that he looked on, and therefore his integrity is called into question. This means that if he sees it, his integrity is called into question.

Finally, a pregnant woman, whether married⁴³ or unmarried, is not considered evidence of *zina* in all but one of the Islamic schools of law (the Maliki school).

The evidentiary requirement for *zina* was intended to protect men and women from frivolous charges. Any accusation of adultery that contravenes any of these conditions must be dismissed by the court. The Quran provides that those who falsely accuse a person of *zina*

42 Under Shi'ah practice, the testimony of women is also allowed, if there is at least one male witness testifying together with six women.

43 This would apply in cases where the husband is known to be either infertile or physically incapable of sexual intercourse.

should be punished by flogging (80 lashes). This aims to deter people from making wanton accusations, and to stress that everyone is presumed innocent.

And those who accuse chaste women and then do not produce four witnesses – lash them with eighty lashes and do not accept from them testimony ever after. (Quran 24:4)

Needless to say, no case of adultery was ever proven by such evidence in Islamic history, or at least no case was ever recorded in Islamic history where the punishment was inflicted on the basis of four witnesses. All *hadiths* relating to the application of *zina* have relied on confession evidence. And even then, the Quran provides that a person who recants or repents should not be punished.

The strict evidentiary requirements to prove *zina* demonstrate that Islam takes a lenient and merciful approach in the interpretation of the offence and application of punishment. This makes clear that, yet again, Sharia law encourages protecting life over death. Therefore, where states do retain the death penalty for *zina*, it would be almost impossible to apply the punishment in practice if the strict evidentiary requirements are adhered to, meaning that an effective moratorium on the death penalty could be established without being unfaithful to Islam.

Other arguments as to why adultery should not be a criminal offence in Islam

Right to privacy

The Quranic requirement against frivolous charges for *zina* aims to stop people from interfering with other people's privacy. It makes clear that the proper way of dealing with such erring actions is that they should remain private and be overlooked. Starting a scandal is absolutely inappropriate.

Those who love that gross indecency should spread among the believers shall be visited with grievous suffering both in this world and in the life to come. (Quran 24:19)

Those who commit adultery in private are guilty of gross misconduct, and Allah will undoubtedly hold them to account for it, but the law has no claim against them.

Authenticated *hadith* statements from Prophet Muhammad that demonstrate a notion of the right to privacy in seventh century Islam include:

1. *'Whosoever conceals the faults of a fellow Muslim, God will conceal his or her faults in this world and the Hereafter...'* (Reported by Sahih al-Bukhari & Sahih Muslim)
2. *'Do not harm fellow human beings and do not shame them. Do not investigate their private imperfections. Whoever investigates the private imperfections of his or her fellow Muslim brother [or sister] God will pursue his private imperfections until He disgraces him in his own house.'* (Reported by Al-Tabarani on the authority of Abu Darda)

This reveals that seventh century Islam aimed to seek to protect people's privacy and prevent the spread of gross indecency, and demonstrates the length to which Islam goes in order to ensure that people refrain from accusing others of adultery, as there is no way to implement *zina* without undermining people's right to privacy and spreading gross indecency.

Is *zina* still necessary for contemporary society?

Although adultery is viewed as a moral vice in Islam, moral vices are not crimes under Sharia law. They are only considered crimes if they directly violate or result in the violation of any of the five indispensables. What this means is that a Sharia court has no jurisdiction over moral vices as long as they do not constitute a *fahisha* (a public display of lewdness).

Islam considered adultery a risk to the protection of an individual's *nasab* (lineage or offspring), which was considered a seventh century Arabian 'human right', and one of the five indispensables. Hence adultery was codified as a crime.

Legitimate arguments can be made as to whether such laws are still relevant in a contemporary society, where the protection of lineage can be guaranteed through scientific means, and not evidence through marriage. Therefore, is Sharia law regarding *zina* still necessary for a modern society?

This is a controversial question and no doubt Muslim jurists will be uncomfortable with the idea of reassessing *hudud* laws when the Quran describes them as *hudud Allah* ('God's limits'). However, the task of Muslim jurists has always been to identify the 'cause and reason' behind laws in order to determine if the laws are universally applicable to all or particular to their original contexts.

Discriminatory application

The Quran is quite clear that all Muslims are equal: all believers, without distinction, are equal and only righteous deeds elevate one person above another. The only distinction between men and women is their level of righteousness.

Whoso acts righteously, whether male or female and is a believer. We will surely grant him a pure life; and We will surely bestow on such their reward according to their best works. (Quran 16:98)

But whoso does good works, whether male or female, and is a believer, such shall enter heaven. (Quran 4:125)

A *hadith* of the Prophet Muhammad also says:

A person who is blessed with a daughter or daughters and makes no discrimination between them and has sons and brings them up with kindness and affection, will be as close to me in Paradise as my forefinger and middle finger are to each other. (Muslim II, Section Beneficence)

However, the way *zina* is applied in many countries is discriminatory towards women. According to one study, research indicates that ‘thousands of women [in Pakistan] have been charged and jailed under the *zina* Ordinance and that the interpretations and repercussions of the laws are class based. Although meant to be applied to all Pakistani citizens, *zina* laws are unevenly exercised, and the most vulnerable members of society – impoverished and illiterate women – are the most affected. That is, women who cannot afford lawyers are most likely to be charged and jailed’.⁴⁴

Since *zina* laws were rarely applied in practice throughout the history of Sharia law, Islamic feminists as well as many other Muslims consider the prominent position they are accorded in present-day Islamic penal codes as an Islamic legal innovation which undermines the right to equality before the law (Article 14(1) of the ICCPR), and therefore should be totally abolished. They call for the urgent need to challenge *zina* laws from within the Islamic legal tradition on grounds that they constitute ‘violence against women in Muslim contexts’. They argue that:

Current *zina* laws reflect centuries-old, human-made *fiqh* interpretations, which can be criticised from within the framework of Islamic principles, in accordance with the changing realities of time and place and contemporary notions of justice. The revival of *zina* laws, and the emergence of a global campaign against them, must be understood in the context of the recent conflict between two systems of values, the one rooted in pre-contemporary cultural and religious practices that often sanction discrimination among individuals on the basis of faith, status and gender, and the other shaped by contemporary ideals of human rights, equality and personal freedom.⁴⁵

There is ample evidence in classical texts of Islamic jurisprudence that eminent Islamic jurists (*fuqaha*) who lived during the formative period of Sharia law and whose works on Sharia laws form part of the foundation of modern Islamic penal systems always strived to find loopholes to prevent *zina* convictions and protect people from punishments. However, ‘*zina* laws are also embedded in wider institutional structures of inequality that take their legitimacy from patriarchal interpretations of Islam’s sacred texts’.⁴⁶

This is in direct contradiction with the verses of the Quran and authoritative traditions of Prophet Muhammad which make Muslims equal. Contemporary Islamic jurists should extend this to all criminal cases, and ensure that countries which retain the death penalty should not apply it discriminatorily. Until they can guarantee this, they should implement a moratorium to ensure they do not execute someone in contravention to the teachings of Islam.

Rights of children of parents accused of *zina*

The existence of *zina* laws in present-day Islamic penal codes unnecessarily violates the rights of the child whose mother or father has been accused of *zina*. Throughout Muslim history and in many Muslim cultures, the term *walad al-zina* or ‘child of *zina*’ (or other associated terms) has been, and continues to be, used as the most serious form of insult one can direct at a person. Thus, *zina* laws result in the social stigmatisation of children, as well as the permanent loss of a parent. This is in contravention to the Convention on the Rights of the Child (to which all Muslim states are party), in particular Article 2,⁴⁷ Article 3,⁴⁸ Article 9,⁴⁹ Article 16⁵⁰ and Article 20.⁵¹

This also contravenes the Quranic principle that:

No soul shall be made to bear the burden of sin of another. (Quran 17:15; and 35:18)

Prophet Muhammad famously declared in a *hadith* that:

He is not of us who does not have mercy on young children... (Reported by Al-Tirmidhi)

Where *zina* applies to a parent, the application of the death penalty could be seen as being in contravention to one of the five indispensables of Islam regarding the protection of offspring. The execution of a mother or father would prevent them from being able to fulfil their obligations to their children, and subsequently, their children would lose their rights to the protection of their parents. For a more detailed discussion on the children of parents sentenced to death or executed, see page 29.

44 Shahnaz Khan, ‘Zina and the moral regulation of Pakistani women’, *Feminist Review*, Vol. 75, 2003, p. 77.

45 Ziba Mir Hosseini, *Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, The Global Campaign to Stop Killing and Stoning Women, 2010, p. 8.

46 Ziba Mir Hosseini, *Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, The Global Campaign to Stop Killing and Stoning Women, 2010, p. 4.

47 Convention on the Rights of the Child, Article 2(2): ‘States Parties shall [...] ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents [...]’.

48 Convention on the Rights of the Child, Article 3(1): ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.

49 Convention on the Rights of the Child, Article 9(1): ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child [...]’.

50 Convention on the Rights of the Child, Article 16(1): ‘No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.’

51 Convention on the Rights of the Child, Article 20(1): ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’

Riddah: apostasy

Most Muslims now accept and agree that the laws relating to *riddah* (apostasy) and blasphemy in Islamic jurisprudence do not only violate the right to freedom of religion (as guaranteed by Article 18 of the ICCPR), but also the fundamental principle of freedom of belief in religion, as enshrined in the Quran.

There shall be no compulsion in the religion. (Quran 2:256)

The truth [has now come] from your Lord. Let him who wills, believe in it, and let him who wills, reject it. (Quran 18:29)

[1] Say: O disbelievers! [2] I worship not that which you worship; [3] Nor worship you that which I worship. [4] And I shall not worship that which you worship. [5] Nor will you worship that which I worship. [6] Unto you your religion, and unto me my religion. (Quran 109)

These Quranic verses, and many others, make it absolutely clear that religious belief is a matter of free, personal choice. No one has the prerogative to force people to accept any belief or to follow a particular faith.

However, the Sharia laws on apostasy remain one of the most controversial issues for contemporary society. It is mentioned in the Quran in various verses, indicating that persons who wilfully abandon Islam are 'cursed by God' and 'will not be forgiven unless they repent thereafter and do righteous deeds'. The verses, furthermore, indicate that such persons will be 'dwellers of the fire' and 'will abide therein forever'.⁵²

As an Islamic term, apostasy is often used to refer to the act of abandoning Islam and embracing a different religion or belief, or the act of a Muslim who was once a Muslim and has become an atheist. The term *riddah* literally means 'relapse or regress'. *Riddah* can be done by word, intention or action to indicate a rejection of Islam. However, repentance leads the offender to avoid punishment.

But if they repent, establish prayer, and give zakat, then they are your brothers in religion; and We detail the verses for a people who know. (Quran 9:11)

*How shall Allah guide a people who disbelieved after their belief and had witnessed that the Messenger is true and clear signs had come to them? And Allah does not guide the wrongdoing people. Those – their recompense will be that upon them is the curse of Allah and the angels and the people, all together, Abiding eternally therein. The punishment will not be lightened for them, nor will they be reprieved. **Except for those who repent after that and correct themselves.** For indeed, Allah is Forgiving and Merciful.* (Quran 3:86-89) (emphasis added)

Each school provides for different periods of time for the transgressor to change his mind about *riddah* and recant, which range from one to ten days.⁵³

The four Sunni schools of jurisprudence differ as to when *riddah* shall be deemed to be conclusive.⁵⁴ Traditionally, apostasy was considered to be when the person in question (a) has understood and professed the *shahada* (Muslim declaration that there is none worthy of worship but God and that Muhammad is the messenger of God), (b) has acquired knowledge of those rulings of the Sharia known to all Muslims, (c) is of sound mind at the time, (d) has reached puberty, and (e) has consciously and deliberately rejected or intends to reject as untrue either the *shahada* or the rulings of Sharia necessary for all Muslims.

For example, if a sane adult Muslim, knowing and professing to God, were to then declare that God does not exist, this would constitute apostasy. Or if a sane adult Muslim, knowing that *salat* (prayer) is *fard al-ayn* (personally obligatory), were to then declare that it was not personally obligatory, this would constitute apostasy.

Some scholars believe that blasphemy equates to apostasy. They have expanded the term to include anyone who denies the existence of God, or denies God's messengers, or claims that a messenger of God was a liar, or claims the lawfulness of something that is unanimously agreed as forbidden such as adultery or drinking alcohol. For example, in 1989 Ayatollah Ruhollah Khomeini, the Supreme Leader of Iran and a Shi'a Muslim scholar, issued a *fatwa* (a juristic ruling concerning Sharia law issued by an Islamic scholar) against Salman Rushdie for what some Muslims believed were blasphemous references in his fourth novel, *The Satanic Verses*. The *fatwa* called on Muslims to kill Rushdie and his publishers, or to point him out to those who can kill him if they cannot themselves. However, it would seem that the *fatwa* was politically motivated and had no basis under Sharia even within the Shi'a tradition. Salman Rushdie's text was a work of fiction, although it drew upon or alluded to some Muslim traditions. Even under traditionalist interpretations of the Sharia, a *fatwa* of apostasy cannot be declared in response to statements or works of art which are open to interpretation.

Not all Islamic jurists consider *riddah* to be a *hadd* because the Quran does not specifically mention a penalty to be imposed on those who renounce Islam.⁵⁵

Islamic scholars differ on its punishment, ranging from execution – based on an interpretation of certain *hadiths* – to no punishment at all as long as they do not work

52 Presentation by Hasan Zeid Mohammed (Islamic jurist from Yemen) at 'The Death Penalty in the Arab World' seminar, held July 2007 in Amman, Jordan, described in Penal Reform International, *Studies on the Death Penalty and the Right to Life in the Arab World*, 2007, pp. 212-251.

53 Cherif Bassiouni, 'Death as a penalty in the Sharia' in Peter Hodgkinson and William A. Schabas (eds.) *Capital Punishment: Strategies for Abolition*, Cambridge University Press, 2004, pp. 169-185, p. 179.

54 Cherif Bassiouni, 'Death as a penalty in the Sharia' in Peter Hodgkinson and William A. Schabas (eds.) *Capital Punishment: Strategies for Abolition*, Cambridge University Press, 2004, pp. 169-185, p. 178.

55 The verse of the Quran, *Surah al-Baqarah*, 2:127, which touches upon this subject, refers to Abraham and is quite general. It does not specifically criminalise *riddah*, which led some scholars to deem *riddah* a *sunnah*-created crime that should be deemed part of *ta'zir* and not part of *hudud*. Thus, its penalty should not be deemed mandatory.

against the Muslim society.⁵⁶ The late dissenting Shi'a jurist Grand Ayatollah Hossein-Ali Montazeri, a significant Shi'a religious authority, stated that the Quranic verses do not prescribe an earthly penalty for apostasy, only a penalty in the hereafter.

... And whoever of you reverts from his religion [to disbelief] and dies while he is a disbeliever – for those, their deeds have become worthless in this world and the Hereafter, and those are the companions of the Fire, they will abide therein eternally. (Quran 2:217)

Whoever disbelieves; let not their unbelief grieve you. To Us they must all return, and then We shall inform them about all that they were doing [in life]. God has full knowledge of what is in people's hearts. We will let them enjoy themselves for a short while, but We shall ultimately drive them into severe suffering. (Quran 31:23-24)

In fact, the death penalty is not mentioned at all in the Quran in reference to apostasy. While Quranic verses condemn apostasy, its punishment is reserved for divine justice in the Hereafter.

Indeed, those who have believed then disbelieved, then believed, then disbelieved, and then increased in disbelief – never will Allah forgive them, nor will He guide them to a way. (Quran 4:137)

Whoever disbelieves in Allah after his belief ... except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment; ... Assuredly, it is they, in the Hereafter, who will be the losers. (Quran 16:106 & 109)

This confirms that apostasy is a question of personal choice, for which a person is accountable *only* to God on the Day of Judgement, and is not accountable to the state or society. This is what is in line with the nature of Islam which stresses the importance of freedom of belief and an individual's responsibility.

A few Islamic jurists treat *riḍḍah* as a *ta'zir* or lesser offence, but again, a strict reading of the Quran would indicate that punishment comes in the Hereafter, and not within the context of a criminal justice system.

During Islam's early days, disagreement between the first *Khalifa* in Islam after the Prophet (Abu Bakr) and Umar Bin Al-Khattab (who became the second *Khalifa* following the death of Abu Bakr) was recorded regarding this very matter. Disagreement between two of the most influential men in the history of Islam is indicative of the level of uncertainty associated with this rule.⁵⁷

A minority of medieval Islamic jurists, notably the Hanafi jurist Sarakhsi (d. 1090 CE), Maliki jurist Ibn al-Walid al-Baji (d. 1101 CE) and Hanbali jurist Ibn Taymiyyah (1263–1328 CE), have also held that apostasy carries no legal punishment.⁵⁸

Nevertheless, the majority of Muslim scholars hold to the traditional view that apostasy's punishment is death. They rely on a *hadith* reported by Ikrimah through Ibn Abbas, who quotes the Prophet as saying 'Kill the person who changes his religion'.⁵⁹ However, several accusations had been levelled against Ikrimah, including lying. It is well known that a reporter of a *hadith* on the death penalty is disqualified if they are subject to accusations. Other *hadiths* include:

If someone changes his religion – then strike off his head. (Reported by Malik ibn Anas)

Any Muslim man who bears witness that there is no god except God and that I am the Messenger of God, his blood is unlawful to shed except under one of three circumstances: a married man who commits adultery; a man who kills an innocent person unjustly; and he who abandons his religion and thus separates himself from the community.⁶⁰

The apostasy that took place during the Prophet's lifetime consisted of a few people who were with the Prophet in Medina, who reverted to disbelief and joined his enemies in Quraysh. They gave state secrets to the enemy and tried to urge Quraysh to attack the Muslim state in Medina. What scholars refer to as 'apostasy' has its foundations in cases where a person renounces his religion, abandons his community and conspires against his own country and society. Although the Prophet condemned a number of people to death just before He entered Mecca to quash the Quraysh uprising, He later pardoned them, with the exception of three who had committed murder.

There is not a single instance where the Prophet's action supports sentencing anyone to death for holding a different view or following a different religion or sect. On the contrary, the Quran reports that a number of hypocrite people who lived among the Muslim community committed actions that decidedly took them into disbelief, and thus became non-Muslim as the Quran states, but the Prophet did not kill any of them. Indeed, He did not enforce any punishment on them.

56 Professor Abdelmouti Bayoumi of the Islamic Research Academy in Cairo, interviewed for Magdi Abdelhadi, *What Islam says on religious freedom*, BBC News, 27 March 2006.

57 Presentation by Hasan Zeid Mohammed (Islamic jurist from Yemen) at 'The Death Penalty in the Arab World' seminar, held July 2007 in Amman, Jordan, described in Penal Reform International, *Studies on the Death Penalty and the Right to Life in the Arab World*, 2007, pp. 212-251.

58 Mohammad Hashim Kamali, 'Punishment in Sharia law: a Critique of The Hudud Bill of Kelantan, Malaysia', *Arab Law Quarterly*, Vol. 13, No. 3, 1998, pp. 203-234.

59 Related by al-Bukhari in his *Sahih* anthology, Vol. 6, p. 2681. It is also related by al-Nassaie, Abu Dawood, Ahmad and Ibn Majah.

60 'Abu 'Isa Muhammad b. 'Isa b. Sawrah al-Tirmidhi, *Sunan al-Tirmidhi* (5 vols.), ed. Muhammad 'Abd al-Rahman 'Uthman, Beirut, Dar al-Fikr, 1974, Vol. 2, p. 429.

The Prophet explained this policy when some of his companions suggested that He should execute Abdullah ibn Ubay, the chief of the hypocrites whose hypocrisy is recorded in the Quran. He refused their suggestion, stating: 'We shall be kind to him as long as he stays with us'.⁶¹ This means that there was to be no compulsion for punishment concerning his beliefs.

In order to reconcile the lack of consensus, some scholars assert that for the death penalty to be applied, apostasy must be for those who abandon Islam and fight against Muslims. The punishment was prescribed as a treason law during the early days of Islam in order to combat political conspiracies against Islam and Muslims, and is therefore not intended for those who simply change their belief or express a change in belief. In contemporary terms, it was equated to high treason or *hirabah* (see right). *Hirabah* does make provisions for the death penalty, so where apostasy equates to treason, then the penalty could be death. Nowadays, many scholars differentiate between treason and apostasy.

In short, this matter remains the centre of significant controversy among jurists, and no consensus has been reached on the penalty prescribed by Sharia for apostasy.

Apostasy was never a problem for the Muslim community. It remained a theoretical issue because the people executed for apostasy until the end of the Abbasid caliphate in the thirteenth century were very few. Apostasy became a political issue with the rise of Western colonialism and consequent intensification of Western Christian missionary activities in Muslim areas.⁶²

With the new tide of resurgent Islam as a reaction to the secular tide that has overwhelmed the Muslim world since the mid-nineteenth century, as well as the contemporary political conflicts between the Middle East and the West,⁶³ apostasy has become politicised as an ideological weapon and some Muslim states continue to make apostasy a punishable offence. In contemporary society, apostasy is punishable by death in Afghanistan, Iran and Saudi Arabia. Other Muslim countries, such as Algeria, Jordan, Kuwait, Nigeria and Pakistan, have also criminalised apostasy, punishing offenders with imprisonment and fines.

In 2011, for example, Iranian authorities sentenced a Christian pastor to death by hanging for the uncodified crimes of 'apostasy in Islam'. The pastor was re-tried and finally acquitted in September 2012 after almost three years in detention. He was re-arrested – intentionally – on Christmas Day, 25 December 2012, but again released in early 2013.⁶⁴

However, it is necessary to mention that the death penalty for apostasy has not been applied anywhere in the Muslim world since 1985, when the Sudanese government executed Mahmood Taha for apostasy.

It is inconceivable that a ruling on such an important matter regarding the taking of a life, even the life of an unbeliever, should be left out of the Quran, and be based on questionable *hadiths*, of which there is no consensus (*ijma'*) from Islamic scholars. Death for apostasy surely cannot be Islamic policy.

***Hirabah*: 'waging war against God' or brigandage or banditry or robbery**

The Arabic term *hirabah* is derived from *harb* which literally means war. It is taken from Quran 5:33 which classified *hirabah* as 'waging war against God':

Indeed, the penalty for those who wage war against God and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment. (Quran 5:33)

The crime of *hirabah* is considered to be so extremely violent that it is deemed to be tantamount to waging war against God. Although the Quran does not clearly define what is meant by 'wag[ing] war against God' or 'caus[ing] corruption on earth', the specific meanings of such concepts were provided by early Islamic jurisprudence (*fiqh*) to include mass murder, rape and murder, war crimes, and other forms of deliberate extreme violence which result in death.

Reports from those believed to have lived during the life of the Prophet were cited to explain that the verse was revealed in response to a crime of extreme violence, torture, and murder committed against a group of innocent villagers by an army from a community with whom the Prophet had recently signed a peace treaty. This explanation is provided in almost all early commentaries (from 8th century CE) as well as later commentaries of the Quran.

However, various Islamic governments have broadened and manipulated the definition of *hirabah* as a means of silencing political opposition, on the grounds that opposition to what is deemed to be an Islamic authority constitutes 'causing corruption on earth' and 'war against God and his messenger'.

Iran is a prime example of how the definition of *hirabah* has been broadened out as a means of silencing political opposition.

Some contemporary Islamic jurists have also included 'acts of terrorism' under the definition of *hirabah*, since they threaten the security and safety of a society at large and therefore life. However, since concepts such as 'terrorism' can be unstable, and lack an agreed international definition, there is always a potential for the politicisation of *hirabah* to include peaceful political opposition.

61 Al-Bayhaqi, *Dala'il al-Nubuwwah*, Vol. 3, p. 471.

62 Mahmoud Ayoub, 'Religious freedom and the law of apostasy in Islam', *Islamochristian = Islamiyat Masihiyat*, Vol. 20, 1994, pp. 75-91, p. 90.

63 Mahmoud Ayoub, 'Religious freedom and the law of apostasy in Islam', *Islamochristian = Islamiyat Masihiyat*, Vol. 20, 1994, pp. 75-91, p. 90.

64 Amnesty International, *Death sentences and executions in 2012*, London, 2013, p. 33.

For example, Article 5 of the Constitution of the Islamic Republic of Iran describes the Supreme Leader as the representative of the 'infallible' Shi'a Imams, and hence of God.⁶⁵ Therefore, any attacks against the Supreme Leader of Iran would constitute *hirabah*.

The punishments for *hirabah* under Quran verse 5:33 include:

- execution;
- crucifixion;
- amputation of hands and feet from the opposite side;
- exile (imprisonment).

On the surface, the Quran seems clear that the death penalty is a mandatory punishment for *hirabah*. However, the grammatical structure of this verse presents some jurists with a problem, and brings into question the mandatory nature of the punishment. The Arabic grammatical particle for 'or' is 'aw', as in 'they should be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land'. However, 'aw' can also mean 'and' in Arabic. Most Islamic jurists agree that the correct meaning of the particle used in the verse of *hirabah* is 'or' and not 'and', and therefore the death penalty is not a mandatory punishment, but a discretionary punishment. The jurist Abu Ishaq al-Shatibi explains that legal theorists have always agreed that these punishments cannot all be administered at the same time to the same individual. The judge will have to choose which punishment to administer based on circumstances and severity of the offence, therefore making it a discretionary sentence.⁶⁶

Many scholars, including Imam Malik, the founder of the Maliki school of thought, have mentioned that they have never heard of crucifixion ever being prescribed in practice. In light of this fact, Shaykh Muhammad S. Al-Awa has said that Malik's observation gives the impression that this punishment was prescribed solely to deter the potential criminal,⁶⁷ without practically having to carry out the punishment.

Like other *qisas* and *hudud* offences, to convict a person of *hirabah*, two witnesses must testify to the act or there must be confession evidence which proves beyond doubt that the accused committed the offence. Circumstantial evidence cannot be admitted into court, and the burden of proof lies with the accuser.

Furthermore, the Hanafi school imposes a statute of limitation of one month on *hadd* offences (aside from unfounded allegations of adultery).⁶⁸

Another safeguard against the imposition of punishment for *hirabah* is that if there was more than one perpetrator, and one cannot be given the *hadd* punishment because, for example, he is a minor, none of the other perpetrators can receive the *hadd* punishment.⁶⁹

Although the offence cannot be pardoned by the victim because it is committed against the state, the Quran does make reference to repentance, and excludes from punishment those who repent because 'Allah is Forgiving and Merciful'.

Except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful. (Quran 5:34).

Although the death penalty is clearly a possible punishment for *hirabah* under the Quran and has definitive import in Islamic crime and punishment, as the Quran has made provisions for alternative forms of punishment (such as exile by imprisonment), and allows repentance as a way of avoiding punishment altogether, it can be argued that Islam provides no bar to achieving the goal of abolition of the death penalty with regards to the offence of *hirabah*.

Hirabah crimes are still prosecuted in Islamic countries that use Sharia law, such as Iran, Nigeria and Saudi Arabia. In Saudi Arabia, those guilty of *hirabah* are sentenced to death, and have been executed even if the victim was not actually killed.⁷⁰ Saudi Arabian law provides that if armed robbers give themselves up and repent, their repentance will nullify the *hadd* punishment and they will be punished only in accordance with *qisas* as to the rights of the victim.⁷¹ In Iran, *hirabah* is known as *moharebeh* ('enmity against God') or *ifsad fil-arz* ('corruption on earth'). The crime of *moharebeh* is aimed at armed insurrection or, more generally, the resort to armed, violent activities. Anyone found responsible for taking up arms, whether for criminal purposes or against the state, or even belonging to an organisation taking up arms against the state, may be considered guilty of *moharebeh*.⁷²

Ta'zir crimes

Ta'zir offences represent crimes for which no punishment is specified in the Quran; effectively all other offences not mentioned already. They are considered less serious than *hudud* offences. There are four situations when *ta'zir* punishments are used: (1) acts that do not meet the technical requirement for *hudud* or *qisas*, such as attempted adultery; (2) offences generally punished by *hudud* but involving extenuating circumstances or doubt;

65 Constitution of the Islamic Republic of Iran, 24 October 1979, accessed 3 November 2014 at <http://www.unhcr.org/refworld/docid/3ae6b56710.html>.

66 *Al-Muwafaqat*, Vol. 5, pp. 37-38.

67 Mohamed S. El-Awa, *Punishment in Islamic Law*, USA, American Trust Publications, 1993, p. 11.

68 Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge, Cambridge University Press, 2005, p. 11.

69 David F. Forte, *Studies in Islamic Law: Classical and Contemporary Application*, USA, Austin & Winfield, 1999, p. 81.

70 Amnesty International, *Defying World Trends: Saudi Arabia's Extensive Use of Capital Punishment*, 2001, p. 2.

71 Sheikh Omar Ibn Abdul Aziz Al-Mutrak, 'Sharia Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia: Fixed Penalties, "Hudud" and Discretionary Penalties, "Ta'zir"', *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia*, Crime Prevention Research Centre, 1976, pp. 417, 456.

72 Amnesty International, *Death sentences and executions in 2012*, London, 2013, p. 32.

(3) acts condemned in the Quran and *sunnah* or contrary to public welfare, but not subject to *hudud* or *qisas*, such as false testimony; and (4) acts which violate social norms, such as obscenity.⁷³

Ta'zir is a 'claim of the state/society' rather than a 'claim against God'. Sharia law places an emphasis on the societal or public interest. The assumption of the punishment is that a greater 'evil' will be prevented in the future if you punish the offender now. This means that *ta'zir* offences can be established by secular legislation.

Ta'zir punishments can vary from country to country or society to society. For example, Egypt has a parliamentary process which has a formal penal code written and based on the principles of Sharia law, but Saudi Arabia allows judges to set the *ta'zir* crimes and punishments. *Ta'zir* can change or be amended, and will vary according to the seriousness of the crime and the circumstances surrounding the offence or the offender.

The penalties can be administered at the discretion of a judge. The punishment may not be more severe than the punishment of a *hudud* offence; therefore the death penalty cannot be applied to offences other than *hudud* offences. However, most Islamic schools find that death cannot be imposed for these types of punishments, unless there are extraordinary circumstances. If a *hudud* or *qisas* punishment is applied, *ta'zir* cannot be used as an additional punishment.

Punishments can range, depending on the crime or circumstances, from death, to imprisonment, to community service, to fines. The choice of penalties for these crimes reflects cultural perspectives and social policy choices.

The burden of proof is less strict in a *ta'zir* case. The testimony of two witnesses or a confession is enough. Confessions are not able to be retracted later. Circumstantial evidence is allowed in court, and most countries prosecute their non-murder crimes as *ta'zir* offences, due to the flexibility of evidence-gathering and sentencing. The majority of punishments in Islam are given under *ta'zir* rules.

Thus, as *ta'zir* is a discretionary offence, there is no bar to achieving the goal of abolition of the death penalty in Islam for offences which come under this category.

Other death penalty applicable offences

As detailed above, Sharia law provides for the death penalty in a very limited number of offences and under highly restrictive circumstances. However, a number of Muslim countries have death penalty applicable offences that go far beyond Sharia law. This includes the death penalty for drug offences, homosexuality and witchcraft/sorcery. While some are of the opinion that these offences are not part of Sharia law, and do not meet the international threshold of 'most serious crimes', this report will nevertheless make some brief reference to them.

Drug offences

Since no punishment for drug offences is specified under Sharia law, the laws relating to the death penalty for drug-related offences have been developed based mostly on juristic discretion and independent legal reasoning, and therefore do not have the status of being primary law in Islam.

While the Quran and *hadiths* are silent on this issue, many jurists have established an analogy with intoxicants. Under traditionalist interpretations of the Sharia, drinking alcohol is punishable by flogging.⁷⁴ The analogy indicates that as drugs are considered far more serious and detrimental than alcohol, the punishment should therefore be harsher than intoxication. However, there are two problems with this. Firstly, the principle of analogy means that a ruling should be produced that is similar to, or lesser than, the original ruling. In this case, the punishment for drug offences should not be harsher than the punishment for intoxication. Perhaps one of the clearest examples of this is what the Mufti of Tunisia said regarding the punishment of a drug dealer. He contended that the punishment cannot exceed flogging with 40 lashes, basing his argument on the analogy for drinking. He cited the rule that anyone who administers a punishment equal to a mandatory one for an offence that does not carry such a mandatory punishment is a transgressor of Sharia law.⁷⁵

There is very little consensus internationally, or from Muslim states, on how to deal with drug offences. Punishments vary from country to country. As measured by state practice, there is no consensus (*ijma'*) to support the death penalty for drug-related offences. The range of enforceable punishment in Muslim countries ranges from imprisonment to flogging to execution. Nineteen countries where Islam is the predominant religion⁷⁶ retain the death penalty for drug-related offences.

73 Matthew Lippman, 'Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law', *Boston College International and Comparative Law Review*, Vol. 12, Issue 1, 1989, pp. 29-62, p. 45.

74 *Hadith* reported by Abu Hurayrah.

75 This rule is stated in a *hadith* related by al-Bayhaqi, attributing it to Ali ibn Abi Talib. Ibn Asakir makes it a direct quotation of the Prophet by Abu Hurayrah. Vis. al-Bayhaqi, *Sunan*, Vol. 8, p. 327.

76 Bahrain, Bangladesh, Brunei, Egypt, Indonesia, Iran, Iraq, Kuwait, Libya, Malaysia, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Syria, Sudan, United Arab Emirates and Yemen.

An even smaller group of states are responsible for the vast majority of executions for drug-related offences: Iran and Saudi Arabia, followed by, to a lesser extent, Egypt, Malaysia, Indonesia, Kuwait, Pakistan, Syria and Yemen. However, among those countries, there is also little collective reasoning as to the enforcement of this punishment. For example, in Bangladesh the death penalty can be applied for possession of 2 kg of heroin, in Malaysia the limit is 15 kg, while in Iran the death penalty can be applied for trafficking or possessing more than 30 grams of specific synthetic, non-medical psychotropic drugs.

The lack of Quranic or *hadith* reference or general consensus (*ijma'*) raises an important question as to whether the death penalty for a drug-related offence goes beyond what is permissible under Sharia law. This suggests that the death penalty is in contravention of the Quranic principle that strictly prohibits the deprivation of the right to life of any human being; as life can only be taken as explicitly specified under Sharia law.

Homosexuality

In a statement (*hadith*) attributed to Prophet Muhammad, He is reported to have said:

*Avert/reject the institution and application of hudud laws when in doubt.*⁷⁷

Similar statements have been attributed to senior companions (*sahaba*) of Prophet Muhammad. It is reported that Umar Ibn al-Khattab, the second *caliph* according to the Sunni tradition, would always say:

*It is better for me to abolish hudud than to institute and apply them on the basis of doubtful evidence.*⁷⁸

A collection of such statements became the foundational basis for the legal maxim in Islamic jurisprudence that *hudud* laws can only be instituted and applied when derived from and supported by incontrovertible textual sources (i.e. the Quran and authentic *hadith* transmitted through multiple reliable sources). Nowhere should this be more applicable than in the *hudud* ordinances for *zina* and homosexuality, which form part of the legal system in a number of Muslim countries today. The application of the death penalty for homosexual acts is an example of *hudud* ordinances derived from and supported by doubtful Islamic sources. The single most important source for the institution of the death penalty for homosexual acts is not the Quran but a tradition (*hadith*) attributed to Prophet Muhammad in which He is reported to have said:

*If you find anyone doing as Lot's people did, kill the one who does it and the one to whom it is done.*⁷⁹

The eminent *hadith* scholar and jurist Jamal al-Din al-Zayla'i (d. 1361) provided a detailed analysis of all the chains of transmission of this *hadith* and cited numerous renowned authorities in the field of *hadith* such as Yahya Ibn Ma'in (d. 848), Al-Bukhari (d. 870), Al-Tirmidhi (d. 892), Al-Nasa'i (d. 915), Al-Dhahabi (d. 1348) and others who classified it and all its various chains of transmission as 'unreliable', 'weak', 'inauthentic' and 'unfounded'.⁸⁰ By as early as the ninth century CE, about two centuries after the death of the Prophet Muhammad, *hadith* scholars were already arguing that it could not be traced back to the Prophet. It is therefore very likely that it was fabricated after his death in order to justify the imposition of capital punishment for homosexual acts.

Even the Shafi'i jurist and scholar from Yemen, Al-Amir Muhammad Ibn Isma'il al-San'ani (d. 1789), admitted that the origin, wording and authenticity of the tradition stipulating punishments for homosexual acts have been disputed by authorities of *hadith*, and the tradition can therefore not be used to institute a death penalty for homosexual acts.⁸¹

In his collection of traditions (*hadith*) entitled *Dhakhirat al-huffaz*, Ibn al-Qaysarani (d.1113) recorded the tradition 'If you find anyone doing as Lot's people did, kill the one who does it and the one to whom it is done'. He then went on to write:

*It was narrated by Amr Ibn Abi Amr who attributed it to Ikrima who in turn attributed it to Ibn Abbas [a companion of the Prophet Muhammad]. However, Amr Ibn Abi Amr is very weak [i.e. very unreliable] as a narrator. It was for this reason that Ibn Ma'in rejected this hadith.*⁸²

Another point worth mentioning here which further puts in doubt, at least within the Hanafi school of Islamic law, the validity of citing the above *hadith* in support of the death penalty for homosexual acts is that it is related by a single authority. In other words, it is based on the word of a single narrator who claims to have heard it from the Prophet Muhammad. Such a tradition is called *khbar wahid* in Arabic which literally means 'a narration from a single source'. While such a tradition, if verified and classified as authentic, may be used to derive religious teachings on a wide range of topics, its use in *hudud* cases is highly controversial since there is still a great possibility that the narrator misheard or failed to accurately narrate what he or she heard. Thus, even assuming that the *hadith* narration cited in support of the death penalty for homosexual acts is indeed authentic, it would still be invalid according to the Hanafi school of Islamic law to use it to derive and support *hudud* laws.

77 Various versions of this *hadith* were reported and recorded in a number of *hadith* collections including the following: Mulla Ali al-Qari, *Sharh Musnad Abi Hanifa*, Beirut, Dar al-Kutub al-Ilmiyya, 1985, p. 186; *Sunan al-Tirmidhi* (*Hadith* No.1424).

78 Ibn Abi Shayba, *Musannaf*, Cairo, Al-Faruq al-haditha, 2007, Vol. 9, p. 304.

79 See *Sunan Abi Dawud* (*Hadith* No. 4465); *Sunan al-Tirmidhi* (*Hadith* No. 1456).

80 Al-Zayla'i, Jamal al-Din, *Nasb al-riya: Takhrij ahadith al-Hidaya*, Jeddah, Dar al-Qibla, undated, Vol. 3, pp. 339-340.

81 Al-San'ani, Al-Amir Muhammad Ibn Isma'il, *Subul al-salam*, Jeddah and Riyadh: Dar Ibn al-Jawzi, undated, Vol. 7, p. 121.

82 Ibn al-Qaysarani, *Dhakhirat al-Huffaz*, Riyadh, Dar al-Salaf, 1996, Vol. 4, p. 2430.

It is for this reason that the Hanafi school of Islamic law concluded that although it considers homosexual acts to be a sin, no punishment was specified either in the Quran or authentic *hadith*. Therefore, homosexual acts should not warrant the death penalty. After citing and discussing the legal maxim that *hudud* ordinances cannot be derived from or supported by doubtful Islamic sources, the eminent jurist Abu Bakr Ibn Mas'ud al-Kasani (d. 1191) went on to write in his voluminous seminal work on Hanafi jurisprudence that:

*According to Abu Hanifa, anal sex, whether done with a woman or a man, does not warrant a hadd penalty even though it may not be permissible.*⁸³

However, in spite of the agreement among all classical Islamic jurists that *hudud* ordinances cannot be derived from or supported by doubtful sources, and the fact that the *hadith* often cited to support the application of the death penalty for homosexual acts was classified by a majority of eminent *hadith* scholars and authorities as unreliable and weak, homosexuality is still a crime punishable by death in a number of Muslim countries today.

Since neither the Quran nor authentic *hadith* sources provide incontrovertible and explicit statements on *hadd* penalties for homosexual acts, such laws draw upon the personal legal opinions (*ijtihad*) of some jurists from the Shafi'i, Hanbali, and Shi'a schools of Islamic law. In his famous legal text entitled *al-Muhalla*, the eminent Andalusian jurist and *hadith* scholar Ibn Hazm (d. 1064) provided a detailed account of the Shafi'i, Hanbali, and other jurists' arguments for the death penalty. He then went on to declare that all such arguments were based on unreliable and weak sources.⁸⁴ At the heart of the debate is how to interpret the Quranic verses which make reference to 'the people of Lot' (also known as the people of Sodom and Gomorrah) and their practices:

And Lot said to his people: 'Would you commit this abomination with your eyes open? Would you approach man with lust rather than women? You are grossly ignorant people.' (Quran 27:54-55)

Traditionalist interpretations argue that this, and similar verses, condemn consensual same-sex sexual relations. However, new interpretations of the same verses by some contemporary Islamic scholars are beginning to challenge the traditional position on homosexuality.⁸⁵ These readings of the Quran argue that such verses do not deal with consensual same-sex relations, but are in response to, and condemn, the threats of aggressive unwanted sexual violence (rape and sexual abuse), which was directed by 'the people of Lot' towards Lot's visitors (the angels) to assert dominance and humiliate them, and therefore do not condemn consensual same-sex sexual

relations. In a study entitled *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (2010), Scott Siraj al-Haq Kugle explained how Ibn Hazm engages in a meticulous analysis of the Quran to find the ethical principle that Lot's people violated and for which they were all punished, since the Quran is not explicit. That principle, it is argued, was their act of rejecting their Prophet and the ethical guidance he brought. 'They rejected him in a variety of ways, and their aggressive sexual assault of his guests was only one expression of their inner intention to deny the dignity of being a Prophet and drive him from their cities'.⁸⁶

Whatever one's position as a Muslim is on homosexuality, whether one considers it to be a sin or to be part of God's diverse creation as argued by those Muslims whose reading of Quran 49:13 includes sexual orientation,⁸⁷ the continued application of the death penalty for homosexuality is not tenable. As demonstrated in this section, such a punishment contravenes the Islamic legal principle that *hudud* laws can only be instituted and applied when derived from and supported by incontrovertible textual sources (i.e. the Quran and authentic *hadith* transmitted through multiple reliable sources). Moreover, many authorities of Islamic law and legal theory from as early as the classical period of Islamic history rejected the application of the death penalty for homosexual acts on the grounds that such a penalty had no foundational basis either in the Quran or authentic teachings of Prophet Muhammad. A strong case can therefore be made today, from the point of view of the Sharia and Islamic legal theory, for the total abolition of such laws.

Sorcery and witchcraft

While there exist differences of opinions among people in many cultures and societies on whether or not sorcery and witchcraft are real and if they can be clearly defined at all, the persecution of people, particularly women and children, accused of witchcraft and sorcery by Christian as well as Muslim 'faith healers' is a reality in some parts of the world, including in Bangladesh, India, Nigeria, Pakistan and Saudi Arabia. It is often the most vulnerable people who find themselves accused of sorcery and witchcraft, including the poor, children, those with mental health issues or those who hold religious beliefs and traditions not in tune with the dominant traditions of their communities (e.g. Sufism, African traditional religion).

Although the Quran makes references to what are understood by many Muslims to be witchcraft and sorcery, neither the Quran nor *hadiths* define what sorcery and witchcraft are, nor whether this is an offence in law and therefore punishable. Furthermore, there is no consensus

83 Al-Kasani, Abu Bakr Ibn Mas'ud, *Bada'i' al-sana'i' fi tartib al-shara'i'*, Beirut, Dar al-Kutub al-Ilmiyya, 2003, Vol. 9, p. 184.

84 Ibn Hazm, *al-Muhalla*, Cairo, Idara al-Tiba'a al-Muniriyya, undated, Vol. 11, pp. 380-385.

85 See Scott Alan Kugle, *Homosexuality in Islam: Islamic Reflection on Gay, Lesbian, and Transgender Muslims*, Oxford, Oneworld, 2010.

86 See Scott Alan Kugle, *Homosexuality in Islam: Islamic Reflection on Gay, Lesbian, and Transgender Muslims*, Oxford, Oneworld, 2010, p. 52.

87 The verse in question is, 'O people, We created you all from a male and female and made you into different communities and different tribes, so that you should come to know one another, acknowledge that the most noble among you is the one most aware of God'. (Quran 49:13) It is now argued that the words 'different communities' should also apply to LGBT communities. Scott Alan Kugle, *Homosexuality in Islam: Islamic Reflection on Gay, Lesbian, and Transgender Muslims*, Oxford, Oneworld, 2010.

(*ijma'*) among Islamic jurists regarding witchcraft or sorcery. Therefore, it can confidently be said that Sharia law does not make an explicit or implicit reference to the death penalty for acts of sorcery or witchcraft.

According to Ibn Qudamah (d. 1223 CE), a jurist of the Hanbali school of Sharia law that is followed today in Saudi Arabia, 'the practice of sorcery is permissible under Sharia if such a practice makes use of verses of the Quran ... or forms of speech [actions] which are harmless ...'⁸⁸

Unfortunately the death penalty is upheld for sorcery or witchcraft in Saudi Arabia, even though there is no basis for it in Sharia law.

Rights of the child of parents sentenced to death or executed

One of the five indispensables in Islam is the protection of offspring. This fundamental Islamic legal principle establishes that the rights of the child should supersede any requirement to apply Sharia laws as stipulated in the Quran or *sunnah*. If it undermines that indispensable, it would appear that the death penalty, if the person to be executed is a parent, is incompatible with Islam. The execution of a mother or father would prevent them from being able to fulfil their obligations to their children in terms of nurturing them or providing for them.

While some Muslim jurists may defend the continued use of the death penalty on the grounds that it repels 'harm' from society by acting as a 'deterrent', while at the same time advancing what they perceive to be some 'benefit' to society, it could equally be argued that the death penalty is a 'harm' to the children of parents sentenced to death or executed, and therefore is a greater 'harm' to society than the imagined 'benefit'. The function of law in Islam, as both classical and contemporary Islamic jurists agree, is to 'accrue benefit' for the individual and society while 'repelling harm'⁸⁹ from the individual and society (see Chapter 1). What then happens when there are both perceived benefits and harms in the application of a given law? The jurist Al-Izz Ibn Abd al-Salam provides an answer:

Whenever there is a clash [between] benefits (masalih) and harm (mafasid), if it is possible to repel harm and achieve the benefits we should do so. If it is not possible to reconcile between the two and if the benefits outweigh the harm, we should privilege the benefits and we

*should not care about the harm. If the harm outweighs the benefits, we should repel it and we should not care about the strength of the benefits.*⁹⁰

It can be strongly argued that the *mafasid* (harm) to children, and thus society, in applying the death penalty to parents outweighs the *masalih* (benefits) of applying it, especially when alternative punishments could be applied.

There is ample evidence in many *hadiths* attributed to the Prophet that He was strongly averse to imposing punishments to mothers as this would negatively affect their children, which could also be extended to include fathers. For example, Muslim Ibn al-Hajjaj (d. 875 CE) recorded the following famous *hadith* in his *Sahih Muslim* (an anthology of *hadiths*):

It was narrated that Buraydah ibn al-Hasib said: 'A woman from Ghamid, a branch of al-Azd tribe, came [to the Prophet to confess that she had committed adultery] and said: "O Messenger of God, purify me!" He [the Prophet] responded, "Woe to you! Go back and seek God's forgiveness and repent to Him." She said: "I think that you intend to send me back as you sent Ma'iz ibn Malik back." He said, "What has happened to you?" She said that she had become pregnant as a result of zina. He said: "Is it you [i.e. are you sure]?" She said: "Yes." He said to her: "[You will not be punished] until you give birth to that which is in your womb." A man from among the Ansar sponsored her [i.e., paid for her needs] until she delivered [the child]. Then he [that Ansari] came to the Prophet and said: "The Ghamidi woman has given birth to a child." He [the Prophet] said: "Then we will not stone her and so leave her child with no one to nurse him..."' (emphasis added)⁹¹

In fact, many Islamic countries do not execute nursing mothers. Article 7(2) of the Arab Charter on Human Rights provides that the death penalty shall not be imposed on 'a nursing mother within two years from the date of her delivery; in all cases, the **best interests of the infant shall be the primary consideration**'. (emphasis added)

Furthermore, as discussed above on page 21, the Quran provides that:

No soul shall be made to bear the burden of sin of another. (Quran 17:15 and 35:18)

There can be no argument that the physical and mental trauma that affects a child of a parent who has been sentenced to death or executed, and the subsequent loss of that parent in their lives, is a great burden that the child must bear.

88 See Ibn Qudamah's *Al-Mughni*, Vol. 10, p. 114.

89 Al-Izz Ibn Abd al-Salam, *Al-Qawa'id fi ikhtisar al-maqasid*, ed. Iyad Khalid al-Taba', Beirut, Dar al-Fikr, pp. 32-34.

90 Al-Izz Ibn Abd al-Salam, *Al-Qawa'id fi ikhtisar al-maqasid*, ed. Iyad Khalid al-Taba', Beirut, Dar al-Fikr, p. 47.

91 See *Sahih Muslim*, *Hadith* No. 1695.

3. Can Sharia law evolve?

Modern-day systems of punishment have developed throughout the world that look at offenders as people that need to be rehabilitated and reformed, rather than receive punishment based on notions of revenge or retribution. Systems of punishment under traditional Islam therefore seem to be outdated for contemporary society.

Unfortunately, the international community has a preconceived notion that Sharia law is immutable and unable to evolve to meet the contemporary understanding of crime and justice or reflect universal human rights. This understanding is inaccurate, and Sharia law is subject to evolution to reflect 'the changes of the times or the changing conditions of society'⁹² through a legal methodology called *fiqh*.

Fiqh, often translated as 'Islamic jurisprudence', literally means 'understanding'. It is used to refer to a jurist's understanding or interpretation of the primary sources of law in Islam (Quran and *sunnah*) in order to derive laws. Thus, while Sharia is believed to be of 'divine' origin, *fiqh* is not. Most of what is now known as 'Sharia law' refers to *fiqh*. The fact that, right from its beginnings, Sharia law or *fiqh* was being produced and disseminated by diverse schools of law (known as *madhhabs*) is in itself evidence of the human origins of *fiqh*. For contemporary Muslim jurists calling for a reinterpretation of the Sharia, this distinction between Sharia and *fiqh* is significant. It legitimises, as Islamic, reinterpretations of the Sharia within a modern context.

'[S]ome specialists and politicians today – often with ideological intent – mistakenly equate Sharia with *fiqh*, and present *fiqh* rulings as 'Sharia law', hence as divine and not open to challenge. Too often we hear statements beginning with 'Islam says...' or 'According to Sharia law...'; too rarely do those who speak in the name of Islam admit that theirs is no more than one opinion or interpretation among many. A distinction between Sharia and *fiqh* is crucial ... because it both engages with the past and enables action in the present; it enables the separation of the legal from the sacred, and to reclaim the diversity and pluralism that was part of Islamic

legal tradition. It also has epistemological and political ramifications, and allows contestations and change of its rulings from within.'⁹³

Thus, calls to re-examine Sharia laws as they relate to the death penalty and to what we now call universal human rights laws are not a violation of Sharia but a revival of the Islamic tradition of reinterpreting the Sharia. For example, the Egyptian jurist of the Shafi'i school of law, Jalal al-Din al-Suyuti (d. 1505 CE), was one of the best-known and respected figures from the late medieval Muslim world whose teachings continue to exert strong influence among a majority of conservative Sunni Muslims today. He was explicit on the need to continuously re-interpret the Sharia for each generation. He opened the first chapter to his book, appropriately titled 'A rebuttal against those who have become rigid on earth and are ignorant that reinterpretation in every generation is compulsory', with the following words:

*We shall cite texts from scholars to prove that re-interpretation [of the Sharia] in every period is a religious obligation [upon all Muslims], and it is not permissible in Sharia for any generation and era to abandon reinterpretation. You should know that the legal texts of eminent scholars from all the schools of law [madhhabs] unanimously agree on this. The first to explicitly state this was Imam al-Shafi'i and then his companion, al-Muzani.*⁹⁴

Jalal al-Din al-Suyuti goes on to quote several earlier authorities among the founders of the schools of Sharia law and others to support the view that it is a religious obligation (*fard*) upon every generation of Muslims to engage in the process of reinterpreting the Sharia in order to address new realities in a constantly changing world.

The famous jurist, Muhammad Amin Ibn Abidin (1784-1836 CE), wrote in his *Risalat al-'Urf* ('An Epistle on Local Customs') that:

The laws are either established [or proved] on the basis of a direct text [from the Quran or authoritative hadith] ... many laws change according to changing times [bi ikhtilaf zaman] such that if a law was to remain the

92 For discussion of this issue, see Ibn Qayyim al-Jawziyya, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamfn*, ed. M. 'Abd al-Hamid, 4 vols., Beirut, 1987, Vol. III, p. 70 and Vol. I, p. 110 f. See also Fakhr al-Din Qa-Ikhan, *Fatiwii*, printed with *al-Fatawa al-Hindiyya*, Vols. 1-3, Repr. Beirut, 1980, Vol. I, pp. 2-3; Khayr al-Din al-Ramli, *Fatiwii*, 2 vols., Cairo, 1893, Vol. I, p. 3; Muhammad Amin Ibn 'Abidin, 'Nashr al-Urf' in *Majma'at Rasa'il*, 2 vols., 1970, Vol. II, pp. 114-147; Muhammad Amin Ibn 'Abidin, *Hashiyat Radd al-MulJtiir*, 8 vols., Beirut, 1979, Vol. I, p. 69.

93 Ziba Mir Hosseini, *Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts*, The Global Campaign to Stop Killing and Stoning Women, 2010, p. 6.

94 Jalal al-Din al-Suyuti, *Al-Radd 'ala man akhlada ila-l-ard wa jahila anna al-ijtihad fi kulli 'asr fard*, Beirut, Dar al-Kutub al-'Ilmiyya, 1983, p. 67.

same as it was in the first case this would cause great difficulty and harm to the people [al-mashaqqah wa darar], and this would be a violation of the universal principles of Sharia which are based on the need to make things light and easy [takhfif wa taysir].⁹⁵

There are a number of famous concrete examples where Muslim rulers changed Sharia law to reflect the needs of that particular society.

Umar ibn al-Khattab was a great reformer in the history of Islam. He had many discretionary views, even during the Prophet's own lifetime. These were included under the heading 'Umar's agreements'. One of his famous discretionary rulings was the suspension of the punishment for theft in the year of famine. During a severe famine, some people who were hungry resorted to stealing food. Umar declared that he would not implement the punishment of amputating hands; instead he would punish offenders by imprisonment and exile. It is not known if Umar resorted to cutting hands after that.⁹⁶

A second example is with reference to the Quranic verse 9:60, which requires that alms (charity) are given to the 'poor and needy', as well as to 'those whose hearts are to be reconciled'. This historically referred to influential non-Muslim Arab tribal leaders during the time of the Prophet who, although wealthy, were given alms by the Prophet in order to win their political support at a time when Islam was still in its developmental stages and very weak. After the death of the Prophet, Islam became a dominant political and military force in Arabia. One of the Prophet's senior companions, Umar Ibn al-Khattab, assumed the role of leader of the Muslims after the first *Khalifa*, Abu Bakr, expanded the Muslim territories and replaced a voluntary military army with a sophisticated and professional one. Umar then refused to maintain the Quranic instruction and practice of the Prophet to give alms to the Arab chiefs. He declared: 'We are now a people whom God has honoured and empowered with Islam' (i.e. Muslims no longer needed to buy the political and military support of the tribal chiefs).⁹⁷ Umar's argument was that the 'legal cause and reason' to grant them the alms in the initial stage no longer existed and the law had to be suspended although clearly stated in the Quran. Umar's legal reasoning emphasised 'the cause and reason of laws', which became known as one of the fundamental principles of Islamic jurisprudence that 'the law is subject to, or will always be attached to the cause and reason. At times when the cause and reason no longer exist, the law will also cease to exist'.⁹⁸

Therefore, does the 'cause and reason' for the death penalty as a punishment for murder, adultery, apostasy and *hirabah* still exist? If it does not, then the law should cease to exist.

It has been argued by Muslim reformers that the severe punishments under Sharia were appropriate within the historical and social contexts in which they originated but are inappropriate today and that the underlying religious principles and values need to find new expression in modernising societies. There is a movement among some liberal Muslims to 'reinterpret Islamic verses about ancient punishments', in the words of Professor Ali A. Mazrui. He states that the punishments laid down fourteen centuries ago, 'had to be truly severe enough to be a deterrent' to those who might commit offences that were deemed harmful to Islamic society in seventh century Arabia, but 'since then God has taught us more about crime, its causes, the methods of investigation, the limits of guilt, and the much wider range of possible punishments'.⁹⁹

Sharia law is based on the principle that the function of law in Islam, as both classical and contemporary Islamic jurists agree, is to 'accrue benefit' for the *masalih* (the individual as well as for the common good or public interest in society) while 'repelling harm' away from the *masalih*.¹⁰⁰ 'Repelling harm' means preventing anything that would undermine one of the five indispensables (life, religion, offspring, intellect or property). Sharia laws are simply a means to achieve that goal and not an end in themselves. This has significance with regards to the application of the death penalty, as it was seen as a way of deterring crime and sin in Islam while repelling harm from the individual or society (*masalih*). However, almost all scientific studies done in the past decades have consistently demonstrated that there is no 'evidence that the death penalty deters crime more effectively than other punishments',¹⁰¹ which questions whether the death penalty is still appropriate in a modern-day society.

We now have new approaches to criminal justice that were not available in the early days of Islam and which aim to 'repel harm'. These include imprisonment, providing opportunities for reform, rehabilitation, educating offenders, monitoring and tracking the movement of offenders, and tools to provide restitution to victims or communities. Such alternative punishments still have the ability to uphold justice and protect society from dangerous individuals without further loss of life through execution, demonstrating that the death penalty is no longer necessary to 'repel harm' away from the *masalih*.

95 Cited in Michael Mumisa, 'Islam and Voting – The Case of British Muslims', *Cordoba Papers*, Vol. 1, Issue 2, London, The Cordoba Foundation, May 2010, p. 4.

96 Al-Baji, *Al-Muntaq*, Vol. 4, p. 49. Also, Al-Qasim ibn Sallam, *Kitab al-Amwal*, Vol. 3, p. 276.

97 Michael Mumisa, *Sharia law: Theory and Interpretation*, Maryland, Amana, 2002, p. 104. See also Tafsir Ibn Kathir (Q9:60).

98 Michael Mumisa, *Sharia law: Theory and Interpretation*, Maryland, Amana, 2002, p. 104. See also Tafsir Ibn Kathir (Q9:60).

99 Ali A. Mazrui, 'Liberal Islam versus Moderate Islam: Elusive Moderation and the Siege Mentality', *The American Journal of Islamic Social Sciences*, Vol. 22, No. 3, 2005, pp. 83-89.1

100 Al-Izz Ibn Abd al-Salam, *Al-Qawa'id fi ikhtisar al-maqasid*, ed. Iyad Khalid al-Taba', Beirut, Dar al-Fikr, pp. 32-34.

101 H. J. Steiner et al, *International Human Rights in Context: Law, Politics, and Morals*, Oxford, Oxford University Press, 2008, p. 19.

It is, therefore, reasonable to suggest a move away from the death penalty to a system of punishment that is more suitable for our time and place, and more conducive to the achievement of the modern-day aim of punishment.

Furthermore, as criminal law has developed in line with contemporary legislative developments in a number of Muslim countries, there is a clear need for reviewing the rulings of Sharia law so as to make proper choices from what the great Muslim jurists have established. In fact many Muslim countries have adopted new and flexible laws that reflect a civil attitude towards offences and crimes. They did so in consultation with local scholars and institutions that issue Islamic rulings (or *fatwa*).

In circumstances where the death penalty is a potential form of punishment, it only seems right that interpretation (*fiqh*) should be done through collective reasoning (*ijma'*) rather than by analogy (*qiyas*). As stated at the beginning of this publication, the right to life is a fundamental tenet of Islam, and the taking of a life can only be sanctioned through Sharia law. It cannot be appropriate to sentence someone to death for an offence not mentioned in the Quran or *sunnah*, or based purely on analogy. Hence general consensus (*ijma'*) should be sought.

In all this, Islamic jurisprudence and the legal experience of other nations should be consulted to identify where consensus on modern notions of the death penalty lie.

Although all Islamic countries retain the death penalty in their domestic legislation (except for Djibouti), their use of it varies considerably. The religious argument is frequently invoked as a justification for its continued retention, yet the diversity of practice would suggest there is little consensus even among Muslims as to the scope of the death penalty. Some, like Iran and Iraq, are enthusiastic practitioners, while others, such as Tunisia and Morocco, have not carried out an execution for twenty years. In Egypt, most recent executions have been carried out for terrorism and rape not resulting in death. In Iraq, the majority of executions in recent years have involved terrorism-related offences or other violent acts such as kidnapping and armed robbery, which might be construed as 'terrorism'. In Malaysia and Saudi Arabia most death sentences are pronounced for drug offences.

Some Arab penal codes impose capital punishment for scores of crimes to which no religious text applies. A study by Abd al-Khaliq Hajar, a Yemeni Judge,

indicates that Yemeni law applies capital punishment to 315 different offences, none of which are supported by any Quranic or *sunnah* text. Morocco also has a disproportionately high number of death penalty applicable offences in its domestic criminal legislation: 365 offences. Only very few of these can be related to Sharia law. The variety of offences for which the death penalty may be applied in Muslim countries is very broad, and includes rape, robbery, arson, kidnapping, murder, attempted murder, drug offences (possession and trafficking), economic offences, treason and espionage, apostasy, consensual sexual relations between adults (adultery and homosexuality) and sorcery.

Unfortunately it is impossible to make an objective analysis of the broad consensus as to which crimes are punishable by death across the Muslim world. Very little information on the application of the death penalty is published by retentionist countries, which exacerbates the inability to assess the general consensus (*ijma'*) on how the death penalty is being applied in practice, or even if it is being applied in conjunction with the conditions established under Sharia law or in a way that respects international human rights standards.

There is a further need to consider what has been attained through the adoption of various international conventions, statements and norms, to which most Muslim countries are signatories. It should be noted that all Muslim countries have ratified the Convention on the Rights of the Child, and many of the most vocal Islamic states have ratified the ICCPR without reservation.¹⁰² In other words, they have already accepted international norms under a strict construction, including only applying the death penalty for the 'most serious crimes', not executing those who were accused of committing an offence under the age of 18, not executing pregnant or nursing mothers, and only applying the death penalty where fair trial standards can be met. Furthermore, they have signed up to other universal rights including the right to freedom of religion, the right to privacy, and the right to equality regardless of race, colour, sex, language, religion or social origin. Therefore, the argument that they must obstruct the evolution of international norms on the death penalty on religious grounds is inconsistent with their practice in the area of international human rights.

¹⁰² For a full list of ratifications and reservations, see United Nations Treaty Collection at https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en.

Conclusion

Islam undeniably provides for the death penalty as part of its criminal justice system. Its scope, however, is considerably more limited than certain Islamic states would have the international community believe. Sharia law creates stringent conditions for its use and includes various opportunities to avoid or commute punishment that in practice would make it almost impossible to carry out an execution. This could, on the face of the matter, equate to a moratorium on sentencing and executions, leading to abolition in law without being in conflict with Islam. Furthermore, Sharia law explicitly encourages life over death through the overarching themes of forgiveness, mercy and repentance as alternatives to punishment, as well as through the undeniable protection of life as one of the five ‘indispensables’ in Islam.

This publication has therefore aimed to demonstrate that the death penalty is not compulsory under Sharia law, and abolition would not be incompatible with Islam.

Although it is undisputable that the Quran explicitly provides the death penalty as punishment for murder (*qisas*), it not only provides, but actively encourages forgiveness and restitution as an alternative. This indicates that Sharia law could still be upheld even where executions are not carried out.

Punishment by death for adultery and apostasy is not explicitly found in the Quran, but is based on various *hadiths* which have been subject to scholarly discretion (*ijtihad*). However, the relevant *hadiths* do not enjoy unanimous acceptance by the Muslim community because they are based on probable texts that do not have definitive import, and are not mentioned in the authentic *sunnah*. Thus, the legitimacy of the death penalty as a punishment for adultery and apostasy can be seriously questioned. Furthermore, Sharia law provides that those who recant or repent of these offences should be forgiven.

It is inconceivable that taking a life through execution, even the life of a person who has committed the gravest crimes in Islam, should be left out of the Quran or be based on questionable *hadiths* without clear general consensus. Death for adultery and apostasy surely cannot be Islamic policy – if it was, there would have been clear direction in the Quran. Life is sacred in Islam, and the deprivation of life strictly prohibited.

In practice it could be argued that Sharia law seems to support this position. The strict evidentiary circumstances required for adultery (four eyewitnesses) and the high

burden of proof demonstrate that this offence was not meant to be applied in practice. In the case of apostasy, the clear Quranic rule that religious belief is a matter of free, personal choice, and no one has the prerogative to force people to accept any belief or to follow a particular faith, undermines any credibility that apostasy should also be punishable by death. At a minimum, these specific restrictions could be seen as promoting a moratorium on sentencing and executions, if not abolition, for adultery and apostasy.

Like *qisas* laws, the Quran also explicitly provides the death penalty for *hirabah* (waging war against god). However, most Islamic jurists agree that the punishments set out in the Quran for *hirabah* are not compulsory, but discretionary, meaning that an alternative punishment, such as imprisonment, could be applied without being unfaithful to Islam.

Other offences for which the death penalty is currently applied in Muslim countries, such as drug-related offences, homosexuality and sorcery/witchcraft, have no grounding in the Quran or authenticated *hadiths* which enjoy general consensus, and therefore it appears that Sharia law is not a justification for such punishments.

Furthermore, where punishment is mentioned in the Quran and authentic *sunnah*, repentance and forgiveness is encouraged as a way of avoiding or commuting punishment, explicitly with regards to premeditated murder (*qisas*), apostasy (*riddah*), and ‘waging war against God’ (*hirabah*). Repentance is surely the grounds for remission of all penalties. Why repentance is not recognised and applied by contemporary Muslim legal systems which apply Sharia law, as part of contemporary theories of rehabilitation of offenders, can only be attributed to selective application of the letter of the law taken without regard for Sharia’s enlightened spirit.¹⁰³

While Islam permitted the establishment of justice on earth, in order to avoid injustice, the principle of absolute certainty was established under Sharia law. Hence, the strict evidentiary requirements and the opportunities to avoid or commute punishment imply that Islam created a system of punishment to act as a deterrent, without having to actually implement a death sentence in practice. This fits into the notion that if a person evades appropriate punishment on earth, absolute divine justice can still be achieved in the Hereafter.

¹⁰³ Cherif Bassiouni, ‘Death as a penalty in the Sharia’ in Peter Hodgkinson and William A. Schabas (eds.) *Capital Punishment: Strategies for Abolition*, Cambridge University Press, 2004, pp. 169-185, p. 184.

This leads to the assumption that if the death penalty were to be applied in the strictest sense as established under Sharia law, executions in Muslim countries would be so rare as to almost never be applied, making this punishment unusual and in keeping with international standards that permit the death penalty only for the 'most serious crimes'.

However, the death penalty continues to retain a high degree of support in the majority of the Muslim countries. Legislative amendments have in fact broadened and increased the number and type of death penalty applicable offences beyond those found in Sharia law, in particular with regards to drug offences and acts of terrorism, as well as others, such as attempted murder, sorcery/witchcraft, homosexuality and arson. It is unfortunate that many Islamic scholars and rulers have broadened the scope of the death penalty for offences to which no specific punishment has been attached in the Quran or the authentic *sunnah*. In certain cases, their argument relies on some weak evidence that may not be used to justify enforcing a mandatory punishment of death, considering how important life is to Islam.

It would therefore not be unfaithful to the tenets of Islam if a Muslim state were to participate in efforts that seek to prohibit or restrict the application of the death penalty. Such participation may be based on strengthening what Sharia law has already established in terms of improving fair trial standards, promoting victim forgiveness and indemnity, encouraging repentance and rehabilitation, suspending mandatory punishments in cases of doubt, and choosing alternative discretionary punishments (*ta'zir*), such as imprisonment, fines or community service.

Thus, Muslim states can curtail the death penalty through their domestic legislation and still remain consistent with Sharia law. The existence of the death penalty for several crimes in Muslim states is a policy choice, but not one which is necessarily mandated by Sharia.

While there are no known instances where Islamic scholars have advocated the abolition of the death penalty, many *Khulafā* (rulers) have suspended its implementation. Moreover, many judges in Islamic history have done the same. Yet, it remains valid as a legal provision. Modern crimes require new consideration and a new penal system that provides sufficient deterrence while encouraging meaningful rehabilitation.

No punishment may be enforced without firm evidence based on the Quran, the authentic *sunnah*, or through proper consensus. Such consensus requires the agreement of all scholars who can exercise scholarly discretion, in all countries of the Muslim world. When one Muslim country disregards a ruling that does not enjoy unanimous agreement, relying on a view upheld by a significant group of its scholars, that ruling is deemed to suffer from a serious flaw. That is enough to abolish the enforcement of the punishment and require its replacement by different punishments.

As in all elements of Islamic life, the guidance of the Prophet should be followed, and in the case of crime and punishment, the Prophet guides Muslims to pardon and forgive offenders, to encourage repentance and mercy, and suspend the death penalty whenever possible.

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