ISLAMIC MEMBER STATE AND THE SCRUTINY OF THE DEATH PENALTY IN THE UNIVERSAL PERIODIC REVIEW

By

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Whoever saves one life, it is as though he has saved all of mankind [Qurʾān 5:32]

ABSTRACT

Abstract

Many Islamic countries propose legitimising the death penalty using theological and secular political reasoning. They argue that the punishment is privileged within a conception of theocracy expressed through state sovereignty and/or it is an efficacious criminal justice policy for punishing those who commit the 'most serious crimes'. This study argues that such justifications are misguided, and that the UN Human Rights Council's Universal Periodic Review (UPR) provides a cogent mechanism to provide a clearer perspective on the legitimacy of the death penalty within Islam.

To investigate the claims of the erroneous theological reasoning for the death penalty, the present study uses the UPR as a methodological lens from which to scrutinise Islamic Member State reasons for the use of the punishment. The UPR is an innovative mechanism for the peer-review of the human rights record of all 193 UN Member States, and this includes the human rights implications for implementing the death penalty within Islam. The Kingdom of Saudi Arabia and Sudan are presented as two case studies, and the work considers whether the sovereign state discourses for maintaining the death penalty are compatible with international human rights standards.

The foundational assessment of this UN mechanism for assessing the Islamic use of the death penalty is then followed by an exegesis of Islamic law and presents findings on the legitimacy of Islamic state propositions for maintaining the death penalty, based on theological interpretations. It identifies a more enlightened reading of Islamic jurisprudence to provide cogent reasons for the prominence of the right to life over the Islamic Member State claims to legitimise the death penalty.

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AND

TEMPORAL DURATION OF THESIS

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Temporal Duration of Thesis

This thesis presents, as accurately as possible, the law and literature relating to the subject matter to the date of 30th September 2018.

LIST OF ABBREVIATIONS

List of Abbreviations

ADHRB: Americans for Democracy and Human Rights in Bahrain

CAT: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CDHRI: Cairo Declaration on Human Rights in Islam

CEDAW: Convention on the Elimination of all Forms of Discrimination Against Women

CHR: Commission on Human Rights

CRC: Convention on the Rights of the Child

CRIN: Child Rights International Network

CSW: Christian Solidarity Worldwide

DRDC: Darfur Relief and Documentation Centre

ECLJ: European Centre for Law and Justice

ECOSOC: Economic and Social Council

HRC: Human Rights Council

ICCPR: International Covenant on Civil and Political Rights

ICCPR-OP-1: First Optional Protocol to the International Covenant on Civil and Political Rights

ICCPR-OP-2: Second Optional Protocol to the International Covenant on Civil and Political Rights

ICERD: International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Commission of Jurists

JS: Joint Submission

MPV: Muslims for Progressive Values

NISS: National Intelligence and Security Service of Sudan

NSHR: National Society for Human Rights (Saudi Arabia)

OHCHR: Office of the United Nations High Commissioner for Human Rights

OIC: Organisation of Islamic Cooperation

OP-CAT: Optional Protocol to the Convention against Torture

OUP: Oxford University Press

SCPRA: Saudi Civil and Political Rights Association

SHRC: Saudi Human Rights Commission

SHRI: Sudanese Human Rights Initiative

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGA: United Nations General Assembly

UNMIS: United Nations Mission in Sudan

UPR: Universal Periodic Review

UNSC: United Nations Security Council

WGAD: Working Group on Arbitrary Detention

TRANSLITERATION TABLE

Transliteration Table

CONSONANTS

ا	ʾ	د	d	ض	ḍ	ك	k
ب	b	ذ	dh	ط	ṭ	ل	l
ت	t	ر	r	ظ	ẓ	م	m
ث	th	ز	z	ع	ʿ	ن	n
ج	j	س	s	غ	gh	ه	h
ح	ḥ	ش	sh	ف	f	و	w
خ	kh	ص	ṣ	ق	q	ي	y

VOWELS

Short:

ـَ	a
ـُ	u
ـِ	i

Long:

ا or ى	ā
و	ū
ي	ī

Doubled:

ـِيّ	iyy (final form ī)
ـُوّ	uww (final form ū)

Diphthongs:

ـَو	au or aw
ـَي	ai or ay

Hamza (’) is omitted at the beginning of a word. (ة) is transliterated as ‘a’ in the final state.

The definite article al- (ال) is not capitalised unless appearing at the beginning of a sentence in the main text.

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CHAPTER ONE: INTRODUCTION

1. Introduction

1.1 General Theme of Enquiry

At least 993 executions occurred in 2017 of which 84% took place in just four countries: Iran, Saudi Arabia, Iraq, and Pakistan.[1]

Islamic nations are amongst the world's top executioners, often laying blame at the doorstep of religion by citing the application of '*sharīʿa* law'.[2] This study challenges the religious underpinnings to maintain the death penalty and tackles the two main theories used to legitimise the punishment, sovereignty and criminal justice. It does this by scrutinising Islamic Member States' justification for the use of the death penalty in the Universal Periodic Review (UPR). The UPR is an innovative mechanism of the United Nation's Human Rights Council established in 2006 which reviews the human rights records of all UN Member States. Each UPR cycle runs for a period of four and a half years.[3]

Under the UPR, countries that apply the death penalty justify its application by claiming that the punishment does not violate international standards on the right to life, under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and that it does not constitute inhuman punishment in violation of Article 7 ICCPR. These arguments are generally aimed at

[1] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 5.

[2] Although the word *sharīʿa* is commonly accepted as representing the Islamic legal system, it must be noted that the *sharīʿa* encompasses both the legal and non-legal aspects of a Muslim's life, individually and communally. Hence, the term Islamic law is preferred by the author, but it has been used interchangeably with *sharīʿa* law in this thesis, owing to the latter's recurrence in the constitution of Islamic states and their UPR reports. Norman Calder and MB Hooker explain, '[w]ithin Muslim discourse, *sharīʿa* designates the rules and regulations governing the lives of Muslims, derived in principal from the Ḳurʾān and *ḥadīth*…The academic discipline whereby scholars described and explored the *sharīʿa* is called *fikh*. The word designates a human activity, and cannot be ascribed to God or (usually) the Prophet... The *sharīʿa*, contained in God's revelation (Ḳurʾān and *ḥadīth*), is explained and elaborated by the interpretative activity of scholars, masters of *fiḳh*, the *fuḳahāʾ*. Since this is in practice the only access to the law, the two words are sometimes used synonymously, though *sharīʿa* retains the connotation of divine, and *fiḳh* that of human.' See Norman Calder and MB Hooker, '*Sharīʿa*' in *Encyclopaedia of Islam: Second Edition* available at <http://dx.doi.org/10.1163/1573-3912_islam_COM_1040> accessed 8 November 2015.

[3] UNGA Res 60/251 (3 April 2006) UN DOC A/Res/60/251.

demonstrating either that the punishment is a legitimate expression of state sovereignty, and/or it is an effective administration of criminal justice.

The background to the research is that there is currently a significant challenge to the hitherto normative religious application of Islamic law to facilitate the application of the death penalty. It is important to note that the authority of the *sharīʿa* is not being challenged, but what is the focus of this study is the theological interpretation which allows for a large scope of capital crimes and the regularity of its application in various contexts. This research engages with the interpretive tensions within Islamic law, and contributes to the debates, through the lens of the UPR. This is the first such study of the subject matter. It attempts to provide a critical framework for all the actors involved in the peer-review mechanism to engage with this discourse within the UPR and international human rights discussions more generally.

1.2 Lacunae in Current Analysis

This study has developed due to the paucity in the research on Islam and the death penalty within the discourse of international human rights law. Although there has been a wide range of scholarly enquiry into the parameters of Islamic law or international human rights law, there have been fewer interdisciplinary analyses that combine the two.[4] Specifically, there is no scholarship on placing this theoretical enquiry within the context of the Universal Periodic Review. Scholarship in this area is clearly lacking and it is the aim of this research to address this gap.

Currently, there have only been three book-length publications which deal specifically with the Universal Periodic Review. The first is the monograph of Purna Sen which provides a general

[4] Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford: OUP 2003); Andreas Th Müller and Marie-Luisa Frick (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Leiden: Brill 2013); Anver M Emon, Mark S Ellis, and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: OUP 2015).

overview of the mechanisms of the UPR and what has been understood from states undergoing the review process and lessons from the interactive dialogues in Geneva. However, Sen makes it clear that the publication is not intended to provide a comprehensive analysis of the UPR or to review the workings of the Human Rights Council.[5]

The second text is an edited collection by Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism*, which provides a detailed analysis of the UPR and its ability to influence states' behaviour by drawing upon a collection of socio-legal scholarship.[6] The third text by James Gomez and Robin Ramcharan, *The Universal Periodic Review of Southeast Asia: Civil Society Perspectives*,[7] has a chapter dedicated to 'The Abolition of the Death Penalty in Southeast Asia: The Arduous March Forward'.[8] Neither publication specifically engages with the Islamic use of the death penalty. Similarly, all available academic articles on the UPR have been consulted but there is insufficient engagement with the death penalty within such a context.[9]

[5] Purna Sen, *Universal Periodic Review of Human Rights: Towards Best Practice* (London: Commonwealth Secretariat 2009); Purna Sen, *Universal Periodic Review: Lessons, Hopes and Expectations* (London: Commonwealth Secretariat 2011).

[6] Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: CUP 2015).

[7] James Gomez and Robin Ramcharan (eds), *The Universal Periodic Review of Southeast Asia: Civil Society Perspectives* (Singapore: Palgrave Macmillan 2017).

[8] M Ravi, 'The Abolition of the Death Penalty in Southeast Asia: The Arduous March Forward' in James Gomez and Robin Ramcharan (eds), *The Universal Periodic Review of Southeast Asia: Civil Society Perspectives* (Singapore: Palgrave Macmillan 2017) 77-96.

[9] See eg, Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) Human Rights Law Review 113-114; Nico Schrijver, 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles' (2007) 20(4) Leiden Journal of International Law 812; Elvira D Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) Chinese Journal of International Law 721-34; Allehone Mulugeta Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 Human Rights Law Review 4; Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform' (2011) 7 ICL Journal 4; Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 New Zealand Yearbook of International Law 189.

There is a wide range of scholarly literature on Islamic criminal law which will inform the research. Of particular relevance is the work of ʿAbd al-Qādir ʿAwdah,[10] M Cherif Bassiouni,[11] Mohamed S El-Awa,[12] Khaled Abou El Fadl,[13] Rudolph Peters,[14] and Intisar A Rabb.[15] Within the parameters of Islam and capital punishment, there is limited information available in the English language and most publications concentrate on Islamic criminal law as a whole rather than a specific focus on the right to life.[16] This work widens the approach of the existing scholarship to expand the horizon of human rights knowledge and demonstrate how it applies to Islam and the death penalty. It aims to provide cogent symmetries between the right to life in Islamic law and international human rights law by identifying shared values between the systems, viewing them as complementary norms as opposed to competing norms. It is hoped that the UPR can act as a forum for such discussions.

1.3 Scope: Defining an Islamic State

This research provides two case studies to illustrate the position of Islamic countries on the death penalty, followed by a theological review of the prima facie capital offences in Islamic law. The author is aware of the dangers of broad generalisations in using the term 'Islamic' as there is not a homogenous expression of the religion, and so specific characteristics concerning criminal justice will be identified and explored. For the purposes of this study, an Islamic state

[10] ʿAbd al-Qādir ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī: Muqāranā bi-l-Qānūn al-Waḍʿī* (Beirut: Dār al-Kitāb al-ʿArabī, n.d.).
[11] M Cherif Bassiouni, 'Death as a penalty in the Sharia' in Peter Hodgkinson and William A Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge: CUP 2004); 'Crimes and the Criminal Process' (1997) 12(3) Arab Law Quarterly 277; 'Leaving Islam is Not a Capital Crime' *Chicago Tribune* (Chicago, 2 April 2006) <www.chicagotribune.com/news/ct-xpm-2006-04-02-0604020336-story.html>; Bassiouni (ed), *The Islamic Criminal Justice System* (London: Oceana Publications 1982).
[12] Mohamed S El-Awa, *Punishment in Islamic Law* (Plainfield: American Trust Publications 1993).
[13] See Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: CUP 2001); *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham: Rowman & Littlefield 2014); *Speaking in God's Name: Islamic Law, Authority and Women* (London: Oneworld Publications 2014).
[14] Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: CUP 2005).
[15] Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (New York: CUP 2015).
[16] See generally, ibid.

is that which: (1) belongs to the Organisation of Islamic Cooperation (OIC); and (2) incorporates Islamic law within its legislative framework, particularly its criminal justice system.

The OIC was established in 1969 and Ioanna Cismas observes that it is the 'sole inter-governmental actor to display religious contours'[17] of Islamic states and provide an interpretive role of human rights in the context of Islam. The organisation describes itself as 'the collective voice of the Muslim world'[18] and at the time of writing has 57 Member States.[19] Its religious *overtones* can be seen in the OIC Charter of 1972 which identifies that common belief is 'a strong factor for rapprochement and solidarity among Islamic people'.[20] This continues in the revised Charter of 2008 which begins symbolically in the name of God and affirms that 'the objectives of the Charter are to be pursued in accordance to the noble Islamic teachings and values'.[21]

Nevertheless, the performance of the OIC's role is complicated by the rich diversity of its membership. Countries may follow either the sunnī or shīʿa branches of Islam and both denominations are further categorised into different schools of legal thought. Furthermore, Member States have Islamic law as the source of their legislation to varying degrees. In some states it may constitute the sole source of legislation (Iran,[22] Saudi Arabia[23]) whilst in others it

[17] Ioana Cismas, *Religious Actors and International Law* (Oxford: OUP 2014) 239.
[18] 'History of the OIC' <www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en> accessed 2 May 2016.
[19] The Member States of the OIC (as listed on the Organisation's website in May 2017) are: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei Darussalam, Burkina Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, and Yemen. See <www.oic-oci.org/states/?lan=en> accessed 2 May 2017.
[20] Charter of the Islamic Conference (1972), preamble (emphasis added).
[21] OIC Charter (2008), art 2.
[22] The Constitution of the Islamic Republic of Iran 1979, art 2.
[23] Saudi Arabia Basic Law of Governance 1992, arts 1 and 7.

may form an important but not exclusive source (Egypt,[24] Jordan[25]) or not a source of law at all (Albania,[26] Tajikistan,[27] Turkey[28]). Other states may have Islam as the state religion[29] (Malaysia,[30] Morocco[31]).

The shīʿa Islamic Republic of Iran has the highest execution rates in the Muslim world, a country responsible for at least 507 executions in 2017;[32] however, this study is restricted to the sunnī branch of Islam. A review of shīʿa Islam is beyond the scope of this work as it is a separate discipline in its own right due to the different theological framework and doctrinal schools that exist within its legal tradition.

This study is therefore limited to the four sunnī doctrinal schools (*madhāhib*) known as the Ḥanafī, Ḥanbalī, Shāfiʿī, and Mālikī schools, all of which were named after their eponyms.[33] Reference is also made to the extinct Ẓahirī school where appropriate.[34] The two case studies chosen are the Kingdom of Saudi Arabia, which follows the Ḥanbalī school,[35] and Sudan, which follows the Mālikī school.[36] The author uses these two countries to provide examples of Islamic Member State engagement with the UPR and analyse the question of the death penalty in the review.

[24] The Egyptian Constitution 2014, art 2.
[25] The Constitution of the Hashemite Kingdom of Jordan 1952, arts 98 and 99.
[26] The Constitution of Albania, art 1.
[27] The Constitution of the Republic of Tajikistan 1994, art 1.
[28] The Constitution of the Republic of Turkey, art 2.
[29] Cismas, *Religious Actors and International Law*, 243; Nisrine Abaid, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (London: British Institute of International and Comparative Law 2008) 32-58; Tad Stahnke and Robert C Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 36 Georgetown Journal of International Law 947, 958–961.
[30] The Federal Constitution of Malaysia, art 3.
[31] The Constitution of Morocco, art 3.
[32] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 6.
[33] See Christopher Melchert, *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E.* (Leiden: Brill 1997).
[34] ibid.
[35] Jacques Waardenburg, *Islam: Historical, Social and Political Perspectives* (Berlin: Walter de Gruyter 2002) 233.
[36] Carolyn Fluehr-Lobban, *Islamic Law and Society in the Sudan* (Abingdon: Routledge 2008) 5.

1.4 Methodology

The method employed for collating information for this study has been through the use of library-based research. Both primary and secondary literature, particularly specialist Islamic texts in English and Arabic, have been utilised to gain a comprehensive insight into the area of this study.

The study analyses the legitimacy of justifications for the continued use of the death penalty by Islamic states within the opportunities provided for scrutiny and review under the UPR. This is undertaken through an analysis of the UPR's online repository in relation to the two countries chosen for the purposes of this research. Under the UPR process, the documents which form the basis of a state's review consist of a national report submitted by the state under review, the stakeholder report, and a report by the Office of the High Commissioner on Human Rights (OHCHR).[37]

To interpret the legal and political framework, existing literature on the UN Human Rights Council, such as the work of Rosa Freedman,[38] Philip Alston,[39] and M Cherif Bassiuoni,[40] has been consulted. Scholarly review of the effectiveness of the UPR is used as a framework to analyse the specific research question on Islam and the death penalty.

[37] The reports can be found on the OHCHR website: <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.
[38] Rosa Freedman, 'Improvement on the Commission? The UN Human Rights Council's inaction on Darfur' (2010) 16 UC Davis Journal of International Law & Policy 81; 'New Mechanisms of the Human Rights Council' (2011) 29(3) Netherlands Quarterly of Human Rights 289; 'The United Nations Human Rights Council: More of the Same?' (2013) 31(2) Wisconsin International Law Journal 209; *The United Nations Human Rights Council: A Critique and Early Assessment* (New York: Routledge 2013); *Failing to Protect? The UN and the Politicisation of Human Rights* (London: Hurst 2014).
[39] Philip Alston, 'Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New Human Rights Council,' (2005-2006) 15 Journal of Transnational Law and Policy 49; 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 Melbourne Journal of International Law 186.
[40] William A Schabas and M Cherif Bassiouni (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Cambridge: Intersentia 2012).

The legal and political information this study generates is used to look at the extent to which Islamic countries disregard enquiry into their application of the death penalty. The two general rejections put forth by retentionist states are that the death penalty is not a human rights question, but it is an appropriate manifestation of state sovereignty and a question of domestic criminal justice.[41] The study therefore examines the extent to which these two political claims act as bulwarks against adopting UPR recommendations which call for the restriction and/or abolition of the death penalty in Islamic countries. The leading text on the international legal framework on the death penalty by William Schabas, *The Abolition of the Death Penalty in International Law*,[42] and the leading criminological text on the death penalty, *The Death Penalty: A Worldwide Perspective*,[43] authored by Roger Hood and Carolyn Hoyle are of particular importance for setting out the international framework for which to view and analyse the question of the death penalty in Islam.

This is followed by a jurisprudential analysis of the death penalty in Islamic law. An inductive approach is taken in that the four doctrinal schools are reviewed in order to consider to what extent one school over the other can promote mercy and peace, in the context of the death penalty, or whether a more sophisticated application of some schools over others is required. It is through this analysis that a new theological interpretation is offered for elevating mercy over retribution to help diminish the use of the death penalty in Islam. This study considers arguments for the non-application of the death penalty which come from within the Islamic jurisprudential tradition. In doing so, it adopts an eclectic approach which draws upon principles from each of the schools that preserve the right to life.

[41] William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge: CUP 2002).
[42] ibid.
[43] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford: OUP 2015).

It should be noted that the prominence of the discussions on Islam and the death penalty is around the right to life which reflects the discussions at the UPR. The death penalty also involves significant questions under Article 7 of the ICCPR (prohibition of torture or cruel, inhuman or degrading treatment or punishment) and therefore it is mentioned where appropriate to do so; however, for the purposes of this study the main focus is on the right to life.

1.4.1 Insider/Outsider Perspective

The researcher of this study identifies as a Muslim and acknowledges that writing from an insider perspective generally presupposes that the writer must lack objectivity. However, W Montgomery Watt (d. 2006) writes:

> Normally a person can only reach important levels of religious experience through participating in the life of the community in which he has been brought up and basing his activity on its ideas. There are exceptions, but this is the normal case. It is not easy for a person brought up in a Christian environment to appreciate the religious ideas of Islam, far less to make them the basis of a satisfactory life. The same is true for the Muslim with Christian ideas. This means that it is Christian ideas which give the Christian the best chance of attaining a richer and deeper experience, and likewise Muslim ideas the Muslim.[44]

Hence, the position of this researcher is one of self-disclosure and transparency. This researcher brings an Islamic religious experience to provide an appropriate lens for which to interpret how this punishment is applied within the UPR by Islamic authorities.

[44] W Montgomery Watt, *Bell's Introduction to the Qur'an* (Edinburgh: Edinburgh University Press 1970) 182.

1.4.2 Research Questions

The research questions will consider:

- To what extent is the UPR effective for scrutinising the death penalty as a punishment?
- To what extent has Saudi Arabia and Sudan's use of the death penalty been appropriately scrutinised in the UPR and to what extent do they accept or reject the recommendations?
- To what extent is the death penalty a religious necessity in Islam?

1.4.3 Structure of Thesis

Chapter 1 of this thesis sets out the research questions, methodology, and scope. The thesis is then divided into two parts. Part One consists of three chapters and focuses on Islam and the death penalty within the UPR. Chapter 2 serves as an introductory chapter which sets out the UN framework in which this thesis is situated. It discusses the history of the UPR, its modalities, and how it functions in the context of Islamic states. The chapter then explores Islamic Member State interaction with the question of the death penalty, beginning with these states' perspectives of the drafting of international human rights instruments through to their participation in the UPR. Chapters 3 and 4 present the two case studies: The Kingdom of Saudi Arabia and Sudan. Both states' UPR cycles are reviewed through an analysis of the relevant UPR documentation (the national report, stakeholder report, OHCHR report, and the Working Group report which documents proceedings from the interactive dialogue in Geneva).

Part Two, consisting of two chapters, contributes to an enhanced understanding of human dignity in Islam by analysing the classical jurisprudence on the death penalty and its application today. Islamic law adopts three categories of crime: *ḥudūd* (doctrinal offences), *qiṣāṣ* (retributive offences), and *taʿzīr* (discretionary offences). Chapter 5 deals with those *ḥudūd*

crimes that are punishable by death such as adultery and apostasy whilst Chapter 6 considers death penalty offences that fall within the latter two categories of *qiṣāṣ* and *taʿzīr*.

Finally, Chapter 7 addresses the research questions, draws upon the preceding chapters, issues recommendations, and deals with limitations and future research.

1.5 A Note on Referencing and Transliteration

For citations and punctuation, this study largely follows the Oxford Standard for Citation of Legal Authorities (OSCOLA). Modifications are as follows:

- Subsequent citations of sources have been shortened using the author's surname and a short form of the title. This replaces the standard n.x style of citation and full references in such cases can be located in the bibliography.
- Place of publication is identified. This is particularly useful for readers wishing to access Arabic sources.
- The full references of *ḥadīth* texts are listed in the bibliography.
- Stakeholder submissions are cited as '(name of stakeholder) UPR submission'. These can all be located on UPR-Info's online repository at www.upr-info.org/en/review > select country > select 'civil society and other submissions'. Full links for individual submissions can be found in the bibliography.

Arabic transliterations follow the International Journal of Middle Eastern Studies (IJMES).[45] All Arabic terms are transliterated according to their pausal forms. This is to enable non-Arabic speaking readers to understand how the Arabic word is written. Where ibn ('son of') is part of a longer name, the lower case 'b.' is used but when it is part of the popularised name by which

[45] See <https://ijmes.chass.ncsu.edu/> accessed 15 December 2016.

the individual is normally referred then Ibn is written out thus Muḥammad Amīn Ibn ʿĀbidīn or Ibn ʿĀbidīn, not Muḥammad Amīn b. ʿĀbidīn.

Where both dates AH (After the Hijra) and CE (Common Era) are used, the first date mentioned is AH. The conversion of Islamic dates to the Christian calendar follows the online 'Islamic Hijri Calendar For 1400 Years' available at <https://habibur.com/hijri/>. Unless otherwise specified, references to a single date (for example, 'the eleventh century') are typically to the Common Era.

PART ONE:

THE DEATH PENALTY IN INTERNATIONAL LAW

CHAPTER TWO:

THE UNIVERSAL PERIODIC REVIEW AND

THE DEATH PENALTY

2. The Universal Periodic Review and the Death Penalty

2.1 Introduction

The Commission on Human Rights (Commission) was in operation for sixty years before it was dissolved and subsequently replaced by the Human Rights Council (HRC) in 2006. Many of the issues surrounding the Commission and its reform proposals have reflected in the way the new HRC has developed and functions, including its creation of the Universal Periodic Review. Hence in order to fully appreciate the purpose of the UPR, it is important to consider the historical context in which it was established.

This is an introductory chapter which sets the UN framework within which the Islamic context will be reviewed. The chapter itself serves two main purposes. The first is to provide a background and comprehensive overview of the UPR process in the context of Islamic states. Secondly, to provide an analysis of the role, or lack thereof, of these states in the evolution of the death penalty in international law and how this is reflected in the UPR.

2.2 UPR Origins: From Commission to Council

Article 68 of the United Nations Charter mandated the Economic and Social Council (ECOSOC) with creating commissions for the protection and promotion of human rights.[1] Under its mandate, ECOSOC established the Commission on Human Rights in 1946, a charter-based subsidiary body, which was 'entrusted with promoting respect for human rights globally, fostering international cooperation in human rights, responding to violations in specific countries and assisting countries in building their human rights capacity'.[2]

[1] See generally Eibe Riedel, 'Article 68' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford: OUP 2002) 1011, 1027.
[2] High-Level Panel on Threats, Challenges and Change, A More Secure World - Our Shared Responsibility (2 December 2004) UN Doc A/59/565, para 282. See also ECOSOC Res 5(I) (16 February 1946) UN Doc E/Res/5(I).

The Commission's work was primarily based around standard setting during its first two decades and from 1967 onwards, ECOSOC extended the Commission's work to promoting, monitoring, and implementing human rights.[3] It began to investigate state-specific human rights violations and a complaints procedure was initiated which was accessible to all states, individuals, and NGOs. Twenty-nine countries were considered under this procedure, between 1978 to 1985, however coverage was not balanced as certain states such as Iran and South Korea were scrutinised whilst other Arab countries and North Korea were not.[4] This selective nature of the Commission was criticised.[5]

In order to address cross-border human rights violations, the Commission created thematic mandates which allowed it to deal with widespread human rights abuses across a range of states.[6] The Commission was criticised for its one-sided form of action as 'it was the mightiest - militarily, economically and politically - who ran the human rights show'.[7] In other words, it was mainly Western countries placing developing countries under international scrutiny and according to the representative of Iraq, 'it was forbidden to mention violations occurring in the United States and Europe'.[8]

Miko Lempinen argues that selective scrutiny could be partly attributed to 'a different understanding of how to address and handle human rights concerns, as well as by a different

[3] Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (New York: Routledge 2013) 15; Ladan Rahmani-Ocora, 'Giving the Emperor Real Clothes: The UN Human Rights Council' (2006) 12(1) Global Governance 15.
[4] Jack Donnelly, 'Human Rights at the United Nations 1955-85: The Question of Bias' (1988) 32 International Studies Quarterly 275, 294. This procedure was largely confidential however, the Commission would publicise the list of countries concerning which action had been taken. Inclusion on this list was generally interpreted as evidence of serious violations (ibid).
[5] ibid 295.
[6] ECOSOC Res 1235 (XLII) (6 June 1967) UN Doc E/4393; ECOSOC Res 1503 (XLVIII) (27 May 1970) UN Doc E/4832. See Tom J Farer and Felice D Gaer, 'The UN and Human Rights: At the End of the Beginning' in Adam Roberts and Benedict Kingsbury (eds), *United Nations: Divided World* (2nd edn, Oxford: Clarendon Press 1993) 279; Phillip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford: OUP 1995) 126; James H Lebovic and Erik Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in UNCHR' (2006) 50(4) International Studies Quarterly 864.
[7] UN Doc E/CN.4/Sub.2/1998/SR.4, para 27 (Mr Khalifa, member of the Sub-Commission on Human Rights).
[8] UN Doc E/CN.4/1992/SR.40, para 38.

understanding of what constitutes promotion and protection of human rights, or for that matter, what constitutes a violation of human rights'.[9] For example, during Brazil's draft resolution on human rights and sexual orientation, the Organisation of Islamic Cooperation (OIC) countries prepared no less than 55 amendments to the draft aiming to remove any reference to sexual orientation. According to the representative of Pakistan, 'the issue was not a proper subject for consideration by the commission'.[10]

The Commission's increasing deficiencies paved the way for its ultimate downfall. A number of factors have been identified which contributed to the Commission's demise such as the increasing politicization of its activities;[11] naming and shaming policy in country-specific resolutions;[12] scrutiny of certain states;[13] and the absence of membership criteria.[14] Rosa Freedman has noted that, 'the expansion of international human rights to cover ever more issues, coupled with the body's increasing loss of credibility in the eyes of the states and observers resulted in the Commission widely being deemed to be unable to fulfil its mandate'.[15]

[9] Miko Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments* (Abo: Abo Akademi University Press 2005) 168.
[10] UN Doc E/CN.4/2003/SR.61, para 60. See also UN Docs E/CN.4/2003/L.106-110; Commission on Human Rights Decision 2003/118.
[11] In the words of Libya, the Commission had become a 'battlefield for political debate', UN Doc E/CN.4/2002/SR.49, para 22.
[12] Jack Donnelly, 'Human Rights at the United Nations 1955-85: The Question of Bias', 295; Jerome J Shestack, 'The Commission on Human Rights: Pitfalls, Progress and a New Maturity,' in Seymore M Finger and Joseph R Harbert (eds), *U.S. Policy in International Institutions: Defining Reasonable Options in an Unreasonable World* (Boulder: Westview Press 1982).
[13] ibid.
[14] Elvira D Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) Chinese Journal of International Law 721-34; Eric Heinze, 'Even-handedness and the Politics of Human Rights' (2008) 21(7) Harvard Human Rights Journal 41. See also Philip Alston, 'Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New Human Rights Council,' (2005-2006) 15 Journal of Transnational Law and Policy 49; Tait Carney, 'The United Nations Human Rights Council' (2007) 8 Human Rights and UK Practice 34; Nazila Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forward or Two Steps Sideways?' (2006) 55 International and Comparative Quarterly 695.
[15] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, 17. See also Nico Schrijver, 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles' (2007) 20(4) Leiden Journal of International Law 812.

A prime example was the case of Iran which was placed under country-specific scrutiny for nearly twenty years by the Commission.[16] The mandate failed to be renewed after the rejection of draft resolution E/CN.4/2002/L.33 in 2002 with Member States criticising the Commission's politicised nature. For example, Algeria observed that 'despite widespread human rights violations during the Shah's political regime, the Commission had seen fit to condemn Iran only since the emergence of the new republic in 1979'.[17] It considered the draft resolution unbalanced and politically motivated.[18]

Pakistan, speaking on behalf of the OIC, said that the organisation opposed selective criticism of some developing and Islamic countries and the Commission was being used to promote political objectives rather than to advance the cause of human rights in the targeted countries. It maintained that, 'the promotion of human rights would not be guaranteed by the adoption of a politically motivated resolution, but through dialogue and cooperation'.[19] Sudan echoed similar sentiments commenting on the selectivity that was practised against some states and how the resolution, 'did not accurately reflect the recent improvements in the human rights situation in Iran and it made negative references to Islam'.[20]

The sentiment was shared amongst non-OIC states too. Cuba voted against the draft resolution in an endeavour to put an end to 'the use of double standards and politically motivated draft resolutions that were threatening the credibility of the Commission and emphasizing the division between the Powers of the north and the developing countries of the south'.[21]

The most damning statement came from Iran itself in that:

[16] For a detailed case study of Iran in the Commission, see Lempinen, *The United Nations Commission on Human Rights*, 333-45.
[17] UN Doc E/CN.4/2002/SR.49, para 20.
[18] ibid.
[19] ibid para 16.
[20] ibid para 24.
[21] ibid para 23.

> The United Nations system had been taken hostage by a powerful minority that unsparingly exploited its mechanisms to exert pressure on certain countries. The system had lost all credibility and integrity.
>
> The promotion and protection of human rights and fundamental freedoms was the primary objective of the United Nations and no country should be immune from international scrutiny. However, the existing system of monitoring human rights violations was selective, arbitrary, partial and unproductive. To rectify the discrepancies of the system in respect of its human rights machinery, and to prevent its abuse and manipulation, a spirit of understanding and cooperation among the entire membership was essential.[22]

Despite its shortfalls, the Commission's achievements cannot be understated. The conception and foundation of the Universal Declaration of Human Rights,[23] the International Covenant on Civil and Political Rights[24] and the International Covenant on Economic, Social, and Cultural Rights[25] (which comprise the International Bill of Human Rights[26]) can all be attributed to the workings of the Commission which played a principal role in these achievements.[27]

2.3 The Introduction of the Human Rights Council

In 2005 the United Nations General-Secretary, Kofi Annan, published a damning report entitled 'In Larger Freedom: Towards Development, Security and Human Rights for All'.[28] It

[22] ibid paras 26-31.
[23] UNGA Res 217A (III), 'Universal Declaration of Human Rights' (1948) UN Doc A/810 at 71.
[24] UNGA Res 2200A (XXI), 'International Covenant on Civil and Political Rights' (16 December 1966) UN Doc A/6316.
[25] UNGA Res 2200A (XXI), 'International Covenant on Economic, Social and Cultural Rights' (16 December 1966) UN Doc A/6316.
[26] See, for example, Peter Meyer, 'The International Bill: A Brief History' in Paul Williams (ed), *The International Bill of Rights* (California: Entwhistle Books 1981).
[27] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, 16.
[28] UNGA, 'Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Huma Rights for All' (21 March 2005) UN Doc A/59/2005.

questioned the Commission's credibility and professionalism with states seeking membership for the promotion of self-interests as opposed to the protection and promotion of human rights.[29] This credibility deficit had 'cast a shadow on the reputation of the United Nations system as a whole',[30] so Annan called for the disbanding of the Commission, arguing that:

> If the United Nations is to meet the expectations of men and women everywhere - and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development - then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council.[31]

Anan's report advocated for a new body on human rights and was met with general support by states and organisations.[32] Although there was a broad consensus that the Commission failed in its duty and there was a need for a new body to strengthen UN human rights, it was masked by grave disagreements about what had actually gone wrong. So, after a series of negotiations on the composition, functions, and procedures of the new Human Rights Council, the General Assembly adopted Resolution 60/251 on 15 March 2006.[33] The final text of the Resolution, however, only determined basic structural issues, such as election of members and composition and issued broad guidelines in respect to the institutional and procedural arrangements of the new Human Rights Council.[34]

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[29] ibid para 182.
[30] ibid.
[31] ibid para 183.
[32] See ECOSOC, 'Summary of the open-ended informal consultations held by the Commission on Human Rights pursuant to Economic and Social Council decision 2005/217, prepared by the Chairperson of the sixty-first session of the Commission' (21 June 2005) UN Doc A/59/847; UN Doc E/2005/73 at para 12.
[33] UNGA Res 60/251, 'Human Rights Council' (3 April 2006) UN Doc A/RES/60/251. The Human Rights Council was created with 170 states voting in favour, 4 against (Israel, Marshall Islands, Palau, United States) and 3 abstaining (Belarus, Iran, Venezuela). See UNGA Press Release, 'General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, with 3 Abstentions' <www.un.org/press/en/2006/ga10449.doc.htm> accessed 20 December 2015.
[34] Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 Melbourne Journal of International Law 186.

In accordance with Article 22 of the UN Charter,[35] the General Assembly established the HRC as one of its subsidiary organs,[36] thereby elevating its institutional standing in comparison to its predecessor. The HRC would therefore assist the General Assembly with the performance of fulfilling its mandate on human rights. This suggested a greater international commitment towards the protection and promotion of universal human rights as the HRC's enhanced status would make its discussions more visible, influential, and authoritative both inside and outside the United Nations.[37]

The 'strong and uniting'[38] language employed in the Resolution helped convey the need for international dialogue, understanding, and cooperation between countries, cultures, and religions. It responded to criticisms of the Commission's politicisation and selectivity by ensuring that the guiding principles of the HRC's work should be universality, impartiality, non-selectivity, and objectivity; it introduced 'a number of innovative elements that would make the Council a significant improvement on the Commission on Human Rights'.[39]

The main differences between the new Human Rights Council and its predecessor revolved around the frequency of meetings held annually, election of members, and the creation of the Universal Periodic Review; a mechanism designed to strengthen the accountability of Member States in relation to their human rights record.[40] The latter would have significance for an

[35] 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.'

[36] Freedman notes that '[s]ubordination is a legal characteristic of subsidiary organs with the GA retaining organisational power and control over the bodies' structure and activities. For example the GA votes to elect the Council's members; has the power to suspend a Council member; may dictate which situations the body must address; and receives an annual report from the Council'. Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, 56.

[37] Kevin Boyle, 'The United Nations Human Rights Council: Origins, Antecedents, and Prospects,' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Oxford: OUP 2009) 12.

[38] UNGA President Jan Eliasson, statement on the draft resolution on the Human Rights Council, GA 60th Session (15 March 2006) 4.

[39] ibid 5.

[40] Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' 2009 9(2) Human Rights Law Review 203; Gerd Oberleitner, *Global Human Rights Institutions* (Cambridge: Polity Press 2008) 65.

understanding of the relationship between Islam and human rights by allowing a transparent and cooperative dialogue to take place at the international level free from notions of bias and selectivity.

2.4 The Human Rights Council's Universal Periodic Review

2.4.1 Background

The concept of a peer review mechanism was first raised by Kofi Annan in 2005 during the final session of the Commission[41] wherein he proposed to abolish the Commission and use a process of peer-review to evaluate and implement universal human rights.[42] Such a proposal was expected to combat the politicization and selectivity of the Commission and would be the key factor in depoliticizing the human rights body.[43]

Annan's proposal suggested a periodical review of each state thereby preventing the 'selectivity bias that had kept some states perennially on or off the Commission's agenda'.[44] He defined peer review as a process 'whereby states voluntarily enter into discussion regarding human rights issues in their respective countries'[45] and findings are implemented 'as a cooperative venture with assistance given to states in developing their capacities'.[46]

The mechanism of universal scrutiny would be the driving factor for the success of such a peer review process. It would allow states to be subject to assessment by other Member States and therefore prevent any single state from evading scrutiny.[47]

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[41] Speech of Secretary-General Kofi Annan to the Commission on Human Rights, 'Reforming UN Human Rights Machinery' (7 April 2005) UN Press Release SG/SM/9808 HR/CN/1108.
[42] UNGA, 'Secretary-General Report, Addendum, Human Rights Council, Explanatory Note by the Secretary-General' (23 May 2005) UN Doc A/59/2005/Add.1, para 6.
[43] Mathew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 Alternatives: Global, Local, Political 449, 457.
[44] ibid 456.
[45] UNGA, 'Secretary-General Report, Addendum, Human Rights Council, Explanatory Note by the Secretary-General' (23 May 2005) UN Doc A/59/2005/Add.1, para 7.
[46] ibid.
[47] ibid para 8.

2.4.2 The Creation of the Universal Periodic Review

Under subsection (d) of Resolution 60/251, the Human Rights Council was mandated with the responsibility of monitoring Member States' compliance with human rights obligations and commitments. This was to be implemented through the Universal Periodic Review, a mechanism based on:

> objective and reliable information…in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs.[48]

Themes of cooperation, capacity-building, and consent were reiterated throughout the resolution. The interaction with the wider UN human rights machinery was also addressed by ensuring that the Universal Periodic Review 'shall complement and not duplicate the work of [the] treaty bodies'[49] which was a main criticism of the Commission.

Drafting took place over three sessions and a conference was also held in Geneva to discuss the different models[50] and approaches suggested for the review.[51] Elements requiring further consideration included whether there should be a prior review by a regional group of the state under review; sources of background information; extent of the state's presentation during the

[48] UNGA Res 60/251, 'Human Rights Council' (3 April 2006) UN Doc A/RES/60/251, para 5e.
[49] ibid.
[50] Models considered included periodic or peer-review mechanisms in the African Union (AU), Council of Europe (CoE), the International Atomic Energy Agency (IAEA), International Labour Organisation (ILO), International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the Organisation of American States (OAS), and the World Trade Organisation (WTO). See also Human Rights Peer Review, Draft Concept and Options Paper, prepared by Canada, 29 April 2005 at para 9.
[51] Patrizia Scannella and Peter Splinter, 'The United Nations Human Rights Council: A Promise to be Fulfilled' (2007) 7(1) Human Rights Law Review 41, 63-64; Allehone Mulugeta Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 Human Rights Law Review 4; Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) Human Rights Law Review 113-114.

review; scope of participation of stakeholders; and contribution of experts or a country rapporteur during the interactive dialogue phase.[52] It was decided that Member States would be reviewed every four years[53] and the periodicity and modalities would be reviewed at the end of the first cycle.[54]

The following year, the HRC adopted Resolution 5/1, also known as the 'Institution Building Package', which provided an overview of the modalities and further expanded upon Resolution 60/251.[55] It listed the objectives of the review as:

(a) The improvement of the human rights situation on the ground;

(b) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State;

(c) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

(d) The sharing of best practice among States and other stakeholders;

(e) Support for cooperation in the promotion and protection of human rights;

(f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.[56]

[52] UNHRC, 'Intersessional open-ended intergovernmental working group to develop the modalities of the universal periodic review mechanism established pursuant to Human Rights Council decision 1/103' (30 November 2006) UN Doc A/HRC/3/3, p7.
[53] This has now changed to 4.5 years, see section 3.4.
[54] Claire Callejon, 'Developments at the Human Rights Council in 2007: A Reflection of its Ambivalence' (2008) 8(2) Human Rights Law Review 335.
[55] UNHRC Res 5/1, 'Institution Building of the United Nations Human Rights Council' (18 June 2007) UN Doc A/HRC/RES/5/1.
[56] ibid para 4.

The Institution Building Package stressed that the Universal Periodic Review should be a cooperative mechanism; an intergovernmental process; operate in an objective, transparent, non-selective, constructive, non-confrontational, and non-politicized manner; and most importantly, promote universal and indivisible human rights.[57] Cultural relativism, however, has the potential to pose a barrier to the realisation of universal human rights, especially in the context of the present study. This is addressed further in section 2.8.1 below.

2.5 Basis for the Review

The Institution Building Package also identified which human rights commitments and obligations would be used to review a state and therefore form the basis of its review. It was agreed that the review would be based upon, 'the United Nations Charter, the Universal Declaration of Human Rights, human rights instruments to which a State is party, and voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council'.[58] The review criteria also included applicable international humanitarian law due to the 'complementary and mutually interrelated nature of international human rights law and international humanitarian law'.[59]

The inclusion of legally binding and non-legally binding human rights instruments as the basis of the review highlights its comprehensiveness and allows it to build upon the universality, indivisibility, and interrelatedness of human rights, and also provides a forum to consider the question of cultural relativism.[60]

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[57] ibid para 3.
[58] UNHRC, 'Intersessional open-ended intergovernmental working group to develop the modalities of the universal periodic review mechanism established pursuant to Human Rights Council decision 1/103' (30 November 2006) UN Doc A/HRC/3/3, p4, para A.
[59] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 1.
[60] Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 726; Nadia Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism,' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (Oxford: OUP 2009) 83.

2.6 How the Universal Periodic Review Works

The first cycle commenced from February 2008 and concluded with the 12th session of the HRC's Working Group in 2011. However in order to accommodate slightly longer reviews by the Working Group, the second and subsequent cycles have been extended to four and a half years in length from 2012. Two-week sessions of the Working Group take place in February, May, and October of each year with fourteen countries being reviewed in each session (a total of forty-two countries per year).[61] At the time of writing, the third cycle of the UPR is underway.

This change, amongst others, is a product of Resolution 16/21[62] which was adopted in March 2011. It contained the revised modalities for the functioning of the Human Rights Council and although a substantial part of the resolution consisted of the Universal Periodic Review, some issues remained pending. The HRC completed the review by adopting Decision 17/119 as a follow-up to the resolution.[63] The implication of this decision allowed the process to become more fair and transparent as identified below in section 2.6.3.

2.6.1 National Consultations

The first stage of the UPR involves national consultations where the state under review is encouraged to prepare information that it will submit 'through a broad consultation process at a national level with all relevant stakeholders'.[64] The consultations, which generally begin ten to twelve months before the actual review,[65] allow the stakeholders to make significant

[61] Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 New Zealand Yearbook of International Law 189.
[62] UNHRC Res 16/21, 'Review of the work and functioning of the Human Rights Council' (12 April 2011) UN Doc A/HRC/RES/16/21.
[63] UNHRC Decision 17/119, 'Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review' (19 July 2011) UN Doc A/HRC/DEC/17/119.
[64] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15(a).
[65] Lisbeth Arne Nordager Thonbo, 'The Role of the State' in Lis Dhundale and Lisbeth Arne Nordager Thonbo (eds), *Universal Periodic Review First Cycle: Reporting Methodologies from the Positions of the State, Civil Society and National Human Rights Institutions* (The Danish Institute for Human Rights 2011) 17.

contribution in spreading awareness and knowledge of the UPR mechanism. This, in turn, allows key human rights issues, such as protecting the right to life, to be brought to the forefront.

Stakeholders are identified as NGOs, human rights defenders, national human rights institutions, academic and research institutions, regional organisations, and civil society representation.[66] Prominent stakeholders raising questions concerning the death penalty in the UPR, and which are engaged with in the proceeding chapters, include Amnesty International, Human Rights Watch, and the International Commission of Jurists. Other NGOs such as Alkarama Foundation, Americans for Democracy and Human Rights in Bahrain, Islamic Human Rights Commission, and Muslims for Progressive Values can also be seen contributing in the UPR of Islamic states.

Civil society engagement in the Universal Periodic Review brings independent and impartial perspectives which are needed throughout the whole process in order to provide a balance to the state's performance. It also gives a voice to the marginalized and vulnerable groups which highlights the universality and indivisibility of human rights. Civil society is considered a 'legitimate representative for the right holders'[67] due to their non-governmental nature. It therefore has a cogent role to play when a state's human rights record is being reviewed.

The idea of national consultations is in line with the principle that the UPR must 'ensure the participation of all relevant stakeholders, including nongovernmental organizations and national human rights institutions'.[68] No detailed instructions, however, are provided on the

[66] OHCHR, 'Information and Guidelines for Relevant Stakeholders on the UPR Mechanism [as of July 2008]' available at <www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf>.
[67] Lis Dhundale, 'The Role of Civil Society' in Lis Dhundale and Lisbeth Arne Nordager Thonbo (eds), *Universal Periodic Review First Cycle: Reporting Methodologies from the Positions of the State, Civil Society and National Human Rights Institutions* (The Danish Institute for Human Rights 2011) 28.
[68] ibid para 3(m).

manner in which the consultative national process should be carried out. As a result, only a small number of state reports and submissions have identified the specific nature of consultations such as the time, location, and number of participants.[69] One such example is Pakistan which listed the date and location of its consultations with government departments and civil society organisations but failed to disclose their identities or the number of organisations actually involved.[70] Similarly, the UAE held several meetings and workshops 'with a wide range of civil society organisations and government bodies'[71] but no further detail was provided. Consequently, the true level of cooperation and engagement with stakeholders cannot be determined as is seen in Chapter 3. This will include stifling effective interpretation of Islamic law on the death penalty.

Some states, such as Bahrain, have also been criticised for failing to hold nationally accessible consultations. In Bahrain's review, the state failed to consult with ten highly active human rights groups, including the Bahrain Centre for Human Rights despite an appeal to the Prime Minister to include them in the consultation process. In fact, the stakeholders that did participate revealed that the consultations held 'were for information not consultation, and that their comments had no reflection in the final national report'.[72]

Failure to engage in meaningful consultations will only impede the UPR process. One of the key reasons for a national consultation process is to allow the stakeholders to provide valuable input into the national report. It allows for an accurate and comprehensive portrayal of the

[69] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 10.
[70] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Pakistan' (6 August 2012) UN Doc A/HRC/WG.6/14/PAK/1, Annex 1.
[71] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: United Arab Emirates' (13 November 2017) UN Doc A/HRC/WG.6/29/ARE/1, para 5.
[72] UNHRC, 'Written Statement Submitted by Cairo Institute for Human Rights Studies (CIHRS), a Non-Governmental Organization in Special Consultative Status' (28 May 2008) UN Doc A/HRC/8/NGO/42, p. 2, para. 3.

human rights situation on the ground (domestically) and it is also able to reflect progressive efforts made by the state to ameliorate any human rights violations. Additionally, the influence of stakeholders can help identify that the proposed recommendations are substantial, relevant, and important.[73] A stakeholder involved in the UPR of an Islamic country can therefore engage in meaningful discourse on the state's use of the death penalty and consider not only relevant international law but also address the theological underpinnings of the punishment to provide a more enlightened approach. This is discussed in Part Two of this thesis.

2.6.2 Submission of Reports

The review of a state is based upon three documents: 1) national report prepared by the state concerned; 2) summary of relevant stakeholder reports, and; 3) a compilation submitted by the Office of the High Commissioner for Human Rights (OHCHR) on relevant official United Nations documents.[74]

The state under review must submit a national report which is restricted to twenty pages in length. States are therefore not required to present 'colossal and factually dense' reports which would be unrealistic given the page limit.[75] It must be submitted to the OHCHR approximately twelve to thirteen weeks in advance of the review.[76]

Stakeholders' reports need to be submitted six months before the state's review and they can either be an independent individual report, not exceeding 2815 words, or a joint stakeholder

[73] Lisbeth Arne Nordager Thonbo, 'The Role of the State', 19.
[74] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15.
[75] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 10.
[76] OHCHR, 'Guidance Note on 3rd Cycle National Reports' available at <www.upr-info.org/sites/default/files/general-document/pdf/ohchr_guidance_national_report_3rdcycle_en.pdf>. Tentative deadlines are included in the calendar of the cycle as posted on the OHCHR website. For States considered at the early session of the year, the deadline is usually set for October of the previous year. For States considered at the April-May session, the deadline is usually set for January-February of the same year. For States considered at the October-November session, deadline is usually set for July-August of the same year.

submission limited to 5630 words.[77] Joint stakeholder submissions are given a higher standing as it indicates that participating stakeholders were successfully able to reach a consensus regarding the human rights situation and were able to propose recommendations to ameliorate the situation in the country concerned.[78] In the instance of Pakistan, a total of 14 joint submissions were provided during its second review, an example being the International Association for Religious Freedom and the South Asia Centre for Peace submitting a joint statement on freedom of religion and belief in the state under review.[79]

For the third cycle of the UPR, the OHCHR introduced new guidelines for stakeholders in order to improve the effectiveness of written submissions and introduced 'matrices of recommendations of countries to be reviewed during the third cycle of the UPR'.[80] The aim of the matrix is to record precise and specific information regarding the implementation, in the state under review, for both supported and noted previous recommendations. The matrix provides a list of thematically clustered recommendations, such as the death penalty, and allows space for 'assessment/comments on level of implementation'.[81]

Stakeholders are encouraged to download their country matrix, complete the relevant section, and submit it as an annex to the main contribution (its inclusion does not affect the word count).[82] In Bahrain's review, only three out of forty-four NGOs used the country matrix with

[77] OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 11 available at <www.upr-info.org/sites/default/files/general-document/pdf/upr_technicalguidelines3rdcycle_submissions.pdf>.
[78] UPR-Info, 'The Civil Society Compendium: A Comprehensive Guide for Civil Society Organisations Engaging in the Universal Periodic Review' (2017) 23.
[79] Joint submission 14. For a full list of stakeholder submissions in Pakistan's review see <www.upr-info.org/en/review/Pakistan/Session-14---October-2012/Civil-society-and-other-submissions#top>.
[80] The table of matrices is available from the OHCHR website at <www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>.
[81] ibid.
[82] OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 5e.

their submission[83] and only one used the matrix in UAE's review.[84] Pakistan's review had a total of 44 submissions but no stakeholder made use of the matrix. There seems to be little engagement with the matrix which needs to be utilised by civil society in order to identify 'challenges or needs of technical cooperation'[85] where recommendations have not been implemented and to ensure submissions remain relevant and specific.

Section 5 of the updated guidelines not only details the benefits of the matrices[86] but also includes practical suggestions such as the use of S.M.A.R.T recommendations for states to take forward in the UPR.[87] It also mentions other formatting and technical advice such as deadlines; word limits; preferred languages of submission; and the use of endnotes and annexes. The OHCHR then compiles all the received stakeholder submissions into a single stakeholder report comprising a total of ten pages in length.[88]

The structure of both the national report and stakeholder reports can follow the General Guidelines adopted by the Human Rights Council. The reports can include information on the national consultation process; the current normative and institutional human rights framework of the state under review; implementation of the human rights framework; cooperation with stakeholders; identification of achievements, best practices, challenges, and constraints; key

[83] See written submissions from Americans for Democracy and Human Rights in Bahrain; Joint Submission 16 (ADHRB and Iraqi Development Organisation); Joint Submission 17 (CIVICUS; Bahrain Centre for Human Rights; Gulf Centre for Human Rights) available at <www.upr-info.org/en/review/Bahrain/Session-27---May-2017/Civil-society-and-other-submissions>.

[84] Joint Submission 17 (CIVICUS; Bahrain Centre for Human Rights; Gulf Centre for Human Rights) 17-23 available at <www.upr-info.org/sites/default/files/document/bahrain/session_27_-_may_2017/js17_upr27_bhr_e_main.pdf>.

[85] OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 5d.

[86] The purpose of the matrices is to collect precise and specific information on the level of implementation, in the State under review, of both the accepted and noted recommendations from their previous reviews; the matrices clearly identify each recommendation (HRC report, cycle, paragraph number, recommendation number and recommending country) which will contribute better to report on the status of implementation and follow-up to the preceding reviews; the matrices help stakeholders identify 'challenges or needs of technical cooperation' where recommendations have not been implemented. See ibid para 5.

[87] S.M.A.R.T recommendations should be specific, measurable, achievable, relevant, and time-bound. See UPR-Info, 'A Guide for Recommending States at the UPR' (2015) 27-29.

[88] Lis Dhundale, 'The Role of Civil Society', 35.

national priorities; and capacity-building expectations.[89] The outcome should be an evaluative report that provides a detailed analysis of a country's human rights record, both the positive and the negative, paving the way for future compromises and assistance from other countries.[90]

Many states predominantly focus on best practices and achievements in their reports which raises the question of objectivity, a point which was raised by the Syrian Arab Republic during Qatar's review. It noted a lack of objectivity in Qatar's reporting, expressing concerns 'regarding the role of charitable institutions in Qatar in the absence of transparency and, also, regarding delays in the ratification of international treaties'.[91] This proved unfavourable with Qatar who wished to respond to the 'allegations and accusations'.[92] Syria raised a point of order, indicating that the Syrian statement had been objective:

> In fact, it had displayed restraint and adhered to the principles of UPR since no mention had been made of the inhuman role played by Qatar in the Syrian Arab Republic. It requested the President to urge Qatar to refrain from using provocative language and to respond objectively to the Syrian statement.[93]

Whilst such instances illustrate that the UPR is not immune from being politicised, it balances state engagement with the presence of stakeholders to allow for a more transparent perspective.

The OHCHR Guidelines strongly encourage stakeholders to specifically tailor their submissions for the UPR and ensure that they contain reliable and credible information on the state under review. They should identify issues of concern, possible recommendations and/or

[89] UNHRC Decision 6/102, 'General Guidelines for the Preparation of Information under the Universal Periodic Review' (27 September 2007) UN Doc A/HRC/DEC/6/102, paras A-G.
[90] Juliana Vengoechea-Barrios, 'The Universal Periodic Review: A New Hope for International Human Rights Law or a Reformulation of Errors of the Past?' (2008) 12 International Law: Revista Colombiana de Derecho Internacional 109.
[91] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Qatar' (27 June 2014) UN Doc A/HRC/27/15, para 26.
[92] ibid para 61.
[93] ibid para 62.

best practices, cover a maximum period of four years, and not contain abusive language.[94] All submissions are made available on the OHCHR's website which adds to the transparency of the whole process.[95]

The third and final report is compiled by the OHCHR on information contained in the reports of human rights treaty bodies, Special Procedures, and other relevant UN documents. This report is also restricted to ten pages.[96] Non-state contributions such as those by national stakeholders are accommodated as official documents in the review process which prevents any hierarchy among the different inputs.[97]

2.6.3 Interactive Dialogue

The UPR takes the form of an interactive dialogue which is held in Geneva where the Universal Periodic Review Working Group conducts a three and a half hour review.[98] The president of the Human Rights Council chairs the Working Group which comprises all HRC Member States and Observer States.[99] Undertaking the review with the members of the HRC sitting as a Working Group rather than at a plenary session enables full participation without occupying sessional meeting time.[100] The duration of the review, according to Matthew Davies, provides for 'more of a schematic overview' of the country's situation 'rather than a detailed appraisal'.[101] As a result, a schematic overview does not provide much opportunity to discuss

[94] OHCHR, 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', paras 5-6.
[95] NGO submissions can be located on each country's page on the OHCHR website dedicated to the UPR: www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx. After selecting the relevant country, click on the footnote at the end of the title 'Summary of stakeholders' information'.
[96] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 15(b).
[97] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 11.
[98] The time allocated for reviews was originally three hours but was later extended for a further half hour. Compare UNHRC Res 5/1 (18 June 2007), at para 22 and HRC Presidential Statement 8/1, (2008) UN Doc HRC/8/PRST/1 at para 7 with UNHRC Dec 17/119, at paras 3-4 and Annex II, and UNHRC Res 16/21, at para 11.
[99] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18.
[100] Callejon, 'Developments at the Human Rights Council in 2007', 334.
[101] Mathew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 Alternatives: Global, Local, Political 449, 462.

wider issues concerning the Islamic Member State use of the death penalty and address the deeper theological questions on the subject.

The dialogue is webcasted live and made accessible on the OHCHR website which is in line with the principles of transparency, non-selectivity, and equal treatment. Stakeholders with ECOSOC status[102] are able to attend the session but are not allocated speaking time and are therefore excluded from directly interacting in the review dialogue.[103] Although this is a drawback to the Universal Periodic Review, it reflects the ideology that the review is a state-led process.[104]

Stakeholders can still make last minute lobbying sessions to governments and also prepare parallel events at the UN office in Geneva to raise awareness of the review taking place.[105] To facilitate NGO lobbying, UPR-Info[106] holds 'pre-sessions' in Geneva one month before the review. This provides civil society with an 'international platform to directly advocate to state delegations ahead of the UPR sessions'.[107] There are instances, however, where the state has restricted this process. For example, during Sudan's second review, a group of human rights defenders were prevented from attending the pre-sessions.[108] Stakeholder lobbying, of which

[102] Further information on how stakeholders can gain ECOSOC accreditation can be found on the relevant OHCHR web-site link: <www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>.
[103] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, at paras 18 and 21.
[104] Marianne Lilliebjerg, 'The Universal Periodic Review of the UN Human Rights Council: An NGO Perspective on Opportunities and Shortcomings' (2008) 26 NQHR 311, 313. See also Lawrence Moss, 'Opportunities for Nongovernmental Organization Advocacy in the Universal Periodic Review Process at the UN Human Rights Council' (2010) 2 Journal of Human Rights Practice 122; Human Rights Council, 'Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council: Compilation of State proposals'(2010) UN Doc A/ HRC/WG.8/1/CRP.1/Rev.1 at 3-5.
[105] Lis Dhundale, 'The Role of Civil Society' in Lis Dhundale and Lisbeth Arne Nordager Thonbo (eds), *Universal Periodic Review First Cycle: Reporting Methodologies from the Positions of the State, Civil Society and National Human Rights Institutions* (The Danish Institute for Human Rights 2011) 41.
[106] UPR-Info is an NGO, based in Geneva, dedicated to utilising the UPR mechanism to ensure cooperation among all actors including states, governments, and civil society. See 'Vision & Mission' (*UPR Info*) <www.upr-info.org/en/about/vision-and-mission> accessed 20 December 2015.
[107] 'Pre-Sessions' (*UPR Info*) <www.upr-info.org/en/upr-process/pre-sessions> accessed 20 December 2015.
[108] '4 Sudanese defenders banned from participating in UPR Info Pre-session' (*UPR Info*, 31 March 2016) <www.upr-info.org/en/news/4-sudanese-defenders-banned-from-participating-in-upr-info-pre-session> accessed 11 April 2016.

this research facilitated, resulted in a cross regional alliance of 14 governments and an NGO affirmation (36 NGOs) of a submission to the HRC for the human rights violations under President Bashir's government.[109] This influenced the recommendations made at the UPR with many states and stakeholders bringing this issue to the attention of the international community and holding the state under review to account.[110]

The review is guided by the troika which is a group of three Member State Rapporteurs chosen by the drawing of lots.[111] The state being reviewed can request that one of the three troika members is from its own region thereby allowing the state to have 'a regional ally that understands its cultural sensitivities and/or issues relating to capacities for human rights protection and promotion'.[112] During the first session of the UPR, all the African states which were scheduled for review requested this.[113] Additionally, a state that is selected to be part of troika can recuse itself from the position. This occurred in 2008 where Pakistan declined to serve as a troika member for India's review due to the history of political tension between the two countries.[114]

According to Roland Chauville, the interactive dialogue reduces 'sensitivities surrounding the discussion of human rights at the international level. It challenges the notion that human rights are a matter of domestic policy and that the involvement of the international community is akin

[109] On file with author.
[110] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Sudan' (11 July 2016) UN Doc A/HRC/33/8, paras 58, 81, 98, 113, 122, 126, 127 and 128.
[111] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 18(d).
[112] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, 26.
[113] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 14.
[114] Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform' (2011) 7 ICL Journal 4; Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 727.

to interfering with the sovereignty of the state being reviewed'.[115] Therefore, statements such as Egypt asserting that retentionist countries 'need to preserve the death penalty given their cultural, political and legal specificities'[116] can be respectfully challenged at the UPR; contesting the notion that capital punishment is underpinned by state sovereignty and criminal justice, and help solidify the argument that it is a matter of human rights.

The interactive dialogue comprises of two main elements: a presentation by the state to be reviewed and a question and answer session. The state under review presents its national report regarding the country's human rights situation and responds to written questions submitted to it through the troika. Member and Observer States are then provided the opportunity to take the floor and pose questions, present observations, or make recommendations. Member States are restricted to three minutes of speaking time whilst Observer States are given two minutes.[117]

During the first cycle, on many occasions, state representatives would stay overnight in order to enrol onto the list of speakers, which would open at 8.45am the day before the review. Moreover, states would adopt strategies that involved getting blocks of allied states to speak together thereby enhancing the impact of their praise and using up the majority of the allotted time. This tactic was seen in the first review of Bahrain which was dominated by its allied states delivering positive statements. Such allies included Palestine, India, Pakistan, Qatar, Tunisia, the UAE, Saudi Arabia, Turkey, Malaysia, Algeria, Libya, and Cuba.[118] Similarly, Tunisia's review heard from numerous allies[119] giving the impression that it was 'an exercise

[115] Roland Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: CUP 2014) 90.
[116] A/HRC/28/16, para 165.
[117] UNHRC, Presidential Statement 8/1 (2008) UN Doc HRC/8/PRST/1, para 7.
[118] See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Bahrain' (9 April 2008) UN Doc A/HRC/WG.6/1/BHR/4, paras 19-31.
[119] The first 15 countries to speak in the interactive dialogue were Kuwait, Palestine, Pakistan, Philippines, Chad, Saudi Arabia, the Russian Federation, Slovenia, China, India, Madagascar, Ghana, Mauritania, Bangladesh and Angola. UNHRC, 'Report of the Working Group on the Universal Periodic Review: Tunisia' (22 May 2008) UN Doc A/HRC/8/21, paras 12-26.

in filibustering'.[120] As a result of political and regional allies dominating the review, many countries inscribed on the speakers' list did not get a chance to participate due to insufficient time.[121]

Regionalism through protecting allied states from scrutiny continued to impact the efficacy of most reviews of OIC members.[122] Qatar's review heard from 49 states[123] but only six (non OIC) asked critical questions.[124] The implications of this are not to be understated. Filibustering against Islamic countries that apply the death penalty will dilute the review process and hinder the opportunity to question their imposition of the punishment based on Islamic law principles.

As a result of this drawback to the UPR mechanism, Decision 17/119 was adopted in 2011 to allow the process to become more fair and transparent for future cycles. The speakers' list now opens a week before the review and the first speaker is drawn by lot with the list proceeding alphabetically from that point. States are permitted to swap places if they should so desire. Strict time limits have also been enforced in regards to state speaking time.[125] This change was seen in Bahrain's second review which heard from a range of states such as Slovenia, Spain,

[120] Sweeney and Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council', 210.
[121] Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground? A Critical Evaluation of the First Cycle and Recommendations for Reform', 273-74.
[122] See for example the reviews of Azerbaijan, Bangladesh, Jordan, Malaysia, Saudi Arabia, Uzbekistan, United Arab Emirates, Yemen which were dominated by other OIC states delivering complimentary statements and few critical questions or recommendations.
[123] Algeria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Canada, Chile, Cuba, Djibouti, DPRK, Egypt, France, Hungary, Indonesia, Iran, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Mexico, Morocco, Nepal, Nicaragua, Norway, Oman, Pakistan, Philippines, Russia, Saudi Arabia, Singapore, Slovenia, Sri Lanka, Spain, Sweden, Syria. Sudan, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Venezuela, Yemen.
[124] Brazil, Canada, Norway, Spain, Sweden, United Kingdom.
[125] HRC Decision 17/119, 'Follow-up to the Human Rights Council Resolution 16/21 with regard to the Universal Periodic Review' (19 July 2011) UN Doc A/HRC/DEC/17/119, paras 5-8: 'The established procedures, which allow three minutes speaking time for Member States and two minutes for observer States, will continue to apply when all speakers can be accommodated within three hours and thirty minutes available to Member and observer States. Should it be impossible to accommodate all speakers within three hours and thirty minutes based on three minutes speaking time for Member States and two minutes for observer States, the speaking time will be reduced to two minutes for all. If all speakers still cannot be accommodated, the speaking time will be divided among all delegations inscribed so as to enable each and every speaker to take the floor'.

Sudan, Switzerland, Thailand, Turkey, and the UAE allowing for a more balanced approach.[126] Hearing from states that are not from the state under review's regional group reduces the chances of bias and unnecessary praise. Hence a non-OIC state will be more likely to question state use of the death penalty and foster critical discussion for elevating the right to life.

It is important to note that the Human Rights Council makes it clear that 'the state under review is sovereign in addressing the questions and/or issues it chooses to answer of those transmitted to it by the troika members or raised during the proceedings of the working group'.[127] This was reflected in North Korea's first review where it failed to accept a single recommendation.[128] Refusing to address issues put forth by other Member States, such as the application of the death penalty, demonstrates a lack of genuine engagement with the mechanism and suggests the state under review is merely paying lip service to the UPR and using sovereignty as a shield to avoid investigation into its human rights abuses.

The state under review needs to address all recommendations put forward to it, providing a clear explanation for any recommendations it is unable to accept in order for the international community to understand what is preventing acceptance and enable ways to potentially overcome this. For example, in Saudi Arabia's review, it failed to accept recommendations to impose a moratorium on the death penalty citing conflict with Islamic law principles.[129] This study will engage with such reasoning to demonstrate an alternative reading of the *fiqh* (jurisprudence) and is critiqued in more detail in Part Two.

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[126] See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Bahrain' (23 May 2012) UN Doc A/HRC/WG.6/13/L.4, paras 26-33.
[127] ibid para 5.
[128] Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: CUP 2014) 31. See UNHRC, 'Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea' (4 January 2010) UN Doc A/HRC/13/13, para 91 and Hisham Badr, 'Report of the Human Rights Council on its Thirteenth Session' (8 February 2011) UN Doc A/HRC/13/56, paras 644-45.
[129] See Chapter 3, section 3.3.4.

At the same time, it must also be noted that the potential impact of recommendations, on the human rights situation of a country, varies depending on the *quality* of recommendations that are issued during the review session (emphasis added). Edward McMahon has categorised recommendations on a scale of 1 to 5 depending on the verb that is used in each recommendation.[130] He describes them as follows (with examples):

1) Category 1: these recommendations require minimal action in comparison with other categories. They call upon the state under review to seek international assistance or share best practices (verbs in this category would include 'call on', 'seek', and 'share').

For example, Brunei Darussalam to Qatar: 'Share its experiences in strengthening its judiciary system.'[131]

2) Category 2: these recommendations encourage continuity of actions and/or policies ('continue', 'maintain', 'persevere', 'pursue'). These recommendations are fairly easy to implement as they do not demand any change however they can be challenging when the state under review is faced with political insecurity, economic cuts or conflict.

For example, Kuwait to Afghanistan: 'Continue implementing national policies and programmes to improve the living conditions of the people'.[132]

3) Category 3: recommendations to consider change ('analyse', 'consider', 'envisage', 'explore', 'reflect upon', 'review'). Such recommendations are generally issued when the subject matter is controversial and does not enjoy state support.

[130] Edward McMahon, 'The Universal Periodic Review: A Work in Progress an Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council' (Friedrich Ebert Stiftung, September 2012) 14-15.
[131] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Qatar' (10 February 2010) UN Doc A/HRC/WG.6/7/L.1, recommendation 83.38.
[132] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Afghanistan' (29 January 2014) UN Doc A/HRC/WG.6/18/L.2, recommendation 138.38.

For example, Maldives to Pakistan: 'Consider removing the reservations made to the ICCPR to ensure gender equality and women's empowerment'.[133]

4) Category 4: recommendations that contain a general element. As a result of being so broad, they can cause frustration to both the state under review and relevant stakeholders as they lack clarity in regards to the method of implementation or measurable outcomes.

For example, Egypt to Saudi Arabia: 'Take all necessary measures to protect the rights of migrant workers, especially those regarding means of remedies'.[134]

5) Category 5: these recommendations require specific actions and 'demand certain tangible or measurable outcomes'. Recommendations on the death penalty predominantly fall within this category.

For example, Sierra Leone to Lebanon: 'Establish a moratorium with a view to abolishing the death penalty'.[135]

During the first cycle, 154 states submitted more than 21,000 recommendations. The second cycle saw a total of 36,331 recommendations made by 168 states. [136] This indicates, in general, the active participation of states in the review process. States' willingness to participate with the mechanism was reflected in their level of political engagement by sending high-level delegations comprising of key and prominent individuals such as state ministers, senior officials, or diplomats.[137] Countries such as Morocco, Tunisia, and Sudan sent Ministers of

[133] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Pakistan' (2 November 2012) UN Doc A/HRC/WG.6/14/L.10, recommendation 122.13.
[134] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (October 2013) UN Doc A/HRC/WG.6/17/L.1, recommendation 137.210.
[135] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Lebanon' (4 November 2015) UN Doc A/HRC/WG.6/23/L.2, recommendation 5.105.
[136] UPR Info <www.upr-info.org/database/statistics/index.php?cycle=1> accessed 1 January 2016.
[137] See UN General Assembly, A More Secure World: Our Shared Responsibility. Report by the High-Level Panel on Threats, Challenges and Change, 2 December 2004, A/59/565 at para 286, available at: <www.un.org/secureworld/report2.pdf> accessed 1 January 2016. The reports of the Working Group provide lists

Justice 'thus affording the process the national legal clout that it deserved'.[138] However, throughout the first cycle, many countries sent delegates from foreign ministries instead of ministers with legal or human rights expertise.[139] Others such as Bahrain, Pakistan, Indonesia, and Algeria sent Ministers or Deputies of Foreign Affairs suggesting that they viewed the UPR as a foreign affairs exercise rather than a process for the protection and promotion of human rights.[140]

2.6.4 Adoption of Universal Periodic Review Outcomes

2.6.4.1 Adoption by the Working Group

Following the interactive dialogue, the troika prepares a report of the Working Group which includes a summary of the proceedings, the issues raised in the interactive dialogue, the recommendations submitted by participating Member States, and voluntary commitments made by the state under review.[141] The time between the interactive dialogue and the adoption of the outcome report is forty-eight hours.[142]

Both accepted and noted recommendations by the state under review are identified in the outcome report. Attribution of recommendations was another challenge faced by the HRC. Egypt argued that 'it is a violation of the sovereign rights of states'[143] to imply that all working group members have agreed upon a recommendation which in fact has only been proposed by

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of the composition of delegations as annexures, available at: <www.upr-info.org/-Working-Group-Reports-adopted-.html> accessed 1 January 2016.

[138] Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment*, 268.

[139] Mathew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 Alternatives: Global, Local, Political 449, 463; Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 729.

[140] Sweeney and Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council', 209.

[141] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, at para 26; UNHRC, Presidential Statement 8/1 (2008) UN Doc HRC/8/PRST/1 at paras 8-11; and UNHRC Presidential Statement 9/2 (2008) UN Doc HRC/9/PRST/2.

[142] Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session', 732.

[143] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 16.

one state. The idea that a recommendation is only ascribed to the state which proposes it garnered widespread acceptance amongst states. As a result, states can avoid having their names attributed to specific recommendations which would technically mean that the Working Group does not adopt the recommendations per se.[144] This is particularly useful for states who may not agree with recommendations that conflict with their own cultural or religious norms. Hence Norway's recommendation to Algeria to 'take all necessary measures to abolish the death penalty and ratify the Second Optional Protocol to the ICCPR'[145] would not be endorsed by states such as Saudi Arabia, Pakistan, Iran, or Sudan who cite Islamic law as a barrier to such a step.

Recommendations are therefore considered to be, in essence, 'bilateral recommendations made through the multilateral forum of the Universal Periodic Review'[146] and this is reflected in the language employed at the end of all outcome reports which states that, '[a]ll conclusions and recommendations contained in the present report reflect the position of the submitting states and the state under review. They should not be construed as endorsed by the Working Group as a whole'.[147]

The selective and politicized nature of recommendations has drawn criticism of the workings of the UPR.[148] An example of this is where near identical recommendations have received different outcomes depending on the country that submitted them. Recommendations by 'likeminded' states have enjoyed state support whilst those from 'unfriendly' states have often

[144] ibid.
[145] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Algeria' (5 July 2012) UN Doc A/HRC/21/13, recommendation 129.90.
[146] Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 195.
[147] See for example, UNHRC, 'Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland' (6 July 2012) UN Doc A/HRC/21/9 at para 111.
[148] See, for example, Edward McMahon, 'Herding Cats and Sheep: Assessing State and Regional Behaviour in the Universal Periodic Review Mechanism of the United Nations Human Rights Council' (2010) <www.upr-info.org/IMG/pdf/McMahon_Herding_Cats_and_Sheeps_July_2010.pdf>.

been rejected.[149] During Egypt's first review, it accepted a recommendation from Bangladesh to 'continue its ongoing review of national laws to ensure that they are in line with its international human rights law obligations'.[150] However, it failed to support a similar recommendation from Israel to 'conduct a wide-ranging review of Egyptian human rights laws in order to bring them into line with Egypt's international commitments, as so pledged in its Human Rights Council candidature and within its National Report'.[151]

Another criticism which arose during the course of the first cycle was states' failure to provide a clear response to all the recommendations received. Approximately 6.5 percent of recommendations received a vague and ambiguous response that failed to specify whether the state under review had accepted or noted the recommendation.[152] One such case was Israel, which accepted a total of three recommendations and did not communicate clear answers to a number of others.[153] As a result, the revised modalities for future cycles require the state under review to clearly convey its position on all received recommendations, preferably before the plenary session at the HRC.[154]

2.6.4.2 Adoption by the Human Rights Council

Approximately three to five months after the Working Group session, the Human Rights Council will conduct a plenary session to adopt the Working Group's outcome report. It allows the state under review to respond to any issues that were not adequately addressed during the

[149] Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 196. For a discussion on like-minded groups see generally, Rhona Smith, 'Form over Substance? China's Contribution to Human Rights through Universal Periodic Review' (2011) Asian Yearbook of International Law 17.
[150] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Egypt' (26 March 2010) UN Doc A/HRC/14/17, para 95.3.
[151] ibid, para 97.2.
[152] Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures', 103.
[153] UNHRC, 'Report of the Human Rights Council on its Tenth Session' (9 November 2007) UN Doc A/HRC/10/29, para 460.
[154] UNHRC Res 16/21, 'Review of the work and functioning of the Human Rights Council' (12 April 2011) UN Doc A/HRC/RES/16/21, para 16.

interactive dialogue. This is generally preceded by an addendum to the outcome document which specifies whether any additional recommendations have enjoyed state support between the time of the review and the adoption of the outcome report.[155]

The HRC allocates one hour for the discussion of the Working Group documents. The time is distributed evenly between the state under review (20 minutes), Member and Observer States (20 minutes), and stakeholders (20 minutes) to express their views. It provides the opportunity for relevant stakeholders to comment on the outcome report and those states whose recommendations were noted can restate their proposals, after which the plenary adopts the outcome report.[156] For example, during the adoption of Iraq's report, the United Kingdom of Great Britain and Northern Ireland (United Kingdom) and Belgium reiterated their recommendations to the state to abolish the death penalty as did the stakeholders, Amnesty International and Verein Sudwind.[157] However, none of these actors made reference to the more limited role of *sharīʿa* in this matter which could have strengthened their arguments by addressing the status of the death penalty from a religious lens as well as an international one.

Although Alex Conte describes this stage as 'little more than a formality and … somewhat of a rubber-stamping exercise'[158], it is much more than that. This is the only stage where stakeholders are given a platform to speak and, having discussed the importance of stakeholders in the UPR[159], it is imperative that their voices are heard in order to make violations of the right to life more transparent.

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[155] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, at paras 29-32 and UNHRC Res 16/21, at para 12, HRC Presidential Statement 9/2, at para 13. The provision of a written communication is called for in UNHRC Res 16/21, at para 16.
[156] Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council', 17.
[157] UNHRC, 'Report of the Human Rights Council on its Twenty-Eighth Session' (8 July 2015) UN Doc A/HRC/28/2, paras 755 (United Kingdom), 761 (Belgium); 772 (Verein Sudwind); 776 (Amnesty International).
[158] Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 198.
[159] See section 2.6.1.

Furthermore, adoption of the report by the Human Rights Council highlights the state under review's public commitment to implement accepted recommendations and emphasises its position on human rights. For example, in Bahrain's addendum to its outcome report, the state acknowledged that death penalty recommendations were not accepted because, '[s]uch abolition is inconsistent with Bahrain's constitution and not required by international law'.[160] Bahrain's constitution does not explicitly provide for the death penalty but makes it clear that, '[t]he Islamic Shari'a is a principal source for legislation'.[161] It is therefore using religion as the basis for maintaining its sovereign right to apply capital punishment, a discourse that is challenged in Part Two of the study.

2.6.5 Implementation and Follow-up

The UPR extends beyond mere reaffirmation of human rights standards by requiring states to explicitly accept or note recommendations. As a result, the state under review is faced with expectations that it will take progressive steps to implementation.[162] The subsequent review focuses on the extent to which the previous cycle's recommendations have been implemented.

Implementation is one of the fundamental challenges facing the Universal Periodic Review.[163] The UPR needs to ameliorate violations and advance human rights on the ground level by

[160] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Bahrain' (12 October 2012) UN Doc A/HRC/21/6/Add.1/Rev.1, para 4.
[161] Bahrain's Constitution of 2002, art 2.
[162] Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Hilary Charlesworth and Emma Larking (eds) *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: CUP 2014) 37-38.
[163] The state under review is primarily responsible for the implementation of accepted recommendations, commitments and pledges. Resolution 5/1 dictates that the international community will facilitate, with the consultation and consent of the country concerned, in implementing recommendations regarding capacity-building and technical assistance. This is strengthened by the 'Voluntary Fund for Financial and Technical Assistance for the Implementation of the Universal Periodic Review' and the 'Voluntary Trust Fund for Participation'. See generally, UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, para 36; UNHRC Res 6/17, 'Establishment of Funds for the Universal Periodic Review, Mechanism of the Human Rights Council' (28 September 2007) UN Doc A/HRC/RES/6/17; OHCHR, 'Terms of Reference for the Voluntary Fund for Financial and Technical Assistance for the Implementation of the Universal Periodic Review' (2009) available at: <www.ohchr.org/Documents/HRBodies/UPR/TOR_TF_for_TC_assistance_UPR.pdf>;'Requests for financial assistance under the Voluntary Fund for Participation in the UPR Mechanism as of 24 February 2012'

'translating the recommendations and commitments made…into measurable improvements'.[164] Recommendations on the death penalty, therefore, need to be S.M.A.R.T[165] in order to facilitate implementation. For example, a recommendation to simply, 'consider restricting the death penalty' lacks any specificity for its application. Instead a recommendation to, 'adopt the punishment only for the "most serious crimes" under Article 6(2) and present to Parliament a motion for a moratorium within two years' is measurable and achievable.

In order to gauge the level of implementation, states are encouraged to submit a midterm update, on a voluntary basis, to the HRC in relation to the accepted recommendations.[166] However, due to the preparation and time taken between the state's review and the adoption of its outcome report, the time left for implementation is significantly shortened, resulting in approximately three years available for domestic adoption.[167] Recommendations on the death penalty will need to take this into account, focusing on the time-specific element of the S.M.A.R.T principle.

The third cycle of the UPR, underway since May 2017, has laid an important focus on the implementation of accepted recommendations from previous cycles. The OHCHR now sends letters, which are publicly available in a spirit of transparency, to each Minster of Foreign Affairs after the HRC adopts the UPR outcomes. These letters are sent as part of a constructive engagement with Member States and identify 10-15 areas for attention and action in advance of the next UPR cycle.[168] In his letter to Pakistan, the High Commissioner encouraged the state

<www.ohchr.org/EN/HRBodies/UPR/Documents/VPUFinancialRequest.pdf> accessed 5 January 2016; UNHRC, 'Operations of the Voluntary Fund for Financial and Technical Assistance in the Implementation of the Universal Periodic Review' (13 April 2017) UN Doc A/HRC/35/18.

[164] Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 201.

[165] Specific, Measurable, Achievable, Relevant, Time-bound.

[166] UNHRC Res 16/21, 'Review of the work and functioning of the Human Rights Council' (12 April 2011) UN Doc A/HRC/RES/16/21, para 18.

[167] Lis Dhundale, 'The Role of Civil Society', 44.

[168] UPR: Overview of the Voluntary Fund for Implementation, 5.

to submit a midterm report by 2020 and highlighted areas in need of particular attention such as safeguarding the right to life by encouraging the state to, '[r]e-impose the moratorium on the death penalty and consider abolishing it. Should it be maintained, it may be applied only to the 'most serious crimes''.[169]

All 193 UN Member States are expected to cooperate and engage with this peer-review mechanism. Resolution 5/1 makes it clear that, 'cases of persistent non-cooperation'[170] will be dealt by the Human Rights Council. However, there is no detail or explanation as to what exactly would be considered 'non-cooperation' of a 'persistent' nature. The Geneva based NGO, UPR-Info, has produced an outline of what this may be which includes non-participation and non-implementation of recommendations. Failure to engage with three or more of the following steps, according to UPR-Info, should be deemed as a persistent non-cooperation case: 1) submitting a national report; 2) selecting the troika; 3) participating in the interactive dialogue; 4) submitting an addendum; and 5) presenting midterm updates on implementation.[171] It must be noted here that selection of the troika is undertaken by the Human Rights Council, by the drawing of lots, so the aforementioned point two is incorrect. So far only one state, Israel,[172] has refused to engage with the Universal Periodic Review. However, the HRC's response was to simply postpone the review. The steps developed in Decision

[169] OHCHR, 'Letter from OHCHR on Implementation in 3rd Cycle: Pakistan' (13 April 2018) 4 available at <www.upr-info.org/sites/default/files/document/pakistan/session_28_-_november_2017/letter_for_implementation_3rd_upr_pak_e.pdf>.
[170] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/5/1, para 38.
[171] UPR Info, 'Non-cooperation with the UPR: Paving the way' (18 March 2013) <www.upr-info.org/en/news/non-cooperation-upr-paving-way> accessed 2 January 2016.
[172] UNHRC Decision OM/7/1, 'The non-cooperation of a State under Review with the Universal Periodic Review Mechanism' (29 January 2013) UN Doc A/HRC/OM/7/1; UNHRC, 'Report of the President of the Human Rights Council submitted in accordance with Council decision OM/7/1 of 29 January 2013' (5 June 2013) UN Doc A/HRC/23/CRP.1.

OM/7/1 were considered unsatisfactory and could set a precedent for other countries. A robust mechanism is needed to ensure full engagement with the process.[173]

2.7 The Death Penalty in International Law

UPR-Info assessed the progress of states during their first two reviews and found that a number of factors were crucial for state implementation. This included states' responses to recommendations received, the nature of the recommendations as well as their subject matter such as the death penalty.[174]

The abolition of the death penalty is one of the most non-implemented and least-accepted recommendations in the Universal Periodic Review.[175] The issue of the death penalty is presented as a recommendation to nearly every retentionist state, and hitherto, has not been demonstrated to directly contribute to abolition. The UPR, however, can become an important lens to analyse the Islamic use of the death penalty. It is necessary to analyse the status of capital punishment in international law and how these states have contributed to its evolving standards as this will reflect upon the extent of their interaction at the UPR.

2.7.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights does not make any reference to the death penalty; however, it preserves the right to life in Article 3: 'everyone has the right to life, liberty and security of person'. The UDHR is considered to be the foundation of contemporary human rights law and it was adopted by the General Assembly on 10 December 1948.[176] Although the

[173] UPR Info, 'Non-cooperation with the UPR: Paving the way' (18 March 2013) <www.upr-info.org/en/news/non-cooperation-upr-paving-way> accessed 2 January 2016.
[174] Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures', 93.
[175] UPR Info, 'Beyond Promises: The Impact of the UPR on the Ground' (2014) 31.
[176] ibid 23; Vratislav Pechota, 'The Development of the Covenant on Civil and Political Rights' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Colombia University Press 1981) 38.

declaration does not create legal obligations and, 'admits the presumption that something less than full effectiveness in terms of law is intended,'[177] it has played a central role in both the United Nations framework as well as in regional systems for the protection and promotion of human rights.

An examination of the Third Committee of the General Assembly debates reveal that Muslim states made influential and constructive contributions to the negotiation and development of the UDHR. This can be seen in the drafting of Article 3 (right to life) and Article 18 (freedom of thought, conscience and religion).[178] The drafting of Article 3 underwent numerous attempts at amendment,[179] including one from the Soviet Union aimed at the abolition of the death penalty.[180]

This resulted in lengthy debates and four Muslim-majority states made notable contributions on this issue. Egypt and Syria raised the question of the death penalty as a matter of domestic criminal law and therefore 'out of place in connection with the article in question'.[181] Instead it was for 'each country to include the relevant provisions in its penal code'.[182] Turkey argued that abolition was premature and considered it to be a highly controversial principle which a number of countries had not yet accepted.[183]

[177] Pechota, 'The Development of the Covenant on Civil and Political Rights', 35.
[178] Susan Waltz, 'Universal Human Rights: The Contribution of Muslim States' (2004) 26(4) Human Rights Quarterly 799-844. Eight Muslim countries had already come into existence and were members of the United Nations. Afghanistan, Egypt, Iran, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen were members of the UN in 1948. The rest became UN members as they became independent. For their membership, see 'Member States' (*United Nations*) <www.un.org/en/member-states/index.html> accessed 20 December 2015.
[179] See eg Panama (UN Doc A/C.3/220); Cuba (UN Doc A/C.3/224); Mexico (UN Doc A/C.3/266); Uruguay (UN Doc A/C.3/268); Lebanon, Cuba, Uruguay and Belgium (UN Doc A/C.3/274/Rev.1).
[180] UN Doc A/C.3/265: Everyone has the right to life. The State should ensure the protection of everyone against criminal attempts on his person. It should also ensure conditions that obviate the danger of death by hunger and exhaustion. The death penalty should be abolished in time of peace.
[181] UN Doc A/C.3/SR.103, 156 (Syria)
[182] UN Doc A/C.3/SR.107, 185 (Egypt).
[183] UN Doc A/C.3/SR.103, 158.

Pakistan suggested that the abolition of the death penalty should be made the subject of a separate resolution to be discussed at a later General Assembly. Shaista Ikramullah, Pakistan's delegate, stated that, 'she was not opposed to the abolition of the death penalty, but it was too controversial a matter to be included in the declaration'.[184] The delegation of Pakistan would therefore abstain from voting on the Soviet Union's amendment.[185] This shows an Islamic pluralism within the origin of the UDHR and demonstrates the complexity of the Islamic legal tradition.

Ultimately, the wording of Article 3, as agreed by the drafters, would state the right to life in enumerative terms without reference to either abolition or retention of the death penalty. William Schabas argues that, '[n]owhere in the *travaux* [*préparatoires*] is there a defence of the death penalty as such, and the decision to exclude abolition was in no way intended as a statement that the United Nations in some way approved of or accepted the death penalty'.[186] Additionally, it was thought to be better not to include the phrase 'death penalty' as a movement was already underway in some states for total abolition.[187] At the same time, a declaration of abolition of the death penalty risked isolating and discrediting the UDHR because the majority of states were retentionist, such as the Islamic states identified above, hence making it out of touch with everyday realities and thereby losing its potential significance.[188]

The lack of a uniform 'Islamic voice' was more visible during the debates surrounding Article 18 (freedom of religion) which has direct relevance to the death penalty since renunciation of Islam is perceived to be a capital crime. However, Islamic states did not invoke the prohibition

[184] UN Doc A/C.3/SR.105, 177.
[185] ibid.
[186] William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge: CUP 2002) 24.
[187] ECOSOC, 'Commission on Human Rights: Summary Record of the Sixth Meeting' (16 June 1947) UN Doc E/CN.4/AC.1/SR.2, 10.
[188] Schabas, *The Abolition of the Death Penalty in International Law*, 42.

against apostasy as an express justification against Article 18; the theological basis for apostasy is discussed in detail in Chapter 5.

Saudi Arabia proposed that only the first sentence of Article 18 should be retained, 'as it sufficiently safeguarded freedom of thought, conscience and religion'.[189] It voiced strong opposition against the second part which explicitly included the 'freedom to change his religion or belief'.[190] According to the Saudi Arabian delegate, Jamil Al-Baroody,[191] this could 'serve as a pretext for inciting hatred and encouraging dangerous differences of opinion'[192] since missionaries, throughout history, 'had often abused their rights by becoming the forerunners of a political intervention, and there were many instances where peoples had been drawn into murderous conflict by the missionaries' efforts to convert them'.[193]

Iraq and Syria supported Saudi Arabia's amendment. Whilst Iraq did not provide any justification for its approval,[194] Syria explained that it would be better to simply state the principle without going into details in order to obviate any controversy or doubts.[195] None of these countries focused on points of Islamic law as a potential barrier to recognising Article 18 in its totality; however, Afghanistan alluded to it by arguing that, 'the reasons put forward by the Saudi Arabian representative were in conformity with the religious beliefs and social principles of [the] country. Afghanistan reserved the right to conform to Moslem laws with regard to the question'.[196]

On the other hand, Pakistan initially opposed the draft of Article 18 but in subsequent debates, announced its support for the whole draft of the UDHR including Article 18. The Foreign

[189] UN Doc A/C.3/SR.127, 391-92.
[190] ibid.
[191] Al-Baroody was a Christian Lebanese.
[192] UN Doc A/C.3/SR.127, 391-92.
[193] ibid.
[194] ibid 402.
[195] ibid 403.
[196] UN Doc A/C.3/SR.128, 408.

Minister of Pakistan, Mohammed Zafrullah Khan, in explaining his position before the General Assembly, deemed it necessary to explain that:

> The teaching of Islam was based on the Koran which contained the oral revelations made to the prophet Mohammed; the Koran was, therefore, the very word of God for Moslems...The Koran expressly said, 'Let he who chooses to believe, believe, and he who chooses to disbelieve, disbelieve.' [Islam] formally condemned not lack of faith, but hypocrisy.[197]

He reiterated that Islam had unequivocally provided the right to freedom of conscience and was 'against any kind of compulsion in matters of faith or religious practices'.[198] The somewhat unpredictable and complex position of Islamic states signified a diversity of national and individual interests, and a pluralism within the religion itself.

No Muslim countries voted against any of the articles when they were formally put to a vote, 'suggesting that whatever objections they did have were not deemed so important that they wanted to go on record as opposing it'. [199] This included Article 3 which guarantees the right to life. Another reason could be that they wanted to portray a supportive and welcoming attitude towards the UDHR; and since the declaration was of a general nature, and not binding, there was no legal obligation attached.

[197] UN Doc A/PV.182, 891-890.
[198] ibid. See also Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge: CUP 1997) 192; Abdullahi A An-Na'im, 'The Position of Islamic States Regarding the Universal Declaration of Human Rights' in Peter Baehr, Cees Flinterman and Mignon Senders (eds), *Innovation and Inspiration: Fifty Years of the Universal Declaration of Human Rights* (Amsterdam: The Royal Netherlands Academy of Arts and Sciences 1999) 186; Nader Hashemi and Emran Qureshi, 'Human Rights' (The Oxford Encyclopedia of the Islamic World) <www.oxfordislamicstudies.com/article/opr/t236/e0325> accessed 25 November 2015.
[199] Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (5th edn, London: Routledge 2012) 40. See also Abdullah al-Ahsan, 'Law, Religion and Human Dignity in the Muslim World Today: An Examination of OIC's Cairo Declaration of Human Rights' (2008) 24 Journal of Law and Religion 569, 572.

Although Article 3 UDHR has been described as being 'neutral' on the subject of the death penalty, a number of General Assembly and ECOSOC resolutions suggest otherwise.[200] These important resolutions focus on the restriction and abolition of capital punishment yet cite the right to life provision in their preambles which implies that Article 3 is indeed abolitionist in outlook.[201] The Secretary-General's report of 1973 also stated that Article 3 implies the restriction and eventual abolition of the death penalty which suggests the two are inseparable.[202]

The UDHR was later complemented by a further two international treaties, the International Covenant on Civil and Political Rights (ICCPR)[203] and the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty.[204]

2.7.2 International Covenant on Civil and Political Rights

The ICCPR, a formal multilateral treaty, was adopted in 1966, twenty years after drafting began due to the lengthy discussions surrounding its content.[205] Whilst delegates from Islamic states were actively involved in the drafting of the Covenant, such as Bedia Afnan (Iraq), Begum Aziz Ahmed (Pakistan), Jamil Al-Baroody (Saudi Arabia), Abdul Kayaly and Jawaat Mufti (Syria), they remained relatively quiet on discussions regarding the right to life.[206]

The question of the death penalty was strongly debated by other Member States and what emerged, according to Roger Hood and Carolyn Hoyle, was 'a necessary compromise allowing

[200] See for example UNGA Res 32/61; UNGA Res 44/128; ECOSOC Res 1745 (LIV); ECOSOC Res 1930 (LVIII).
[201] Schabas, *The Abolition of the Death Penalty in International Law*, 43.
[202] UNGA 'Report of the Secretary-General E/5242' (1973) UN Doc E/5242, para 11.
[203] UNGA Res 2200A (XXI) (16 December 1966) UN Doc A/RES/21/2200.
[204] UNGA Res 44/128 (15 December 1989) UN Doc A/RES/44/128.
[205] Schabas, *The Abolition of the Death Penalty in International Law*, 45-46.
[206] Waltz, 'Universal Human Rights: The Contribution of Muslim States', 808; William A Schabas, 'Islam and the Death Penalty' (2000) 9 William & Mary Bill of Rights Journal 223, 226.

for limited retention'.[207] This is because a small number of states at the time were abolitionist[208] whilst others sought to safeguard their sovereignty and monopoly to determine that a domestic criminal sanction can include an execution.[209]

The right to life was included in Article 6 of the ICCPR, derived from Article 3 of the UDHR,[210] but also allowed for the death penalty under certain reservations. Article 6 has, therefore, been viewed as being both permissive and restrictive.[211] It has been interpreted as permissive by recognising the death penalty as an exception to the right to life whilst also being restrictive by describing it as, 'a regrettable and temporary compromise, but viewing it as ultimately incompatible with the right to life in its most pure expression'.[212] Of its six paragraphs, four make explicit reference to the subject of the death penalty.[213]

The draft of Article 6(1) had been agreed in 1957 and stated 'every human being has the *inherent* right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life' (emphasis added). The expression 'inherent right to life' demonstrated that the drafters of the Covenant considered the right to life to be antecedent to legal structures and more than just a product of legal framework.[214] Yoram Dinstein notes that the Covenant only characterises this right as inherent which, 'may attest to its privacy and emphasize that it derives from the very fact of a human being's existence'.[215]

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[207] Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford: OUP 2015) 25.
[208] This included Venezuela (abolished 1863), San Marino (abolished 1865), Costa Rica (abolished 1877), Panama (abolished 1903), Ecuador (abolished 1906), Uruguay (abolished 1907), Colombia (abolished 1910), Iceland (abolished 1928), Germany (abolished 1949), Honduras (abolished 1956), and Monaco (abolished 1962).
[209] ibid.
[210] According to Pechota, it seems that the purpose of the ICCPR was to give legal effect and implementation to the rights provided under the UDHR (Pechota, 'The Development of the Covenant on Civil and Political Rights', 35).
[211] Schabas, *The Abolition of the Death Penalty in International Law*, 95.
[212] ibid.
[213] Arts 6(2), (4), (5) and (6).
[214] Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press 1981) 114.
[215] ibid.

Article 6(2) further states, 'in countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime'. The notion of 'most serious crimes' posed a significant challenge to states as it failed to discern exactly what crime(s) would fall under this category and as a result, it has been highly criticised for allowing a wide variation of state practice. It could therefore be open to interpretation according to national tradition, culture, and politics; the opposite of trying to create a universal declaration and definition of human rights.[216]

Instead of being considered as permission for countries to proceed with capital punishment, the Chairman of the Working Group for the drafting of Article 6 stated that the expression 'in countries which have not abolished the death penalty' was intended to 'show *the direction* in which the drafters of the Covenant hoped that the situation would develop'[217] including Article 6(6) that, '[n]othing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant'. Furthermore, the phrase 'in countries which have not abolished the death penalty' implies that paragraph 2 would not be applicable to states that have already embraced the abolitionist stance and it cannot be reinstated.[218]

Roger Hood and Carolyn Hoyle cogently argue that, 'the term "most serious crimes" in Article 6(2) was nothing more than a "marker" for the policy of moving towards abolition through restriction'.[219] This idea of progressive restriction clearly indicated that the level of seriousness required for crimes justifying the death penalty would need constant evaluation, in the most

[216] Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 26.
[217] UN Doc A/C.3/SR.816, para 19; Schabas, *The Abolition of the Death Penalty*, 102 (emphasis added).
[218] R Sapienza, 'International Legal Standards on Capital Punishment' in Bertrand G Ramcharan, *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff 1985) 289; Human Rights Committee, 'Draft general comment No. 36 on Article 6: Right to life, Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs' (2 September 2015) CCPR/C/GC/R.36/Rev.2, para 36 (state parties are 'barred' from reintroducing the death penalty).
[219] Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 26.

narrowing of definitions, until total abolition was achieved.[220] This goal was reiterated in General Assembly Resolution 2857 (XXVI) and 32/61. The main objective of the United Nations, in accordance with Article 3 of UDHR and Article 6 of ICCPR, is to 'progressively restrict the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries'.[221]

The Human Rights Committee[222] has also addressed the meaning of 'most serious crimes' in the most recent Draft General Comment No. 36[223] stating that the term must be read restrictively and relate to crimes of extreme gravity, such as premeditated murder or genocidal killings. It states in length that:

> Crimes not resulting directly and intentionally in death, such as drug offences, attempted murder, corruption, armed robbery, piracy, abduction, repeated evasion of compulsory military service and sexual offences, although serious in nature, do not manifest the extraordinary high levels of violence, utter disregard for human life, blatant anti-social attitude and irreversible consequences that could conceivably justify the imposition of the death penalty as a form of legal retribution.[224]

Therefore, States Parties that retain the death penalty for these offences are in violation of their obligations under Article 6 ICCPR. This also means that Islamic states that criminalise apostasy, blasphemy, adultery, and homosexuality as capital offences are not adhering to

[220] ibid.
[221] UNGA Res 2857 (XXVI) (20 December 1971); Res 32/61 (8 December 1977) UN Doc A/RES/32/61.
[222] A body of 18 experts that monitors implementation of the ICCPR by its States Parties. Under Article 40(4), the Committee has issued a number of 'General Comments' which help States Parties to fulfil their reporting obligations 'by sharing the experience gleaned from the many perioidic reports already studied, drawing attention to insufficiencies, and suggesting imporvements'.
[223] This General Comment replaces earlier General Comments No. 6 (16th session) and No. 14 (23rd session) adopted by the Committee in 1982 and 1984, respectively.
[224] Human Rights Committee, 'Draft General Comment No. 36 on Article 6: Right to life, Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs' (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2, paras 37-38.

international law standards. Another restriction of the death penalty under Article 6 is found in paragraph 5 which excludes pregnant women and persons below 18 years of age.[225]

Furthermore, Article 7 of the ICCPR which prohibits cruel, inhuman, and degrading treatment is of particular relevance to the imposition of the death penalty. It has been recognised as an indirect attack on the use of capital punishment.[226] A violation of this article is also linked to the death-row phenomenon where there is a considerable delay in execution following a sentence of death. The method of execution must be 'carried out in such a way as to cause the least possible physical and mental suffering'.[227] Hence, executions by way of gas chambers, decapitation, stoning, and hanging would constitute violations of Article 7.[228] Confessions that are obtained as a result of treatment that is prohibited, such as torture, also constitute a breach of the Article. The Committee has declared this to violate the right to a fair trial, under both Articles 14 and 6.[229]

Article 14 provides that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The Committee noted that 'in capital punishment cases, the duty of states parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative'.[230] The death penalty must

[225] The paragraph reads: [s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
[226] Schabas, *The Abolition of the Death Penalty in International Law*, 140ff. On the methods of execution, see Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 178.
[227] General Comment 20(44), UN Doc CCPR/C/2/Rev.1/Add.3, para 6.
[228] Juan E. Méndez, 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (9 August 2012) UN Doc A/67/279, paras 29-33; Report of the Secretary-General, 'Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' (13 April 2015) UN Doc E/2015/49 para 124.
[229] UN Doc CCPR/C/GC/R.36/Rev.2, paras 42, 43, 53.
[230] Reid v Jamaica (No 250/1987) para 12.2.

therefore only be imposed after a fair trial. A breach of procedural norms in such a context would also be a breach of the right to life itself.[231]

2.7.3 ECOSOC Safeguards

In 1981, five years after the ICCPR came into force, the Committee on Crime Prevention and Control was assigned to examine the issues surrounding summary and arbitrary executions.[232] The Committee prepared nine safeguards to be adhered to wherever the death penalty was imposed. These 'Safeguards' were adopted by the Committee in 1984 and subsequently entrenched in an ECOSOC resolution.[233] They were also endorsed by the General Assembly and the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders who called for their 'widespread dissemination and implementation'.[234] In essence, they reiterated the terms of the relevant provisions in the ICCPR, namely Articles 6, 7, 14, and 15. According to the safeguards, the death penalty should only be applied to the most serious of crimes, expanding upon Article 6(2). It declared that the definition of most serious crimes 'should not go beyond intentional crimes, with lethal or other extremely grave consequences'.[235]

In 1989, the Committee adopted a new resolution that dealt with implementing the Safeguards and incorporated new standards to be applied in capital punishment cases. This second resolution added that 'persons suffering from mental retardation or extremely limited competence, whether at the stage of sentence or execution' would be excluded from the death

[231] See Human Rights Committee, 'Views: Communications No. 623/1995, 624/1995, 626/1995, 627/1995' (29 May 1998) UN Doc CCPR/C/622/D/623/1995, CCPR/C/622/D/624/1995, CCPR/C/622/D/626/1995 and CCPR/C/622/D/627/1995, para 18.10.
[232] UNGA Res 36/22, 'Arbitrary or Summary Executions' (9 November 1981) UN Doc A/RES/36/22, para 7.
[233] Committee on Crime Prevention and Control, 'Report on the Eighth Session' (21-30 March 1984) UN Doc E/1984/16 and E/AC.57/1984/18; ECOSOC Res 1984/50, 'Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty' (25 May 1984) UN Doc E/1984/50.
[234] UNGA Res 39/118, 'Human Rights in the Administration of Justice' (14 December 1984) UN Doc A/RES/39/118. See also UN Doc A/39/PV.101, para 79; UN Doc A/CONF.121/C.1/L.9.
[235] ECOSOC Res 1984/50 (25 May 1984) UN Doc E/1984/50.

penalty. It also highlighted retentionist states' obligation to allow 'adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency'.[236] The resolution was reconfirmed in 1996 and recognised for its unique contribution as there had previously been a lack of protection for the mentally retarded from the death penalty.[237]

Although the Safeguards are not treaties, they have been endorsed by ECOSOC which illustrates their unanimous acceptance by the international community. The Secretary-General monitors their implementation with his findings published in quinquennial reports.[238] Schabas argues that the Safeguards and their implementation, 'represent an invaluable benchmark and an important development in the limitation- that is, the partial abolition- of the death penalty'.[239]

2.7.4 Second Optional Protocol to ICCPR

Alongside the Safeguards, another important development in this area has been the creation of the Second Optional Protocol which was adopted by the General Assembly in 1989.[240] This Protocol, which supplemented the ICCPR, was developed with a view to furthering the discussion on capital punishment and seeking to break new ground.[241] Prior to the drafting of the Second Protocol, Islamic states remained relatively quiet during the United Nations debates

[236] ECOSOC Res 1989/64 (24 May 1989) UN Doc E/1989/64.
[237] ECOSOC Res 1996/15 (23 July 1996) UN Doc E/1996/15.
[238] ECOSOC, by its Resolution 1745 (LIV) of 16 May 1973, invited the Secretary-General to submit to it, at five-year intervals starting from 1975, periodic updated and analytical reports on capital punishment. Under Resolution 1995/57 of 28 July 1995, it recommended that the quinquennial reports of the Secretary-General should continue to cover also the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. There have been nine quinquennial reports to date. See UN Docs E/5616 (covering period 1969-1973); E/1980/9 (covering period 1974-1979); E/1985/43 (covering period 1979-1983); E/1990/38/Rev.1 (covering period 1984-1989); E/1995/78 (covering period 1989-1993); E/2000/3 (covering period 1994-1998); E/2005/3 (covering period 1999-2003); E/2010/10 (covering period 2004-2008); E/2015/49 (covering period 2009-2013).
[239] Schabas, *The Abolition of the Death Penalty in International Law*, 173.
[240] UNGA Res 44/128 'Elaboration of a second optional protocol to the International Civil and Political Rights, aiming at the abolition of the death penalty' (15 December 1989) UN Doc A/RES/44/128.
[241] UN Doc A/C.3/35/SR.74, para 56

on the death penalty and failed to mention the influence that Islamic law had on their position. It was only after preparations began to introduce a draft protocol to the ICCPR that this group of states 'emerged as a force determined to influence the debate in the 1980s'.[242]

In 1981, the General Assembly sought submissions from Member States on the idea of an optional protocol. Pakistan stated that the abolition of the death penalty was incompatible with Islamic law and according to Schabas, this was the first sign of religious arguments, within the international community, on the death penalty.[243] This religious justification soon became a common aspect of the debates.[244] During a discussion on the Protocol, the position of Islamic countries was aptly summarised by the delegate of Oman who was firmly convinced that:

> The abolition of the death penalty was a substantive and controversial question which was inconsistent with the legal system of the Islamic countries for which the death penalty was of *fundamental importance*…For Islam, the right to life was a sacred right since human beings were the creation of Almighty God and, as such, must therefore be protected. However, if an individual willingly took the life of another, Islamic law provided that the State must in turn take the life of that criminal, once guilt was established by the courts. The death penalty, to the extent that it was an integral part of Islamic law, must be upheld at all costs.[245]

[242] William A Schabas, 'Islam and the Death Penalty' (2000) 9 William & Mary Bill of Rights Journal 223, 226.
[243] ibid 227.
[244] See eg UN Doc A/C.3/37/SR.67; UN Doc A/C.3/44/SR.52.
[245] UN Doc A/C.3/37/SR.67, para 45 (emphasis added).

Countries such as Afghanistan,[246] Iran,[247] Iraq,[248] Jordan,[249] Kuwait,[250] Libya,[251] Oman,[252] Pakistan,[253] Somalia,[254] Sudan,[255] and Tunisia[256] all expressed their support for the death penalty. According to Kuwait, 'there could be no question of accepting the idea of abolishing the death penalty…because that would involve changing a cardinal principle of the Kuwaiti religion'.[257] The debate on an actual draft reached the General Assembly for consideration in 1988. Again there was strong opposition voiced by states in favour of capital punishment, the majority being states with a predominantly Muslim population.[258]

Saudi Arabia suggested the draft resolution be set aside and argued that the death penalty was enshrined in the Qurʾān, aimed at protecting human rights and was a sanction against anyone who took a life.[259] Similarly, Jordan stated that the death penalty had a positive, deterrent effect.[260] Pakistan and Afghanistan opposed the draft resolution due to the primacy afforded to Islamic law.[261] Somalia 'endorsed the views already expressed by the representatives of Muslim countries. The draft resolution was insensitive to [the] country's values and religion'.[262]

[246] ibid para 59.
[247] ibid para 49.
[248] ibid para 53.
[249] ibid para 48.
[250] ibid para 47.
[251] ibid para 52.
[252] ibid para 45.
[253] ibid para 67.
[254] ibid para 50.
[255] ibid para 46.
[256] ibid para 67.
[257] ibid para 47.
[258] See comments made by Egypt (UN Doc A/C.3/44/SR.52, para 7); Iraq (UN Doc A/C.3/44/SR.52, para 11); Saudi Arabia (UN Doc A/C.3/44/SR.52, para 12); Islamic Republic of Iran (UN Doc A/C.3/44/SR.52, para 13); Indonesia (UN Doc A/C.3/44/SR.52, para 14); Jordan (UN Doc A/C.3/44/SR.52, para 16); Oman (UN Doc A/C.3/44/SR.52, para 18); Afghanistan (UN Doc A/C.3/44/SR.52, para 19); Somalia (UN Doc A/C.3/44/SR.52, para 21); Pakistan (UN Doc A/C.3/44/SR.52, para 22); Bangladesh (UN Doc A/C.3/44/SR.52, para 30).
[259] UN Doc A/C.3/44/SR.52, para 12.
[260] ibid 16.
[261] ibid para 19; UN Doc A/C.3/44/SR.52, para 22.
[262] UN Doc A/C.3/44/SR.52, para 21.

Notwithstanding the above, the 'Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty' was adopted on 29 December 1989. It received fifty-nine votes in favour, twenty-six against, and forty-eight abstentions. With the exception of China, the United States, and Tanzania, all votes against the resolution belonged to OIC Member States.[263]

Under Article 1, the Protocol stated:

> 1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
>
> 2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

The Second Optional Protocol also introduced independent and international supervision of whether States Parties are complying with their commitment of abolition. Article 3 requires States Parties to submit their reports to the Human Rights Committee on measures undertaken to give effect to the Protocol. In cases of non-compliance, the Committee will consider

[263] UNGA Res 44/128 (15 December 1989) UN Doc A/44/824.
In favour: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Cape Verde, Colombia, Costa Rica, Cyprus, Czechoslovakia, Democratic Kampuchea, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Grenada, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Luxemburg, Malta, Mexico, Mongolia, Nepal, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Spain, Sweden, Togo, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and Yugoslavia. Nicaragua later advised the Secretariat that it had intended to vote in favour.
Against: Afghanistan, Bahrain, Bangladesh, Cameroon, China, Djibouti, Egypt, Indonesia, Islamic Republic of Iran, Iraq, Japan, Jordan, Kuwait, Maldives, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sierra Leone, Somalia, Syrian Arab Republic, United Republic of Tanzania, United States of America, and Yemen. Malaysia and Sudan later advised the Secretariat that they had intended to vote against.
Abstaining: Algeria, Antigua and Barbuda, Bahamas, Barbados, Bhutan, Botswana, Brunei Darussalem, Burkina Faso, Burundi, Chile, Congo, Cote d'Ivoire, Cuba, Democratic Yemen, Dominica, Ethiopia, Fiji, Gambia, Ghana, Guinea, Guyana, India, Israel, Jamaica, Kenya, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritius, Mozambique, Myanmar, Romania, Rwanda, Senegal, Singapore, Solomon Islands, Sri Lanka, Suriname, Trinidad and Tobago, Turkey, Uganda, Vanuatu, Zambia, Zimbabwe. Saint Vincent and the Grenadines later advised the Secretariat that it had intended to abstain.

communications from other State Parties (Article 4) and individuals subject to its jurisdiction (Article 5).

States Parties believe that abolition of the death penalty, 'contributes to enhancement of human dignity and progressive development of human rights' and all measures towards abolition are considered as 'progress in the enjoyment of the right to life'. The Protocol emphasises that States Parties undertake an '*international commitment* to abolish the death penalty'.[264] Eric Neumayer maintains that although there are no specific measures requiring States Parties to persuade retentionist countries to join the abolitionist movement, it is evident that 'countries go beyond the mere domestic abolition of the death penalty in becoming state parties to the second protocol'.[265] This was reflected by Italy and the Nordic countries in 1994, as well as the EU in 1999, when they submitted a proposal for a UN resolution calling upon all states to ratify the Second Optional Protocol.[266] However this was met with strong opposition by Muslim states once again and such attempts ultimately failed.[267]

Islamic Member States such as Bangladesh,[268] Sudan,[269] Saudi Arabia,[270] Libya,[271] Egypt,[272] Iran,[273] and Jordan[274] all spoke against the resolution. Sudan argued that capital punishment was 'a divine right according to some religions, in particular Islam'.[275] Saudi Arabia denounced the attempt for failing to take account of the cultural and religious features or domestic laws of

[264] UNGA Res 44/128 (15 December 1989) UN Doc A/RES/44/128, preamble (emphasis added).
[265] Eric Neumayer, 'Death Penalty Abolition and the Ratification of the Second Optional Protocol' (2008) 12(1) International Journal of Human Rights 3, 5.
[266] See UN Doc A/49/234, Add.1, Add. 2 (1994), later revised by UN Doc A/C.3/49/L.32/Rev.1 (1994)
[267] B Dunér and H Geurtsen, 'The Death Penalty and War' (2002) 6(4) International Journal of Human Rights 1, 4; William A Schabas, 'The United Nations and Abolition of the Death Penalty' in Jon Yorke (ed), *Against the Death Penalty: International Initiatives and Implications* (Abingdon: Ashgate 2008) 25-26.
[268] See UN Doc A/C.3/49/SR.34, paras 47-49.
[269] See UN Doc A/C.3/49/SR.36, paras 57-59.
[270] See UN Doc A/C.3/49/SR.43, paras 43-44.
[271] ibid para 53.
[272] ibid paras 57-60.
[273] ibid paras 61-62.
[274] ibid paras 70-71.
[275] UN Doc A/BUR/49/SR.5, para 13.

different countries.[276] Libya maintained that capital punishment was imposed in accordance with Islamic law and there should be no effort to impose the abolition of the death penalty which, it claimed, was still the sole deterrent to serious crimes such as murder.[277] Iran declared it was the 'sovereign right of every state to choose the most appropriate penal system, taking into account its society's cultural, religious and historical characteristics'.[278] Although not an OIC state, Singapore criticised attempts by States to use the UN 'to impose their own values and system of justice on other countries'.[279]

As demonstrated above, the most vocal opposition received to the Second Protocol, and the abolition of the death penalty in general, has come from Islamic retentionist countries, including those with a strong Muslim population. These states cite Islamic law as the justification for their continued use of the death penalty and have therefore either abstained or voted against resolutions concerning capital punishment.[280] The legitimacy of such an argument is deconstructed in Part Two below which focuses on the Islamic use of the death penalty.

2.7.5 Cairo Declaration on Human Rights in Islam

A year after the Second Protocol was adopted, the OIC adopted the 1990 Cairo Declaration on Human Rights in Islam (CDHRI) which implicitly provided for the death penalty. The Declaration was intended to, 'serve as a general guidance for member states in the field of

[276] UN Doc A/C.3/49/SR.43, para 43.
[277] ibid para 53.
[278] ibid para 62.
[279] UN Doc A/C.3/49/SR.33 paras 23-27; and SR.57 paras 16-17.
[280] See eg. UNGA Res 62/149 (26 February 2008) UN Doc A/RES/62/149; UNGA Res 63/168 (13 February 2009) UN Doc A/RES/63/168; UNGA Res 65/206 (28 March 2011) UN Doc A/RES/65/206; UNGA Res 67/176 (20 March 2013) UN Doc A/RES/67/176; UNGA Res 69/186 (4 February 2015) UN Doc A/RES/69/186; UNGA Res 71/187 (2 February 2017) UN Doc A/RES/71/187.

human rights'.[281] It is important to note that the CDHRI is a non-binding instrument and therefore it does not have the legal capacity to derogate from human rights law.

What distinguishes the CDHRI from other human rights instruments is the incorporation of 'Islamic limitation clauses.'[282] The preamble affirms the religious nature of the document which is 'to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life *in accordance with the Islamic Shari'ah*' whilst Article 24 makes a sweeping statement that, '[a]ll the rights and freedoms stipulated in this Declaration are *subject to the Islamic Shari'ah*' (emphasis added).

Numerous rights afforded in the CDHRI are limited by clauses such as 'except for' or 'without a Shari'ah prescribed reason'; 'in accordance with ethical values', the 'tenets', the 'principles' or the 'provisions of the Shari'ah'; 'within the framework of the Shari'ah'; and 'as would not be contrary to the principles of the Shari'ah'.[283] This is also reflected in the right to life provision under Article 2(a) which recognises that, '[l]ife is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation' but this right may be infringed 'for a Shari'ah prescribed reason'. This phrase is broad and vague and fails to reflect the plurality of Islamic law which is demonstrated in Part Two. Islamic law is not a monolithic entity and encompasses interpretations that promote the sanctity of life and emphasise universal values of mercy, justice, and forgiveness over the right to put to death. Using the CDHRI to accommodate interpretations which are at odds with human rights standards can open the door to human rights violations. As a result, the CDHRI has been viewed as a major compromise on human

[281] OIC, Resolution No. 49/19-P, Nineteenth Islamic Conference of Foreign Ministers, Cairo, 5 August 1990, art. 1. The Cairo Declaration on Human Rights in Islam, hereafter CDHRI, was annexed to the resolution.
[282] Ioana Cismas, *Religious Actors and International Law* (Oxford: OUP 2014) 258.
[283] CDHRI, arts 2, 7, 12, 16, 19, 22 and 23.

rights as it has the potential to legitimise human rights abuses. Furthermore, it is found to have had little impact on the practice of OIC states.[284]

The OIC has built a form of 'religionalism', which subjects human rights to *sharīʿa* instead of building a regionalism that strengthens human rights protection. This approach is not reflective of the majority of OIC states but mirrors the legal systems and attitude of a minority. States that do not incorporate *sharīʿa* into their domestic laws can make little use of the CDHRI.[285] According to Ioana Cismas, this is the main problem of the Cairo Declaration: 'it does not encourage states to promote reform of *sharīʿa* law, but accommodates the status quo. Ultimately, if the intention of the OIC is to construct cultural legitimacy for international human rights in Muslim societies, the Cairo Declaration does not reflect such an intention'.[286] The CDHRI must evolve its language to reflect a Declaration which develops a regionalism that strengthens human rights and reflects the plurality of the *sharīʿa*.

2.7.6 Arab Charter on Human Rights

Another regional human rights instrument is the 1994 Arab Charter of Human Rights adopted by the League of Arab States.[287] The Charter received widespread criticism for failing to meet international human rights standards and no Arab state ratified it. A revised text of the Charter was adopted in 2004, aimed at modernising the original document to correspond with international human rights. It entered into force March 15 2008 and 13 states have ratified it to date.[288]

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[284] Cismas, *Religious Actors and International Law*, 265.
[285] ibid 284.
[286] ibid.
[287] The League formed in Cairo on 22 March 1945 with six members: Egypt, Iraq, Transjordan (renamed Jordan in 1949), Lebanon, Saudi Arabia and Syria. As of 2018 it has 22 members: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, Yemen. See International Center for Not-for-Profit-Law, *NGO Law Monitor: League of Arab States* (*ICNL*, 2013) <www.icnl.org/research/monitor/las.html> accessed 2 February 2017.
[288] Algeria; Bahrain; Iraq; Jordan; Lebanon; Libya; Palestine; Qatar; Saudi Arabia; Syria; United Arab Emirates; Yemen.

The first article of the 2004 Charter declares the need '[t]o entrench the principle that all human rights are universal, indivisible, interdependent and interrelated' which emphasises a clear and unambiguous commitment to universality unlike the 1994 version of the Charter which did not contain such a provision. The Charter is devoid of cultural, religious, or other relativism and its preamble makes reference to various international instruments including the UN Charter, the UDHR, ICCPR, and ICESCR. However, it also refers to the CDHRI, a document which is clearly grounded in Islam.

In agreement with Mervat Rishmawi, the conservatism of the CDHRI is reflected in some of the substantive provisions of the Charter. For example, Article 8 requires States Parties to 'protect every person in their territory from being subjected to physical or mental torture or cruel, inhuman or degrading treatment' but not punishment, which reflects the continued use of corporal punishment and the death penalty under *sharīʿa*.[289] Furthermore, Arab states do not have a uniform position on some of the issues which demonstrates the inconsistency in the interpretation of *sharīʿa* amongst states that use it as the main source, or one of the sources, of legislation.

The Charter affirms the right to life and closely follows the principles of the ICCPR but with some textual differences. Under Article 6, the death penalty is reserved for only 'the most serious crimes' and Article 7 exempts juveniles under 18 years as well as pregnant women 'unless otherwise stipulated in the laws in force at the time of commission of the crime'. This caveat is in clear breach of Article 6(5) ICCPR and 37(a) CRC which contain an absolute prohibition, with no deferring to domestic law.[290] The majority of Arab states are party to the

[289] Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2000) 5(2) Human Rights Law Review 361, 367.
[290] Article 6(5) ICCPR states: 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women' and Article 37(a) CRC states: 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital

ICCPR and CRC and none have entered any reservations under Article 6(5) ICCPR or 37(a) CRC. It appears that the Charter 'reflect[s] the practice in a small minority of States, namely Saudi Arabia and Yemen, who are among the remaining few countries in the world still to execute children under 18'.[291] This is explored further in Chapter 3. Furthermore, pursuant to Article 4 of the Charter, the prohibition on the use of the death penalty against children and pregnant women can be the subject of derogation in a state of emergency. This is in contradiction to Article 5 which guarantees the right to life and prohibits derogation.

Under Article 8, 'physical or psychological torture' is prohibited, as is 'cruel, degrading, humiliating or inhuman treatment' but not punishment. No definition of torture is provided[292] and a number of important principles related to torture that have been emphasised by the Human Rights Committee, the Committee Against Torture, and the Special Rapporteur on Torture are absent. For example, there is no prohibition of the use of statements extracted under torture or cruel treatment in any legal proceedings.[293] This provision can therefore be understood as implicitly providing for punishment and, arguably, certain forms of torture since no definition is given as to what may constitute torture which risks it being arbitrarily applied.

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punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'.

[291] ibid 372 citing 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions' (22 December 2004) UN Doc E/CN.4/2005/7; and Amnesty International Report, 'Stop Child Executions! Ending the Death Penalty for Child Offenders' (15 September 2004) AI Index ACT 50/015/2004.

[292] cf CAT, art 1 which defines torture as: '… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

[293] Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?', 374. See CAT, arts 2 and 15. The Human Rights Committee has also said that 'the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.' See Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (10 March 1992) UN Doc A/47/40, Annex VI, para 12.

Further omissions can be also be found under Article 13 which guarantees the right to a fair trial and procedural guarantees and Article 16 which lists a number of minimum guarantees for trial. The Charter lacks some important guarantees such as trial 'without undue delay' and by an 'independent and impartial tribunal established by law' as recognised in Articles 14(3)(c) and 14(1) of the ICCPR respectively.[294] This exacerbates the risk of hearings falling below the fair trial standards and provides greater leeway for sentencing individuals to death.

The Arab Charter on Human Rights is a significant document for Arab States reaffirming their commitment to human rights. Whilst it remains largely consistent with international law, it contains a number of omissions and inconsistencies which prevent it from being in total compliance with international human rights standards. This is particularly evident from its failure to make progress in the law and practice on the death penalty in the region. It is argued that the Charter represents, 'a serious setback in the struggle to afford greater protection for the right to life. In turn, it actively undermines the position of international human rights law in the Arab world'.[295]

2.8 The Death Penalty in the UPR through the OIC Lens

The attachment of OIC Member States to the CDHRI, or that of Arab League states to the Arab Charter, appears to have been minimal, particularly when acting in the UN framework.[296] The UPR mechanism illustrates this point well. Only one OIC state, Iran,[297] referred to the CDHRI in its national report and only two Arab League states, Lebanon[298] and Kuwait,[299] mentioned

[294] Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?', 374.
[295] ibid 372.
[296] Cismas, *Religious Actors and International Law*, 279.
[297] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Islamic Republic of Iran' (18 November 2009) UN Doc A/HRC/WG.6/7/IRN/1, para 120.
[298] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Lebanese Republic' (23 August 2010) UN Doc A/HRC/WG.6/9/LBN/1, para 13.
[299] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Kuwait' (3 November 2014) UN Doc A/HRC/WG.6/21/KWT/1, para 5.

the Arab Charter on Human Rights. These states have not used either of the two instruments in their international practice, particularly the CDHRI, 'nor have they expressed a conviction that parts of it or the entire Declaration are binding on them- there is no evidence to support a claim that the Declaration or parts of it are regional customary law'.[300]

This demonstrates that OIC and/or Arab state practice on human rights issues, such as the right to life, is not agreed upon for these instruments to reach customary law status. A lack of reliance on the CDHRI and Arab Charter to maintain the death penalty is further support of this. It is therefore not a legal obstacle to Member States' compliance with international human rights law, such as protecting the right to life.

Nevertheless, the imposition of the death penalty still remains a highly contested issue in the UPR. To date there have been a total of 2539 death penalty recommendations of which only 564 have been accepted by states, translating as a 22% acceptance rate. This includes recommendations that have been partially accepted.[301]

During the first cycle, the top five states receiving death penalty recommendations were the United States (32); Iran (27); Iraq (26); Sudan (22); and Tanzania (19) and the top five issuing death penalty recommendations were Spain (73); France (72); Italy (65); Brazil (47); and UK (43). Cycle one received a total of 913 recommendations on the death penalty.[302]

The second cycle saw similar statistics. The top five states receiving death penalty recommendations were the United States (51); Iran (41); Thailand (32); Singapore (32); and Japan (30) and the top five issuing death penalty recommendations were France (110); Spain (97); Australia (90); Italy (88); and Portugal (88). Cycle two received a total of 1626

[300] Cismas, *Religious Actors and International Law*, 279.
[301] See 'Statistics of Recommendations' (*UPR Info*) <www.upr-info.org/database/statistics/> accessed 12 July 2018.
[302] ibid.

recommendations on the death penalty suggesting a greater engagement on the issue by states.[303]

The majority of states making the most death penalty recommendations belong to the European Union which holds an abolitionist position hence their recommendations are reflective of this stance.[304] Similarly, Muslim majority states have received the highest number of death penalty recommendations which reflects the global assessment of their entrenched endorsement of capital punishment.

Islamic Member State support for the death penalty is most apparent when assessing Egypt and Sudan's recommendations at the UPR. Instead of making recommendations challenging retentionist states' use of the punishment, they went one step further and used the UPR mechanism to encourage other states to *maintain* the death penalty (emphasis added). Egypt recommended Afghanistan, Viet Nam, Central African Republic and Chad to 'continue using its sovereign right to apply the death penalty as a tool of criminal justice in accordance with the proper safeguards specified under international human rights law'.[305] It also encouraged China to 'continue to implement the policy of strictly controlling and applying the death penalty'.[306] All these states under review accepted the recommendations except Chad which

[303] ibid.
[304] See generally Jon Yorke, 'The Evolving European Union Strategy Against the Death Penalty: from Internal Renunciation to Global Ideology - Part 1' (2006) 16 Amicus Journal 23; Jon Yorke, 'Sovereignty and the Unnecessary Penalty of Death: European and United States Perspectives' in A Sarat and J Martschukat (eds), *Is the Death Penalty Dying? European and American Perspectives* (Cambridge: CUP 2011) 236-76; Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (New York: Palgrave Macmillan 2010).
[305] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Afghanistan' (20 July 2009) UN Doc A/HRC/12/9, recommendation 95.46; UNHRC, 'Report of the Working Group on the Universal Periodic Review: Viet Nam' (2 April 2014) UN Doc A/HRC/26/6, recommendation 143.114. The recommendation to the Central African Republic and Chad is worded slightly differently: 'Continue exercising its sovereign right of implementing its penal code in conformity with universally agreed human rights standards, including the application of the death penalty.'
[306] UNHRC, 'Report of the Working Group on the Universal Periodic Review: China' (5 October 2009) UN Doc A/HRC/11/25, para 114.30.

did not provide an explanation. It would have proven fruitful for Chad to explain why it did not accept the recommendation which would have allowed for greater discussion on this issue.

Egypt's pro death penalty stance was further highlighted in its recommendation to the Netherlands, a state that had abolished the death penalty in 1870, to 'initiate a debate on the death penalty, with a view to reaching responsive conclusions consistent with international human rights law'.[307] Netherlands did not accept the recommendation affirming its 'firm opposition to the death penalty, and that its respect for human rights is basic in this position'.[308] These examples show Egypt's attempts to problematise the abolitionist perspective in the UPR as it did not base its recommendations on the review criteria[309] but instead focused on state practice to maintain the death penalty or consider its reintroduction contrary to international law.[310]

Both Egypt and Sudan also made similar recommendations to Malaysia to 'continue exercising its sovereign right of adopting national legislation and the penal code, including the application of the death penalty'.[311] Sudan also recommended Yemen to 'abide only by internationally agreed principles of international law. In this regard, capital punishment does not fall within such agreed norms, the imposition of capital punishment is the prerogative of individual States'.[312] This indicates a misinterpretation of the role of the death penalty in international law which provides for a very restricted application of the punishment as demonstrated in the previous sections.

[307] UNHRC, 'Report of the Working Group on the Universal Periodic Review: The Netherlands' (13 May 2008) UN Doc A/HRC/8/31, para 78.2.
[308] ibid para 39.
[309] UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, Annex, para 1. The review criteria are: (a) The Charter of the United Nations; (b) The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is party; (d) Voluntary pledges and commitments made by States.
[310] The Human Rights Committee's General Comment No. 36 'bars' the reintroduction of the death penalty.
[311] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Malaysia' (3 March 2009) UN Doc A/HRC/11/30, para 104.15.
[312] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Yemen' (5 June 2009) UN Doc A/HRC/12/13, para 91.53.

Furthermore, Islamic states encouraging other states to maintain the death penalty reinforces the attitude that it is not a matter of human rights but rather it is a legitimate criminal sanction which the state, as sovereign, can apply as it wishes. It does not consider the implications of such a recommendation, especially if the country in question has a poor record of human rights, for example, failing to observe fair judicial processes. This risks the death penalty being arbitrarily applied and the right to life ultimately subjugated.

During Libya's review, the state acknowledged that the question of abolition of the death penalty has been considered on several occasions however it 'resolved to retain the penalty for reasons relating to Islamic law on the one hand and for social reasons on the other relating to the desire to prevent any resurgence of the phenomenon of revenge'.[313] This suggests a purposeful attempt to monopolise the interpretation of Islamic law that allows for a wide application of the punishment, as demonstrated in Part Two. Nevertheless, and despite its apparent support for the punishment, the state affirmed that '[a]bolition of the death penalty remains a goal of Libyan society'.[314] Whether this is a genuine aspiration of the state remains to be seen in its third cycle and whether it adopts tangible steps towards abolition.

On the other hand, Maldives argued that Islam constitutes the basis of all its laws hence it is unconstitutional to remove punishments such as the death penalty,[315] and did not engage in any effort to consider a moratorium and/or abolition. In fact, it decided to reinstate the death penalty after a six-decade long moratorium.[316] Here we see the constitutionality of the death penalty being solidified on the basis of religious grounds, the focus of which is taken up in Part Two below. Such statements demonstrate the varying and changing interpretation of Islamic law as

[313] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Libyan Arab Jamahiriya' (24 August 2010) UN Doc A/HRC/WG.6/9/LBY/1, para 92.
[314] ibid.
[315] UNHRC, 'Draft report of the Working Group on the Universal Periodic Review: Maldives' (21 May 2015) UN Doc A/HRC/WG.6/22/L.6, para 11.
[316] See ibid recommendation 144.23.

both states use Islamic law as a source of their legislation yet appear to have diverging views on the status of capital punishment. For example, Libya acknowledges abolition as an ultimate aim whilst Maldives remains static on its retentionist views.

2.8.1 A Note on Cultural Relativism

In the Islamic context, the promotion of perceived *sharīʿa* norms is often used as an argument against the promotion of universal values and this can be seen, to varying degrees, in the UPR of states such as Iran, Maldives, Yemen, and Pakistan.[317] An examination of their reports reveals a number of expressions of cultural relativism which can be used to justify non-adherence to international human rights obligations. A vocal proponent in this regard is Iran which argued that human rights need to be understood in light of its adherence to Islamic principles which it uses to establish the foundation of its legal system.[318] Relying upon, 'the principle of cultural diversity, while respecting and avoiding political and cultural pressures', it concluded in its national report that:

> Any change or adjustments in these laws must come about as a result of dynamic national dialogue among our own authorities and civil society in the context of Islamic principles. Pressure or demands by other countries to accept and adopt certain Western standards of human rights will practically have negative impact on promotion of human rights.[319]

This does not seem to reflect the possibility that the death penalty can be removed 'in the context of Islamic principles'. Iran's position suggests that any change in domestic laws must be preceded by national dialogue and this study informs such dialogue by challenging the

[317] See Roger Lloret Blackburn, 'Cultural Relativism in the Universal Periodic Review of the Human Rights Council' (ICIP Working Paper, September 2011).
[318] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Islamic Republic of Iran' (18 November 2009) UN Doc A/HRC/WG.6/7/IRN/1, para 130.
[319] ibid.

perceived necessity of the death penalty within Islamic thought. Hence the question of the death penalty in Islam is not simply one based purely on international human rights, but it is also based on the theological underpinnings in the religion which need to be elucidated and deconstructed. This is presented in Part Two.

Another Islamic state, Maldives, stressed that it had embraced and maintained Islamic values for the last 800 years. Islamic values were part of the national identity and heritage and formed the basis of the Constitution and all Maldives' laws hence, 'any efforts to introduce values and practices that were contrary to the values of Islam…would not be entertained by the people of Maldives'.[320] This raises the question as to what are the values of Islam which is explored in Part Two of the study. In fact, it is the values of mercy, justice, and compassion in Islam which serve as an antidote to the death penalty and need to be adequately reflected in current discourse.

During Yemen's review, the state acknowledged the UPR mechanism 'as a means of improving the human rights situation by applying principles of impartiality, objectivity and full transparency'[321] but failed to mention the principle of universality thereby lending support to the cultural relativism argument. Furthermore, during the interactive dialogue stage, Iran applauded Yemen's efforts to promote human rights and address challenges, 'with due regard to national and regional particularities and historical, cultural and religious backgrounds'.[322] In a similar vein, Egypt encouraged Afghanistan to '[c]ontinue to resist attempts to enforce any values or standards beyond the universally agreed human rights norms'.[323]

[320] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Maldives' (13 July 2015) UN Doc A/HRC/30/8, para 11.
[321] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Yemen' (20 February 2009) UN Doc A/HRC/WG.6/5/YEM/1, pt 13.
[322] UN Doc A/HRC/12/13, para 21.
[323] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Afghanistan' (20 July 2009) UN Doc A/HRC/12/9, recommendation 95.20.

Consequently, states may unilaterally reject certain recommendations on the basis that they do not concern 'universally recognised human rights,' as was claimed by Pakistan during its review.[324] This has become 'a rather powerful rhetorical device to contend that the West is perpetuating false universalisms'[325] and allows states to immunise themselves from further scrutiny. Strong cultural relativism[326] has troubling implications for international law as a whole and hinders the ability of different cultures to participate in constructive dialogue. Colleen Good argues that in order to ensure greater agreement and reduce instances of cross-cultural misunderstandings, aspects of weak relativism should be considered in that, 'different cultures have different cultural and ethical histories, and that these histories should not be brushed aside and ignored, but should instead be examined closely to allow us to further intercultural dialogue on subjects such as human rights'.[327] The discussion on the death penalty in Islam is an example of this. Exploring the historical, cultural, and religious background of capital punishment in Islamic law will help provide a new perspective and enable further dialogue with a view to elevating the right to life by subjugating the right to put to death.

This complements Khaled Abou El Fadl's approach wherein he challenges the claim of 'Muslim exceptionalism' amongst Islamic states by arguing that, 'any effort to deal with this issue must start by acknowledging that Islam itself, like all religions, is founded on certain universals, such as mercy, justice, compassion, and dignity'.[328] The *sharīʿa* embodies rational

[324] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Pakistan' (4 June 2008) UN Doc A/HRC/8/42, paras 47, 108.
[325] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Maryland: Rowman & Littlefield 2014) 185.
[326] Colleen Good provides a useful overview of the two stances within relativism: 'first, the more extreme strong relativist view is that there is no such thing as universal human rights, as all beliefs and values are culturally relative and therefore apply only within certain cultures. Second, the less extreme weak relativist view states that, while ethical systems do come out of particular cultural settings, this does not mean that these ethical systems do not share some overlap—therefore a comprehensive human rights doctrine may be possible'. Colleen Good, 'Human Rights and Relativism' (2010) 19(1) Macalester Journal of Philosophy 27, 27. See also Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Human Rights Quarterly 400.
[327] Good, 'Human Rights and Relativism', 49.
[328] El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, 186.

or natural moral values which precede the law but are also recognised by the law and this is reflected in Qurʾānic discourse which consistently employs terminology that presupposes the existence of universal values.[329]

This provides for common grounds with the death penalty in international human rights and the question of the death penalty in Islam which is explored in Part Two. It also illustrates the idea that there is a rationality within Islam that has shifted the momentum away from death to the fostering of life. There is a mistaken belief that the death penalty is an expression of cultural relativism but in fact, Islam respects the right to life in ways consistent with international human rights. It is respecting values such as mercy, forgiveness, and justice that facilitates the existence of life rather than death. Unfortunately, such an approach is yet to solidify through the international fora when it comes to the question of the death penalty in Islamic Member States. This is reflected in the case studies of the Kingdom of Saudi Arabia and Sudan.

2.9 Conclusion

This chapter provided an overview of the Universal Periodic Review by providing the historical backdrop to its creation before exploring the process and modalities of the UPR mechanism in the context of Islamic states. It then proceeded to analyse the relationship between these states and the role of the death penalty in international human rights law and how this translates into the UPR.

Islamic Member States made contributions to the drafting of the UDHR and the ICCPR, namely the Second Optional Protocol, where their pro death penalty position was solidified under the pretext of religion. Regional instruments such as the Cairo Declaration on Human Rights in Islam or the Arab Charter on Human Rights, whilst implicitly providing recourse to the death penalty, have not been relied upon by these states when dealing with international human rights

[329] ibid.

standards such as the right to life. Consequently, these cannot be considered as customary international law and used as a barrier for the removal of the death penalty.

The UPR sheds further light on Islamic states and the death penalty by providing a constructive, transparent, and cooperative platform to engage in human rights issues. All OIC states have engaged with the UPR mechanism albeit to varying degrees. What emerges is a common theme of regionalism and 'religionalism' used to undermine the review process, and this is often seen through the use of vague or mainly congratulatory language. Furthermore, a number of Islamic states perpetuate a false relativism narrative and use religion to account for a lack of adherence to international human rights law such as Afghanistan, Iran, Maldives, Pakistan, Saudi Arabia, and Sudan. This is particularly evident from death penalty recommendations which are regularly rejected by these states.

CHAPTER THREE:

CASE STUDY: THE KINGDOM OF SAUDI ARABIA

3. Case Study: The Kingdom of Saudi Arabia

3.1 Introduction

A vocal opponent and critic of the ICCPR Second Optional Protocol, the Kingdom of Saudi Arabia is responsible for a significant number of death sentences and executions that occur worldwide. Often viewed as a repeat human rights offender, the country is a staunch defender of capital punishment and one of the top executioners in the world. Amnesty International records at least 158 executions in 2015;[1] 154 executions in 2016;[2] and 146 executions in 2017.[3]

Saudi Arabia's continued application of the death penalty has always been justified on the basis of religion which forms the foundation of its legal system. There is no penal code or official interpretation of the *sharīʿa* that is published by the government and therefore it is utilising a fluid interpretation which can allow for a wide scope of the death penalty and a frequent application. This chapter presents an analysis of the Kingdom's UPR, with its first review held in 2009 followed by its second review in 2013 and engages with how the death penalty is viewed as a product of state sovereignty and internal criminal justice rather than human rights.

3.2 The beginning of a Kingdom

Sharīʿa as the basis of all legislation has been upheld since the inception of the Kingdom in 1932 through to the current reign of King Salman.[4] The Kingdom itself was born from two religious revivals. The first was a result of an 18th century alliance between Muḥammad Ibn Saʿūd, the chief of an agricultural settlement called Diriyah (near Riyadh), and a Muslim scholar and reformer named Muḥammad Ibn ʿAbd al-Wahhāb who advocated for a return to

[1] Amnesty International, *Global Report: Death Sentences and Executions 2015* (2016) 4.
[2] Amnesty International, *Global Report: Death Sentences and Executions 2016* (2017) 5.
[3] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 6.
[4] William Ochsenwald, 'Saudi Arabia and the Islamic Revival,' (1981) 13(3) International Journal of Middle East Studies, 273.

puritanical Islam.[5] The latter sought to purify Islam from what he labelled as innovations and to apply a strict interpretation of the *sharīʿa*.[6] His teachings were situated in the Ḥanbalī *madhhab*[7] whose founder Aḥmad Ibn Ḥanbal (d. 241/855) followed the *sunna* (prophetic tradition) most meticulously.[8] This alliance between Ibn Saʿūd and Ibn ʿAbd al-Wahhāb provided the ideological momentum for Saudi expansion and according to David Commins, 'this was the origin of the pact between religious mission and political power that has endured for more than two and a half centuries'.[9] The second revival occurred as a result of ʿAbd al-ʿAzīz, the then leader of the al-Saʿūd family, uniting the two Kingdoms of Hejaz and Najd in 1932, forming the Kingdom of Saudi Arabia as it is known today.

Saudi Arabia explicitly acknowledges Islam in its constitution with strong constitutional structures for the organisation and functioning of power.[10] Islam is assigned a privileged status and 'does not merely mean prayers, and fasting and *Hajj* (pilgrimage) and *Zakat* (alms-giving); it also includes the law of the lands and the institutions of the State'.[11] Maududi, a famous Islamic scholar and philosopher, elaborates:

> [I]f we want to establish religion of God, the objective will not be achieved by merely establishing the institutions of *Saum* (fast) and *Salat* (prayer). We shall have

[5] TR McHale, 'A Prospect of Saudi Arabia' (1980) 56(4) International Affairs 622, 624; Leslie McLoughlin, *Ibn Saud: Founder of a Kingdom* (New York: Palgrave Macmillan 1993) 6-9; Sandra Mackey, 'The Man They Called Ibn Saud' (2012) 120 The National Interest 89, 89; Kenneth William, *Ibn Sa'ud: The Puritan King of Arabia* (London: Cape 1933).
[6] Brenda Shaffer, *The Limits of Culture: Islam and Foreign Policy* (Cambridge: MIT Press 2006) 127-28.
[7] For a history of the four schools of law (sing. *madhhab*/pl. *madhāhib*), see Chapter 5, section 5.2.1.
[8] Jacques Waardenburg, *Islam: Historical, Social and Political Perspectives* (Berlin: Walter de Gruyter 2002) 233.
[9] David Commins, *The Wahhabi Mission and Saudi Arabia* (London: I.B Tauris 2006) 19. For a detailed analysis on Saudi Arabia's historical and ideological background see Derek Hopwood, 'The Ideological Basis: Ibn Abd al-Wahhab's Muslim Revivalism' in Timothy Niblock (ed), *State, Society and Economy in Saudi Arabia* (London: Croom Helm 1981); Natana J DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (Oxford: OUP 2008).
[10] Nisrine Abaid, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (London: British Institute of International and Comparative Law 2008) 38; Ayoub M Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 Arab Law Quarterly 5-54.
[11] Sayyid Abul A'la Maududi, *The Islamic Law and Constitution* (Khurshid Ahmed tr and ed, 2nd edn, Lahore: Islamic Publications 1960) 158.

> to establish side by side with them the Divine Law and make the *Shari'ah* the law of the land. If the latter is not established, then even if the institutions of *Salat* etc. are in force, it will not amount to the establishment of *din* (religion). It would only be partial enforcement of it and not a total one.[12]

This argument follows the idea that Islam must be implemented to not only govern the domain of spiritual acts but also form the basis of all laws, for organising government, policing, and punishment as seen in the legislative framework of Saudi Arabia.[13] *Sharīʿa* is considered the exclusive source of legislation and therefore has an intrinsic influence over the state's legal structure which is codified by the Basic Law of Governance 1992.[14] Article 23 stipulates that the law must be implemented in accordance with the Islamic faith and the state must undertake this duty.[15] The integral role of Islam in the country is affirmed in Article 1:

> The Kingdom of Saudi Arabia is a sovereign Arab Islamic state. Its religion is Islam, and its constitution is the Holy Qur'an and the prophet's (peace be upon him) sunnah (traditions). Its language is the Arabic language and its capital city is Riyadh. [16]

The state is endowed with legislative power over the divine law. God's sovereignty is expressed through human agents however it relies upon the subjective interpretive determinations of the state for its production and execution. The Basic Law does not specify a doctrinal school (*madhhab*) whose rules are binding, but in practice the courts tend to apply Ḥanbalī law. This

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[12] ibid 159.
[13] See eg Frank E Vogel, *Islamic Law and the Legal System: Studies of Saudi Arabia* (Leiden: Brill 2000) xixiii; Peter Mansfield, *The New Arabians* (New York: J.G. Ferguson Publishing 1981) 21; George N Sfeir, 'The Saudi Approach to Law Reform' (1988) 36(4) The American Journal of Comparative Law 729, 753.
[14] Abaid, *Sharia, Muslim States and International Human Rights*, 46.
[15] 'The state shall protect the Islamic creed and shall apply Islamic Shari'ah. The state shall enjoin good and forbid evil, and shall undertake the duties of the call to Islam'.
[16] 'The Basic Law of Governance' (*MOFA*, 20 September 2011) <www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/aboutKingDom/SaudiGovernment/Pages/BasicSystemOfGovernance35297.aspx> accessed 1 October 2016.

is a result of the Royal Decree of 24/3/1347H (1928) which affirmed that rulings are to conform with the established decisions found in the Ḥanbalī *madhhab*. An important exception was also included in paragraph (b) where, 'the courts would apply the opinion of other schools of Islamic law if they determined that it was better to apply it so as to reach a more appropriate ruling which would best serve public welfare'.[17] This is an important feature that can help produce a more reasoned interpretation of death penalty laws in Islam and is explored further in Part Two.

The Constitution treats the Kingdom as 'a means to an end; the end in this case being the absolute rule of Islam and adherence to it by all Saudis'.[18] For example, Article 5(a) of the Basic Law establishes that a monarchy is the country's system of governance and demands allegiance of all citizens to the King. Concepts such as separation of powers are disregarded and instead, executive and legislative branches of government are considered to be extensions of the King's power.[19] However a number of provisions laid down in the Basic Law restrict the King's mandate to rule such as Article 5(b) and Article 7. They introduce a concept of deference which confines the King's power to the Qurʾān and the *sunna* thereby emphasising religion as the basis for the legal system.[20]

The death penalty is not explicitly provided for under the Basic Law; however, Article 38 states:

[17] Abdullah F Ansary, 'A Brief Overview of the Saudi Arabian Legal System' (*NYU Global*, 2008) <www.nyulawglobal.org/globalex/Saudi_Arabia.html#_edn315>. See also *al-Hayʾa al-Qaḍāiyya* [Judicial Board] Decision No.3 (17/1/1347 - 25 June 1928), approved by the Royal Decree of 24/3/1347 - 8 Sept 1928; Nabil Saleh, 'The Law Governing Contracts in Arabia' (1989) 38(4) International and Comparative Law Quarterly 761, 764-65; Vogel, *Islamic Law and Legal Systems: Studies of Saudi Arabia*, 10.
[18] Abaid, *Sharia, Muslim States and International Human Rights*, 42.
[19] Vogel, *Islamic Law and Legal Systems: Studies of Saudi Arabia*, 170.
[20] Abaid, *Sharia, Muslim States and International Human Rights*, 42-43; Joseph L Brand, 'Aspects of Saudi Arabian Law and Practice' (1986) 9(1) Boston College International and Comparative Law Review 1, 20.

> There shall be no crime or punishment except on the basis of Shari'a or a statutory provision, and there shall be no punishment except for deed subsequent to the effectiveness of a statutory provision.

This suggests that the state's use of the death penalty rests on *sharīʿa* grounds[21] and Article 10 of the Law of Criminal Procedure acknowledges the existence of the punishment by affirming that the Court of Appeal will, 'review sentences of death, stoning, amputation or qisas (retaliatory punishment) in cases other than death'.[22] Since Saudi Arabia has not codified its penal system, there is no formal code or legislation which details all the capital offences. This is a major obstacle for elevating the right to life as, without the presence of a codified law, the state can impose the death penalty arbitrarily.

The Death Penalty Worldwide database lists the death penalty offences in Saudi Arabia.[23] These include murder,[24] robbery,[25] burglary,[26] terrorism-related offences,[27] drug-trafficking,[28]

[21] The validity of such a claim is challenged in Part Two.
[22] Royal Decree M/39, Law of Criminal Procedure (16 October 2001).
[23] 'Saudi Arabia' (*Death Penalty Worldwide*) <www.deathpenaltyworldwide.org/country-search-post.cfm?country=saudi+arabia> accessed 4 January 2016.
[24] Amnesty International, *Affront to Justice: Death Penalty in Saudi Arabia* (2008) 9-10.
[25] Hands Off Cain, 'Saudi Arabia: Three Burmese Immigrants Beheaded' (23 January 2008) <www.handsoffcain.info/archivio_news/200801.php?iddocumento=10301566&mover=0> accessed 4 January 2016.
[26] ibid.
[27] 'Saudi Arabia Executes 47 on Terrorism Charges' *Al Jazeera* (Doha, 3 January 2016) https://www.aljazeera.com/news/2016/01/saudi-announces-execution-47-terrorists-160102072458873.html> accessed 4 January 2016.
[28] Royal Decree M/39, Law of Combating Drugs and Psychotropic Substances (13 August 2005) 17-18. According to Article 37 of the law, most drug-related crimes are punishable by death. These include 'smuggling', 'receiving drugs from a smuggler', 'importing, exporting, manufacturing, producing, transferring, extracting, growing, or receiving drugs and psychotropic substances with the intention of promoting its use', and 'consensually participating in committing all the previous acts'. See also Amnesty International, *'Killing in the name of Justice': The Death Penalty in Saudi Arabia* (August 2015) 21-24.

adultery,[29] apostasy,[30] homosexual and lesbian acts,[31] espionage,[32] sorcery,[33] witchcraft,[34] recidivist alcohol consumption,[35] 'corruption on earth',[36] and kidnapping.[37] Many of the offences can be non-fatal yet are still punished with death, contrary to international human rights standards as discussed in Chapter 2 and the country's UPR below.

3.2.1 International Human Rights and Saudi Law

The Basic Law makes direct reference to the state's obligation to protect human rights under Article 26 in that, '[t]he State shall protect human rights in accordance with the Islamic Shari'a'. Saudi Arabia's relationship with human rights has been somewhat ambivalent and can be traced back to its role in the creation of the UDHR. Although the Saudi representative, Jamil Al-Baroody, was 'one of the few diplomats to have seen the UDHR and the covenants through, from the start, the Third Committee debates in 1948, to the end, with the approval of

[29] Shihar Aneez, 'Saudi Arabia Sentences Woman Convicted of Adultery to Death by Stoning' *The Independent* (London, 27 November 2015).
[30] 'Saudi Arabia: Poet Sentenced to Death for Apostasy' (*HRW*, 23 November 2015) <www.hrw.org/news/2015/11/23/saudi-arabia-poet-sentenced-death-apostasy> accessed 4 January 2016.
[31] 'Saudi Arabia' (*Death Penalty Worldwide*) <www.deathpenaltyworldwide.org/country-search-post.cfm?country=saudi+arabia> accessed 4 January 2016.
[32] Patrick Wintour, 'Saudi Arabia Sentences 15 People to Death for Spying for Iran' *The Guardian* (London, 6 December 2016) <www.theguardian.com/world/2016/dec/06/saudi-arabia-sentences-15-people-to-death-for-spying-for-iran> accessed 10 December 2016.
[33] 'Saudi Arabia Execution of 'Sorcery' Woman Condemned' *The Telegraph* (London, 13 December 2011) <www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/8952641/Saudi-Arabia-execution-of-sorcery-woman-condemned.html> accessed 4 January 2016.
[34] 'Saudi Man Executed for Witchcraft and Sorcery' *BBC* (London, 19 June 2012) <www.bbc.co.uk/news/world-middle-east-18503550> accessed 4 January 2016.
[35] 'Saudi Arabia' (*Death Penalty Worldwide*) <www.deathpenaltyworldwide.org/country-search-post.cfm?country=saudi+arabia> citing Ali b. Raashid ad-Dubayyaan, 'Alcoholic Beverages: Legal Punishment and Detrimental Effects' 37 Al-Adl Journal 202-205.
[36] Amnesty International, *Defying World Trends: Saudi Arabia's Extensive Use of Capital Punishment* (2001) 2-3.
[37] According to Death Penalty Worldwide: 'Individuals have been executed for offenses that included kidnapping; it is unclear whether individuals have been executed simply for kidnapping. We did not categorize kidnapping as a separate death eligible offense recognized by any specific law, but it is possible that death sentences were awarded as ta'zir for kidnapping'. See also Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 165-66.

the covenants in 1966',[38] the Kingdom was one of the eight Member States, and the only Muslim country, to abstain from the General Assembly vote on the Declaration.[39]

Al-Baroody, representing a country known for its Islamic conservatism, did not focus on points of Islamic theology in his arguments but his abstention in the UDHR vote was most likely based on Islamic perspectives, in particular, Article 18 which provided freedom of thought, conscience, and religion.[40] Given the religious basis of the newly-established Saudi state, it was not surprising that it sought to restrict religious change. Al-Baroody questioned the delegates of France and Lebanon as to whether they had consulted the Muslim populations in their jurisdictions before accepting the text guaranteeing the right to change one's religion or belief.[41] He also asked the United Kingdom, Belgium, and the Netherlands, whether they were 'not afraid of offending the religious beliefs of their Moslem subjects by imposing that article on them'.[42] This line of questioning seems to indicate that Saudi Arabia considered the text of Article 18 to be contrary to Islamic precepts.

As the UN developed, the practice of Saudi Arabia challenging international human rights standards based on religious norms became more visible in the international fora, with the state articulating explicit arguments to this effect. It was one of the most vocal opponents to the Second Optional Protocol to the ICCPR arguing that, 'the inclusion of capital punishment as an item on the agenda was a further attempt to give currency to so-called "universal concepts" without taking account of the cultural and religious features or domestic laws of different

[38] Susan Waltz, 'Universal Human Rights: The Contribution of Muslim States' (2004) 26(4) Human Rights Quarterly 799, 813.
[39] Also abstaining were South Africa, the former Soviet Union, Byelorussia, Ukraine, Poland, Czechoslovakia, and Yugoslavia. Voting record can be found at <www.ohchr.org/en/Library/Pages/UDHR.aspx> accessed 2 October 2016.
[40] John Kelsay, 'Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights' in David Little, John Kelsay and Abdulaziz A. Sachedina (eds), *Human Rights and Conflicts of Culture: Western and Islamic Perspectives on Religious Liberty* (Colombia: University of South Carolina Press 1988) 48.
[41] Waltz, 'Universal Human Rights: The Contribution of Muslim States', 815-16. See also UN Doc A/C.3/SR.127, 402-404.
[42] UN Doc A/C.3/SR.127, 404.

countries'.[43] The Saudi delegate, Mr Al-Rassi, affirmed that in the Kingdom, 'capital punishment provided for under Islamic law was intended simply as a powerful deterrent to serious crime, which was fortunately rare'.[44] The state's execution of 146 individuals in 2017 alone runs counter to this claim.[45]

Saudi Arabia's attitude to capital punishment is perhaps very telling in the first and second cycles of its Universal Periodic Review.

3.3 First Cycle

Saudi Arabia had its first Universal Periodic Review in 2008.[46] It received 113 recommendations from 43 states and a total of 89 recommendations were accepted.[47]

3.3.1 National Report

In the national report submitted as part of its review, the state declared that 'human rights are a universal human heritage to which all peoples are entitled'[48] and emphasised its commitment to fully cooperating with 'every institution seeking to safeguard, promote and enhance human rights'.[49] This seems to be political rhetoric employed by Saudi Arabia as its interpretation of human rights seems to privilege its relative position as discussed below.

The report begins with the methodology undertaken to prepare the submission and lists the full involvement of all governmental and non-governmental bodies, seeking full objectivity and

[43] UN Doc A/C.3/49/SR.43, para 43.
[44] UN Doc A/C.3/49/SR.43, para 44.
[45] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 6.
[46] A/HRC/WG.6/4/L.9, para 1. The number of recommendations that translated into domestic legal change has not been made available. UPR-Info contacted 6 NGOs and the State under Review for a follow up however it received no response. See UPR-Info, 'Saudi Arabia: Mid-term Implementation Assessment' (21 December 2011).
[47] See 'Database of Recommendations' (*UPR-Info*) <www.upr-info.org/database/> accessed 1 October 2016.
[48] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Saudi Arabia' (20 December 2008) UN Doc A/HRC/WG.6/4/SAU/1 [hereinafter Saudi Arabia National Report 1], para 5.
[49] Saudi Arabia National Report 1, para 6.

transparency.[50] It fails to provide details of these consultations such as the time, location, or identity of the NGOs actually involved. As a result, the true engagement and/or impact of stakeholders is left unknown. If the document's word limit is a factor for such an omission, then this could always be included as an annex which has not been done.[51]

It then proceeds to highlight the normative and institutional framework for human rights in the Kingdom which includes the Basic Law of Governance,[52] the Statutes of the Judiciary,[53] the Codes of Civil and Criminal Procedure,[54] the Code of Practice for Lawyers,[55] and the international human rights instruments ratified by the Kingdom.[56]

The theme of religion is prevalent throughout the report with fourteen references alone to the *sharīʿa* including Qurʾānic verses.[57] The report highlights the state's obligation to protect human rights by citing Article 26 of the Basic Law which affords protection of these rights in 'accordance with the Islamic sharia'. This demonstrates that human rights are not absolute in the Kingdom but are restricted by religious tenants and therefore subject to the dictates of the *sharīʿa*. The state's frequent reference to the provisions of *sharīʿa* affirm the level of primacy afforded to it; the *sharīʿa* 'constitutes the quintessence of the Kingdoms' legislation insofar as

[50] ibid para 7.
[51] See eg, OHCHR, 'Guidance Note on 3rd Cycle National Reports' available at <www.upr-info.org/sites/default/files/general-document/pdf/ohchr_guidance_national_report_3rdcycle_en.pdf>.
[52] Basic Law of Governance (promulgated by Royal Decree No. A/90 dated 27/08/1412H (March 1, 1992)).
[53] Law of the Judiciary and Law of the Board of Grievances (promulgated by Royal Decree No. M/78 dated 19/9/1428H (1 October 2007)).
[54] The Code of Shari'a (Civil) Procedure (promulgated by Royal Decree No. M/21 dated 20/5/1421H (20/8/2000)); The Code of Criminal Procedure (promulgated by Royal Decree No. M/39 dated 28/7/1422H (15/10/2001)).
[55] The Code of Practice for Lawyers (promulgated by Royal Decree No. M/38 dated 28/7/1422H (15/10/2001)).
[56] The Convention on the Rights of the Child, ratified by Royal Decree No. M/7 of 16/4/1416 AH; The International Convention on the Elimination of all Forms of Racial Discrimination, ratified by Royal Decree No. M/12 of 16/4/1418 AH; The Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Royal Decree No. M/11 of 4/4/1418 AH; The Convention on the Elimination of All Forms of Discrimination against Women, ratified by Royal Decree No. M/25 of 25/5/1421 AH; The United Nations Convention against Transnational Organized Crime, ratified by Royal Decree No. M/20 of 24/2/1425 AH, and its supplementing Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, ratified by Royal Decree No. M/56 of 11/6/1428 AH; The Convention on the Rights of Persons with Disabilities and its Optional Protocol of 2008.
[57] See eg Saudi Arabia National Report 1, paras 4, 9, 20, 24, 25, 30, 66.

it incorporates a number of constitutional principles to ensure protection of and respect for human rights'.[58]

Deference to the 'Islamic sharia' is a common theme in the Kingdom's report and is also reflected in the state's establishment of the Saudi Human Rights Commission (SHRC) whose objective is to protect and promote human rights in accordance with international standards. A caveat is added to this declaration by stating that the SHRC's objectives are achieved in a manner consistent with the Islamic faith.[59] Furthermore, the Human Rights Commission is not an independent body and functions within a state-sanctioned framework. It reports directly to the King who has the authority to appoint its entire membership.[60]

Another body referenced in the report is the National Society for Human Rights (NSHR), a civil society institution, and is highlighted as one of the achievements made by the state. The society aims to protect human rights in accordance with Saudi law, the Qurʾān, the *sunna*, 'along with the Declarations and Covenants of Human Rights issued by the Arab League, the Organization of Islamic Cooperation, and the United Nations and its agencies and specialized committees, so long as they do not contradict with Islamic Shariah'.[61]

Although depicted as an 'independent private association',[62] the NSHR operates under significant government influence and can therefore be viewed as increasingly partisan.[63] It does

[58] ibid para 9.
[59] ibid para 24; Article 1, Regulation of the Human Rights Commission, Council of Ministers Resolution No. 207 (dated 8 Sha'ban 1426H / 12 September 2005).
[60] Americans for Democracy & Human Rights in Bahrain and Bahrain Institute for Rights & Democracy, *A Midterm Report on Saudi Arabia's UPR Second Cycle: Analyzing Saudi Arabia's Refusal to Reform* (June 2016) 46; 'Human Rights Commission Regulation—Saudi Arabia' (*University of Minnesota Human Rights Library*) <http://hrlibrary.umn.edu/research/saudiarabia/HRC-regulation.html> accessed 5 November 2016; 'Law of the Council of Ministries—Saudi Arabia' (*University of Minnesota Human Rights Library*) <http://hrlibrary.umn.edu/research/saudiarabia/law-council_ministries.html> accessed 5 November 2016.
[61] The Constitution of the National Society for Human Rights, Article 2 available at <http://nshr.org.sa/en/?page_id=130> accessed 5 November 2016.
[62] Saudi Arabia National Report 1, para 47.
[63] Forty-one of its initial members mostly came from government backgrounds and a trust of King Fahd's estate financed its activities. See Madawi al-Rasheed, *A History of Saudi Arabia* (Cambridge: CUP 2010) 251.

not have any direct administrative connections to the Saudi government but it does receive generous funding from the estate of the late King Fahd.[64] In March 2004, the society received royal approval from King Fahd to operate as long as it worked in line with the Qurʾān and the 1992 Basic Law of Governance.[65] Therefore, discussion pertaining to the right to life by either the SHRC or NSHR is at risk of promoting state-centric ideology, i.e. the notion that capital punishment is to be maintained owing to perceived matters of criminal justice, rather than an objective discourse on human rights.

There is no explicit reference to the death penalty anywhere in the national report suggesting that Saudi Arabia's attitude to capital punishment is seen as a matter of state sovereignty as opposed to a question of human rights. This is reflected in its voting pattern on the UN General Assembly Resolutions on the moratorium on the use of the death penalty and the accompanying *note verbale* of disassociation.[66] Saudi Arabia has consistently voted against these resolutions,[67] including the most recent resolution in 2016, and endorsed the *note verbale* each year which emphasises that capital punishment is 'first and foremost an issue of the criminal justice system and an important deterring element vis-à-vis the most serious crimes'.[68]

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[64] ibid.

[65] 'The Royal Approval' (*National Society for Human Rights*, 10 March 2004) <http://nshr.org.sa/en/?page_id=127> accessed 3 November 2016. The letter states 'We have reviewed your proposal to establish a National Society for Human Rights, and your request for permission for this Society to practice, and your assurance that the Society will adopt in its activity the Holy Quran and the teachings of the Prophet Muhammad (Peace and Blessing of Allah be upon him), and that the Society will aid in attaining Article 26 of the Constitution which states: 'The State shall protect human rights in accordance to Islamic Law…'. Because the Basic Law states that the Kingdom's Constitution is the Holy Quran and the teachings of the Prophet Mohammed (Peace and Blessing of Allah be upon him), and because the Islamic Law aims to protect and maintain rights, the establishment of this Society is deemed appropriate, God willing. We wish you success, and hope that you consider God Almighty in your work, and that you work towards all that is good and beneficial.'

[66] The *note verbale* declares that, '[t]he permanent missions wish to place on record that they are in persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition in contravention of existing stipulations under international law'. See UN Doc A/62/658.

[67] UNGA Res 62/149 (26 February 2008) UN Doc A/RES/62/149; UNGA Res 63/168 (13 February 2009) UN Doc A/RES/63/168; UNGA Res 65/206 (28 March 2011) UN Doc A/RES/65/206; UNGA Res 67/176 (20 March 2013) UN Doc A/RES/67/176; UNGA Res 69/186 (4 February 2015) UN Doc A/RES/69/186; UNGA Res 71/187 (2 February 2017) UN Doc A/RES/71/187.

[68] UN Docs A/62/658; A/63/716; A/65/779; A/67/841; A/69/993.

The note further claims that '[e]very State has an inalienable right to choose its political, economic, social, cultural, legal and criminal justice systems, without interference in any form by another State'[69] and that:

> All Member States are acting in compliance with their international obligations. Each Member State has decided freely, in accordance with its own sovereign right established by the United Nations Charter, to determine the path that corresponds to its own social, cultural and legal needs, in order to maintain social security, order and peace. No Member State has the right to impose its standpoint on others.[70]

Clear principles of sovereignty and criminal justice are reflected in the above statement and are being used to prevent scrutiny of states' practice of the death penalty. Moreover, to assert that all states are adhering to their right to life obligations is a bold claim to make and the UPR process itself demonstrates that this is not accurate. The OHCHR and stakeholder reports for Saudi Arabia, as discussed below, are a case in point. Furthermore, respecting human rights does not deprive a state of its sovereignty and is a false antithesis to claim otherwise. Whilst all states have the right to punish, including the use of religion to set criminal sanctions, there are limits defined by international human rights as identified in Chapter 2; and a true application of Islamic criminal sanctions is reflective of the ideology of promoting the right to life which is explored in Part Two below. The Universal Periodic Review is a mechanism that can help affirm such a discourse.

The only reference to the state penal law in the national report is regarding the Code of Criminal Procedure which was promulgated by Royal Decree No. M/39 on 16 October 2001. A significant legislative instrument that, 'directly addresses the most important human rights

[69] ibid.
[70] ibid.

issues by clearly defining the procedures from the time of arrest until the accused is brought to trial'.[71] However, upon closer inspection, and as highlighted by the Special Rapporteur on the independence of judges and lawyers, the interests of an investigation seem to be afforded priority over the interests of the defendant.[72]

The report also highlights the state's commitment to the prohibition of torture and other cruel, inhuman or degrading treatment, noting its accession to the UN Convention Against Torture and lists the measures undertaken as part of its obligation to implement it. This includes the Kingdom's reports to the Committee Against Torture which have been 'presented and discussed'. [73] This is a false narrative as there has only been one report presented to the Committee to date, as shown in the OHCHR's compilation, and this reflects the state's obscure practices towards this human rights issue. Failure to commit to treaty body reporting deadlines suggests that it is not deemed as increasingly important on the state's agenda. This might be purposeful, but we are prevented from knowing because of the opaque practices galvanised by the propositions of state sovereignty.

States generally have a vested interest in presenting a positive image of their human rights record and with no mention of capital punishment in Saudi Arabia's national report, it is possible for this human rights issue to be overlooked within the UPR. However, the presence of stakeholders and the United Nation's own report differentiates this review process from any other UN mechanism as it allows pertinent human rights issues to be brought to the fore, making human rights violations more visible.

The opposing narrative on the human rights situation is reflected in the polarisation of submissions received from the principal actors involved in the UPR process. Whilst the

[71] Saudi Arabia National Report 1, para 16.
[72] Human Rights Committee, 'Report of the Special Rapporteur on the independence of judges and lawyers, Dato Param Cumaraswamy: Report on Saudi Arabia' (14 January 2003) UN Doc E/CN.4/2003/65/Add.3, para 96.
[73] Saudi Arabia National Report 1, para 43.

sovereign remains silent on the issue of capital punishment, the voices of the United Nations and civil society resonate loudly by addressing right to life violations and holding the state under review to account. This can be seen from the OHCHR and stakeholder reports below.

3.3.2 OHCHR Report

The OHCHR compilation, submitted on 20 November 2008, draws upon reports submitted by Special Procedures and treaty bodies, including comments and observations by the State concerned, and other relevant UN documentation.[74]

Saudi Arabia is not a party to a number of core treaties such as the ICESCR, ICCPR, ICCPR-OP-1, and ICCPR-OP-2 and has issued reservations under ICERD, CEDAW, CAT, and CRC to which it is a party.[75] A reservation allows a State Party to exclude itself from the legal effect of specific treaty provisions whilst remaining a party to the treaty in general. It has been defined as:

> A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[76]

A number of states have issued reservations to human rights treaties but what makes Islamic countries such as Saudi Arabia so distinctive from other reserving states is that they have

[74] UNHRC, 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Saudi Arabia' (20 November 2008) UN Doc A/HRC/WG.6/4/SAU/2 [hereinafter Saudi Arabia OHCHR Report 1].
[75] OHCHR Report 1, table 1.
[76] 1969 Vienna Convention on the Law of Treaties, article 2(1)(d). The full text of reservations, declarations and objections relating to human rights treaties can be found in the publication Multilateral Treaties Deposited with the Secretary-General, UN Doc ST/LEG/SER.E/26 (2009). It is over two thousand pages in length and is no longer published annually in hard copy. The latest printed version (3-volume set) provides the status information as of 1 April 2009. The online version is updated daily, see <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

justified reservations on the basis of Islamic law.[77] For example, under the CRC, Article 37(a) prohibits any child to be subjected to 'torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed on offences committed by persons below eighteen years of age'. Although a party to this Convention, Saudi Arabia has entered into 'reservations with respect to all such articles as are in conflict with the provisions of Islamic law'. Such recommendations are indeterminate, imprecise, and open-ended which is 'contrary to the certainty required for the acceptance of a clear legal obligation'.[78] No detail is given explaining how the reservation conflicts with Islamic law. The Committee on the Rights of the Child has therefore urged the state to review its general reservation and either withdraw or narrow it.[79] The use of general reservations makes it problematic in determining the extent to which States Parties undertake the obligation to comply with treaty provisions. Ultimately such reservations render States Parties' commitments to be viewed as more symbolic than substantive.[80]

The OHCHR report refers to treaty bodies such as the Committee Against Torture, the Committee on the Elimination of Racial Discrimination, and the Committee on the Rights of the Child when discussing the state's role in preserving the right to life.[81] The Committee on the Rights of the Child recommended Saudi Arabia to immediately suspend executions for persons who were under 18 years of age at the time of the offence and take the necessary action to convert them into penalties that are in line with the CRC.[82] It encouraged the state to

[77] See eg Marsha A Freeman, 'Reservations to CEDAW: An Analysis for UNICEF' (Gender, Rights and Civic Engagement Section, Division of Policy and Practice 2009) 13; Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Boston: Martinus Nijhoff 2009).
[78] Christine Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women' in J P Gardner (ed), *Human Rights as General Norms and a States Right to Opt Out* (London: British Institute of International & Comparative Law 1997) 70.
[79] CRC, 'Concluding Observations: Saudi Arabia' (17 March 2006) UN Doc CRC/C/SAU/CO/2, para 8.
[80] Michael L Buenger, 'Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the CEDAW' (2013-2014) 20 Buffalo Human Rights Law Review 67, 72.
[81] OHCHR Report 1, paras 25-32.
[82] UN Doc CRC/C/SAU/CO/2, para 33.

undertake a critical review of its legislation with a view to abolishing the death penalty for such persons.[83]

Furthermore, the Special Rapporteur on extrajudicial, summary or arbitrary executions raised concerns for the imposition of capital punishment on child offenders citing the case of Ahmad al-Dukkani, a 13-year-old male sentenced to death in 2005 for the murder of his 3-year-old neighbour.[84] Such a punishment is incompatible with the state's international obligations under the CRC which prohibits the death penalty for persons under 18 at the time of the offence.[85] It is also contradictory to Saudi Arabia's commitment found in its 2004 report to the Committee on the Rights of the Child which states that, 'a juvenile is defined under the Detention Regulation and the Juvenile Homes' Regulation of AH 1395 (1975) as every human being below the age of 18'.[86] Imposing the death penalty on a 13-year-old is therefore in contravention of the state under review's own domestic legislation.

As demonstrated above, the Special Rapporteur's findings are in conflict with the information provided in the national report wherein Saudi Arabia affirms its ratification of the treaty and 'large-scale dissemination of the articles of the Convention through the information media, at schools and among the governmental and judicial authorities'.[87] Instances of the juvenile death penalty do not reflect an awareness and adequate application of the CRC, particularly at the judicial level.

The Committee on the Elimination of Racial Discrimination also expressed concern at allegations that foreigners were indiscriminately being sentenced to death and encouraged the

[83] UN Doc CRC/C/SAU/CO/2, para 75.
[84] UNCHR, 'Report of the Special Rapporteur on Civil and Political Rights, Including the Question of Disappearances and Summary Executions' (27 March 2006) UN Doc E/CN.4/2006/53/Add.1, 196-97.
[85] ibid.
[86] CRC, 'Second periodic reports of States parties due in 2003: Saudi Arabia' (21 April 2005) UN Doc CRC/C/136/Add.1, para 33.
[87] Saudi Arabia National Report 1, para 29.

state to fully cooperate with the Special Rapporteur on extrajudicial, summary and arbitrary executions.[88] Almost half of the 102 executions that took place in 2008, the year of Saudi Arabia's first review, were foreign nationals from poor and developing countries. Most of them had no defence lawyer and were unable to follow court proceedings in Arabic.[89] Not being informed of one's consular rights is a violation of Article 36[90] of the Vienna Convention on Consular Relations, which Saudi Arabia ratified in 1988.[91]

Saudi Arabia's cooperation with human rights mechanisms remains an issue of concern. The OHCHR's contribution in the UPR, viz-à-viz its report, allows for greater transparency on the Kingdom's human rights obligations and enables a more constructive and open dialogue for its review. The report details that Saudi Arabia has a number of treaty body reports overdue, for example, the second to third CAT reports are outstanding from 2002 to 2006 respectively. Although the Committee on the Rights of the Child commended Saudi Arabia's efforts to address a number of concerns identified from its first report, it urged the state to 'make every effort to address the recommendations issued in the concluding observations'.[92]

Cooperation with the UN Special Procedures is also lacking with a visit requested by the Special Rapporteur on extrajudicial, arbitrary and summary executions in 2005 and no response received.[93] The Rapporteur sent communications to the government regarding death sentences imposed on child offenders,[94] confessions extracted under torture and cases falling short of

[88] OHCHR Report 1, para 26; CERD, 'Concluding Observations: Saudi Arabia' (2 June 2003) UN Doc CERD/C/62/CO/8, para 18.
[89] Amnesty International, *Global Report: Death Sentences and Executions 2008* (2009) 16.
[90] Article 36(b) requires the authorities to inform the person concerned without delay of his rights and paragraph states: 'Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.'
[91] Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 282.
[92] ibid, para 16; UN Doc CRC/C/SAU/CO/2, paras 5-6.
[93] OHCHR Report 1, 4.
[94] UN Doc E/CN.4/2006/53/Add.1, 196-97; UN Doc A/HRC/8/3/Add.1, 343-46.

international fair trial standards.[95] Sufun Muhammad Ali Ahmed al-Zafifi, a Yemeni national, was convicted of abduction and rape, and the Special Rapporteur received reports alleging that his confession, 'was extracted under duress, that the trial took place behind closed doors and that he was not afforded defense counsel'.[96]

What emerges is a distinct polarisation of attitudes as demonstrated by the state in its national report and the Special Procedures in the OHCHR report. Although Saudi Arabia specifies that its Code of Criminal Procedure provides 'comprehensive safeguards', this does not seem to occur in practice. This demonstrates a superficial engagement with the UPR process as the state is failing to acknowledge its limitations in protecting the right to life or the occurrence of unfair trials which are facilitating the application of the death penalty.

The OHCHR makes it clear that lack of information or focus on a specific issue could be due to the state under review's non-ratification of a relevant treaty and/or lack of cooperation with international human rights mechanisms. In Saudi Arabia's case, this would suggest a lack of discussion on the right to life is due to non-ratification of the ICCPR; however, through various treaty bodies and Special Procedures, this has been addressed to some extent especially when taking the limited length of the OHCHR submission into account.

3.3.3 Stakeholder Report

The stakeholder report[97] presents a summary of nine stakeholder submissions to Saudi Arabia's UPR.[98] Additional stakeholders submitted statements separately which can be found on the

[95] UN Doc A/HRC/8/3/Add.1, 335-37 and 349.
[96] ibid 336.
[97] UNHRC, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Saudi Arabia' (14 November 2008) UN Doc A/HRC/WG.6/4/SAU/3 [hereinafter Saudi Arabia Stakeholder Report 1].
[98] Participating stakeholders: Alkarama for Human Rights, Amnesty International, Becket Fund for Religious Liberty, European Centre for Law and Justice, Human Rights Watch, International Commission of Jurists, Islamic Human Rights Commission, Jubilee Campaign, and Reporters without Borders.

OHCHR website.[99] The infringement of the right to life and administration of the law were identified as key concerns across the submissions.[100]

Amnesty International noted that the state's human rights framework is weak and undermined by the government's political, legal, and judicial structures. The only reference to human rights is the generic statement provided in the Basic Law that human rights will be protected according to the *sharīʿa*.[101]

A number of stakeholders including Alkarama,[102] Amnesty International,[103] Becket Fund for Religious Liberty,[104] and the International Commission of Jurists[105] all raised concerns regarding the state's use of the death penalty for a number of offences including non-violent offences; and how Saudi Arabia 'continues to use [the death penalty] extensively, even against children, in defiance of international standards'.[106] Furthermore, the disproportionate and discriminatory use of the death penalty against the poor, the foreign workers, and women is 'a result of government failure to abide by international standards for fair trial and safeguards for defendants in capital cases'.[107] Offences such as blasphemy and apostasy are also punishable by death according to Saudi law with the Becket Fund for Religious Liberty reporting the case of a Turkish national, Sabri Bogday, who was sentenced to death for blasphemy in 2007 and also indicated that foreigners are more vulnerable to death sentences.[108]

[99] See <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> accessed 4 January 2016.
[100] Saudi Arabia Stakeholder Report 1, paras 12-17.
[101] Amnesty International UPR Submission, 3.
[102] Alkarama for Human Rights UPR Submission, 6.
[103] Amnesty International UPR Submission, 5.
[104] Becket Fund for Religious Liberty UPR Submission, 4.
[105] International Commission of Jurists UPR Submission, 7.
[106] Amnesty International UPR Submission, 5.
[107] ibid.
[108] Becket Fund for Religious Liberty UPR Submission, 4.

Alkarama highlighted the case of Khaled Bin Mohamed Issa Al-Qadihi who was sentenced to death due to alleged drug trafficking.[109] However, he was unable to hire a lawyer, had not acknowledged the facts, and argued that the confession was obtained under duress. This is clear evidence of fair trial standards not being met in violation of Article 14 ICCPR.[110] Although Saudi Arabia is not yet party to this Convention, its national report states that, 'in actual fact many of the provisions of these two Covenants are being implemented'.[111] Access to a fair trial does not seem to be one of those provisions. Alkarama recommended that the state should, 'ensure a legal process which offers all possible safeguards to ensure a fair trial, particularly those accused of a crime punishable by death'.[112]

The European Centre for Law and Justice noted that judges in Saudi Arabia are guided by general principles of Islamic jurisprudence and vaguely-worded laws which are interpreted differently by various jurists. One such example being that, 'it is the judge who decides what constitutes apostasy'.[113] This echoes the sentiments of the Becket Fund who argued that human rights and freedoms are contingent upon the application of the *sharīʿa* as interpreted by the Saudi courts. Furthermore, the secrecy of court proceedings protects judges from legal scrutiny by defence lawyers thereby enhancing the former's discretionary powers.[114]

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[109] Alkarama for Human Rights UPR Submission, 6. See also Jeffrey Fleishman, 'Turkish Barber Faces Death in Saudi for Cursing' *Irish Times* (Dublin, 31 May 2008) <www.irishtimes.com/news/turkish-barber-faces-death-in-saudi-for-cursing-1.1216189>; 'Clemency Plea for Sri Lanka Maid' *BBC* (London, 9 July 2007) <http://news.bbc.co.uk/1/hi/world/south_asia/6285538.stm>; Damien McElroy, 'Foreigners Eight Times More Likely to be Executed in Saudi Arabia, Report Says' *The Telegraph* (London, 14 October 2008) <www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/3192085/Foreigners-eight-times-more-likely-to-be-executed-in-Saudi-Arabia-report-says.html> accessed 4 January 2016.

[110] Article 14(3)(d) guarantees the defendant to: To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; and (g) Not to be compelled to testify against himself or to confess guilt.

[111] Saudi Arabia National Report 1, para 18. The two Covenants in question are the ICCPR and ICESCR.

[112] Alkarama for Human Rights UPR Submission, 6.

[113] European Centre for Law and Justice UPR Submission, pt C.

[114] Becket Fund for Religious Liberty UPR Submission, 2.

The International Commission of Jurists argued that the absence of a codified penal law coupled with judges' unfettered power in deciding what constitutes a crime and what is the adequate sentence to be applied has led to a steady increase in the number of executions. Arbitrary arrests and unfair trials occur often and threaten the rights of the citizens.[115] The NGO also recognised that under Saudi Arabia's interpretation of *sharīʿa* law, the death penalty is applied for a wide range of offences including those with non-lethal consequences. It identified that the difficulty here is that many principles of *sharīʿa* law and verses of the Qurʾān are subject to different interpretations even amongst renowned scholars; this is investigated below in Part Two. Punishments for criminal acts such as death for adultery and apostasy contravene Saudi Arabia's obligations under CAT.[116]

Human Rights Watch delivered a scathing report on Saudi Arabia's criminal justice system arguing that the deficiencies in both Saudi Arabia's law and practices are fostering human rights violations. Defendants' rights are so 'fundamental and systemic' that Saudi Arabia's current criminal justice system is at odds with a system that should be based upon international human rights standards.[117] The Code of Criminal Procedure promulgated in 2002 fails to protect the basic rights of defendants. The code does not allow a detainee to challenge the 'lawfulness of her detention before a court, fails to guarantee access to legal counsel in a timely manner, and contains no provision for free legal assistance to the indigent….judges routinely ignore, and are even ignorant of, the provisions of the law of Criminal Procedure'.[118]

Amnesty international stated that the criminal justice system mainly operates in secret and

> on a summary basis and fosters impunity for human rights perpetrators. It allows for prolonged incommunicado detention and detention of suspects without charge

[115] International Commission of Jurists UPR Submission, 7.
[116] ibid.
[117] Human Rights Watch UPR Submission, 4.
[118] ibid.

> or trial for long periods of time. It provides no right for suspects to challenge in court the legality of their detention or to lodge complaints about other abuses such as torture and other ill-treatment.[119]

It called upon the government to declare a moratorium on executions and review all cases with the aim of commuting prisoners' sentences or providing them a new and fair trial without recourse to the death penalty.[120]

Furthermore, echoing the statements of previous stakeholders, the ICJ highlighted that under international human rights standards and jurisprudence, 'capital punishment can only be imposed for the most serious crimes and in all circumstances, any trial leading to the imposition of the death penalty must conform to fundamental guarantees of a fair trial by a competent, independent and impartial tribunal established by law'.[121] It called upon the Human Rights Council to urge the government of Saudi Arabia to abolish the death penalty, accede to the human rights treaties providing for its abolition, ensure that fair trial guarantees are respected and to not impose capital punishment on child offenders. [122]

The concept of most serious crimes, as discussed in Chapter 2, is to be construed in the narrowest of circumstances. Stakeholders have recognised this and, using the platform of the UPR, challenged Saudi Arabia's position on the death penalty under international law. Although a number of these organisations refer to Islamic law being open to interpretation, there is a lack of acknowledgment of the restricted role it plays in the application of the death penalty which is analysed in Part Two of the study.

3.3.4 The Review

[119] Amnesty International UPR Submission, 4.
[120] ibid 7.
[121] International Commission of Jurists UPR Submission, 7.
[122] ibid 8.

3.3.4.1 Interactive Dialogue

The first review of Saudi Arabia took place on 6 February 2009 during the fourth session of the Working Group on the Universal Periodic Review.[123] A list of questions was prepared in advance by a number of countries[124] of which the Netherlands,[125] Sweden,[126] Canada,[127] Denmark,[128] and the United Kingdom[129] addressed the question of capital punishment and fair trial guarantees. The questions were transmitted to Saudi Arabia through its troika: Germany, Madagascar, and Qatar.[130]

In its presentation, Saudi Arabia began by stating that the principles of the UPR complement the principles of its faith including God's command to, 'help one another in righteousness and piety, but do not help one another in sin and transgression'.[131] What emerges is a narrative whereby God gives religious mandates to make people live the right life (through the Qurʾān and *sunna*);[132] and the nation state, as sovereign, enforces those mandates through a legal construct (the Constitution). This narrative that conflates the two arguments is in need of

[123] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (4 March 2009) UN Doc A/HRC/11/23 [hereinafter Saudi Arabia Working Group Report 1].
[124] Canada, Czech Republic, Denmark, Germany, Latvia, Lithuania, Netherlands, Sweden, United Kingdom of Great Britain and Northern Ireland.
[125] What measures is the government taking to safeguard the right to a fair trial and to prevent these violations?
[126] Could the government of Saudi Arabia elaborate on the status of the death penalty in relation to the resolutions of the General Assembly, including with regard to any plans to abolish the penalty or introduce a moratorium, as well as on measures it is taking to ensure that international standards guaranteeing protection of the rights of those facing the death penalty today are met?
[127] Could the Government of the Kingdom of Saudi Arabia provide more information on safeguards which are included in the Saudi judicial system to ensure:
- that defendants and their legal counsel have an opportunity to present all evidence and arguments in a case?
- that tribunals and courts follow prescribed procedures?
- that defendants and their legal counsel have an opportunity, through cross-examination to question those who originate allegations?
- the transparency of directives and decisions of Saudi tribunals and courts?
[128] Which concrete measures does the Saudi Arabian Government plan to take in order to halt the executions of juveniles at the time of the offence? – Saudi Arabia being a state party to the UN Convention on the Rights of the Child.
[129] On 24 November 2008, the Shura Council approved an amendment which set the age of adulthood as 18. Would you please confirm when the Council of Ministers will ratify this decision and whether this will ensure that no one under the age of 18 is tried as an adult in a criminal court?
[130] Saudi Arabia Working Group Report 1, para 2.
[131] Qurʾān 5:2.
[132] For a discussion on the primary sources of the *sharīʿa*, see Chapter 5.

revision as the sovereign has taken an aspect of God, the right to put to death, and applied it where God has not mandated. The sanctity of life in the sacred texts is therefore being exploited. This is dealt with, in detail, in Chapters 5 and 6.

Saudi Arabia also noted that the UPR process is, 'comprehensive and consistent with the Islamic principle of calling oneself to account, since it is a process of self-assessment and an appropriate means to present a true picture that will help states to evaluate the human rights situation in a country's territory'.[133] This reflects a practice of self-reflection, not a mandate for punishment. Hence, as a process of 'self-assessment', Saudi Arabia should reflect on the interpretive plurality of Islamic law and be receptive to discussions for a more nuanced understanding of the death penalty in an attempt to promote the fostering of life.

Following on from its introductory comments, the state under review highlighted the primacy of Islam above all else by identifying that rights in Islam are derived from the Qurʾān and *sunna* which constitute the basis of all legislation and provide for a comprehensive mode of life in Saudi Arabia. These rights precede those mentioned in international human rights instruments.[134] This is an important observation that indicates Saudi Arabia's awareness of universal rights that precede the law whilst also being recognised by the law. Islam promotes universal values of mercy, justice, and forgiveness, as explored in Part Two of this thesis, and it is recognising these values that can subjugate the sovereign right to put to death.

Similar to its national report, the state did not make any reference to the death penalty thus reinforcing the argument of state sovereignty and criminal justice trumping human rights. Despite this, other Member States issued recommendations in this respect. Fifty-four

[133] Saudi Arabia Working Group Report 1, para 6.
[134] ibid para 15.

delegations[135] delivered a statement during the interactive dialogue stage of the review and a further 24 delegations made statements which, although could not be delivered due to time constraints, were made available on the UPR extranet.[136] A total of eight recommendations were received regarding the issue of the death penalty from: Austria, Chile, Germany, Italy, Mexico New Zealand, Sweden, and Switzerland. None of the OIC or Arab League states spoke on this subject which is reflective of their attitudes on the death penalty. This can be seen in the Cairo Declaration on Human Rights in Islam (CDHRI) and Arab Charter on Human Rights, both of which allow derogation from the right to life. Other states such as Azerbaijan, Egypt, France, Lebanon, Morocco, and the United Kingdom issued recommendations regarding issues of justice and the state's conformity to international human rights standards.[137]

The United Kingdom recommended that Saudi Arabia amend its Criminal Practice Code to ensure that only persons above 18 years will be tried as adults. Those below 18 years of age at the time of the offence should have their executions commuted to a custodial sentence.[138] This is a good example of a S.M.A.R.T recommendation however citing the CRC would make it more specific and strengthen the proposal.

Similarly, Austria and Germany called for a moratorium on the executions of juveniles with Germany further recommending the state to review its practice of applying the death penalty.[139] Saudi Arabia accepted this recommendation in accordance with its commitments undertaken under the Convention on the Rights of the Child.[140] Austria and Germany issued vague and

[135] United Arab Emirates; Israel; Algeria; United Kingdom; Egypt; Nicaragua; Cuba; Venezuela; Yemen; Oman; Bahrain; Pakistan; Jordan; Morocco; Sudan; Libya; Qatar; Lebanon; Canada; Austria; Italy; Chile; Mexico; Germany; Cote d'ivoire; Palestine; Indonesia; Japan; Finland; South Africa; Uzbekistan; Russia; Belarus; Belgium; Azerbaijan; India; Kuwait; Turkey; Tunisia; Switzerland; Malaysia; Thailand; Philippines; Sri Lanka; Norway; Sweden; China; Singapore; New Zealand; Korea; Chad; Nigeria; Bangladesh; France.
[136] Saudi Arabia Working Group Report 1, para 25.
[137] See 'Database of Recommendations' (*UPR-Info*) <www.upr-info.org/database/> accessed 1 October 2016.
[138] Saudi Arabia Working Group Report 1, para 29.
[139] ibid paras 45, 49.
[140] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia: Addendum' (4 March 2009) UN Doc A/HRC/11/23/Add.1, para 38.

generic recommendations that lacked any specificity or measurable outcome. Instead, Saudi Arabia responded by citing the CRC which forms part of its review criteria (i.e. human rights instruments the state has ratified), an approach that the recommending states should have adopted.

Taking note of the wider scope of offences punishable as a capital offence and the increasing number of executions, Italy recommended that as a first step, Saudi Arabia should consider its domestic legislation on the death penalty with a view to restricting its scope and bringing it in line with the international minimum standards on the death penalty. It recommended establishing a moratorium on the death penalty with a view to its abolition. This too was noted.[141] Italy's recommendation did not make use of the S.M.A.R.T principle and this is reflected in its lack of citation to relevant law. This was also seen in Chile's recommendations below.

Chile recommended (a) eliminating the death penalty and (b) adjusting domestic legislation to the requirements and standards of international human rights instruments.[142] Whilst noting part (a), Saudi Arabia did accept the latter and stated that competent authorities in the Kingdom undertake a comprehensive periodic review of domestic legislation to ensure it is consistent with international human rights instruments.[143] Since Chile did not attempt to specify the 'domestic legislation' in question nor did it elaborate on the 'international human rights instruments' that Saudi Arabia should adhere to, this allowed the state under review to accept such a generic recommendation. As a result, Saudi Arabia is able to increase its acceptance rate

[141] Saudi Arabia Working Group Report 1, para 46.
[142] ibid para 47.
[143] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia: Addendum' (4 March 2009) UN Doc A/HRC/11/23/Add.1, para 12.

of recommendations, which will prove favourable in the international community, without making any tangible efforts to affect change in its death penalty laws.

Mexico and Switzerland recommended that Saudi Arabia establish a moratorium with a view to its abolition.[144] This was noted by Saudi Arabia. Both recommendations failed to acknowledge the review criteria as laid down in HRC Resolution 5/1 which states that the review is based upon five elements: the UN Charter, UDHR, voluntary pledges and commitments, human rights instruments the state has ratified, and applicable international humanitarian law. Failing to cite the source of the recommendation implies that the recommending state is not overly familiar with the UPR framework and/or has not invested time and effort to formulate a concrete and specific recommendation which is in line with the objectives of the UPR.[145]

Since Saudi Arabia has not ratified the ICCPR, reference to Article 6(2) has less domestic relevance however a recommending state could still refer to Article 3 UDHR which provides for the right to life. It is interesting to note that none of the recommendations pertinent to the question of capital punishment made any reference to Article 3 UDHR.[146] As Saudi Arabia is not a state party to ICCPR, Article 3 UDHR would form the basis of any recommendation to the state. This would mean that states, such as Saudi Arabia, which have not ratified certain treaties would not be able to evade scrutiny in the UPR process.

Sweden was the only country to refer to the General Assembly resolutions on the death penalty by recommending that Saudi Arabia introduce a moratorium with a view to its abolition and 'adhere to the General Assembly resolutions in this regard'. [147] This too was noted. Whilst a

[144] Saudi Arabia Working Group Report 1, paras 48, 65.
[145] Christina Szurlej, 'Universal Periodic Review: A Step in the Right Direction?' (DPhil thesis, Middlesex University 2013) 131.
[146] On the significance of Article 3 UDHR, see Schabas, *The Abolition of the Death Penalty in International Law*, ch1.
[147] Saudi Arabia Working Group Report 1, para 71.

commendable effort to refer to the resolutions, particularly since Saudi Arabia is not party to the ICCPR, Sweden missed an opportunity to cite Article 3 UDHR or Article 37(a) CRC.

New Zealand expressed concern regarding the high number of executions during 2007 and 2008. It recommended Saudi Arabia to strengthen the application of international safeguards in relation to the death penalty and thereby protect the rights of those facing death penalty.[148] Saudi Arabia accepted this recommendation. This was the only category five recommendation on the death penalty that was accepted notably because it did not require a moratorium or the abolition of the death penalty but rather to protect the rights of those *facing* the death penalty (emphasis added).

Belarus issued a category two recommendation[149] urging Saudi Arabia to, 'continue to give priority attention to the protection of the rights of the child'[150] which was easily accepted. This is because such a vague recommendation lacks specific action for example, the abolition of the juvenile death penalty. Like other recommending states, Belarus failed to cite the source of the obligation which in this case would be the CRC to which Saudi Arabia is a party. As a result of such generic recommendations, the state under review is able to pay lip service to the UPR by easily accepting recommendations whilst at the same time lacking any impetus to bring about real change.

In responding to the recommendations on capital punishment, the delegation of Saudi Arabia stated that the country, 'has a clear position on capital punishment, which is considered a deterrent in Islamic Sharia. It's not simple to impose it. The state offers counsel to the accused and covers the cost of attorneys'.[151]

[148] ibid para 74.
[149] See Edward Mcmahon's category of recommendations as explained in Chapter 2, section 2.6.3.
[150] Saudi Arabia Working Group Report 1, para 87.16.
[151] ibid, para 82.

Deterrence is one of the most repeated justifications that is advanced for the imposition of the death penalty. Roger Hood and Carolyn Hoyle scrutinise the efficacy of the deterrence argument, maintaining that:

> The issue is not whether the death penalty deters some – if only a few – people where threat of a lesser punishment would not, but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is associated with a *marginally* lower *rate* of the kinds of murder for which it has been appointed.[152]

As identified by Hood and Hoyle, it is extremely difficult, if not impossible, to find empirical data on the deterrent effects of capital punishment. The studies do not provide definitive evidence on the impact of capital punishment when used on an extensive scale such as China and Iran and/or for certain crimes such as drugs[153] or economic crimes.[154] Therefore, states should not rely on the deterrence argument to inform their position on the death penalty.

3.3.4.2 Adoption of the Outcomes

Saudi Arabia's response to the recommendations on capital punishment were included in the outcome report adopted by the HRC in its eleventh session.[155] During the plenary, the state commended the role of the UPR for ensuring the universality of human rights through constructive dialogue. It observed that, 'all people, without exception, [are] entitled to enjoy the principle of the universality of human rights'.[156]

[152] Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 393.
[153] See Global State of Harm Reduction, *Regional Overview: Middle East and North Africa* (2016) 4-5.
[154] Hood and Hoyle, *The Death Penalty: A Worldwide Perspective*, 294.
[155] UNHRC, 'Report of the Human Rights Council on its Eleventh Session' (16 October 2009) UN Doc A/HRC/11/37.
[156] ibid para 448.

However, the state also highlighted that the mechanism needed to consider the characteristics and evolution of different societies. The UPR required, 'a profound understanding of each culture and its guiding values and principles, which, by their very nature, converge with the humanitarian principles that have made human rights universally acceptable to and recognized by all cultures and civilizations'.[157] In Saudi Arabia's case, its guiding principles are based on the state's interpretation of the *sharīʿa* which it frequently invokes to justify derogation from the right to life. This is solidified in its second UPR which is analysed below.

3.4 Second Cycle

3.4.1 National Report

Saudi Arabia's second UPR took place in 2013. Its national report is a step up from the first cycle, offering greater clarification on its human right progress.[158] In explaining the state's normative and institutional framework for human rights, the report makes clear that *sharīʿa* law governs the Kingdom and Muslim rulers are 'mandated to apply its established principles and rules to the promotion and protection of human rights, as prescribed in the Holy Koran, the Sunnah of the Prophet and Islamic jurisprudence'.[159]

The report emphasises that the Kingdom, 'does not have its own particular interpretation of Islam. Jurisprudence does not imply varying interpretations of Islam; strictly speaking, it is an intellectual exercise in which sharia scholars are bound by specific criteria and rules'.[160] This appears to be a nebulous statement at best and does not acknowledge the variations in approaches to the *sharīʿa*. Islamic legal tradition is not a monolithic entity and jurisprudence does involve interpretation but is bound by the school's hermeneutical methodology. No

[157] ibid para 446.
[158] UNHRC, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/1: Saudi Arabia' (5 August 2013) A/HRC/WG.6/17/SAU/1 [hereinafter Saudi Arabia National Report 2].
[159] Saudi Arabia National Report 2, para 8.
[160] ibid para 9.

clarification is provided for what the state means by 'interpretation' and therefore such a statement seems to be a semantical play on words.

The protection and promotion of human rights is practised on the ground by virtue of the application of Islamic law. Ratifying the ICCPR and the ICESR is a matter that remains under constant consideration, but no further explanation is given.[161] Justifying non-ratification or derogation from important human rights instruments, by citing the impossibility of simultaneously respecting religious and international obligations, is a common practice amongst Islamic states. Such an interpretation is contested since 'cultural and religious specificities may be taken into consideration in order to develop adequate means to ensure universal respect for universal human rights, but they cannot jeopardize the very recognition of these rights for all'.[162]

Four and a half pages are dedicated to 'the judiciary and criminal procedures' in the Kingdom which is a considerable amount when compared to its initial report in the first UPR cycle. This suggests that greater consideration has been afforded to this area of law by the state under review, possibly as a result of increased scrutiny by other Member States, the OHCHR, and stakeholders during its previous review.

Training programmes for judges have been created as a continued effort to build and develop judicial capacities by the Ministry of Justice.[163] It has organised a number of workshops and courses, in collaboration with other government and academic bodies, to strengthen judicial matters including workshops and seminars held on human rights.[164] In order to strengthen

[161] ibid para 19.
[162] Human Rights Committee, 'Concluding Observations: Yemen' (9 August 2005) UN Doc CCPR/CO/84/YEM, para 5; Roger Lloret Blackburn, 'Cultural Relativism in the Universal Periodic Review of the Human Rights Council' (ICIP Working Paper, September 2011) 27.
[163] Saudi Arabia National Report 2, para 29.
[164] ibid.

arbitration, the practice of law, and their role in improving due process, 1513 courts have been registered with the Ministry of Justice as of 30 June 2013 with 2700 lawyers licensed to practise and 1300 trainees signed up.[165]

Saudi Arabia's Human Rights Commission has established a unit of expert staff whose job it is to attend trial hearings in order to strengthen the principle of fair trials and public hearings.[166] As a result, the Commission has identified a number of effective features. These include the fact that counsel for the accused have their fees paid by the Ministry of Justice for those persons who are unable to afford it; the attendance of representatives from the National Society of Human Rights as well as media and individuals concerned with human rights issues.[167] Negative features have also been identified, and 'promptly addressed by the Ministry of Justice', such as the case of an accused entering the courtroom with shackled feet.[168]

The Supreme Court has been given the responsibility for establishing judicial principles in line with international standards by virtue of the new Judiciary Act.[169] The codification of *sharīʿa* provisions remains a matter of ongoing deliberation and special researchers have been appointed at a number of academic institutions in order to delve further into this matter.[170] This is particularly relevant for death penalty laws as their codification can help prevent an arbitrary application of the punishment.

The state's criminal laws are also identified as an area of best practice, providing statutory safeguards that guarantee the rights of the accused throughout all levels of criminal proceedings from arrest all the way through to detention, investigation, and trial. This is derived from

[165] ibid para 30.
[166] ibid para 31.
[167] ibid.
[168] ibid.
[169] No further details about this Act are provided in the report.
[170] ibid para 33. At the time of writing, the state has published a book of 2,323 judicial principles and legal precedents, printed in eight volumes, which summarise jurisprudence development in the Kingdom however this has not been made publicly available. 'Saudi Justice Minister Inaugurates Book on Legal Precedents' *Arab News* (Riyadh, 5 January 2018) <www.arabnews.com/node/1219391/saudi-arabia> accessed 20 January 2018.

Islamic law principles and upheld by the Basic Law, which together provide the framework for fair trials in accordance with international standards. Certain penalties, notably capital punishment, have additional safeguards 'for which the sentencing requirements are more stringent with respect to the availability of conclusive evidence, ascertainment of the grounds and conditions, and the absence of impediments'.[171]

The national report further emphasises that, '[c]apital punishment is imposed only for the most serious crimes in the narrowest of circumstances and is not carried out until after the case has proceeded through every level of court'[172] but fails to clarify what these crimes are. The case begins in the Court of First Instance (*muḥkama al-ʿāma*) which is heard by three judges and their ruling must be unanimous.[173] It then proceeds to the Court of Appeal (*muḥkama al-tamyīz*) where five judges of the criminal division review the ruling even if it is uncontested.[174] If the Court of Appeal upholds the ruling, the case escalates to the Supreme Court (*majlis al-qaḍā' al-aʿlā*) to be further analysed by five judges.[175] The stages of judicial process are complete if the Supreme Court upholds the ruling.[176]

[171] Saudi Arabia National Report 2, para 34.
[172] ibid para 35.
[173] Art. 129, Law of Criminal Procedure promulgated by Royal Decree No. (M/39), 28 Rajab 1422 - 16 October 2001: The General Court shall have jurisdiction over cases that fall outside the jurisdiction of the Summary Court provided for under Article 128 hereof, or any other case that by law falls within the subject matter jurisdiction of this court. In particular, this court, convening as three judges, shall have jurisdiction over cases wherein the sentence claimed is the death penalty, rajm (stoning), amputation or qisas (retaliatory punishment) in cases other than death. This court shall not be entitled to issue a death sentence by way of ta'zir, except pursuant to a unanimous vote. Should such unanimity be impossible, the Minister of Justice shall assign two other judges in addition to the three judges who shall together be entitled, either unanimously or by majority vote, to issue a death sentence by way of ta'zir.
[174] Law of Criminal Procedure 2001, art 10: Criminal panels of the Appellate Court shall consist of five judges to review sentences of death, stoning, amputation or qisas (retaliatory punishment) in cases other than death. For other cases, they shall consist of three judges.
[175] Law of Criminal Procedure 2001, art 11: Sentences of death, stoning, amputation, or qisas in cases other than death that have been affirmed by the Appellate Court shall not be final unless affirmed by the Permanent Panel of the Supreme Judicial Council.
[176] Saudi Arabia National Report 2, para 35.

At first glance, this justification would appear to complement international human rights jurisprudence on the death penalty and appropriate appeals mechanisms.[177] However, as demonstrated in the submissions by the OHCHR and relevant stakeholders, Saudi Arabia's interpretation of 'most serious crimes' is not in line with international law. The Human Rights Committee General Comment No.36 clearly states that the term must be read restrictively and limited to crimes of intentional killing.[178] Therefore crimes such as drug offences, attempted murder, corruption, armed robbery, sexual offences, and apostasy, which are all death penalty offences under Saudi law,[179] are not considered within the remit of most serious.[180]

The national report then proceeds to explicitly state that, '[n]o authority in the State is empowered to modify or suspend the penalties of retribution and doctrinal punishment prescribed, respectively, for qisas and hadd offenses, as they are categorically provided for in sharia law, with no leeway for interpretation'.[181] This is an apodictic answer which permits little discussion on the issue and reveals a lack of self-criticism. It fails to acknowledge the very limited role of *sharīʿa* in capital punishment cases, especially when such offences do not enjoy consensus amongst Islamic scholars, or any alternative interpretations as discussed in Part Two. The state should use the UPR as a platform to engage in more meaningful intellectual discourse in order to promote and strengthen its human rights.

[177] For example, ICCPR art 14 and ECOSOC Safeguards 5 and 6.
[178] Human Rights Committee, 'Draft General Comment No. 36' (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2, para 37.
[179] See 'Death Penalty Database: Saudi Arabia' (*Death Penalty Worldwide*, 4 April 2011) <www.deathpenaltyworldwide.org/country-search-post.cfm?country=Saudi+Arabia> accessed 4 November 2016.
[180] Report of the Secretary-General, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (13 April 2015) UN Doc E/2015/49, paras 66-74; Schabas, *The Abolition of the Death Penalty in International Law*, 105-111.
[181] Saudi Arabia National Report 2, para 36.

Further justifying its use of the death penalty, the government claims that such penalties are only applicable to specific offences that require evidence so conclusive that it eliminates any room for doubt and that they have been prescribed by Islam in order to:

> preserve life, safeguard the supreme interests of society and deter any attempt to violate those interests. Killing thus incurs a qisas penalty as a just retaliation equivalent to the offense committed.
>
> In this regard, it is a feature of the liberality and breadth of sharia law that a person convicted of killing may be pardoned by the authorities (the King) in the case of ta'zir offences (for which the penalties are discretionary), or, in the case of qisas offences, by the next of kin, it being an irrevocable personal right of theirs to do so.[182]

In murder cases, the consensus of the victim's heirs is required for enforcement of the sentence and:

> determined and frequently successful efforts are made, on the basis of Royal Decree No. KH/8/547 of 8 February 2000, to appeal to the relatives of the person who has been killed to pardon the killer. In offences involving banditry (*hirabah*), the death penalty is not a requirement per se and may be substituted by exile, i.e., imprisonment.[183]

It is somewhat ironic that the state is quoting the 'liberality and breadth' of the *sharīʿa* whilst at the same time arguing that there is no room for any interpretation on the death penalty and having one of the highest execution rates in the Muslim world.

[182] ibid para 36.
[183] ibid para 38.

Moreover, in its national report, Saudi Arabia identifies imprisonment as 'one of the most damaging penalties'[184] and affirms that its judiciary tends to opt for alternative penalties by once again, 'draw[ing] on the breadth of sharia law, on which its rulings are based, and on the educational perspectives of sharia whereby punishment is a tool for correction and rehabilitation'.[185] The reforming and rehabilitative nature of punishments in Islamic law is found under a category of discretionary crimes known as *taʿzīr* whose penalty can include, for example, public disclosure, imprisonment, or fines. However, the reality is that a number of *taʿzīr* crimes are sentenced by death in Saudi Arabia and go beyond what has been elucidated in the classical *fiqh* discourse, a fact that the state omits from its discussion. This is explored in detail in Chapter 6.

The imposition of the juvenile death penalty is also addressed by the state. Under the juvenile justice system, in order to ascertain whether a child has attained puberty, the courts will consider whether he/she is displaying one of the physiological indicators of puberty and therefore competent to, 'perform religious obligations, dispose of assets and be held criminally accountable, which is consonant with the provisions of the Convention on the Rights of the Child'.[186] The report concedes that:

> Establishing evidence of puberty is a doctrinal matter in which the most appropriate interpretation is committed, taking into account circumstances and factors arising out of modern day shifts. It is (sic) should be mentioned that new child protection laws have been passed in which a child is defined as "anyone under 18 years of age" as made clear in the report.[187]

[184] ibid para 32.
[185] ibid.
[186] ibid para 39.
[187] ibid para 39.

Here we see a shift towards embracing the more 'appropriate' interpretation that favours the preservation of life and perhaps, it could be argued, a gradual softening of attitudes.

Saudi Arabia's human rights record is portrayed under a very positive light in its national report and this is further highlighted by its discussion on cooperation with NGOs and UN Special Procedures. It states that the Kingdom has allowed a number of human rights organisations to conduct field missions in order to ascertain the human rights situation on the ground. It has also responded to information requests from UN human rights mechanisms including the OHCHR and Special Procedures mandate holders. Not only has the state taken the recommendations issued by treaty bodies and Special Procedures into consideration but 'has implemented many of those recommendations. Indeed, most of the laws, measures and accomplishments pertaining to the promotion and protection of human rights, as described in this report, are in keeping with such recommendations'.[188] The polarisation of submissions is clear here as the OHCHR report does not support this claim and is discussed further in section 3.4.2.

The report further showcases the achievements of the governmental Human Rights Commission which 'fosters cooperation with national, regional and international human rights entities'[189] in order to achieve its objectives and expand its relations. It notes that at the national level, the Commission organised various conferences, workshops and seminars for human rights personnel, aiming to develop their technical capacities and 'enable them to exercise objectivity in their work in accordance with international standards'.[190] More detail is also provided on the role of the National Society for Human Rights which publishes reports on the human rights situation on the Kingdom, identifies any shortcomings, assesses the human rights progress achieved, and submits appropriate conclusions and recommendations.[191]

[188] ibid para 85.
[189] ibid para 82.
[190] ibid para 87.
[191] ibid para 88.

Whilst the state has facilitated the creation of the SHRC and NSHR, in an attempt to avoid calls for greater participatory governance and less corruption, it allows them to operate under limited freedom.[192] Both organisations publish periodic reports detailing information collected from complaints and site visits. The SHRC is mandated to produce two annual reports: one on the status of the Commission, and the other on the status of human rights in the country. This translates to a total of 24 annual reports that should be published between the beginning of its operations in 2007 and 2018, but only four are available. Twenty are not publicly available which highlights the SHRC's irregularity in reporting.[193]

In its 2012 report that is available to view, the SHRC reveals a number of deficiencies and issues recommendations on Saudi Arabia's death penalty laws, recommending the Saudi government to:

> formally delineate the crimes of Hadd, Qisas, and Diyya, and that it codify sanctions for current 'discretionary' punishments; the state's lack of a formal penal code, and the judiciary's freedom from any system of precedence, has led to a myriad of unfair sentencing practices throughout the kingdom. Another recommendation, that the government modify the Law of Criminal Procedure to explicitly guarantee the accused's right to legal counsel at every stage of detention,

[192] ADHRB, 'Mapping the Saudi State, Chapter 9: The National Human Rights Institutions' (10 December 2015) 10 <www.adhrb.org/wp-content/uploads/2015/12/MSS-Ch.-9_Final.pdf> accessed 2 October 2016.
[193] It is important to note that ADHRB states a 'lack of public availability, however, may not indicate a failure to produce the mandated reports. Periodically, Saudi newspapers will discuss the release and findings of a Commission report that does not appear on the organization's website. A May 2015 article from the Saudi domestic newspaper Okaz states that the Commission's Asir branch produced an annual report concerning just the Asir region, although the article fails to divulge significant information about this report's content. Neither this report, nor any other locally-focused reports from the Commission's various branches, appear on its website.' ibid 7.

> interrogation, and trial, would close a loophole that various Saudi authorities have used to undermine the defendant's right to legal representation.[194]

In comparison to the SHRC's poor reporting status, the NSHR has consistently published an annual report on its activities since 2007 and these are available in full on its website.[195] However, it has only published three annual reports on the status of human rights. These reports have been supplemented by standalone publications including a report on 'Conformity of the Saudi Rules and Regulations with the Conventions on Basic Human Rights'.[196] This report identifies ratification of the ICCPR as an ongoing issue and notes that if the Kingdom ratifies the treaty, it will issue reservations against some provisions 'which the Kingdom considers as non-complying with Islamic ordainments'.[197] It identifies Article 6 (right to life) and Article 18 (freedom of religion) as provisions 'arousing doubt of contravention of the Islamic rules'.[198] However, the NSHR argues that there is no need to raise a reservation against Article 6(2) as 'the seriousness of the crime can be measured by the consequences thereof on the Saudi Society'.[199] Whilst this is a positive development (not raising a reservation), it is an inadequate response which ignores the fact that 'most serious crimes' are confined to intentional killing only. Therefore, whilst Saudi society may find adultery, drug offences, and apostasy deserving of the death penalty, they cannot be categorised under the remit of most serious.

A potential reservation to Article 18 is also identified on the basis that, 'a Muslim cannot have the freedom to convert to another faith as this is prohibited under the Islamic Rules, therefore the Kingdom must raise a reservation against this sort of freedom'.[200] It does not provide any

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[194] ADHRB, 'Mapping the Saudi State, Chapter 9: The National Human Rights Institutions' citing Hayʾa Ḥuqūq al-Insān, 'Taqrīr Ḥāla Ḥuqūq al-Insān fī Mamlika al-ʿArabiyya al-Saʿūdiyya' (1433/2012).
[195] 'Taqārīr wa Darāsāt' (*NSHR*) <https://nshr.org.sa/?publication_category=تقارير-ودراسات#> accessed 2 October 2016.
[196] NSHR, 'Conformity of the Saudi Rules and Regulations with the Conventions on Basic Human Rights' available at <http://nshr.org.sa/en/wp-content/uploads/2013/12/81_PDF1.pdf> accessed 2 October 2016.
[197] ibid 140.
[198] ibid 142.
[199] ibid 143.
[200] ibid 147.

alternative readings on the status of the death penalty in Islam, for example the interpretation that apostasy *simpliciter* is not a capital offence, but rather acknowledges any reservations as a given. This monopoly of interpretation is challenged in Part Two.

Although the SHRC and NSHR attempt to provide recommendations to ameliorate the human rights violations present in Saudi Arabia, their reporting is limited by connections to a government that it is supposed to hold accountable. Furthermore, Americans for Democracy and Human Rights in Bahrain (ADHRB) argue that the organisations do not report on high profile cases that are politically sensitive.[201] This limits rhetoric on the death penalty and is at risk of promoting an interpretation of Islamic law that allows the sovereign to maintain its right to sentence individuals to death.

Furthermore, the thirteen organisations that filed for Saudi Arabia's review demonstrate that the state appears to overstate its cooperation with NGOs since only two reside in the Kingdom: the Adala Centre for Human Rights and the Saudi Civil and Political Rights Association (SCPRA). Both have faced obstacles in operating and registration difficulties from the government. At the time of writing, SCPRA members are serving prison terms[202] whilst the Adala Centre has closed under government pressure.[203] This is not indicative of a state that declares, '[n]o obstacles or barriers are placed in their [NGOs] way and they are assured of protection and legal redress under the law in the event of any kind of violation of their rights'.[204]

3.4.2 OHCHR Report

[201] ADHRB, 'Mapping the Saudi State, Chapter 9: The National Human Rights Institutions', 8-10.
[202] 'Saudi Arabia Jails Two Prominent Activists' *Al Jazeera* (Doha, 9 March 2013) <www.aljazeera.com/news/middleeast/2013/03/20133919479471122.html> accessed 2 October 2016.
[203] 'Saudi Arabia: Rights Groups Blocked from Operating' (*Human Rights Watch*, 29 August 2013) <www.hrw.org/news/2013/08/29/saudi-arabia-rights-groups-blocked-operating> accessed 2 October 2016.
[204] Saudi Arabia National Report 2, para 88.

The second OHCHR report,[205] submitted on 6 August 2013, is similar to the first in that it highlights Saudi Arabia's poor reporting status with regards to treaty body reports. The Kingdom is overdue on a minimum of two reports for every treaty body. Its second, third, and fourth reports are overdue since 2002, 2006, and 2010 respectively for CAT whilst its third and fourth reports are overdue since 2011 for CRC.[206] This demonstrates that no real progress has been made between both review cycles.

The Kingdom's cooperation with Special Procedures is also inadequate. A number of visits have been requested with no positive outcome. The Special Rapporteur on extrajudicial, summary or arbitrary executions requested a visit in 2005 and a reminder was sent in 2008 however no official response has been received. It is clear that the second cycle did not see much change. Reminders for a visit request were also sent by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (in 2010), the Special Rapporteur on freedom of religion or belief (in 2009), and the Special Rapporteur on the situation of human rights defenders (in 2012).[207]

The Special Rapporteur on violence against women, its causes and consequences noted that there is no codified penal code and recommended the adoption of one which clearly defines criminal offences.[208] This means that the interpretation and application of *sharīʿa* is subject to 'the competency of the courts and to a council of senior religious scholars, appointed by the king'.[209]

[205] UNHRC, 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 16/21: Saudi Arabia' (6 August 2013) UN Doc A/HRC/WG.6/17/SAU/2 [hereinafter Saudi Arabia OHCHR Report 2].
[206] OHCHR Report 2, 5.
[207] ibid 6.
[208] A/HRC/11/6/Add.3, paras 47, 74 and 95 (b)
[209] OHCHR Report 2, para 30.

Judges are reported to apply guidelines derived from customs and traditions which contravene obligations contained within the *sharīʿa* and international human rights instruments to which the state is party. The Special Rapporteur recommended that a training programme for judges be created to assist the Kingdom in respecting its international obligations.[210]

In 2013, seven Saudi citizens were sentenced to death for theft, including armed robbery.[211] The Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, expressed serious concern that the individuals were to be executed for crimes that do not fall within the 'most serious crimes' category and after questionable trials.[212] The Special Rapporteur on torture, Juan Méndez, was also concerned at allegations of torture and other ill-treatment in detention and confessions made under duress.[213] The chair of the Working Group on Arbitrary Detention (WGAD) noted that the death penalty was to be applied following 'possible violation of the right to liberty and security of all seven individuals'.[214] Despite repeated calls to stop the executions, Saudi Arabia imposed the punishment.[215]

The UN High Commissioner for Human Rights strongly condemned the executions stating that they were in clear breach of international safeguards and repeated concerns, 'as to the nature of the alleged crimes, confessions based upon torture and the insufficiency of trials'.[216] He noted that capital punishment was imposed for crimes which were not 'most serious' under international law such as drug offences, apostasy, sorcery, witchcraft, and heresy.[217]

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[210] ibid.
[211] 'Saudi Arabia Executes Seven Men for Armed Robbery' *BBC* (London, 13 March 2013) <www.bbc.co.uk/news/world-middle-east-21767667> accessed 12 October 2016.
[212] Jean-Marc Ferré, 'UN Experts Urge Saudi Arabia to Halt Execution of Seven Men Sentenced to Death' (*UN News*, 12 March 2013) <https://news.un.org/en/story/2013/03/434132> accessed 12 October 2016.
[213] ibid.
[214] OHCHR Report 2, para 21.
[215] 'Saudi Arabia Executions: 7 Put to Death for Robbery' (*Huffington Post*, 13 March 2013) <www.huffingtonpost.com/2013/03/13/saudi-arabia-executes-7-men-by-firing-squad_n_2866655.html?guccounter=1> accessed 12 October 2016.
[216] OHCHR Report 2, para 21.
[217] ibid.

In 2012, the Special Rapporteur on summary executions was concerned by the growing number of death sentences and the increase of communications dealing with imminent executions. The High Commissioner urged the state to join the global momentum against the death penalty and, as a first step, establish a moratorium on its use.[218]

WGAD highlighted the issue of problematic trials alleging that the accused were detained without a warrant, not informed of the charges, not presented before a judge, given no access to a lawyer, and held incommunicado for different lengths of time. Ill treatment, torture, or inhuman conditions of detention were also a cause for concern in many cases. According to WGAD, persons in detention were not provided the opportunity to contest the legality of their detention.[219] This is in stark contrast to what the Kingdom described as providing 'comprehensive safeguards'.[220]

The OHCHR is able to challenge state claims of the death penalty being imposed 'only for the most serious crimes and in the narrowest of circumstances' thereby providing a more balanced review of the country's human rights situation. This is also reflected in the stakeholder submissions below.

3.4.3 Stakeholder Report

The stakeholder report[221] comprised of a summary of 13 stakeholder submissions to the UPR.[222] A number of stakeholders such as Amnesty International, the Cairo Institute for

[218] ibid para 22.
[219] ibid paras 23, 31.
[220] Saudi Arabia National Report 1, paras 3-8.
[221] UNHRC, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council Resolution 16/21: Saudi Arabia' (24 July 2013) UN Doc A/HRC/WG.6/17/SAU/3 [hereinafter Saudi Arabia Stakeholder Report 2].
[222] Alkarama for Human Rights; Amnesty International; Child Rights International Network; European Centre for Law and Justice; Global Initiative to End All Corporal Punishment of Children; Human Rights Watch; International Publishers Associations; Reporters Without Borders; Society for Threatened Peoples. The following are Joint Submissions: Joint Submission No. 1 (JS1) by the Cairo Institute for Human Rights Studies (CIHRS), Adala Center for Human Rights, and the Association for Civil and Political Rights in Saudi Arabia (ACPRA);

Human Rights, Adala Centre for Human Rights Saudi Arabia, and Alkarama noted that despite the state having accepted certain recommendations in its previous UPR, it failed to ratify core international human rights treaties such as the ICCPR, ICESCR, and OP-CAT.[223] This suggests that Saudi Arabia's acceptance of recommendations to consider ratification of international instruments was superficial and seen as a tick-box exercise as opposed to genuinely reforming its human rights obligations.

The International Publishers Associations and Joint Submission 1 (JS1) expressed concern over the lack of explicit protection of basic rights and liberties under the Kingdom's Basic Law which contains vaguely drafted articles.[224] There is no clear definition of crimes and authorities under existing legislation and ECLJ noted that the legal system is dependent on the government's official interpretation of *sharīʿa* law.[225] It seems as though no genuine attempts were made towards harmonising domestic laws with international and regional human rights conventions, a key area of concern from the majority of stakeholders.[226]

The absence of a codified penal code was identified as a significant issue in Saudi Arabia's justice system with JS3 noting that this could lead to arbitrary murder.[227] Punishable crimes and their respective penalties are not clearly defined and the definition of a 'legal infraction' is based upon the judge's interpretation of *sharīʿa* law as is the determination and severity of punishment meted out. In fact, there is no evidence of any developments pertaining to legal

Joint submission No. 2 (JS2) by Front Line Defenders and the Adala Center for Human Rights; Joint Submission No. 3 (JS3) by Organization for Defending Victims of Violence (ODVV), and Institute of the World Horizons Landscape (Global Horizon Institute); Joint submission No. 4 (JS4) by Al-Adala Center for Human Rights, and International Federation for Human Rights (FIDH), and the Coalition for Equality without Reservation.

[223] JS1 UPR Submission, 2; Alkarama UPR submission, 5; Amnesty International UPR Submission, 1, 4.

[224] International Publishers Association UPR Submission, 1; JS1 UPR Submission, 2.

[225] European Centre for Law and Justice UPR Submission, 1.

[226] JS1 UPR Submission, para 3.

[227] ibid 2, 6.

and judicial reform such as the codification of discretionary sentences or amending the criminal procedure code since Saudi Arabia's first UPR.[228]

Human Rights Watch noted that the Code of Criminal Procedure lacks basic safeguards. It fails to allow detainees the opportunity to question the lawfulness of their detention nor does it guarantee access to legal representation in a timely manner.[229] Pre-trial detention is granted up to six months without judicial review and statements made under duress are not viewed as inadmissible in court. Furthermore, judges tend to disregard provisions of the Code of Criminal Procedure.[230] JS3 and Human Rights Watch recommended Saudi Arabia to formulate a penal code that restricts punishable crimes as a matter of urgency and amend the law of criminal procedure by bringing it in line with international human rights law.[231]

Amnesty International regretted that Saudi Arabia failed to accept recommendations to declare a moratorium on the death penalty or to restrict its scope in line with international minimum standards.[232] It also reported that executions are increasing by the year with numbers feared to be higher than declared owing to recent reports of secret executions. The death penalty continues to be applied for a range of non-violent offences such as drug trafficking and apostasy. Foreigners bear the brunt of this punishment and it is also disproportionately applied to foreigners' children for crimes perpetrated under the age of 18. Amnesty International urged Saudi Arabia to establish a moratorium on executions and review all pending death penalty cases with a view to commuting sentences or providing a new and fair trial without recourse to the death penalty.[233]A number of stakeholders urged for the prohibition of death sentences and

[228] Alkarama UPR Submission, 1-2; see also Human Rights Watch UPR Submission, 2.
[229] Human Rights Watch UPR Submission, 1.
[230] ibid.
[231] ibid 2; JS3 UPR Submission, 2, 6.
[232] Amnesty International UPR Submission, 1, 4.
[233] ibid 3, 5.

recommended the abolition of capital punishment for anyone who was under the age of 18 at the time of the offence as well as raising the minimum age of criminal responsibility.[234]

The Global Initiative to End All Corporal Punishment of Children and Child Rights International Network noted that in its previous UPR, Saudi Arabia accepted recommendations to eliminate capital punishment of under 18s.[235] Despite this, capital punishment for children remains a lawful sentence in the Kingdom and it is one of the three countries in the world which continue to impose the juvenile death penalty.[236] Legislation pertaining to children has been under review since 2006. Islamic law governs the main laws surrounding juvenile justice and the minimum age of criminal responsibility has been increased from seven to twelve years of age. Nevertheless, 'reports are inconsistent and the change does not apply to girls or in qisas cases'.[237] Under the Detention Regulation and the Juvenile Homes Regulation, a juvenile is defined as an individual below 18 years of age however the law does not demand all child offenders to be tried in the juvenile justice system nor does it require judges to have regard for the child's age at the time of the offence when making their decision.

Saudi Arabia's administration of justice and rule of law are of growing concern. JS1 and JS3 highlighted that 'the Public Prosecution of the Specialized Criminal Court lacks independence and is subordinate to the minister of the Interior [and] defendants are tried after years of detention and in proceedings that violate the right to a fair trial'.[238] JS3 also noted that according to the *sharīʿa*, as interpreted in the country, judges are prohibited from accepting confessions made under duress however this is not reflected on ground. Alkarama noted that

[234] Child Rights International Network UPR Submission, 1, 5; Human Rights Watch UPR Submission, 2; Amnesty International UPR Submission, 5; JS3 UPR Submission, 6.
[235] Global Initiative to End All Corporal Punishment of Children UPR Submission, 1; Child Rights International Network UPR Submission, 1; Human Rights Watch UPR Submission, 2.
[236] ibid.
[237] Global Initiative to End All Corporal Punishment of Children UPR Submission, 3.
[238] JS1 UPR Submission, 3, 4; JS3 UPR Submission, 5.

where a confession obtained under torture is the sole evidence in a prosecution, undue importance is given to it despite the fact that a number of torture cases have been reported in the Kingdom. It recommended Saudi Arabia to effectively establish all provisions of the CAT without exceptions.[239]

According to Human Rights Watch, detainees are frequently subjected to systematic violations of due process and rights to a fair trial. Both Human Rights Watch and JS1 recorded similar observations where the Code of Criminal Procedure is not being implemented in practice and thereby resulting in defendants being denied counsel for questioning or the trial itself. There is no body to hear complaints or appeals concerning the legality of detention. Authorities more often than not fail to inform individuals of the crime they are being accused of or present any supporting evidence for why they are being held.[240] JS2 urged for pre-trial detention to be used in exceptional circumstances, in conformity with international human rights standards, and that time limits established by domestic law are strictly adhered to.[241]

Amnesty International stated that Saudi Arabia's national human rights framework is threatened by a flawed criminal justice system. It highlighted the discrimination faced by foreign nationals with no knowledge of Arabic which is the language of interrogation and trial hearings. Authorities often fail to act in accordance with international standards for fair trial and safeguards for such defendants. Moreover, they are often denied adequate interpretation facilities and court hearings generally take place in secret and out of the public eye.[242]

The NGO further observed that the Saudi Human Rights Commission, a governmental body, and the National Society for Human Rights, also formed by governmental decree, are the only

[239] Alkarama UPR Submission, 3-5; JS3 UPR Submission, 5.
[240] Human Rights Watch UPR Submission, 1-2; JS1 UPR Submission, 3.
[241] JS2 UPR Submission, 5.
[242] Amnesty International UPR Submission, 2-3.

two human rights organisations tolerated in Saudi Arabia to the exclusion of all others. Local human rights NGOs have not been authorised to register themselves.[243]

Despite Saudi Arabia's glowing report on its institutional and human rights infrastructure and policies, the narrative told by the stakeholders above illustrates the polarisation of attitudes towards the Kingdom's human rights situation on the ground.

Saudi Arabia's cooperation with human rights mechanisms is another area of concern. Mirroring concerns raised in the OHCHR report, Amnesty International expressed alarm that the Kingdom has not permitted any international human rights organisation or UN bodies to visit the country, for research purposes, in the past four years. This included Amnesty International which has been requesting access over decades.[244] JS1 highlighted that the country repeatedly denied a number of requests by the UN Special Rapporteur to visit. Government reprisals against human rights defenders for their participation and cooperation with UN human rights mechanisms are also on the rise.[245]

The stakeholder report highlighted the deficiencies in Saudi Arabia's legal system which facilitate the application of the death penalty and made recommendations for improvement. However, similar to the first cycle, the stakeholders failed to demonstrate an awareness of the theological underpinnings of the death penalty in Islam and the interpretive plurality present within Islamic law which can significantly reduce the death penalty at the very least. The focus on Islamic law is taken up in Part Two.

3.4.4 The Review

[243] ibid, 1-2.
[244] ibid.
[245] JS1 UPR Submission, 2, 9-10. See also JS2 UPR Submission, 2-5; Human Rights Watch UPR Submission 2; International Publishers Association UPR Submission 2-3.

3.4.4.1 Interactive Dialogue

The review of Saudi Arabia took place on 21 October 2013 during the 17th session of the Working Group on the Universal Periodic Review.[246] In its presentation, Saudi Arabia affirmed its commitment to the protection and promotion of international human rights. It highlighted its cooperation with other bodies by stating that it prepared its second UPR report through cross-collaboration with government authorities, civil society organisations, human rights activists, and academics.[247] Once again, it failed to disclose any further details regarding such consultations.

Echoing its views from the first UPR report, the Kingdom explained the vital role the Basic Law of Governance plays in safeguarding human dignity and protecting fundamental rights and freedom. The Basic Law ensures the state protects human rights in conformity with Islamic law.[248] Furthermore, the independence of the judicial authority 'provides sufficient guarantees to establish fairness and protect rights of everyone, through accountability and according to fair and impartial laws'.[249]

A list of questions prepared in advance were submitted by Belgium, Czech Republic, Germany, Netherlands, Norway, Slovenia, Spain, United Kingdom and the United States of America.

[246] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (26 December 2013) UN Doc A/HRC/25/3 [hereinafter Saudi Arabia Working Group Report 2].
[247] Saudi Arabia Working Group Report 2, para 8.
[248] ibid para 9.
[249] UNHRC, 'Report of the Human Rights Council on its Twenty-Fifth Session' (27 May 2014) UN Doc A/HRC/25/2, para 395.

From these, five (Sweden,[250] United Kingdom,[251] Belgium,[252] Czech Republic,[253] and Spain[254]) made specific reference to the death penalty whilst others questioned the Code of Criminal Procedure and fair trial procedures such as Slovenia[255] and the United States.[256] None of these states addressed the death penalty from a theological perspective which suggests a lack of awareness in this area.

During the interactive dialogue stage, 102 delegations took the floor to deliver statements. Saudi Arabia accepted a total of 151 out of 225 recommendations.[257] Eighteen countries issued a total of 20 recommendations on the issue of capital punishment but only two were accepted and the rest noted.[258] This was more than double the amount of recommendations received on capital punishment compared to the previous cycle which highlights a greater engagement and awareness on this issue.

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[250] Does the Kingdom of Saudi Arabia contemplate any measures to introduce a moratorium on the application of the capital punishment with a view to abolish it? Are there any plans to revise the application of penalties with a view to abolish the above types of punishments?

[251] We welcome the positive measures taken to define 18 as the age of majority. What more is being done to prevent individuals under the age of 18 years from facing the death penalty and those under 16 years from marrying, and, accordingly, has the Code of Criminal Practice been amended in line with our previous, and accepted, recommendation?

[252] How many individuals are currently on death row? Of those, how many are foreign nationals? How many of those on death row have children, and how many children are affected in this way? What support is provided to these children?

[253] What kind of specific measures are available in the justice system to protect the rights of minors? Is there a respective legal provision safeguarding that the juvenile offenders under the age of 18 are not executed?

[254] Since Saudi Arabia rejected the recommendation made during the last UPR to introduce a moratorium on the application of the death penalty; do Saudi Arabian authorities consider limiting the scope of the application of the death penalty? Do they consider limiting the application of the death penalty to serious crimes only, excluding its application in apostasy and drug trafficking cases?

[255] Slovenia understands that Saudi Arabia has no penal code and no system of binding judicial precedents and that determination and severity of punishments can vary with a judge's interpretation of Shari'a law. Where can one find precise definitions of cognizable criminal offences?

[256] We are concerned that authorities have arrested numerous individuals on security related charges and have detained these individuals for long periods without access to legal counsel. What measures is the Saudi government taking to ensure that individuals are afforded due process of law, including a clear and timely description of charges against them, access to counsel, and minimum fair trial guarantees?

[257] See 'Database of Recommendations' (*UPR-Info*) <www.upr-info.org/database/> accessed 1 October 2016. The number of recommendations that translated into domestic legal change are as follows: 1 fully implemented; 9 partially implemented; and 64 technically implemented with little or no substantive impact (ADHRB, *A Midterm Report on Saudi Arabia's UPR Second Cycle: Analyzing Saudi Arabia's Refusal to Reform* (June 2016)).

[258] The recommending states on the issue of capital punishment were: Albania, Australia, Austria, Brazil, Canada, Czech Republic, France, Germany, Italy, Lithuania, Norway, Paraguay, Poland, Slovakia, Slovenia, Spain, Sweden and Switzerland.

These recommending states were largely from the EU and Commonwealth, expressing concern at the use of the death penalty, the lack of due process and the absence of a written criminal code. It is important to note that the death penalty has been abolished in the European Union and is enshrined in the European Convention on Human rights[259] hence EU states' recommendations are reflective of this.

Sweden and Slovakia remained concerned about the increased number of executions, including the application of the death penalty for minors.[260] Spain expressed regret that Saudi Arabia failed to comply with commitments concerning the rights of persons sentenced to death particularly children.[261]

In response to the comments and questions received, Saudi Arabia stated that:

> [T]he Code of Criminal Procedure contained all the safeguards needed to protect the rights of the accused persons, such as the right to a lawyer during investigation and trial, the right to a fair and public trial and the right to be present when the judgement is handed down. The statutory procedures ensure that juveniles are treated in a manner consistent with their age.[262]
>
> [T]he death penalty is imposed only for the most serious crimes and strict procedures are applied to safeguard human rights when the death penalty is imposed insofar as the judgements are received by three judges at the three levels of jurisdiction, in a manner consistent with international standards. Saudi Arabia notes that international law does not prohibit capital punishment if it is imposed in

[259] See Jon Yorke and Christian Behrmann, 'The European Union and the Abolition of the Death Penalty' (2013) 4 Pace International Law Review 1.
[260] Saudi Arabia Working Group Report 2, paras 116, 124.
[261] ibid para 120.
[262] ibid para 63.

> accordance with international standards. It requests states to consider all aspects of this issue in view of the considerable disparity between viewpoints thereon.[263]

Saudi Arabia's insistence on retaining the death penalty is justified here on the basis of international law. Whilst it is true that international law, specifically ICCPR Article 6, does not explicitly prohibit the death penalty, it is clear that it envisioned its eventual abolition, as noted by the Human Rights Committee:

> States parties that are not yet totally abolitionist should be on an irrevocable path towards complete abolition of the death penalty de facto and de jure, in the foreseeable future…It would appear to run contrary to the object and purpose of article 6, paragraph 5 for States parties to increase de facto the rate and extent in which they resort to the death penalty, and to reduce the number of pardons and commutations they grant. [264]

The UK expressed its disappointment over Saudi Arabia's non-implementation of recommendations from the previous UPR cycle. It also regretted Saudi Arabia's 'failure to meet treaty body reporting deadlines and the lack of access for several Special Rapporteurs'.[265] Colombia however noted Saudi Arabia's 'commitment to making progress in implementing the recommendations from the first cycle of the UPR'.[266] This is contradictory to UK's statement showing a stark contrast in states' level of engagement in the process. It also brings into question whether states have a genuine interest in the UPR, as a platform for the protection of human rights, or whether they simply view it as a formality.

[263] ibid para 97(a).
[264] UN Doc CCPR/C/GC/R.36/Rev.2, para 52.
[265] Saudi Arabia Working Group Report 2, para 30.
[266] ibid para 58.

The only two death penalty recommendations accepted by Saudi Arabia were received from Italy and Australia. Italy recommended that Saudi Arabia 'carry out further efforts to increase the transparency and openness of legal proceedings contemplating deaths sentences'[267] and Australia recommended that Saudi Arabia 'implement legal reforms recognizing a legally-defined age of minority that prevents early and forced marriage, detention of minors as adults and exposure of minors to the death penalty'.[268] It is not surprising that these two recommendations were accepted because firstly, they did not require any substantive change to the death penalty laws and secondly, requesting a state to 'carry out further efforts' without defining what this encompasses or without providing a measurable outcome is akin to asking it to 'improve the human rights in the country'. In other words, easy to accept without requiring any tangible efforts.

Thirty-six recommendations were partially endorsed meaning 187 recommendations in total were fully or partially accepted. Four recommendations were partially endorsed on capital punishment. These were submitted by Switzerland,[269] Austria,[270] Norway,[271] Lithuania,[272] and France.[273] Saudi Arabia failed to clarify what parts were accepted but it is most probably those parts that do not require the state to abolish the death penalty such as 'bring the law and judicial

[267] ibid recommendation 138.123.
[268] ibid recommendation 138.152.
[269] 138.126 Abolish the death penalty for all individuals considered as minors under international law (Switzerland); ensure that capital punishment is not imposed for offences committed by persons under 18 years of age (Austria).
[270] ibid.
[271] 138.130 End the practice of executing children and bring the law and judicial practices into line with fair trial guarantees in international standards.
[272] 138.124 Establish a moratorium on the use of the death penalty with a view to abolition, and in the meantime, immediately stop imposing the death penalty on anyone under the age of 18; bring the law and judicial practices in line with international fair trial guarantees and reduce the number of crimes which carry the death penalty as sanction.
[273] 138.125 Establish alternative punishments to the death penalty and suspend the application of the death penalty for less serious offences and for people who were minors at the time of their crimes, in the perspective of a moratorium on executions.

practices into line with fair trial guarantees in international standards'[274] or 'suspend the application of the death penalty for people who were minors at the time of their crimes'.[275]

The Kingdom clarified that full or partial endorsement of recommendations is in line with the principles of Islamic law which protect human rights; and partial endorsement highlights its approval of only part of the recommendation 'or its approval of the objective of the recommendation while holding a differing opinion concerning the manner of its implementation or the requisite timeframe thereof'. On the other hand, the non-endorsement of recommendations may signify incompatibility with Islamic law, failure to reflect the current reality, matters that are beyond the scope of the review, and/or inclusion of false allegations.[276] This suggest that the idea of a moratorium or abolition of the death penalty is incompatible with Islamic law which is challenged in Part Two of this study.

In responding to the recommendations on capital punishment, Saudi Arabia reiterated that the death penalty is imposed only for the most serious crimes as previously mentioned in paragraphs 34, 35, and 38 of its national report. The Kingdom's regulations, the Statue of the Judiciary, and the Code of Criminal Procedure are all consistent with international standards and include safeguards that ensure a fair trial.[277] The Code of Criminal Procedure has been amended to make it more consistent with international standards.[278] Relying on the notion of 'most serious crimes' and claiming adherence to international human rights standards is a misleading and inaccurate argument by the state. Saudi Arabia imposes the death penalty for crimes that do not meet the most serious threshold and neither does it explain what the

[274] Saudi Arabia Working Group Report 2, recommendation 138.124.
[275] ibid recommendation 138.125.
[276] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia: Addendum' (28 February 2014) UN Doc A/HRC/25/3/Add.1, para 4.
[277] ibid para 14.
[278] ibid para 8.

amendments to the Criminal Code are. We are therefore prevented from knowing the true extent of its conformity with international standards.

The state further explained that, 'no authority is empowered to modify or abolish the legally established fixed penalties (hudud) prescribed in the Islamic sharia'.[279] Whilst the *ḥudūd* are indeed a part of Islamic law, this answer fails to acknowledge the interpretive plurality of such a tradition. Different schools of law have laid down differing criteria as to what can be categorised as a capital crime, and this is demonstrated in Part Two.

Furthermore, in an effort to downplay its use of capital punishment, the state mentioned that the judiciary tends to waive capital punishment charges in accordance with the *ḥadīth* (prophetic narration) which states: 'Ward off the hudud (fixed penalties) with specious argument'.[280] This is an important *ḥadīth* that shows Islam does not insist on applying the death penalty. It also demonstrates the reluctance of imposing capital punishment for fixed offences; hence, it is argued, the prohibition for discretionary offences should be greater. Although classical jurists used a number of procedural hurdles to avoid the death penalty, including the concept of doubt (*shubha*) and repentance (*tauba*), as discussed in Part Two, this is not reflected in Islamic state practice. For example, Saudi Arabia executed 146 individuals in 2017 alone.[281] Instead the state is protecting its sovereign right to apply the death penalty by using religion as a false pretext.

The Kingdom also emphasised that the death penalty is not imposed for minors and children. Specific criteria such as age is taken into account by the Kingdom's judiciary in order to determine criminal responsibility and 'the Kingdom's legislation defines a child in a manner

[279] ibid para 7.
[280] ibid para 14.
[281] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 6.

consistent with Article 1 of the Law on the Rights of the Child'.[282] Islamic law provides various interpretations for the age of criminal liability[283] however Saudi Arabia has adopted a more liberal interpretation that sets the age to 18 years. This is a welcome change in the protection of juveniles against the death penalty however the state under review should also embrace a more enlightened reading of *fiqh* that will protect *all* individuals against a sentence of death.

3.4.4.2 Adoption of the Outcomes

Thirteen states made statements during the adoption of the outcome of the review: Lebanon, Libya, Malaysia, Montenegro, Morocco, Oman, Pakistan, Philippines, Qatar, Senegal, South Sudan, Sri Lanka, and Egypt. All these countries expressed their appreciation and support to Saudi Arabia, congratulating and applauding its efforts to promote and strengthen human rights locally and globally. There was no mention of the right to life or the use of capital punishment. The silence on the state's use of the death penalty is quite telling especially since nine of these states belong to the OIC and/or Arab League, all of which retain the death penalty. The laudatory comments are also reflective of using regionalism to protect allied states from scrutiny. Montenegro was the only state to provide some constructive criticism encouraging the state to strengthen its legislative framework 'in accordance with international law standards, particularly the ICCPR and its optional protocols'.[284]

Other relevant stakeholders also made comments at the plenary session. Amnesty International expressed regret that Saudi did not provide any explanations in its report, as it indicated it would, for which parts of the partially accepted recommendations it rejects.[285] As a result, Saudi Arabia's stance on these recommendations remains questionable since there is no real

[282] ibid para 15.
[283] See Chapter 5.
[284] UNHRC, 'Report of the Human Rights Council on its Twenty-Fifth Session' (27 May 2014) UN Doc A/HRC/25/2, para 406.
[285] Amnesty International Oral Statement (19 March 2014) 3.

and tangible response. This hinders the review process as it prevents substantive discussion taking place and achieving a solution.

The organisation also stated that the death penalty continues to be applied to juveniles and for a wide range of non-lethal offences. The Indian Council of South America recommended the establishment of a moratorium on the death penalty with the state seeking to explore alternative avenues to such a punishment.[286]

Human Rights Watch expressed regret that Saudi Arabia missed an important chance created by the UPR to 'make concrete pledges to address important human rights shortcomings raised by many states during the UPR debate'.[287] UN Watch noted that the UPR aims to scrutinise the human rights record of every UN Member State in order to protect and promote human rights however it is questionable whether the report on Saudi Arabia actually lives up to this goal.[288] A number of statements made by delegations such as Chad,[289] Iraq,[290] Vietnam,[291] and Yemen[292] indicate towards a glowing human rights record of Saudi Arabia and it is worth asking if these statements are indeed an accurate and comprehensive portrayal of the human rights situation on the ground.

Such generic statements of praise undermine the UPR process as they illustrate a lack of understanding of the UPR framework, highlight political and regional biases, and show state

[286] UN Doc A/HRC/25/2, para 419-20.
[287] Human Rights Watch Oral Statement (19 March 2014) 1.
[288] UN Watch Oral Statement (19 March 2014) 1.
[289] 'Chad appreciated Saudi Arabia's accession to a significant number of international human rights instruments.'
[290] 'Iraq welcomed Saudi Arabia's accession to OP-CRC-SC, OP-CRC-AC and ILO Convention No. 138. It commended the efforts to promote and protect human rights.'
[291] 'Viet Nam noted with appreciation the achievements in the protection of cultural and social rights. It also welcomed the efforts to eliminate trafficking in persons, anti-corruption and combating discrimination, and highlighted difficulties and challenges.'
[292] 'Yemen commended the measures to ensure women's participation as candidates in elections, decision-making and access to managerial positions in employment, and noted measures to protect children from violence.'

engagement with the process to be superficial and symbolic rather than effective and substantive.

In the Kingdom's concluding remarks, the state delegate took the opportunity to 'reaffirm, *firstly*, that the Kingdom of Saudi Arabia is proud to abide by the Islamic sharia and we are also proud to be a member of this distinguished Council'.[293] This is an expression of theocratic sovereignty with the state, in essence, declaring that it abides by the transcendent power, and not a secular one. The delegate further emphasised that consideration of cultural diversity is needed for the success of the UPR as:

> The difference between cultures of the world is an undeniable fact and an inevitable reality and the attempts to impose certain cultures on communities in matters of human rights brings more harm than good to those same human rights. Hence, it is necessary to take into account the cultural diversity and reinvest it in the protection and promotion of human rights, and that this should be considered as part of the concept of 'universal human rights'.[294]

In fact, Libya also noted that specific recommendations did not enjoy the support of Saudi Arabia due to 'religious, cultural specificity and social regards'.[295] Cultural relativism can be seen at play here. The notion of cultural relativism is a common challenge to the idea of human rights being inalienable and applicable to all. What may be considered a universal norm in human rights by the West will not necessarily be applicable in other cultures.[296]

The idea of cultural relativism is further highlighted when examining the recommendations received from Muslim majority states over both cycles. During the first cycle, it is interesting

[293] UN Doc A/HRC/25/2, para 426 (emphasis added).
[294] ibid; Saudi Arabia Oral Statement (19 March 2014) 16.
[295] UN Doc A/HRC/25/2, para 403.
[296] Anthony Langlois, 'Normative and Theoretical Foundations of Human Rights' in Michael Goodhart (ed), *Human Rights: Politics and Practice* (Oxford: OUP 2009) 19.

to note that Saudi Arabia received the majority of recommendations from OIC and Arab League states, constituting a total of 37 recommendations. What is more interesting is that *all* of these recommendations were accepted by Saudi Arabia (emphasis added). Eighteen of them fell under category 1 or 2 and were therefore generic in nature, for example, Oman: 'continue efforts and endeavours to improve overall human right's protection in the country'[297] and Azerbaijan: 'continue efforts and endeavours to improve overall human rights protection in the country'.[298] None were on capital punishment.

As a recommending state, Saudi Arabia made a total of 78 recommendations during the first UPR cycle. Fifty-six of these recommendations were made to states belonging to the Arab League and/or OIC and all 56 were accepted by the state under review. Interestingly, 38 of these recommendations were either category one or two recommendations therefore not requiring concrete action. It is evident that states are not investing enough time and effort into the process and failing to understand the purpose for which the UPR was created.

During the second cycle, Saudi Arabia made a total of 120 recommendations, of which 59 were made to Arab League and/or OIC states. All 59 were accepted. As a state under review, it received 78 recommendations from Arab League and/or OIC states. Sixty-four were accepted and 14 noted. One recommendation was received on the death penalty from an OIC state, Albania, to 'abolish juvenile death penalty and corporal punishment'. This, however, was not accepted.

As discussed in Chapter 2, the Arab Charter contains the right to life however Articles 6 and 7 permit the death penalty for the most serious crimes and for under 18s if stipulated in the laws in force at the time of the crime. Similarly, the Cairo Declaration on Human Rights in Islam prohibits taking away the right to life unless it is for a *sharīʿa*-based reason. Although state

[297] Saudi Arabia Working Group Report 1, recommendation 87.8.
[298] ibid.

interaction with these regional instruments has been minimal, their silence on the death penalty indicates a sense of regionalism at the UPR.

3.5 Mid-term Update

Saudi Arabia did not submit a mid-term report in its first UPR. Although this is optional, it does suggest a lack of genuine engagement with the process. Nevertheless, in June 2016, ADHRB issued a 120-page long midterm report on Saudi Arabia's implementation of its accepted recommendations from the second cycle. Of the 187 recommendations fully or partially endorsed, 113 were identified as not having been implemented. This included the recommendations relating to the use of capital punishment and the right to a fair trial. A number of concerning cases were also highlighted to demonstrate the state's continued use of the death penalty in violation of fair trial standards.

In May 2012, Dawood Hussein al-Marhoon and Abdullah Hasan al-Zaher were arrested for participating in anti-government rallies. They were 17 and 16 years old at the time.[299] Two years later, in 2014, Ali al-Nimr was sentenced to death for crimes committed when he was 17 years old. This included non-violent offences such as 'going out to a number of marches, demonstrations and gatherings'.[300] In October of the same year, two other individuals were also sentenced to death for crimes committed as minors.[301]

[299] 'Saudi Arabia: Fears grow that three young activists could soon be executed' (*Amnesty International*, 16 October 2015) <www.amnesty.org/en/latest/news/2015/10/saudi-arabia-three-young-activists-could-soon-be-executed/>; Michael Kaplan, 'Who Is Abdullah Al-Zaher? Saudi Arabian Teenager Set for Execution by Beheading for Anti Government Protest' (*International Business Times*, 21 December 2015) <www.ibtimes.com/who-abdullah-alzaher-saudi-arabian-teenager-set-execution-beheading-anti-government-2234466> accessed 12 October 2016.

[300] 'Saudi Arabia Must Not Execute Ali Mohammed Baqir al-Nimr' (*Amnesty USA*) <https://act.amnestyusa.org/ea-action/action?ea.client.id=1839&ea.campaign.id=42755>.

[301] 'Saudi Arabia: Fears grow that three young activists could soon be executed' (*Amnesty International*, 16 October 2015) <www.amnesty.org/en/latest/news/2015/10/saudi-arabia-three-young-activists-could-soon-be-executed/> accessed 12 October 2016.

The families of the accused argued that fair trial guarantees were not upheld and confessions were obtained under torture.[302] The individuals were denied access to legal counsel for their trials which is in clear contravention to Saudi Arabia's obligations under the Convention on the Rights of the Child, namely 'every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'.[303]

On 2 January 2016, 47 prisoners were executed including two individuals who were minors at the time of the alleged offence. Mustafa Akbar, a Chadian national, was amongst them and was arrested in 2013 at the age of 13. A Saudi court sentenced him to death in 2014, eleven years after his arrest and without recourse to legal counsel. The case has been described as 'completely secret' by Al Qst, a Saudi human rights organisation.[304]

Mishaal al-Faraj was another individual executed on 2 January for purportedly joining Al-Qaeda in 2004 when he was 17 years old. His detention was accompanied with reports of torture, no access to a lawyer and being held for years without trial.[305] A third individual was executed a month after the mass execution, Ali Saeed al-Rebh. He was sentenced to death for allegedly participating in protests when he was 17.[306]

Although Saudi Arabia accepted a recommendation to increase the transparency and openness of death penalty cases, ADHRB reports no improvement on the matter. Trials are still being held in secret even when there are no exceptional circumstances as identified in Article 55 of

[302] Adam Coogle, 'Saudi Arabia's Troubling Death Sentence' (*Human Rights Watch*, 26 September 2015) <www.hrw.org/news/2015/09/26/saudi-arabias-troubling-death-sentence> accessed 12 October 2016.
[303] Convention on the Rights of the Child, art 37(d).
[304] Rori Donaghy, 'REVEALED: Juvenile prisoners and mentally ill killed in Saudi executions' *Middle East Eye* (London, 8 January 2016) <www.middleeasteye.net/news/untold-story-prisoners-arrested-children-and-mentally-unwell-inmatesexecuted-saudi-8396661> accessed 12 October 2016.
[305] ibid.
[306] 'Juvenile protester was among Saudi mass-execution victims, new information shows' (*Reprieve*, 25 January 2016) <www.reprieve.org.uk/press/juvenile-protester-was-among-saudi-mass-execution-victims-new-informationshows/> accessed 12 October 2016.

the Law of Criminal Procedure. Defendants in death penalty cases are rarely provided legal counsel nor are they regularly informed of the progress of their case.[307]

ADHRB notes that:

> The increasing use of the Specialized Criminal Court (SCC) to adjudicate cases involving the death penalty has exacerbated this lack of transparency, as the SCC has more expansive authorities by which to conduct trials in secret and in the absence of the accused. Since the start of Saudi Arabia's second UPR cycle, the SCC has sentenced several men to death after closed legal proceedings.[308]

It is clear that Saudi Arabia must do more to improve its human rights situation namely protecting the right to life and utilise the UPR mechanism effectively in order to do so.

3.6 Conclusion

This chapter analysed Saudi Arabia's engagement with the UPR, its justification for the use of the death penalty, and the manner in which principal actors such as stakeholders and the OHCHR address this human rights violation.

As a Kingdom whose legal structures are based primarily on Islamic law and principles, this is clearly reflected in the state's interaction in the UPR and its constant references to the *sharīʿa* in its national reports. During its first review, Saudi Arabia remained silent on the issue of the death penalty whilst stakeholders used the UPR platform to make transparent the human rights violations on the right to life. A number of them addressed the fact that due to a lack of codified laws, the law is based on the judge's interpretation of the *sharīʿa* which can be flexible and lead to arbitrary outcomes.

[307] Americans for Democracy & Human Rights in Bahrain & Bahrain Institute for Rights & Democracy, 'A Midterm Report on Saudi Arabia's UPR Second Cycle: Analyzing Saudi Arabia's Refusal to Reform' (June 2016) 77.
[308] ibid 78.

In its second review, after receiving much attention on its questionable use of the death penalty, Saudi Arabia finally addressed this issue in its national report. It argued that 'there is no leeway for interpretation' when it comes to the death penalty in Islam, thus reinforcing its pro death penalty stance. It failed to embrace or acknowledge an alternative reading of Islamic law and promote the prominence of peace and mercy in the sacred texts.

CHAPTER FOUR:

CASE STUDY: SUDAN

4. Case study: Sudan

4.1 Introduction

Sudan is another retentionist state that continues to apply the death penalty albeit to a lesser degree than Saudi Arabia. Amnesty International reported at least 18 death sentences in 2015,[1] 21 death sentences in 2016,[2] and 17 death sentences in 2017.[3] Two executions were recorded in 2016 and none were reported to have occurred in 2017 which shows a possible trajectory towards *de facto* abolition in the future.

The death penalty has remained a distinctive feature of Sudan's penal system prior to the country's independence through to President Bashir's reign as discussed below. This chapter serves two purposes: (1) to provide the historical background of the death penalty in Sudan, and; (2) to analyse the extent to which Sudan maintains its sovereign right to impose capital punishment in its Universal Periodic Review of 2011 and 2016 respectively.

4.2 A complex history

Prior to a single unified government or administration, different kingdoms dominated Sudan such as the Funj Kingdom of Sinnar (1504-1821) and the Dar Fur Sultanate (1650-1916).[4] The justice system in Sinnar was largely based on customary law, as interpreted by the Sultan or provincial kings, with a limited knowledge of the *sharīʿa*.[5] Judges (*qāḍīs*) did not play an important role in the early phase of the Kingdom.[6] The death penalty was the exclusive prerogative of the King who issued judgements on all capital cases.[7] All persons found guilty

[1] Amnesty International, *Global Report: Death Sentences and Executions 2015* (2016) 6-7.
[2] Amnesty International, *Global Report: Death Sentences and Executions 2016* (2017) 5.
[3] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 7.
[4] PM Holt and MW Daily, *A History of the Sudan: From the Coming of Islam to the Present Day* (5th edn, New York: Longman 2000) 22-47.
[5] Jay Spaulding, 'The Evolution of the Islamic Judiciary in the Sinnar' (1977) 10(3) The International Journal of African Historical Studies 408, 411-12.
[6] ibid 411.
[7] ibid; Jay Spaulding, *The Heroic Age of Sinnar* (East Lansing: Michigan State University Press 1985) 6.

by the King were executed, irrespective of the magnitude of the crime.[8] A visitor to the Sinnar in 1523 observed: 'Whoever commits a fault, be it great or small, is slain; and every day they have courts of justice'.[9]

During the end of the sixteenth century, a centre of Islamic justice based on one of the four sunnī schools of law, the Mālikī school, began to develop and reached its peak in the 1700s.[10] The Mālikī doctrine was taught and disseminated by scholars from Hijaz, Egypt, and West African pilgrims alongside a minority of Shāfiʿīs.[11] The institution of *qāḍīs* gradually rose to prominence, however, intentional homicide and other capital crimes continued to be tried by the King himself. In cases of intentional homicide, the judge would provide the victim's heir the choice of blood money but if he insisted on the killer's execution then the case would be handed over to the King. The killer was then executed immediately.[12]

In the Dar Fur Sultanate, similar to the Sinnar, Islamic law existed alongside customary law but to a lesser extent.[13] The King would consult with a group of *fuqarā'* (Islamic jurists) before dispensing justice whilst crimes were resolved internally in village communities. Fines played a dominant role in the Fur and were paid for homicide, theft, adultery, and libel. However, persons found guilty of intentional homicide were sent to al-Fashir for execution and were hanged or beaten to death.[14] Despite the presence of *fuqarā'* in Dar Fur, penal law appears to

[8] ibid.
[9] Sigmar Hillelson, 'David Reubeni, An Early Visitor to Sennar' (1933) 16(1) Sudan Notes and Records 55, 57.
[10] Carolyn Fluehr-Lobban, *Islamic Law and Society in the Sudan* (Abingdon: Routledge 2008) 23-26.
[11] Sean O'Fahey and Jay Spaulding, *Kingdoms in the Sudan* (London: Methuen Young Books 1974) 73.
[12] Spaulding, 'The Evolution of Islamic Judiciary', 415, 418.
[13] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan' in Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Surrey: Ashgate Publishing 2011) 39. See also O'Fahey, *The Darfur Sultanate: A History* (London: Hurst 2008) 212.
[14] Olaf Köndgen, *The Codification of Islamic Criminal Law in the Sudan: Penal Codes and Supreme Court Case Law under Numayri and al-Bashir* (Leiden: Brill 2017) 31-32.

have operated entirely under customary law with Sean O'Fahey and MI Abu Salim observing that, 'there is no evidence that sharia punishments were ever imposed'[15] in this Sultanate.

Sudan as a 'unified geopolitical entity, with all its social, cultural, ethnic and political diversity'[16] emerged in 1821 with the invasion of the Ottoman ruler of Egypt, Khedive Mohamed Ali.[17] The Turko-Egyptian administration brought a strong influence of the Ḥanafī school into Sudan but this was limited to the law of personal status and family relations such as marriage and inheritance.[18] The criminal law was secular in nature and administered by criminal courts.[19] Zaki Mustafa argues that '[o]ne cannot say with any degree of certainty what law was applied during that period, the innumerable documents available in the Abidn Archives in Cairo show that *sharīʿa* was applied in some cases whereas Egyptian military and civil codes were applied in others'.[20] The paucity of studies of this area can be attributed to the Mahdi's army which destroyed the relevant archives.[21]

The oppressive regime of the Ottoman rule paved the way for the Mahdist uprising (1881-1898) led by Muhammad Ahmad b. Abdallah, the self-proclaimed 'Mahdi', who sought to emancipate the country from foreign rule of the Turks and impose the *sharīʿa* for the general governance of Sudan.[22] After a successful military campaign, the Mahdi imposed a dominant and subjugating system of rule through a literal application of the Qurʾān and *sunna*. This was complemented by his legal directives (*manshūrāt qawāʿid al-aḥkām*), and later, of his

[15] Sean O'Fahey and MI Abu Salim, *Land in Dar Fur* (Cambridge: CUP 1983) 9.
[16] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 39.
[17] See generally PM Holt, *The Mahdist State in the Sudan 1881-1898* (Oxford: Clarendon Press 1958).
[18] Fluehr-Lobban, *Islamic Society in the Sudan*, 4-6.
[19] Holt and Daily, *A History of the Sudan*, 41-51; Fluehr-Lobban, *Islamic Society in the Sudan*, 30.
[20] Zaki Mustafa, *The Common Law in the Sudan: An Account of the 'Justice, Equity and Good Conscience' Provision* (Oxford: Clarendon Press 1971) 37. See also Richard Hill, *Egypt in Sudan 1820-1881* (Oxford: OUP 1959) 43-44.
[21] Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 33.
[22] Holt, *The Mahdist State in the Sudan 1881-1898*, 114.

successor, Khalifa Abdallah (r. 1885-1898).[23] PM Holt notes that the Mahdi's *manshūrāt* frequently contradicted the traditional sunnī schools of law. For example, women entering public places were punished with 100 lashes and smoking also carried a penalty of 100 lashes which was more severe than the punishment for consuming alcohol.[24] Crimes such as intentional homicide, adultery, and blasphemy were all deemed capital offences.[25] Financial compensation in cases of unintentional homicide was replaced with the mandatory punishment of *qiṣāṣ*.[26] The death penalty, amputations, and life imprisonment were common punishments with the latter also inflicted on judges who dared to dissent against the Khalifa's authority.[27]

The Mahdist rule played a significant historical role as the first coordinated attempt to apply *sharīʿa*, albeit questionably, in Sudan.[28] The conquest of Sudan by Anglo-Egyptian forces in 1898 marked the end of the Mahdist rule and established the Anglo-Egyptian condominium agreement. The new administration introduced the Penal and Criminal Procedure Codes of 1899 which were based on Anglo-Indian colonial legislation and adapted to Sudanese conditions.[29] This was the first codification of criminal laws in modern Sudan and did not incorporate any *sharīʿa* elements.[30] The death penalty remained a prevalent feature of

[23] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 40. See also Aharon Layish, 'The Legal Methodology of the Mahdi in The Sudan, 1881-1885: Issues in Marriage and Divorce' (1997) 8 Sudanic Africa 37, 39.
[24] Holt, *The Mahdist State in the Sudan 1881-1898*, 114-15.
[25] Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 34-35; Safia Safwat, 'Islamic laws in the Sudan' in Aziz Al-Azmeh (ed), *Islamic Law, Social and Historical Contexts* (New York: Routledge 1988) 236.
[26] ibid.
[27] See Omar Al-Fahal Al-Tahir, 'The Administration of Justice during the Mahdiya' (1964) Sudan Law Journal and Reports, 167-70.
[28] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 41. For the 'fundamentalist' features of *Mahdist* law see, Bleuchot, 190-97; Zaki Mustafa, *The Common Law in the Sudan: An Account of the 'Justice, Equity, and Good Conscience' Provision* (Oxford: Clarendon Press 1971) 39; Fluehr-Lobban, *Islamic Society in the Sudan*, 32-33.
[29] Gabriel Warburg, *The Sudan under Wingate* (London: Frank Cass 1971) 126; Francis M Deng, *Customary Law in the Modern World: The Crossfire of Sudan's War of Identities* (London: Routledge 2010) 9-10; Jeffrey Adam Sachs, '"Native Courts" and the Limits of the Law in Colonial Sudan: Ambiguity as Strategy' (2013) 38 Law and Social Inquiry 973, 978; Salman MA Salman, 'Lay Tribunals in the Sudan: A Historical and Socio-Legal Analysis' (1983) 21 Journal of Legal Pluralism, 66.
[30] Mustafa, *The Common Law in the Sudan*, 43-46; Egon Guttmann, 'The Reception of Common Law in the Sudan' (1957) 6(3) International and Comparative Law Quarterly 401, 405.

sovereign power in this period and was provided for under Articles 41 and 42 of the Penal Code:

> 41. The punishments to which offenders are liable under the provisions of this Code are first, death; secondly, forfeiture of property; thirdly, imprisonment; fourthly, fine; fifthly, flogging; sixthly, whipping.
>
> 42. In every case in which sentence of death shall have been passed, the Governor General may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.[31]

After Sudan's independence in 1956, the role of *sharīʿa* in the legal system became more prominent especially after the military coup of Colonel Jafar Nimeiry in 1969.[32] The status of the death penalty evolved to take on a more 'Islamic' role. The first permanent Constitution of Sudan was instated in 1973 with Article 9 expressing that:

> The Islamic law and custom shall be main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws.

Provisions for the death penalty remained, although restricted in application, under Articles 74 and 75:

> Any person sentenced to death is entitled to apply for pardon or commutation of the sentence. Mercy, pardon and commutation of the death sentence may be granted in all cases.

[31] Sudan Penal Code 1899, 30 available at <https://archive.org/details/sudanpenalcode00sudaiala/page/n3> accessed 30 July 2017.
[32] Nasredeen Abdulbari, 'Identities and Citizenship in Sudan: Governing Constitutional Principles' (2013) 2 African Human Rights Law Journal 383, 395.

> No person under eighteen years of age shall be sentenced to death and such sentence shall not be executed on women who are pregnant or suckling their babies unless two years of suckling have lapsed.

Numayri tasked a three-member committee to Islamize Sudanese law[33] and in September 1983, he declared *sharīʿa* as 'the sole guiding force behind the law of the Sudan'.[34] Numayri's presidential decrees became known as the 'September Laws'[35] and incorporated *sharīʿa* crimes into Sudanese law based on the committee's work. As a result, the Penal Code of 1983, which drew heavily on its 1974 predecessor, introduced the Islamic punishments of *ḥudūd* and *qiṣāṣ*. This included stoning, crucifixion, and retaliatory punishments[36] and signalled the first instance where the use of the death penalty, based on Islamic law, was made constitutional.

It is important to note that two of the committee members, Abū Qurūn and al-Jīd, did not have specialist training in Islamic jurisprudence (*fiqh*) which resulted in a high degree of inconsistency between the *fiqh* and the Penal Code of 1983.[37] For example, contrary to the strict *fiqh* requirement of four male witnesses to the act of unlawful sexual intercourse (*zinā*), the testimony of others was also acceptable.[38] Olaf Köndgen notes that:

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[33] The committee consisted of al-Nayāl 'Abd al-Qādir Abū Qurūn, the son of a prominent Sufi master of the Qādiriyya brotherhood in Abū Qurūn; 'Awaḍ al-Jīd Aḥmad, a former legal assistant of the attorney general Zakī Muṣṭafā; and Badriyya Sulaimān, a provincial judge. Abū Qurūn and al-Jīd were law graduates from the University of Khartoum in the early 1970s. Abdelwahab AM Osman, 'The Political and Ideological Development of the Muslim Brotherhood in Sudan, 1945-1986' (DPhil thesis, University of Reading 1989) 266; Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 51.

[34] Ann Mosely Lesch, *The Sudan-Contested National Identities* (Bloomington: Indiana University Press 1998) 55.

[35] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 46.

[36] The total number of punishments in the 1983 Penal Code more than doubled from six to thirteen, reflecting the Islamization of the Code. The original six in the 1974 Code included: (1) death, (2) forfeiture of property, (3) imprisonment, (4) detention in a reformatory, (5) fines, and (6) flogging. The extra seven listed in the 1983 Code were: (1) compensation as an additional ta'zir punishment, (2) execution with or without crucifixion, (3) stoning, (4) amputation, (5) amputation and cross-amputation, (6) full or reduced diya (7) qisas.

[37] Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 52; Ibrahim M Zein, 'Religion, Legality and the State, 1983 Sudanese Penal Code' (DPhil thesis, Temple University 1989) 247-48.

[38] Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 53.

> The use of 'legal uncertainties' (*shubha*), which are used in the *fiqh* to restrict the execution of *ḥadd* punishments, were limited. This, in combination with the admission of witnesses not approved by the *fiqh*, meant that the application of *ḥadd* punishments was facilitated considerably. Further, the new penal code introduced *ḥadd* punishments for crimes that would not be considered *ḥadd*, but which, according to the *fiqh*, would be *taʿzīr* crimes.[39]

The September laws were applied in an arbitrary and biased manner. Authorities would confront men and women in their houses, cars, and elsewhere and present them before courts that were established under the state of emergency and did not follow fair rules of procedure and trial (kangaroo courts). Men and women found in cars together were charged with 'attempted adultery' unless evidence of marriage or intimate blood relation was supplied.[40] Severe punishments were meted out ranging from amputation, cross-amputation, floggings, to the death penalty.[41] Abdelsalam and Medani have observed that these laws were viewed as a clear deviation from the true principles of Islam.[42] Opposition to the September laws was widespread and Mahmud Mohammad Taha, the leader of the reformist 'Republican Brothers' argued that:

> The September laws have distorted Islam in the eyes of intelligent members of our people and in the eyes of the world…These laws violate Sharia and violate religion

[39] ibid.
[40] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 47.
[41] For a detailed account of the introduction of *shari'a* in Sudan's criminal law in 1983, see Aharon Layish and Gabriel R Warburg, *The Reinstatement of Islamic Law in Sudan under Numayri: An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology and Repercussions* (Leiden: Brill 2002) 75-142.
[42] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 46-47.

itself…We call for the repeal of the September 1983 laws because they distort Islam, humiliate the People and jeopardize national unity…[43]

Taha was executed in 1985 for his uncompromising views and charged under the offence of apostasy although no such offence was recognised by the Penal Code at the time.[44]

Following a bloodless coup d'état in 1989, a new regime under the leadership of Brigadier Umar al-Bashir set out to transform Sudanese society into a model Islamic society.[45] This included the introduction of a new Islamized Penal Code which was adopted in early 1991, repealing the Penal Code of 1983.

The Criminal Act of 1991 amended Islamic law provisions for the death penalty by attempting to 'remedy many of the major inconsistencies between earlier codes and the *fiqh*'.[46] The revised Act also included the addition of apostasy as a death penalty offence which marked the first time that apostasy was criminalised under statutory law.[47]

Bashir's government was also responsible for the creation of two constitutions in Sudan: the 1998 Constitution and the 2005 Interim National Constitution.[48] The 1998 Constitution ensured

[43] Quoted by Jürgen Rogalski, 'Die Republikanischen Brüder im Sudan. Ein Beitrag zur Ideologiegeschichte des Islam in der Gegenwart' (The Republican Brothers in Sudan: A Contribution to the Ideological History of Islam in the Present) (MA thesis, Freie University, Berlin 1990) 44-45. See also Abdullahi Ahmad an-Na'im, 'The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan' (1986) 16(3) Religion 197, 205.
[44] On the death sentence for Taha, see Declan O'Sullivan, 'The Death Sentence for Mahmoud Muhammad Taha: Misuse of the Sudanese Legal System and Islamic Shari'a Law?' (2001) 5(3) International Journal of Human Rights 445; Gabriel R Warburg, *Islam, Sectarianism and Politics in Sudan since the Mahdiyya* (London: Hurst 2003) 160-165.
[45] See Alex de Waal and AH Abdel Salam, 'Islamism, State Power and Jihad in Sudan' in Alex de Waal (ed), *Islamism and its Enemies in the Horn of Africa* (London: Hurst 2004) 71-113; Khaled Abdel Aziz, 'Sudan's Bashir Sees Islamic Law, Defends Flogging' (*Reuters*, 19 December 2010) <http://af.reuters.com/article/topNews/idAFJOE6BI04I20101219> accessed 16 July 2017 ('If south Sudan secedes, we will change the constitution and at that time there will be no time to speak of diversity of culture and ethnicity. . . . Sharia (Islamic law) and Islam will be the main source for the constitution, Islam the official religion and Arabic the official language'.).
[46] Köndgen, *The Codification of Islamic Criminal Law in the Sudan*, 83.
[47] Sudanese Criminal Act 1999, art 126. See below for a discussion on apostasy laws in Sudan.
[48] Bashir's regime did not initiate work immediately on a new constitution but rather sought legitimacy by advocating for an Islamic state. The government ruled by decree in the meanwhile and nine years passed without a new constitution being implemented. After being elected president in 1996, work began on writing a new constitution. Warburg, *Islam, Sectarianism and Politics in Sudan since the Mahdiyya*, 206.

Muslim dominance by stipulating that, 'Islamic law and the consensus of the nation, by referendum, Constitution and custom shall be the sources of legislation; and no legislation in contravention with these fundamentals shall be made'.[49]

The religious foundation of the Constitution was further strengthened by vesting sovereignty in God who delegated power to the people unlike the 1973 Constitution which vested sovereignty in the people alone.[50] Under Article 4 of the 1998 Constitution:

> Supremacy in the State is to God the creator of human beings, and sovereignty is to the vicegerent people of the Sudan who practice it as worship of God, bearing the trust, building up the country and spreading justice, freedom and public consultation. The Constitution and the law shall regulate the same.

The Constitution differed from all its predecessors by incorporating a larger degree of the principles of *sharīʿa* however it also 'validated the expansion of the number of crimes to which the death penalty could be applied and limited protection for minors'.[51]

Although Article 20 provided the right to life,[52] Article 33 permitted its derogation:

> (1) No death penalty shall be inflicted, save as retribution or punishment for extremely serious offences by law.
>
> (2) No death penalty shall be inflicted for offences committed by a person under eighteen years of age; and such penalty shall be executed upon neither pregnant nor suckling women, save after two years of lactation; nor shall the same be

[49] Sudanese Constitution 1998, art 65.
[50] 'Sovereignty in the Democratic Republic of Sudan vests in the people and shall be exercised by them through their popular and Constitutional instructions and organizations.'
[51] African Centre for Justice and Peace Studies, *Widening the Scope: The Expanding Use of Capital Punishment in Law and Practice in Sudan* (December 2010) 7.
[52] 'Every human being shall have the right to life, freedom, safety of person and dignity of honour save by right in accordance with the law; and he is free of subjection to slavery, forced labour, humiliation or torture.'

inflicted upon a person who passed seventy years of age other than in retribution and prescribed penalties (hudud).[53]

In 2005, the government signed an agreement with the Sudan People's Liberation Movement/Army, known as the Comprehensive Peace Agreement (CPA) signalling the end of the Second Sudanese Civil War and laying down a timetable for a South Sudan independence referendum. The CPA confined the application of *sharīʿa* to the North and exempted the South. It aimed to democratically transform Sudan through reconciliation of national laws with the Interim National Constitution (INC) of 2005, which includes a Bill of Rights containing fundamental rights and freedoms.[54]

The INC denotes a significant departure from previous constitutions in that Sudan does not assume a specific identity based on ethnic, cultural, linguistic, or religious unity, rather it embraces a plurality of religions and cultures.[55] Sudan is not defined as an Islamic republic nor is Islam considered the state religion as enumerated by its 1998 predecessor and sovereignty is vested back in the people under Article 2. However, this is not reflected in practice. The 2014 trial of Meriam Ibrahim, a Sudanese Christian woman sentenced to death for apostasy, is a case in point. The implications of this are discussed further in Sudan's second UPR below.

In fact, only three articles in the Constitution refer directly to Islam. Section 5(1) identifies that '[n]ationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people.' It fails to clarify what will happen if consensus goes against the former and can therefore be seen as poor wording to maintain Islamic law. Article 156(d) calls on judges and law enforcement agencies to observe 'the long-established Sharia principle that non-Muslims are

[53] Sudanese Constitution 1998, art 33.
[54] Abdelsalam and Medani, 'Criminal Law Reform and Human Rights in African and Muslim Countries with Particular Reference to Sudan', 49.
[55] Interim National Constitution 2005, art 1.

not subject to prescribed penalties and therefore remitted penalties shall apply according to law'. Finally, under Article157(1)(b), the Non-Muslim Rights Commission must ensure that 'Non-Muslims are not adversely affected by the application of the Sharia law in the National Capital'.[56] This contradicts the position of non-Muslims in the Criminal Act 1991 which does not make such a distinction.

Although the INC 'omits most other articles from the 1998 Constitution that relate to Islamic precept and notions', it maintains the sovereign right to impose the death penalty. Article 28 provides every human being with the inherent right to life and Article 36 follows the same limitations as the 1998 Constitution, namely that 'no death penalty shall be imposed, save as retribution, hudud or punishment for extremely serious offences in accordance with the law' but fails to define what it considers as 'extremely serious offences'. Those under 18 or above 70 are exempt from the death penalty, except in cases of retribution (*qiṣāṣ*) or fixed offences (*ḥudūd*). This is an inadequate provision which implicitly allows for the juvenile death penalty. The death penalty is maintained for reasons owing to Islamic criminal justice which is challenged in Part Two.

There is a procedural nuance within the INC as Article 27(3) (incorporating international obligations) and Article 28 (inherent right to life) suggest the non-application of the death penalty in general but Article 36[57] explicitly permits the use of the punishment including its application to juveniles. Therefore, instead of confining the death penalty, contradictory provisions facilitate its execution.

[56] See below for a discussion on the case of Meriam Ibrahim.
[57] '(1) No death penalty shall be imposed, save as retribution, hudud or punishment for extremely serious offences in accordance with the law. (2) The death penalty shall not be imposed on a person under the age of eighteen or a person who has attained the age of seventy except in cases of retribution or hudud. (3) No death penalty shall be executed upon pregnant or lactating women, save after two years of lactation.'

Furthermore, the death penalty remains a lawful punishment for offences and conduct which contravene the evolving jurisprudence on 'most serious crimes' under international law.[58] For example, in Sudan's Criminal Act 1991,[59] Firearms and Ammunitions Act 1986,[60] Drugs and Narcotics Act 1994,[61] The Anti-Terrorism Act 2001,[62] Armed Forces Act 2007,[63] The National Security Act 2010,[64] The Child Act 2010,[65] and The Combating Human Trafficking Act 2013.[66] The Special Rapporteur on extrajudicial summary or arbitrary executions has addressed death sentences for:

> adultery, apostasy, blasphemy, bribery, acts incompatible with chastity, corruption, drug possession, drug trafficking, drug-related offences, economic offences, expressing oneself, holding an opinion, homosexual acts, matters of sexual orientation, manifesting one's religion or beliefs, prostitution, organization of prostitution, participation in protests, premarital sex, singing songs inciting men to go to war, sodomy, speculation, acts of treason, espionage or other vaguely defined

[58] See UN Doc CCPR/C/GC/R.36/Rev.2.
[59] Crimes against the state: undermining of the Constitutional Order (article 50), instigation of war (article 51) and espionage (article 53); Apostasy (article 126(1) & (2)); Crimes against body and soul: murder (article 130) and instigation of a minor or insane person to commit suicide (article 134); Crimes of honour, public morality and reputation: adultery where the offender is married (article 146(1)), sodomy where the offender is convicted for the third time (article 148 2 (c)), rape that constitutes adultery or sodomy (article 149(3)), incest (article 150(2)), and running a place for prostitution (article 155(3)); Crimes against property: armed robbery (article 168(1)(a)); Corruption (article 177); Crimes against humanity, genocide or war crimes (article 186 of 2009 Amendment Criminal Act 1991); False testimony and fabricating evidence (article 104).
[60] Trade in firearms or running a private store without a license and owning, using or carrying firearms without a license (article 44 (3)).
[61] Trade in drugs and narcotics (article 15); Provision of drugs and narcotics (article 16); Commitment of the offences in articles 15-16 in association with an international gang, or as part of an international crime (article 17).
[62] Incitement to commit an act in furtherance of the purposes of a terrorist state (article 5) and committing an act of terrorism (article 6).
[63] Non-compliance with orders and instructions (article 142); abandonment of military posts (article 143 (1)); forcing subordinates to surrender (article 145); surrender or unconditional truce, (article 146); assistance of the enemy (article 147); joining the enemy (article 148 (1)); rebellion against constitutional order (article 162 (1)); dealing with another country with intention to harm the interests of the state (article 163); disclosure of military information and secrets (article 164); violations related to firearms and ammunition (article 182); offences related to military equipment, gear and uniforms (article 183 (1)).
[64] Crimes related to collaboration with an enemy (article 55); Conspiracy and Mutiny (article 56); Endangering the internal or external security of the country (article 57).
[65] Kidnapping of, traffic in and transfer any organ or organs of any child; rape of Children (article 86 (e) and (f)).
[66] Human trafficking where the victim dies.

acts usually described as 'crimes against the State', and writing slogans against a country's leader.[67]

This suggests that problems of non-compliance have remained widespread. The above offences cannot be grouped in the same category as intentional killing and many of these offences violate the very Covenant they purportedly adhere to. For example, criminalising apostasy, blasphemy, manifesting one's religion or beliefs, and freedom of expression is a breach of Articles 18 and 19 of the ICCPR.

Not only do the breadth of crimes punishable by death in Sudan conflict with international human rights law, which restricts the death penalty to crimes of intentional killing,[68] it is also not reflective of the limited role of capital punishment in Islamic law as discussed in Part Two of this study. A substantial reform of Sudan's penal laws is required for a genuine application of the INC. Below we now consider how Sudan's preservation of the death penalty translates into its Universal Periodic Review, first cycle in 2011, and second cycle in 2016.

4.3 First Cycle

Sudan's first Universal Periodic Review took place on 10 May 2011; however, the content was dominated by the ongoing crisis in Darfur. It received a total of 160 recommendations of which 121 were accepted.[69]

4.3.1 National Report

The state national report was written after consultations with civil society organisations and the state recognised that the UPR 'should not be a mechanism for which the government alone

[67] Report of the Secretary-General, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty' (18 December 2009) UN Doc E/2010/10, para 65; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions' (29 January 2007) UN Doc A/HRC/4/20, para 40.
[68] See UN Doc CCPR/C/GC/R.36/Rev.2.
[69] See 'Database of Recommendations' (*UPR-Info*) <www.upr-info.org/database/> accessed 30 July 2017.

prepares'.[70] Although Sudan acknowledged the importance of stakeholders in the review process, it did not provide further details on the consultations except that they were, 'conducted in a number of sessions and workshops organized for that purpose'.[71] This reduces the transparency of the mechanism as we are prevented from knowing the level of contribution made by civil society and whether their comments had any reflection in the final national report. Hence, any comments and/or recommendations on the death penalty are at risk of being precluded from the state narrative in order to protect the sovereign power to apply the punishment.

The report begins by affirming Sudan's 'sincere desire to comply and cooperate with United Nations human rights mechanisms, including the universal periodic review'[72] and acknowledges that human rights are 'universal, indivisible and interdependent and interrelated'.[73] It highlights Sudan's legal framework for human rights protection[74] and refers to Sudan as a multi-racial, multi-cultural, and multi-religious state.[75] There is no official state religion declared, Sudan embraces different religions and cultures which are considered sources of strength, inspiration, and harmony.[76]

All rights and fundamental freedoms are guaranteed under Part Two of the Constitution which incorporates the Bill of Rights set forth in Article 27. The Constitution prohibits detraction or derogation from any of the rights and freedoms enshrined therein and prohibits their suspension, 'treating them as laws that can be neither undermined nor amended by legislative

[70] UNHRC, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Sudan' (11 March 2011) UN Doc A/HRC/WG.6/11/SDN/1 [hereinafter Sudan National Report 1], para 5.
[71] Sudan National Report 1, para 5.
[72] ibid para 2.
[73] ibid.
[74] Comprises of the Comprehensive Peace Agreement of 2005, the Interim National Constitution of the Republic of Sudan (INC) 2005 and supplementary national legislation. ibid paras 6-16.
[75] Sudan National Report 1, para 10; INC 2005, art 1(1).
[76] Sudan National Report 1, para 14; INC 2005, art 1(3).

institutions without the matter being put to a referendum'.[77] This is not accurate since Article 28 of the INC guarantees the inherent right to life yet the very same Constitution permits its derogation under Article 36.

The government further claims that in accordance with Article 27(3) of the Constitution, all international human rights treaties, covenants, and instruments ratified by the state form an integral part of the Constitution, '[i]ndeed, many of the provisions of these conventions are at the heart of the national legislation'.[78] If international human rights are so important to the state as it alleges, then this should be reflected in its domestic law and practice. Sudan has ratified the ICCPR yet remains in violation of its obligation to restrict the death penalty to 'the most serious crimes' which is affirmed by the Human Rights Committee in its concluding observations[79] and the Secretary-General in his quinquennial report that, 'non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults'[80] are crimes for which the death penalty should not be applied.

The national report further states that, 'various existing laws were reviewed in order to bring them into line with the Constitution and relevant international conventions'[81] and mentions a number of statutes by way of example.[82] One such example being 'the Sudanese Criminal Code of 1991, which was amended in 2009 by the addition of a full chapter on crimes against humanity, war crimes and genocide'.[83] It is noteworthy that Sudan's exercise in reviewing

[77] ibid para 13.
[78] ibid para 16.
[79] See Human Rights Committee, 'Concluding Observations: Sudan' (19 August 2014) UN Doc CCPR/C/SDN/CO/4, para 4; (29 August 2007) UN Doc CCPR/C/SDN/CO/3, para 19; (19 November 1997) UN Doc CCPR/C/79/Add.85, para 8-9; (10 October 1991) UN Doc A/46/40, para 519.
[80] UN Doc E/2010/10, para 63.
[81] Sudan National Report 1, para 15.
[82] Statutes cited are: The Voluntary Work Act 2006; The Armed Forces Act 2007; The Political Parties Act 2007; The Electoral Act 2008; The National Council for Child Welfare Act 2008; The Sudanese Criminal Code 1991; The National Human Rights Commission Act 2009; The Press and Publications Act 2009; The National Disabled Persons Act 2009; The Southern Sudan Referendum Act 2009; The Abyei Area Referendum Act 2009; The Child Act 2010.
[83] Sudan National Report 1, para 15.

domestic laws did not extend to its death penalty provisions which conflict with the Sudanese Constitution and the international human rights obligations of Sudan. This discrepancy is best illustrated by Article 126 of the Criminal Act 1991 which punishes apostasy with death, contrary to the government's claim that the Constitution, 'guarantees to every individual the right of freedom of conscience and religious creed, in addition to the associated right of manifesting his religion or creed...It also provides that no person shall be coerced into adopting a creed in which he does not believe'.[84] Whilst all religions are given an equal standing in the Constitution (Article 1(3)), Sudanese criminal law protects a certain interpretation of Islamic law over others. It also runs contrary to Article 18 ICCPR which guarantees freedom of religion.[85] Hence Sudan's assertion that domestic legislation has been amended to complement relevant international law is insufficient as a principle of law.

A number of rights under the ICCPR are identified as being incorporated into the Constitution and national legislation such as the right to a fair trial (Article 14),[86] freedom of expression (Article 19),[87] equality and non-discrimination (Article 26),[88] but, unsurprisingly, the right to life is absent from discussion.[89] Discussion on the right to life is confined in the national report which is consistent with Sudan's expression of sovereignty. The section on children's rights is the only area which addresses capital punishment, albeit as a fleeting reference. It does not deal with the legality of the death penalty nor does it provide any justification for its continued application. However it does remove the sovereign's right to impose the juvenile death penalty through the introduction of the Child Act 2010.[90] The new Act, repealing the Child Act 2004,

[84] ibid para 23. See INC 2005, art 38.
[85] 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.'
[86] Corresponding to INC 2005, art 34.
[87] Corresponding to INC 2005, art 39.
[88] Corresponding to INC 2005, art 31.
[89] Sudan National Report 1, para 32.
[90] ibid paras 15, 75.

'raise[s] the age of criminal liability for children from seven to twelve years and categorically prohibits the death penalty for any person under eighteen years of age'.[91] The Child Act 2010 also states that, 'the provisions of this Act shall prevail over any other provisions in any other law' which ensures that children are protected from execution. This is an important advancement considering that under Article 3 of the Criminal Act 1991, 'adult means any person whose puberty has been established by definite natural features and who has completed fifteen years of age, and whoever attains eighteen years of age shall be deemed an adult even if the features of puberty do not appear'.

The national report identifies Sudan's cooperation with international and regional mechanisms as one of its best practices. In terms of its regional commitments, the report affirms that 'the Sudan effectively participates in the work of the African Commission on Human and People's Rights'[92] however at the time of this report, Sudan was behind on its fourth periodic report to the African Union and approaching the deadline for its fifth report. It eventually submitted its fourth and fifth reports together in 2012.[93] The report also notes that Sudan, 'continues to participate in the work of the present Human Rights Council [and] it has also continued to submit periodic reports to the conventional mechanisms for the treaties to which it is a party'.[94] This seems to be political rhetoric intended to boost Sudan's image in the international community as the OHCHR compilation demonstrates Sudan's inconsistency in treaty body reporting. The state's twelfth to sixteenth reports for CERD have been overdue, with the last report submitted in 2000 and its second and third reports for CESCR have been overdue since

[91] ibid para 75; Article 5(2)(l) Child Act 2010.
[92] Sudan National Report 1, para 96.
[93] See Republic of the Sudan, 'The 4th and 5th Periodic Reports of the Republic of the Sudan in Accordance with Article 62 of the African Charter on Human and Peoples Rights 2008 – 2012' available at <www.achpr.org/states/sudan/reports/4thand5th-2008-2012/> accessed 12 March 2017.
[94] Sudan National Report 1, para 95.

2003 and 2008 respectively.[95] The state submitted its third report on the implementation of the ICCPR in 2006, nine years late with the Human Rights Committee urging the state to 'respect the schedule it has established for the submission of reports'.[96] Its fourth report was due in 2011, the year of its first UPR, and this too was submitted late.[97] We can see that the OHCHR report provides a much-needed balance to Sudan's self-affirming report and is discussed further below.

4.3.2 OHCHR Report

The OHCHR compilation, submitted on 24 February 2011, notes that Sudan is not party to ICCPR-OP-1, ICCPR-OP-2, CEDAW, CED, and CAT (only a signatory, 1986). It is however party to the ICCPR and CRC, acceding to the treaties in 1986 and 1990 respectively with no declarations or reservations issued.[98] Consequently, it is expected to fulfil its human rights commitments in accordance with these obligations, which includes protecting the right to life.

However, certain national laws conflict with the 2005 Comprehensive Peace Agreement and the 2005 Interim National Constitution and violate the state's international obligations. One significant example being the 1991 Criminal Act.[99] The Secretary-General also made similar comments calling for a reform to the national criminal laws.[100] He further noted that the imposition of the death penalty continues to be a matter of concern especially when individuals on death row have not been provided with legal representation during their trials.[101]

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[95] UNHRC, 'Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Sudan' (24 February 2011) UN Doc A/HRC/WG.6/11/SDN/2 [hereinafter Sudan OHCHR Report 1], section II, table 1.
[96] UN Doc CCPR/SDN/CO/3, para 2.
[97] See 'Reporting Status for Sudan' (*OHCHR*) <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=SDN&Lang=EN> accessed 12 March 2017.
[98] Sudan OHCHR Report 1, section I, table 1.
[99] ibid para 4; UNMIS submission to the UPR on Sudan, para 7; UNSC, 'Report of the Secretary-General on the Sudan' (19 January 2010) UN Doc S/2010/31, para 69.
[100] UN Doc S/2010/31, para 69.
[101] ibid para 65.

On 10 February 2010, two Special Rapporteurs issued an urgent appeal to the government of Sudan concerning the continued application of the death penalty against minors.[102] This was a follow-up to previous communications sent in 2008 which remained without a response from the government. The subject of appeal were ten male minors who were sentenced to death in violation of international standards on safeguards and restrictions relating to the imposition of the death penalty.[103] Eight were found guilty by the Anti-Terrorism courts and one by the Nyala General Court in South Darfur. In the case of Mahmood Adam Zariba, the court failed to grant a medical examination to determine his age. He was sentenced to death on 31 July 2008 by Anti-Terrorism Court 4 in Omdurman.[104] As to the cases of Mohamed Hashim Ali Abdu, Ishag Yaseen Ali Adam, Abdelsalam Yahya Abdallah Adam, Mohamed Al Duma Yahya Abaker, Mohamed Al Talib Mustafa Al Sanousi, and Mansour Ibrahim Abaker Hashim, it is reported that the courts relied exclusively on a report of a police medical committee for the determination of the defendants' age which was found to be over the age of 18. The defence counsel were denied access to the report in question and the courts failed to consider doubts cast on the methodology of the report during cross-examination. The defendants were all sentenced to death by the Anti-Terrorism Courts.[105]

The Special Rapporteur challenged that:

> While the authorities have denied that any minors were sentenced to death in these trials, they have never produced court records nor medical certificates to show that

[102] UN Doc A/HRC/14/24/Add.1, para. 1072; UN Doc A/HRC/14/26/Add.1, para. 1046.
[103] Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, 'Communications to and from Governments' (18 June 2010) UN Doc A/HRC/14/24/Add.1, para 1072; Report of the Special Rapporteur on independence of judges and lawyers, Gabriela Carina Knaul de Albuquerque e Silva, 'Communications to and from Governments' (18 June 2010) UN Doc A/HRC/14/26/Add.1, para 1046.
[104] UN Doc A/HRC/14/24/Add.1, para 1073.
[105] ibid para 1074-1075. Mohamed Hashim Ali Abdu and Ishag Yaseen Ali Adam were sentenced to death on 31 July 2008 by Anti-Terrorism Court 3 in Bahri (Khartoum North) and the others on 20 May 2009 by the same court.

> adequate medical examinations had been conducted to assess the age of the…defendants. The information received indicates that under Sudanese law neither the defence lawyers nor the interested public can download disclosure of the court records in this respect.[106]

In Al Sadig Mohamed Jaber Al Dar Adam's case, the defendant's birth certificate was accepted by the Khartoum Anti-Terrorism Court as valid documentation of his age which proved that he was 17 at the time of the offence. However, Article 27(2) of the Criminal Act 1991 permits the juvenile death penalty for *ḥudūd* crimes and Al Sadiq was therefore able to be prosecuted under the *ḥudūd* offence of *ḥirāba*, pursuant to Article 167, and sentenced to death.

Turning to the case of Abdulrahman Zakaria Mohamed, the Nyala General Court in South Darfur sentenced him to death on 3 May 2007 after finding him guilty of murder and robbery.[107] He was aged 17 at the time of the trial. The court held that, under the INC and Criminal Act 1991, *ḥudūd* offences were exempt from the general prohibition of the juvenile death penalty. The court affirmed the primacy of the Sudanese constitution over any other domestic law and therefore, 'the victim's family's right to retribution (*qiṣāṣ*) prevails over the 2004 Child Act which prohibits the death penalty for offences committed by minors'.[108]

The judgement was appealed and subsequently quashed by the Nyala Appellate Court which held that Abdulrahman's death sentence was a violation of the Child Act 2004.[109] The case was returned to the Nyala General Court for reconsideration, instructing it to, 'apply the appropriate alternative measures stipulated in the Child Act, and to decide on the compensation (blood money) for the family of the deceased'.[110] The victim's family refused this alternative and the

[106] ibid para 1075.
[107] ibid para 1078.
[108] ibid.
[109] ibid.
[110] ibid.

case then reached the Supreme Court in Khartoum.[111] In December 2008, the Supreme Court upheld the original decision of the Nyala General Court and sentenced Abdulrahman to death.

In the Special Rapporteur's engagement with the age of a juvenile, he noted that the Court's decision was based on two arguments. Firstly, the prohibition of the death penalty for children did not apply to *ḥudūd* cases which was in accordance with both the INC and Criminal Act 1991. Secondly, the definition of a child was interpreted under Article 3 which meant that as long as the defendant reached 15 years of age and exhibited natural signs of puberty, the provisions of the Criminal Act applicable to adults should be applied. Abdulrahman was executed on 14 May 2009.[112]

The Special Rapporteur argued that, whilst not wishing to prejudice the accuracy of the information received, Article 37(a) CRC and Article 6(5) ICCPR provide that the death penalty will not be imposed on persons below 18 years of age.[113] These provisions are absolute and without exception. Whether the crime is a *ḥudūd* offence or not is immaterial for the purposes of Sudan's international law obligations as the CRC and ICCPR are binding upon the state.

Addressing the Supreme Court's reliance on the Criminal Act's definition of an 'adult', the Special Rapporteur noted that under Article 37(a), the CRC is explicitly clear that the minimum age for an individual to be potentially subject to the death penalty is 18 years. He further added that '[u]nlike other provisions of the covenant, this prohibition is not flexible when account is taken of the individual development and maturity of the offender. The ICCPR similarly admits no flexibility in terms of execution of the death penalty for persons under 18 years of age'.[114]

[111] ibid.
[112] ibid.
[113] ibid para 1079.
[114] ibid para 1080.

The government replied to the communications on 18 March 2010.[115] However a translation of the response from relevant services was not received at the time the report was finalised. The response was produced in the following report.[116] The government noted that:

> According to information provided by the defendants during the preliminary investigation, all the defendants were over 18, except for Mohamed Jabar Al Dar Adam, who said that he was 17 but provided no proof of age. He did show all signs of having reached his majority, however. For these reasons, the court sent him to medical experts for an age assessment. They reported back that he was over 18, and therefore he was sent for trial and convicted under article 168 of the Criminal Code of 1991. [117]

In this statement of fact, we see an enumeration of criminal liability and the age of majority in Sudanese law, but no definition is provided. The government did not expand upon the meaning of 'all signs' resulting in a vague and unhelpful response.

The Committee on the Rights of the Child urged Sudan to ensure that children are exempt from the death penalty, including in cases of retribution or *ḥudūd*, and to substitute any death sentences already handed down to persons under 18 years with an appropriate alternative sanction.[118] Similar concerns were raised by UNICEF, the Independent Expert, and the Human Rights Committee with the latter also recommending that the number of crimes liable for the death penalty should be restricted.[119] It stated that the death penalty for offences which do not fall under the threshold of the most serious crimes are incompatible with Article 6 ICCPR and

[115] UN Doc A/HRC/14/26/Add.1, para 1059.
[116] Report of the Special Rapporteur on independence of judges and lawyers, Gabriela Knaul, 'Summary of information, including individual cases, transmitted to Governments and replies received' (19 May 2011) UN Doc A/HRC/17/30/Add.1.
[117] ibid paras 1099-1100.
[118] Sudan OHCHR Report 1, para 14.
[119] ibid.

should be repealed. In August 2007, the Human Rights Committee also called upon Sudan to, 'guarantee the death penalty will not be applied to persons aged under 18 years'.[120]

The Working Group on Arbitrary Detention (WGAD) raised grave concerns regarding the fairness of the trial of 10 men sentenced to death for murder in 2007, arguing that, 'no judicial system could consider valid a confession obtained under torture and revoked before a court, nor a death sentence based on such confession'.[121] The case was brought before the WGAD in August 2008 and in its opinion, it found that the defendants were not provided with a fair and public hearing in accordance with Article 14 ICCPR. All ten defendants recanted their confessions in court arguing that they had been compelled to make such statements due to threats, intimidation, torture, and ill-treatment; a patent violation of Article 7 ICCPR. These 'confessions' were produced during four months of incommunicado detention, and without access to legal counsel and family visits.[122] This was a gross violation of fair trial guarantees which includes the right to 'have adequate time and facilities for preparation of [one's] defence and to communicate with counsel of [one's] own choosing'[123] and the 'right not to be compelled to confess guilt'.[124] The Human Rights Committee noted that '[i]n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings'.[125] The General Assembly also declared that prolonged incommunicado detention 'may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment'.[126]

[120] ibid para 33.
[121] ibid para 31.
[122] UN Doc A/HRC/14/24/Add.1, para 1053.
[123] ibid, para 1055; Article 14(3)(b) of the ICCPR.
[124] UN Doc A/HRC/14/24/Add.1, para 1055; article 14(3)(g) of the ICCPR.
[125] Human Rights Committee, 'General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32, para 38.
[126] UNGA Res 61/153 (14 February 2007) UN Doc A/RES/61/153, para 12.

A request to medically examine the defendants was made to the lead prosecutor, on the basis of alleged torture. The prosecutor and judge denied the request despite the fact that when the trial proceedings began, physical signs of injuries and scars were clearly visible on many of the defendants' arms, hands, thighs and shoulders due to the alleged torture.[127] The Commission on Human Rights Resolution 2005/39 urged states to disregard any statement made as a result of torture, ensuring it is not used in any proceeding yet such confessions were exclusively relied upon to sentence the defendants to death, thus eliminating the possibility of a fair trial. Although several mandate holders of the Human Rights Council appealed to the government to stay the executions, the defendants were hanged on 13 April 2009 in a Khartoum prison.[128] This runs contrary to the state's claims in its national report that:

> The Criminal Code of 1991, for instance, emphatically provides that detainees under investigation must be treated in a manner conducive to the preservation of their dignity, must not be subjected to any physical or mental harm and must receive suitable medical care. The National Security Act of 2009 and the regulations on the treatment of detainees also include separate provisions to ensure that detainees are treated in an appropriate and humane manner.[129]

The Special Rapporteur on extrajudicial, summary or arbitrary executions emphasised that 'only the full respect for the stringent due process guarantees distinguishes capital punishment, as permitted by Article 6 of the Covenant "in countries which have not abolished the death penalty", from a summary execution which violates the most fundamental human right'.[130]

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[127] UN Doc A/HRC/14/24/Add.1, para 1057.
[128] UN Doc A/HRC/14/26/Add.1, para 1062.
[129] Sudan National Report 1, para 35.
[130] UN Doc A/HRC/14/24/Add.1, para 1061. The Special Rapporteur also remarked: 'We cannot sit in judgement about whether the defendants were guilty of the gruesome murder of Mr Mohamed Ahmed. However, in cases involving capital punishment the slightest doubt cast on whether due process has been followed makes an execution inadmissible. This follows from the irreversibility of the death penalty' (para 1063). See also ECOSOC Res 1984/50 (25 May 1984) 'Safeguards guaranteeing protection of the rights of those facing the death penalty'.

Violations of fair trial guarantees and due process in Sudan were also addressed by UNMIS who attributed this to an inadequate legal framework in place for the protection of human rights. This included the 2010 National Security Act and 1991 Criminal Procedure Act.[131] Additionally, the continued reliance on the 1993 Evidence Act, which allows the use of confessions obtained under duress as evidence in court, was further hindering the country's administration of justice. The Human Rights Committee recommended that Sudan prohibits the use of confessions obtained in contravention to Article 7 of the ICCPR in any court.[132]

4.3.3 Stakeholder Report[133]

The stakeholder report for the Sudan comprised of a summary of 22 stakeholder submissions to the UPR.[134] Amnesty International, Centre on Housing Rights and Evictions, Joint

[131] Sudan OHCHR Report 1, para 34; UN Doc S/2010/31, para 69.
[132] ibid para 32; UN Doc CCPR/C/SDN/CO/3, para 25.
[133] UNHRC, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council Resolution 16/21: Sudan' (25 February 2011) UN Doc A/HRC/WG.6/11/SDN/3 [hereinafter Sudan Stakeholder Report 1].
[134] Amnesty International, London (United Kingdom); The Centre on Housing Rights and Evictions, Geneva (Switzerland); Christian Solidarity Worldwide, Surrey (United Kingdom); Darfur Relief and Documentation Centre, Geneva (Switzerland); Global Initiative to End All Corporal Punishment of Children, London (United Kingdom); Human Rights Watch, New York (USA); Islamic Human Rights Commission, Wembley (United Kingdom); Jubilee Campaign, Surrey (United Kingdom); Maarij Foundation for Peace and Development (Sudan); Minority Rights Group International, London (United Kingdom); Society Studies Centre, Khartoum (Sudan); Society for Threatened Persons, Göttingen (Germany). The following are Joint Submissions: Joint Submission No. 1 (JS1) by The Human Rights Committee comprising Justice and Peace, Commission of the Catholic Church, Women Training and Promotion Association, Women Development Group, Women Empowerment Group, Sawa Sawa, Muslim Women's Association, My Sister's Keeper, and Alma's Centre for the Girl Child Empowerment (Sudan); Joint Submission No. 2 (JS2) by Redress, London (United Kingdom) and Sudanese Human Rights Monitor (Sudan); Joint Submission No. 3 (JS3) by Izza Peace Foundation, African American Society for Humanitarian Aid and Development and Bridges International, Khartoum (Sudan); Joint Submission No. 4 (JS4) by Cairo Institute for Human Rights, Cairo (Egypt), Bahrain Centre for Human Rights (Bahrain), and Palestinian Organisation for Human Rights (Lebanon); Joint Submission No. 5 (JS5) by: SABA Organization for Child/Mother best Interest Action, Asmaa Society for Development, SEEMA Centre for Training and Protection of Women and Child Rights, Sudanese Organization for Research and Development (Sudan); Joint Submission No. 6 (JS6) by: Generation in Action and Green Star Initiatives (Sudan); Joint Submission No. 7 (JS7) by: Mutawinat Association, Legal Podium, Blees Centre, El-Manar Association, El-Gandr Centre (Sudan); Joint Submission No. 8 (JS8) by: United Nations Foundation/Better World Campaign, Washington (USA); Southern Sudan Organization for Relief and Development, Juba; IDEA –Organization Southern Sudan, Juba; Women Self-Help Development Organization, Juba; Southern Sudan Deaf Development Concern, Juba; Sudan Self-Help Foundation, Juba; Equatoria State Association of the Physically Disabled, Juba; South Sudan Association of the Visually Impaired, Juba; Equatoria State Union of Visual Association, Juba; Catholic Church -Women Desk, Juba; Kajo-Keji Human rights Community Awareness Programme, Juba; Lokita Charitable Society, Juba; Net Work New Sudan Ingenious NGO, Juba; South Sudan Human Right Society for Advocacy, Juba; Community

Submission 3 (JS3), JS7, and JS9 recommended the ratification of a number of international human rights instruments, such as the ICCPR-OP-2 and CAT.[135] They called for all state laws to be revised in conformity with the Interim National Constitution and the treaties to which Sudan is a party.[136]

Amnesty International stated that the Independent Expert on the situation of human rights in Sudan was the only mandate that could offer a comprehensive overview of the human rights situation. It recommended that Sudan continues to cooperate with the Independent Expert and accept outstanding mission requests by the Special Procedures, without delay.[137] It documented 16 death penalty cases between 2008 and 2010 and recommended 'an immediate moratorium on executions, a commutation of all death sentences to terms of imprisonments, [and] rigorous compliance with international standards of fair trial, including in cases punishable by the death penalty'.[138]

UNICEF and JS5 expressed concern regarding Sudan's use of the juvenile death penalty which is a direct violation of Article 37 CRC, noting that the state's domestic law is at odds with its international human rights obligations on protecting the right to life.[139] JS5 also noted that individuals under the age of 18 were exempt from the imposition of the death penalty in accordance to Article 36 of the INC however it did not apply in cases of retribution or *ḥudūd* crimes.[140] This could be a fruitful avenue to discuss the age of criminal liability from a *sharīʿa*

Empowerment for Progress Organization, Juba; South Sudan Women General Association, Juba; and Southern Sudan Law Society, Juba (Sudan); Joint Submission No. 9 (JS9) by: Mutawint Group, Legal Forum, Bliss Centre, Al Manan Society, and Gender Center (Sudan); Joint Submission No. 10 (JS10) by: Irsa'a Centre for Legal Aid, Nuba Mountain Solidarity League, Equatorial Son's League, Activists in Voluntary Work, Portsudan Madinaty Newspaper, Progress Centre for Social Development, Liaison Movement, Assamandal Theatre Group, Legal Forum (Sudan).

[135] Sudan Stakeholder Report 1, paras 1-3.

[136] ibid para 4; DRDC UPR Submission, 1; JS2 UPR Submission, 5; JS7 UPR Submission, 3-4; JS9 UPR Submission, 5; HRW UPR Submission, 6.

[137] Sudan Stakeholder Report 1, para 14; Amnesty International UPR Submission, 4-5.

[138] Sudan Stakeholder Report 1, para 15.

[139] JS5 UPR Submission, 5; UNICEF UPR Submission, 4.

[140] Sudan Stakeholder Report 1, para 19.

perspective as interpretations exist that put the minimum age at 18, which is discussed further in Chapter 5, thereby challenging the legitimacy of maintaining such a provision. However, the stakeholders failed to engage with this aspect of the law.

Although a January 2010 amendment to the Child Act determined 18 years as the firm age of majority, courts have continued to apply the death penalty to juveniles in *ḥudūd* offences as seen in the case of nine individuals sentenced to death by the Special Court in Nyala, on 21 October 2010, for a carjacking incident. The defendants were allegedly affiliated with the Justice and Equality Movement (JEM) and four of them were believed to be under 18 years old at the time of the sentence. They were charged pursuant to Articles 50 (offences against the state), 51 (fomenting war against the state), 168 (armed robbery), and 182 (criminal damage) under the Criminal Act.[141]

The Darfur Relief and Documentation Centre (DRDC) criticised the Special Criminal Courts for lacking due process and fair trial guarantees and administering harsh punishments which are disproportionate to the crimes committed. On 29 May 2008, the government created four Anti-Terrorism Special Courts 'to try individuals accused of participating in JEM's attack against Khartoum'.[142] These courts were given Exceptional Rules of Procedure (ATSCRP) which DRDC identified as being inconsistent with universal human rights standards and falling short of satisfying minimum standards of justice in both customary and international law.[143]

The ATSCRP prevented defendants from bringing habeas corpus petitions. Judges systematically denied access to legal counsel of their choice in private or to investigate allegations of torture and ill-treatment. One hundred and eleven death sentences were reportedly handed down by these courts thus far. The Anti-Terrorism Special Court of Appeal

[141] JS5 UPR Submission, 5; HRW UPR Submission, 3; DRDC UPR Submission, 4.
[142] DRDC UPR Submission 4.
[143] ibid.

confirmed these sentences which are now awaiting the signature of the president for the executions to be carried out.[144] The Society for Threatened Persons expressed similar concerns and added that 50 of the individuals sentenced to death were released in February 2010 following an agreement between JEM and the Sudanese Court.[145]

Another key concern identified by stakeholders was the use of confessions extracted under torture in death penalty trials, in violation of Article 7 ICCPR. The National Intelligence and Security Service (NISS) agents had powers to detain individuals up to four and a half months 'without judicial oversight which enabled them to commit human rights violations such as torture and other ill-treatment and to extract 'confessions' under duress'.[146]

Referencing WGAD's opinion regarding the 10 men accused of a newspaper editor's murder, Redress noted that 'this case, as well as convictions pursuant to trials under the anti-terrorism law, raise serious concerns over their compatibility with the right to life, which requires that the death penalty should only be imposed following a fair trial'.[147] The defendants were denied legal counsel and confessed under duress yet the convictions were upheld in three appeals and a petition to the Constitutional Court. UN Special Procedures issued several submissions urging Sudan to reconsider the convictions but they were ignored.[148]

Since then, six men were charged with the murder of 13 police officers in the Soba Aradi riots of 2006 and were executed, in Khartoum, in January 2010.[149] Similar to previous cases, the defendants were not provided with pre-trial legal counsel and revoked confessions they had made. Yet again, the convictions were upheld at all stages of appeal despite submissions made

[144] ibid; UNMIS UPR Submission, para 36.
[145] STP UPR Submission, 2.
[146] Sudan Stakeholder Report 1, para 23.
[147] Redress UPR Submission, 3.
[148] UNMIS UPR Submission, para 26.
[149] ibid.

by UNMIS and UN Special Procedures.[150] UNMIS also reported 158 people tried in 11 special trials by the Omdurman Anti-Terrorism Court from June 2008 until January 2010; and 106 persons were sentenced to death (50 of whom were later released). In each trial monitored, defendants alleged they had been forced to confess.[151]

DRDC referred to Article 206 of the Criminal Procedure Act 1991 which expressly permits the use of evidence and confessions obtained under torture to be admitted in legal proceedings, also noting that this practice was encouraged by the National Security Act and the Emergency and Public Safety Protection Act (Emergency Act) 1997.[152] The procedural rules employed by courts were inconsistent with universal human rights standards nor did they meet the minimum standards of justice required under customary and international law.[153]

Minority Rights Group International highlighted the right to freedom of religion under Article 18 ICCPR and 18 UDHR, encouraging the state to guarantee full religious freedom.[154] Christian Solidarity Worldwide (CSW) noted that apostasy continued to be a statutory crime in accordance with the 1991 Penal Code. It recommended that the government uphold the enjoyment of freedom of religion or belief, 'repeal its apostasy law; and extend a standing invitation to the Special Rapporteur on freedom of religion or belief'.[155] Minority Rights Group and CSW did not engage with the *fiqh* (Islamic jurisprudence) of the punishment which would have strengthened their recommendations. The status of apostasy as a death penalty offence, in Islamic law, needs to be challenged and a more nuanced understanding reveals that the punishment does not apply to apostasy *simpliciter*, a discussion that is taken up in detail in Chapter 5 of this thesis.

[150] ibid.
[151] ibid para 35.
[152] Sudan Stakeholder Report 1, para 40.
[153] ibid para 41.
[154] Minority Rights Group UPR Submission, 3.
[155] Sudan Stakeholder Report 1, para 49.

The above comments from the stakeholders demonstrate how they utilised the UPR platform to make important observations on Sudan's use of the death penalty and how it continues to remain a major challenge to the right to life. Although they identified shortcomings in Sudan's legal system which facilitate the application of the death penalty, they missed an important opportunity to address the punishment from an Islamic law perspective.

4.3.4 The Review

4.3.4.1 Interactive dialogue

Sudan's review took place at the 14th meeting of the Working Group on the UPR, on 10 May 2011. Belgium, China, and Mauritania were selected as the troika to facilitate the review.[156] A total of 189 recommendations were received of which 163 were accepted by the state. Twenty-two recommendations were received on the death penalty and ten were accepted.[157]

A list of questions prepared in advance by 12 states was submitted via the troika. Five of these states addressed the application of the death penalty in Sudan: Canada,[158] Denmark,[159] Ireland,[160] Switzerland,[161] United Kingdom.[162] Whilst most questions asked the state under

[156] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Sudan' (11 July 2011) UN Doc A/HRC/18/16 [hereinafter Sudan Working Group Report 1], paras 1-2.
[157] See 'Database of Recommendations' (*UPR-Info*) <www.upr-info.org/database/> accessed 30 July 2017. The number of recommendations that translated into domestic legal change are as follows: 86 fully implemented and 57 partially implemented. Of these, six death penalty recommendations were fully implemented concerning the juvenile death penalty (UPR-Info, 'Sudan: Mid-term Implementation Assessment' (5 June 2014) 53, 59, 73-75).
[158] The criminal code of Sudan retains the application of death penalty. Cases of minors having been executed have been reported. Sudan is party to the Convention on the Rights of the Child that defines a child as a person below 18 years old. When will Sudan modify its law to ensure that minors can not be executed?
[159] As long as Sudan has not abolished capital punishment, will it ensure that death penalty cases proceed with respect for the rule of law, that no children or juveniles are subjected to this punishment and that it is applied only to serious violent crimes?
[160] Ireland is opposed to the death penalty, and asks whether the Government of National Unity and the Government of Southern Sudan have any plans to establish a moratorium on executions with a view to abolishing the death penalty?
[161] Does the Government of Sudan consider the establishment of a moratorium on executions with a view to abolishing the death penalty?
[162] What plans do Sudan and South Sudan have to establish a moratorium on the death penalty as provided for under UN General Assembly resolutions 62/149 and 63/168?

review about its plans to establish a moratorium, none engaged with the *fiqh* of the death penalty in order to more effectively challenge the sovereign's right to put to death.

In the state under review's presentation, the delegation of Sudan reaffirmed the views expressed in its national report. It voiced its desire to cooperate with the Human Rights Council stating that its presence at the UPR was recognition of this.[163] Although this is a commendable effort, the state must do more than simply be present at the UPR; it needs to fully engage with the process which includes full transparency of its human rights situation, any challenges it faces such as the conflict between the INC and death penalty laws, and enable a forum for constructive discussion.

The state noted that legislative reform was a continuous process with a number of amendments made to existing national laws in order to fulfil its obligations under international human rights treaties. It did not explain what was being done regarding those domestic laws that are in violation of international human rights standards nor did it provide a timeframe for when this could be achieved.

It hoped that the UPR mechanism could replace other mechanisms 'including special country mandates which are characterised by selectivity and double standards and used for purposes unrelated to human rights, and which have been proven to be ineffective and in need of reform'.[164] This is an example of the state engaging in superfluous debate as Sudan's desire for the UPR to replace other mechanisms indicates to its lack of awareness of the purpose and role of the UPR which is to complement, not duplicate or replace, their work.[165]

[163] Sudan Working Group Report 1, paras 1, 6.
[164] ibid paras 13-15.
[165] See UNGA Res 60/251, para 5e.

Furthermore, geographic mandates increase, in principle, the visibility of the human rights situation in a country however the politicisation of the old Commission limited the success of the Special Procedures.[166] This was partly attributed to the criticism that certain countries benefitted from some kind of informal immunity from country mandates.[167] Nevertheless, Oliver Hoehne makes a convincing argument that as the system of country mandates has gained considerably in scope and legitimacy:

> geographic mandates now bother countries to the extent that they would often wish to do away with them. This may arguably be seen as a sign of their success and development. The geographical imbalance of the system certainly needs to be tackled, but the way forward should be through the establishment of country mandates wherever reasonably justified, and not through the abolition of this important focused mechanism.[168]

Fifty-two delegations delivered statements during the interactive dialogue stage and 160 recommendations were made. Switzerland made reference to reported executions of children despite the Children's Act 2010 prohibiting the juvenile death penalty.[169] It also referred to the Independent Expert's reports on torture, ill-treatment, and arbitrary detention committed by the NISS.[170] It recommended the commutation of death sentences already imposed against minors

[166] See Chapter 2, section 2.2.
[167] Oliver Hoehne, 'Special Procedures and the New Human Rights Council – A Need for Strategic Positioning' (2007) 4(1) Essex Human Rights Review 1, 3; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (Philadelphia: University of Pennsylvania Press 1994) 148; Phillip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford: OUP 1992) 164; Rosa Freedman, 'The United Nations Human Rights Council: More of the Same?' (2013) 31(2) Wisconsin International Law Journal 209, 220-23.
[168] Hoehne, 'Special Procedures and the New Human Rights Council – A Need for Strategic Positioning', 8. See also Tomas Husak, 'In Defence of the United Nations Special Procedures' in Lars Muller (ed), *The First 365 Days of the United Nations Human Rights Council* (Geneva 2007); Marc Limon & Hilary Power, 'History of the United Nations Special Procedures Mechanism Origins, Evolution and Reform' (Universal Rights Group 2014).
[169] Sudan Working Group Report 1, para 34.
[170] ibid.

to appropriate alternative sentences, and to ensure that the death penalty is not applied for crimes committed before the age of 18.[171]

Saudi Arabia enquired about the measures taken to implement the Convention on the Rights of the Child and issued recommendations in this regard.[172] It would be beneficial for Saudi Arabia to adopt the same concern for itself as it has been criticised for its lack of adherence to the CRC as discussed in Chapter 3.

Belgium also echoed concerns regarding the imposition of the death penalty against minors and recommended that Sudan respect the principles enshrined in ECOSOC resolution 1984/50, ensuring that the death penalty will be applied to the most serious crimes and individuals over 18 years at the time of the offence.[173] Similarly, other states such as Uruguay,[174] Spain,[175] Italy,[176] Brazil,[177] Palestine,[178] France,[179] and Slovenia[180] expressed concerns regarding the application of the death penalty against minors and recommended its abolition. France[181] and Slovenia[182] also recommended the commutation of death sentences in general. Recommending actions varied from 'establishing a moratorium', 'immediately prohibiting' to 'considering the abolition of the death penalty'.

[171] 83.98. Ensure that no one is executed for a crime that he/she would have committed when he/she was under the age of 18 years, and commute death sentences already pronounced against minors to appropriate alternative sentences.
[172] 83.68. Elaborate national legislation for the protection of child rights and create national mechanisms to monitor implementation.
[173] 83.93. For as long as it resorts to the death penalty, respect the relevant international standards, especially the principles stated in Economic and Social Council resolution 1984/50, and particularly ensure that it will only be applied to the most severe crimes and to individuals who are more than 18 years of age at the time of the act.
[174] 83.94. Establish a moratorium on the death penalty with a view to its abolition and immediately stop the imposition of this cruel measure on children.
[175] 83.95. Immediately prohibit the death penalty and immediately prohibit its application to minors.
[176] 83.96. Abolish the death penalty against juvenile offenders.
[177] 83.97. Consider especially abolishing the death penalty to children under 18 years.
[178] 83.99. Lower the criminal responsibility for children, ban the application of the death penalty to children, and prohibit the recruitment of children as child soldiers and their participation in armed conflict.
[179] 83.100. Prohibit executions of minors pursuant to the Children's Act of 2010.
[180] 83.101. Ensure that the death penalty is not carried out at least on persons under 18 years of age.
[181] 83.91. Commute death sentences to prison terms.
[182] 83.92. Replace death sentences with an appropriate alternative sanction.

France was the only recommending state to make reference to Sudan's domestic law whilst Belgium was the only state to cite ECOSOC Resolution 1984/50 on safeguards against the death penalty. Although a commendable effort to include some aspect of law into their recommendation, these did not meet the criteria set out in HRC Resolution 5/1 for the review of a state.[183]

In fact, no recommending state relied on the review criteria. Since Sudan is party to the ICCPR and CRC, it would prove beneficial for recommending states to refer to Article(s) 6, 7, and/or 14 of the ICCPR when dealing with the question of the death penalty, notwithstanding Article 3 UDHR. This would enable states to produce more concrete recommendations.

All recommendations concerning the death penalty as applied to juveniles were accepted by Sudan which observed that its Constitution and the Child Act 2010 were in place to protect children from capital punishment, noting that persons below 18 years of age are exempt from the death penalty.[184] Again, no recommendation relied on the review criteria such as Article 37(a) of the CRC.

Several near identical recommendations were issued for the establishment of a moratorium on the death penalty with a view to its abolition.[185] These recommendations did not enjoy Sudan's support. Instead, Sudan stressed that:

> In compliance with Sudan's commitment to the ICCPR, the death penalty in the Sudanese laws is confined to the most serious crimes. In murder cases there is room

[183] The basis of the review is: (a) The Charter of the United Nations; (b)The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is party; (d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council.
[184] Sudan Working Group Report 1, para 80.
[185] See 83.86. Establish a moratorium on all executions and, eventually, abolish the death penalty (Switzerland); 83.87. Consider abolishing the death penalty (Brazil); 83.88. Establish a moratorium on the use of the death penalty with a view to its total abolition (Spain); 83.89. Establish, as soon as possible, a moratorium on the execution of the death penalty with a view to its abolition in the future (Belgium); 83.90. Establish a moratorium on executions with a view to abolishing the death penalty (Italy).

> for pardoning by the relative(s) of the deceased and in such case the death penalty will not be imposed.[186]

Although recommending states did not acknowledge the relevant international law in their recommendations, i.e. the ICCPR, the state under review did - albeit incorrectly. Sudan's response to maintaining the death penalty ignored previously raised concerns by the Human Rights Committee that the death penalty continues to be applied for crimes not considered 'the most serious'.[187] Furthermore, the Special Rapporteur on extrajudicial, summary or arbitrary executions has taken the view that a subjective approach to interpreting 'most serious crimes' is not viable as relying upon what individuals or Governments consider to be serious would 'render the relevant international law standard meaningless'.[188]

Paragraph 6 of Article 6 ICCPR is most relevant here as it explicitly states that, 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant' therefore continued justification of the death penalty, that too based on incorrect assumptions of the law, is inadequate as it is delaying abolition.

Whilst recommendations on the death penalty were generic and lacked any reference to Sudan's international human rights obligations, some were based on inaccurate information. The state noted that:

> While the recommendation itself seems to be accepted in its objective, the wording adopted gives false assertion to a situation which is not true. In such cases we accepted some of the recommendations. Also we received some recommendations

[186] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Sudan, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review' (16 September 2011) UN Doc A/HRC/18/16/Add.1, paras 24, 46.
[187] See Human Rights Committee, 'CCPR General Comment No. 6: Article 6 (Right to Life)' (30 April 1982).
[188] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions' (29 January 2007) UN Doc A/HRC/4/20, para 40.

> to do something that we have already done or already doing. Also in this case we accepted the recommendation and noted to the action already taken to enforce the recommendation.[189]

A prime example of this was Switzerland's recommendation for Sudan to ratify the ICCPR.[190] This recommendation is clearly inaccurate as Sudan ratified the ICCPR in 1986 and this was highlighted by the state under review.[191] What it is not party to, however, is the ICCPR's Optional Protocols. Recommending states need to ensure that their recommendations are accurate or risk diluting the review process.

Another example was Honduras' recommendation to 'abolish the law that legalizes the Sunna'[192] which is generic and vague. It is unclear what law Honduras was referring to and neither did it base its recommendation on the review criteria. Based on the Jubilee Campaign's submission,[193] it is possible that Honduras was referring to a form of FGM practised in Sudan, which is termed 'sunna', however this was not made clear in the recommendation. On the other hand, it could be referring to the use of 'Islamic sharia' as stipulated in Article 5(1) of the Constitution which would suggest a misunderstanding of the applicable law. Islamic law is not based on the *sunna* alone but is constituted from primary and secondary sources.[194] Sudan responded that it did not understand what 'law that legalizes the Sunna' meant and nor is there such a law in place.[195]

Freedom of religion was another area of recommendation to the state, especially since apostasy is a capital crime in Sudan. Poland noted that freedom of religion was restricted in Sudan and

[189] UN Doc A/HRC/18/16/Add.1, paras 7-8.
[190] 83.2. Ratify the International Covenant on Civil and Political Rights.
[191] UN Doc AHRC/18/16/Add.1, para 12.
[192] 83.109. Abolish the law that legalizes the Sunna and completely eradicate the practice of female genital mutilation through education and awareness campaigns in the communities.
[193] Jubilee Campaign UPR submission, 4.
[194] See Chapter 5, section 5.1 for an overview of Islamic legal theory.
[195] UN Doc AHRC/18/16/Add.1, para 23.

like Spain, it recommended a revision of the 1991 Penal code and to decriminalise apostasy.[196] Whilst it is commendable that both states made reference to domestic law, they failed to note its inconsistency with Article 18 of the ICCPR, a treaty to which Sudan is party. Sudan did not accept these recommendations, stating that 'freedom of religion is guaranteed by the constitution and the laws'.[197] The 2014 case of Meriam Ibrahim, a woman sentenced to death for apostasy and adultery, contradicts this position and formed a large part of Sudan's second UPR and is discussed in the next cycle.

4.3.4.2 Adoption of the Outcomes

In the adoption of the outcome of the review, Sudan reiterated that the human rights treaties to which it is party are considered an integral part of its Constitution.[198] New laws had been enacted which included that 'the death penalty for those under 18 years of age is strictly prohibited'.[199] The provisions for the death penalty in its penal system, which have been identified to be in violation of international law, were not reformed nor did Sudan give any indication that this area was a work in progress. When compared to submissions made by the OHCHR and stakeholders, there is an apparent polarisation of views as Sudan does not seem to be making any substantive progress on preserving the right to life. Instead it seems to be cementing its sovereign right to impose the death penalty by refining its capital judicial process.

Ten states made statements during the adoption stage none of which addressed the question of capital punishment.[200] The views expressed by these states, Algeria, Cuba, USA, Egypt,

[196] 83.31. Enact a religious freedom act expressly excluding the application of sharia to non-Muslims and decriminalizing apostasy which is considered a crime under the Penal Code (1991) (Spain); 83.32. Revise the 1991 Penal Code and abolish the penalization of apostasy (Poland).
[197] UN Doc A/HRC/18/16/Add.1, para 16.
[198] UNHRC, 'Report of the Human Rights Council on its Eighteenth Session' (18 November 2011) UN Doc A/HRC/18/2, paras 565-66. See also '25th Plenary, 18th Regular Session, Human Rights Council (Part 2)' at time 07:42:00-08:13:00 (*UN Web TV*, 23 September 2011) <http://webtv.un.org/en/ga/watch/25th-plenary-18th-regular-session-human-rights-council-part-2/5253857413001/?term=&sort=date&page=6> accessed 15 July 2017.
[199] ibid.
[200] UN Doc A/HRC/18/2, paras 588-97.

Mauritania, Sri Lanka, Saudi Arabia, Nigeria, UAE, and Qatar were overwhelmingly positive except for the United States. This is not surprising considering most are regional allies of Sudan; however, a lack of objective feedback risks undermining the process.

Saudi Arabia noted Sudan's positive interaction with the UPR and that it:

> cooperated with all UN human rights mechanisms, respected its commitments and declared its readiness to cooperate with the international community. This clearly showed that Sudan considered human rights important and was concerned with implementing them through legislative and institutional initiatives.[201]

Such praiseworthy and inaccurate statements undermine the UPR process. Sudan is behind on its treaty body reporting and has failed to implement substantial legislative reforms to remove death penalty laws which contradict its own Constitution let alone international human rights. Recommending states should provide constructive critique and issue recommendations that strengthen the process, not diminish it.

The stakeholders depicted a different version of events on the ground with majority of the narrative surrounding the state of relations between Sudan and South Sudan since the cessation.[202] As a result, rhetoric on the death penalty was limited.

Nevertheless, in its oral statement, Amnesty International expressed regret over Sudan's rejection of recommendations to establish a moratorium on the death penalty with a view to its abolition. Highlighting the discrepancy between the state report and the human rights situation on the ground, the NGO recognised that Sudan accepted recommendations to prohibit the death penalty for persons under 18 years however at least nine persons (three children and six adults) were in the death row section of Shalla Prison in Darfur where they are awaiting retrial.

[201] ibid para 594.
[202] See eg, ibid paras 598-606.

Amnesty International called upon the state to commute these death sentences and for an appeal in line with international fair trial standards.[203] The Cairo Institute for Human Rights similarly echoed concerns over due process and lack of basic fair trial guarantees, 'a blatant example is 19 people accused of apostasy'.[204] It called upon the state to 'promote religious freedom, expressly outlawing the strict application of sharia law and decriminalising apostasy'.[205]

4.4 Mid-term Update

Sudan submitted its midterm report in 2013 detailing the progress made regarding the implementation of the accepted recommendations in its first UPR. Considering the large majority of African and OIC states failed to produce a midterm report, Sudan's submission suggested an increased level of engagement with the mechanism and, therefore, was a meaningful step in the right direction.[206]

Since the state did not accept most of the recommendations on the death penalty, these were not included in the report. It did, however, accept recommendations concerning the abolition of the death penalty against juvenile offenders, to which it responded that, 'the Child Act 2010 explicitly prohibits the imposition of the death penalty on persons below 18 years old and the Constitutional Court affirmed the same in one of its decisions'.[207]

UPR-Info released its own Midterm Implementation Assessment (MIA) report which included responses from stakeholders involved in Sudan's UPR. The purpose of the MIA is to demonstrate how all stakeholders are expected to follow through on, and to implement, their

[203] Oral statement by Amnesty International, 2.
[204] Oral statement by Cairo Institute for Human Rights, 1.
[205] ibid.
[206] For a list of midterm reports see 'UPR Mid-term Reports' (*OHCHR*) <www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> accessed 15 July 2017.
[207] 'Universal Periodic Review of the United Nations Human Rights Council: Sudan's National Mid-term Report', 27 available at < https://lib.ohchr.org/HRBodies/UPR/Documents/session11/SD/SudanImplementation_en.pdf >.

commitments. States should implement accepted recommendations and civil society should monitor that implementation.[208]

In a joint submission, Asmaa Society for Development and Awn Center for Advocacy and Consultancy noted that Sudan's rejection for the abolition of the death penalty is based on *sharīʿa* law but there are many crimes which do not fall under this remit and continue to be punishable with death.[209] The joint submission failed to provide further clarification as to what these crimes were or how they are devoid of any theological basis which would have given greater credibility to the report and allowed for a more productive discussion on the issue.

The human rights NGO, Redress, highlighted Sudan's indifference to concerns raised by the UN Human Rights Committee in 2007 that the death penalty is being applied to crimes that do not fall within the remit of 'most serious' and neither have they been followed by any legislative changes.[210] The state is also silent on:

> serious concerns over procedural shortcomings, such as the anti-terrorism laws, and practices, such as reliance on confessions in death penalty cases that defendants alleged had been extracted under torture. Any death penalty imposed following an unfair trial constitutes a violation of the right to life contrary to Sudan's obligations under the ICCPR and other relevant treaties.[211]

Moreover, Sudan did not accept any recommendations to become subject to individual complaints procedures such as the First Optional Protocol to the ICCPR. Ratification of the Protocol would allow Sudan to recognise the jurisdiction and competence of the Human Rights Committee to hear complaints relating to its use of the death penalty. It responded that, 'Sudan

[208] UPR-Info, 'Sudan: Mid-term Implementation Assessment', 2 available at <www.upr-info.org/sites/default/files/document/sudan/session_11_-_may_2011/mia-sudan.pdf>.
[209] ibid 51.
[210] ibid.
[211] ibid.

has a Constitutional Court which is the guardian for the human rights stipulated in the Constitution and the international human rights treaties to which Sudan is a party'.[212]

This justification fails to acknowledge that complaints would only be heard by the UN Human Rights Committee after effective remedies have been exhausted. It would not infringe upon the Constitutional Court's role as guardian. However, there may be situations where the Constitutional Court fails to discharge its role as guardian due to its limited mandate, misinterpretation of applicable standards, or delays. And '[i]t would be in those cases that the Human Rights Committee could play an important role as supervisory body ensuring respect of Sudan's obligations under the ICCPR'.[213]

Sudan's first cycle revealed a lack of engagement, by the state under review, on the right to life. Whilst this was taken up by other recommending states and stakeholders, there was a lack of awareness by these actors on the Islamic position of the death penalty which would provide a better critique of state death penalty laws since the *sharīʿa* is the primary source of its legislation.

4.5 Second Cycle

4.5.1 National Report

Sudan's second UPR occurred in May 2016.[214] Its national report is a marked improvement from its first especially regarding the role of civil society in the national consultation process. In preparation for the report, '70 such organisations were directly invited to participate while the event was also announced over the media. Twenty-four NGOs working in the field of

[212] ibid.
[213] ibid.
[214] UNHRC, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/1: Sudan' (15 February 2016) UN Doc A/HRC/WG.6/25/SDN/1 [hereinafter Sudan National Report 2].

human rights also took part'[215]. An annex is also attached detailing the nature of the consultations and names of participants.[216]

Moreover, since the first report was adopted, 'Sudan has issued a series of laws to promote fundamental freedoms and protect human rights'.[217] This includes the Criminal Act of 1991 which was revised in 2015 'with the addition of the offence of sexual harassment and the separation of the offence of rape from that of adultery in Article 149, thereby removing all ambiguity and ensuring just and fair treatment for victims'.[218] Pre-2015, Article 149 defined rape as 'whoever makes sexual intercourse, by way of adultery (*zinā*), or sodomy (*liwāṭ*), with any person without his consent'. Defining rape as '*zinā* without consent' was highly problematic due to the evidentiary requirements for *zinā* which are based on a virtually impossible burden of proof. This 'evidentiary threshold has attributed to impunity for rape, as conviction can realistically only be secured where the perpetrator confesses to the crime'.[219]

The revised Article disassociates *zinā* and *liwāṭ* from the definition of rape[220] and 'an added victory is that rape is not defined just by penal [sic] penetration, but also now includes foreign objects on other parts of the body'.[221]

Whilst this is considered to be a positive step by Sudan, the Article still has some shortcomings. Although rape is now distinct from *zinā* and *liwāṭ* as crimes, this separation does not extend to

[215] Sudan National Report 2, para 4.
[216] The annex is available at <www.ohchr.org/en/hrbodies/upr/pages/sdindex.aspx> accessed 15 July 2017.
[217] ibid para 5.
[218] ibid para 11.
[219] Redress and Khartoum Centre for Human Rights and Environmental Development, 'Priorities for Criminal Law Reform in Sudan: Substance and Process' (Option Paper 2008) 10; Abdel Salam Sidahmed, 'Problems in Contemporary Application of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women' (2001) 28(2) British Journal of Middle Eastern Studies 187, 203.
[220] The revised Article states: 'A person shall be deemed to have committed the crime of rape, if that person copulates with another person by an act resulting in the insertion of a sexual organ or any object or any other bodily part in the vagina or anus of the victim by the use of force or the threat thereof, or by coercion causing fear of the use of violence, or by threat, detention, psychological coercion, seduction, abuse of authority against such person or another, or where the crime has been committed against a person who is unable to express consent due to natural, seduction or age-related reasons.'
[221] Liv Tønnessen and Samia al-Nagar, 'Women and Girls Caught between Rape and Adultery in Sudan: Criminal Law Reform. 2005-2015' (CHR Michelsen Institute 2015) 18.

punishments. The revised Article 149 has kept subsection (3) (now renumbered as subsection (2)) which stipulates:

> Whoever commits the offence of rape, shall be punished, with whipping a hundred lashes, and with imprisonment, for a term, not exceeding ten years, unless rape constitute the offence of adultery, or sodomy, punishable with death.

Another amendment which the government fails to mention in its report is Article 126 of the same Act which introduces further crimes under the capital offence of apostasy. Apostasy now includes 'anyone blaspheming or insulting the Prophet Muhammed',[222] 'speaking evil, contradicting or distorting the Quran',[223] 'Cursing the Prophet's companions in general or Abu Bakr, Umar, Uthman or Ali or speaking evil of Aisha'.[224] The state does not make any reference to this change nor provide any justification however Sudan's curtailment on freedom of religion formed the main critique of the OHCHR and the stakeholder report when discussing the right to life. This shows the importance of non-state actors in addressing the gaps left by the state under review.

Similar to the first national report, the right to life is precluded from the narrative. No justification is provided for the state's use of the death penalty and its apparent inconsistency with international law especially when it received a number of recommendations in this respect. This can be interpreted as the state clinging to its sovereign right to determine its criminal justice practices and is further supported by Sudan's comments made at the 2015 Human Rights Council's High-level Panel on the Death Penalty. During the discussions, Sudan referred to 'the principle of non-interference in the internal affairs of a country and each country can

[222] Amended art 126 (1b).
[223] Amended art 126 (1c).
[224] Amended art 126 (1d).

choose its own legal and judicial system based on national legislation in order to guarantee peace and stability to all citizens'.[225]

Section IV, of the national report, deals with the implementation of recommendations accepted in the previous cycle and the report addresses these recommendations in a thematic order. Responding to 'recommendations concerning the rights of children', the government claims that under Article 4 of the Child Act 2010, the minimum age of criminal responsibility is 12 and the Act defines a child as any person under the age of 18. Additionally, children are exempt from the death penalty and 'Article 69 lays down the punitive measures which may be applied'.[226]

On the other hand, in its submission to Sudan's UPR, the Child Rights International Network observed that the death penalty remains lawful for offences committed before the age of 18.[227] It reported that the Special Court upheld a death sentence in December 2011 for two children charged with carjacking and a woman believed to be under 18 was sentenced to death by stoning for adultery on 31 May 2012.[228] CRIN argued that although the Child Act 2010 provides that all children are to be sentenced by a child court (Articles 62 and 67) and does not provide the court with the death penalty as a sentence (Article 77), the impact of the Act remains unclear. Under Article 77, the Act requires the court to have 'due regard' that 'death sentence is not inflicted on the child'. CRIN questioned what 'due regard' means in this context

[225] UNHRC, 'Panel Discussion on the question of the death penalty - 9th Meeting, 28th Regular Session Human Rights Council' (*UN Web TV*, 4 March 2015) at time 2:36:00 <http://webtv.un.org/…/transforming-the-world-…/4930324186001/watch/panel-discussion-on-the-question-of-the-death-penalty-9th-meeting-28th-regular-session-human-rights-council/4094190610001>; UN Media Release, 'Human Rights Council holds High-Level Panel on the death penalty' (*OHCHR*, 4 March 2015) HRC15/015E <www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=15640&LangID=E>. See also Report of the United Nations High Commissioner for Human Rights, 'High-level panel discussion on the question of the death penalty' (16 July 2015) UN Doc A/HRC/30/21, para 25; UN Doc A/46/40, para 506.

[226] Sudan National Report 2, para 64.

[227] Sudan Stakeholder Report 2, para 35; CRIN UPR Submission, 1.

[228] ibid 2. See David Smith, 'Sudanese woman sentenced to stoning death over adultery claims' *The Guardian* (London, 31 May 2012) <www.theguardian.com/world/2012/may/31/sudanese-woman-stoning-death-adultery> last accessed 31 July 2017.

as ‘the wording appears to fall short of a categorical prohibition on the death penalty for offences committed while a child’. This means the death penalty could remain a possibility for offences committed before 18 years of age.[229]

Since no recommendations on the death penalty were accepted in Sudan’s first UPR, there is no mention of the right to life in the implementation section nor anywhere else in the report. However the OHCHR and Stakeholders’ report provide an alternative narrative, one that focuses on the right to life specifically in relation to freedom of religion.

4.5.2 OHCHR Report

The Human Rights Committee urged Sudan to ratify both OP-CRC-IC and ICCPR-OP-2 aimed at the abolition of the death penalty.[230] The Committee expressed concern that the national legal framework and INC did not recognise rights enshrined in the ICCPR. It recommended that Sudan ensures its criminal law is compatible with its obligations under the Covenant.[231]

The Human Rights Committee and the Independent Expert expressed concern over the death penalty being applied to crimes that fell under the ‘most serious crimes’ threshold which was contrary to the ICCPR.[232] Both recommended a moratorium on the death penalty and/or its abolition including the abolition of the juvenile death penalty. They recommended that Sudan ensure that ‘all allegations of torture and ill-treatment be promptly, independently and thoroughly investigated’ and confessions obtained in violation of Article 7 of the ICCPR are not used by the courts. [233]

[229] CRIN UPR submission, 1.
[230] UNHRC, ‘Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1: Sudan’ (27 March 2016) UN Doc A/HRC/WG.6/25/SDN/2 [hereinafter Sudan OHCHR Report 2] para 2.
[231] Sudan OHCHR Report 2, para 5.
[232] See also UN Doc CCPR/C/GC/R.36/Rev.2.
[233] Sudan OHCHR Report 2, para 27; UN Doc CCPR/C/SDN/CO/4, paras 14-15; UN Doc A/HRC/30/60, paras 57, 74(g).

The Independent Expert addressed the issue of freedom of religion citing the case of Meriam Ibrahim who was sentenced to death, on 15 May 2014, for allegations of apostasy under Article 126 of the Sudanese Criminal Act. The case received widespread media coverage and international outcry with the Independent Expert receiving numerous complaints about the case.[234] The defence petition held that Meriam's personal faith and beliefs had been misrepresented. A man claiming to be Meriam's brother informed the authorities, in September 2013, that she had married a Christian and committed adultery. It is only then that the authorities became aware of the Ibrahim family. The defence argued that Meriam had been a devout Christian and met her husband, Daniel Wani, whilst a practising Christian. The Court of Appeal overturned the conviction on 23 June and Meriam was released from prison.[235]

According to the Independent Expert, Mashood A Baderin, 'the Court of Appeal's ruling overturning the decision of the lower court in this case is commendable in the interest of justice from the perspective of both Islamic law and that of international human rights'.[236] He also noted that in Sudan's second periodic submission to the Human Rights Committee on the implementation of the ICCPR, the state expressed that the Act does not criminalise conversion from Islam 'but only the manifestation of such conversion if such manifestation affects public safety'.[237]

This interpretation was supported by Court of Appeal judge, Osman Atigani Mahmoud, who quashed the conviction observing that:

[234] Sudan OHCHR Report 2, para 42; Report of the Independent Expert on the situation of human rights in the Sudan, Mashood A. Baderin (4 September 2014) UN Doc A/HRC/27/69, paras 29, 43.
[235] Jon Yorke, 'Meriam Ibrahim Saved from 100 Lashes and the Death Penalty' (OxHRH Blog, 28 June 2014) <http://ohrh.law.ox.ac.uk/meriam-ibrahim-saved-from-100-lashes-and-the-death-penalty/>; Jon Yorke, 'Meriam Ibrahim is Freed: Weaving together Law, Politics and Civil Society,' (OxHRH Blog, 5 August 2014) <http://ohrh.law.ox.ac.uk/meriam-ibrahim-is-freed-weaving-together-law-politics-and-civil-society/> accessed 7 November 2016.
[236] UN Doc A/HRC/27/69, para 43.
[237] ibid para 44; UN Doc CCPR/C/75/Add.2, para 127.

> Sudanese law does not criminalise the abstract offence of apostasy unless it is combined with manifestation and propagation. This view is adopted by those who believe that the offence of apostasy applies only to apostates who fight against Islam. The Sudanese law only criminalises the conduct of fighter apostate and not the Muslim who only changed his religion.[238]

Mahmoud held that in order to prove the apostasy charge, Meriam would need to have 'stated that she is Muslim and that she propagates or publicly promotes the renunciation of the creed of Islam'.[239] Nevertheless, Meriam's acquittal was in fact a result of her being deemed mentally unfit, by a majority of two to one, as identified by the stakeholder report below.

The Independent Expert urged Sudan to uphold the right to freedom of religion and belief without discrimination, in accordance to both the Sudanese Constitution and ICCPR Article 18 to which Sudan is a State Party. The Sudanese Bar Association and National Commission for Human Rights stated that Meriam's case 'raised important legal questions about the scope of the right to freedom of religion and belief in Sudan, which needed to be re-examined'.[240] The case demonstrated a lack of appropriate judicial training in Sudan, particularly at the lower bench of the judiciary.[241]

4.5.3 Stakeholder Report[242]

[238] Unofficial translation of Appeal Court Judgement of 23 June 2014, Abrar Alhadi Mohammed Abdallah and Others Trial (on file with author).
[239] ibid.
[240] UN Doc A/HRC/27/69, paras 44-45.
[241] ibid.
[242] UNHRC, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council Resolution 16/21: Sudan' (19 February 2016) UN Doc A/HRC/WG.6/25/SDN/3 [hereinafter Sudan Stakeholder Report 2].

The stakeholder report comprised of 24 stakeholders' submissions to the UPR.[243] In dealing with the scope of Sudan's international obligations, Muslims for Progressive Values (MPV) recommended Sudan ratify the Second Optional Protocol to the ICCPR with an aim to abolish the death penalty.[244]

JS6 and MPV noted that courts have continued to pass death sentences, some in absentia. They recommended an immediate moratorium on the death penalty with a view to its abolition.[245] MPV reported that Sudan's imposition of the death penalty is not restricted to the most serious crimes. The death penalty is provided for crimes against the state, offences which have been used increasingly often since 2011 to punish and silence political opposition party members and other activists who have criticised government policy. An example is Ibrahim el Sheikh, leader of the Sudanese Congress party, who was charged in 2014 with the death penalty offence of undermining the constitutional order after he criticised the actions of the Government's Rapid Support Forces. Furthermore, since its previous review, the scope for the application of

[243] ADF International, Geneva (Switzerland); Amnesty International, London (United Kingdom); Alkarama Foundation, Geneva (Switzerland); Arab NGO Network for Development, Beirut (Lebanon); CIVICUS World Alliance for Citizen Participation, Johannesburg (South Africa); Child Rights International Network, London (United Kingdom); The European Centre for Law and Justice, Strasbourg (France); Front Line Defenders – The International Foundation for the Protection of Human Rights Defenders, Dublin (Ireland); Global Initiative to End All Corporal Punishment of Children, London (United Kingdom); Human Rights Watch, Geneva (Switzerland); Jubilee Campaign, Fairfax, VA (USA); National Commission for Human Rights, Sudan (Sudan); Muslims for Progressive Values, LA, CA (USA); Redress, London (United Kingdom); Reporters Without Borders, Paris (France); Sudanese Human Rights Initiative, Khartoum (Sudan); The Carter Center, Atlanta (USA). The following are Joint Submissions: Joint Submission No. 1 (JS1) by: Global Campaign for Equal Nationality Rights and the Institute on Statelessness and Inclusion, Eindhoven (Netherlands); Joint Submission No. 2 (JS2) by: Our Rights Group on behalf of Asmaa Society for Development, Sudanese Human Rights Monitor's Awn Center, Sudanese Development Initiative (Sudan), Sudanese Solidarity Committee, Sudanese Organization for Research & Development (Sord) and Seema (Sudan); Joint Submission No. 3 (JS3) by: Sexual Rights Initiative in partnership with Action Canada for Sexual Health and Rights, The Egyptian Initiative for Personal Rights, The Federation for Women and Family Planning, Akahatá and Coalition of African Lesbians, Ottawa (Canada); Joint Submission No. 4 (JS4) by: Habitat International Coalition, the Sudanese Human Rights Monitor, Social Peace Initiative for Darfur Housing and Land Rights and Nuba Mountains International Association Sudan (Sudan); Joint Submission No. 5 (JS5) by: Association for Progressive Communications and Alternatives International, Johannesburg (South Africa); Joint Submission No. 6 (JS6) by: African Centre for Justice and Peace Studies (NY, London, and Kampala), International Federation for Human Rights, Paris (France), and International Refugee Rights Initiative (Uganda); Joint Submission No. 7 (JS7) by: Christian Solidarity Worldwide, New Malden (United Kingdom) and Christian Solidarity Worldwide Nigeria (Nigeria).

[244] MPV UPR submission, 2, 3 and 9.

[245] JS6 UPR submission, 15, 16 and 19; MPV UPR submission, 10.

the death penalty has been broadened with apostasy now including additional prohibited acts and the creation of a new crime of trafficking.[246]

JS6, ECLJ, Jubilee Campaign, and MPV recommended reconciling the Criminal Act with the Interim Constitution to ensure religious freedom and repeal Articles 125-126. Several stakeholders cited the case of Meriam Ibrahim on the restriction of freedom of religion in Sudan.[247] ADF International reported that Ibrahim was raised a Christian by her mother; her father, a Muslim, had abandoned the family when she was 6 years old. Nevertheless, she was considered to be a Muslim under the government's interpretation of *sharīʿa* law, because her father was a Muslim, and therefore charged with apostasy.[248]

Meriam's lawyers challenged the constitutionality of proselytising from Islam under Article 126 of the Criminal Act 1991 and argued that it was a violation of Article 38 INC. The lawyers were harassed and given death threats for being 'un-Islamic'. Despite guarantees in the Constitution to protect religious liberty, Sudan's national laws and practices contradict this fundamental right.[249]

The Sudanese Human Rights Initiative (SHRI) observed that a group of UN human rights experts condemned Meriam's death sentence and held that her trial was a violation of basic fair trial and due process guarantees.[250] In particular, she was unable to call upon witnesses to

[246] MPV UPR submission, 16.
[247] See AI UPR submission, 3; ADF UPR submission, 2; JS6 UPR submission, 15; JC UPR submission 3; JS7 UPR submission, 2; Redress UPR submission, 2; MPV UPR submission, 3.
[248] ADF UPR submission, 2.
[249] JC UPR submission, para 13.
[250] UN High Commissioner for Human Rights, 'Sudan: UN Rights Experts Condemn Death Sentence Against Pregnant Mother for Apostasy and Adultery' (*OHCHR*, 19 May 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14618&LangID=E> accessed 1 July 2017. The UN Experts included: Ms. Rashida Manjoo, UN Special Rapporteur on violence against women, its causes and consequences; Mr. Mashood Baderin, UN Independent Expert on the situation of human rights in the Sudan; Mr. Christof Heyns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions; Ms. Gabriela Knaul, UN Special Rapporteur on the independence of judges and lawyers; Mr. Heiner Bielefeldt, UN Special Rapporteur on freedom of religion or belief; Mr. Juan Méndez, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Ms. Frances Raday, Chairperson-Rapporteur of the UN Working Group on the issue of discrimination against women in law and in practice; Ms. Rita Izsák, UN

present her defence or effectively challenge any witnesses. Furthermore, Article 2(e) of the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that 'the essential elements of a fair trial including adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence' which the state failed to do.[251] SHRI recommended Sudan to bring 'its hudud offences in line with human rights and urged that those penalties are applicable to Muslims exclusively'.[252]

CSW reported that Meriam was acquitted on the basis of mental health as opposed to her right to choose or change her religion which is a concerning development.[253] A reading of the court transcript does indeed reveal that appeal judge, Kawthar Abd Al-Rahman, held 'the appellant's mental sickness and her attempt to commit suicide, which was supported by a medical report, provides reason to excuse her of criminal responsibility for her actions because any person who is not fit to stand trial cannot be held criminally liable'.[254] Similarly, the third appeal judge, Dr. Ahmad Hamdein Tabiq, held that the Merit Court applied a correct understanding of the law but 'the appellant still benefits from the likelihood of being mentally ineligible due to mental and psychological instability and illness'. He denied that Meriam's conviction was a violation of Article 18 ICCPR, turning the argument on its head by stating that:

> Depriving Muslims of their right to apply these punishments and interference in their religion could be considered as a restriction on *their* freedom of religion…A

Special Rapporteur on minority issues; Mr. Mads Andenas, Chair-Rapporteur of the UN Working Group on Arbitrary Detention.

[251] SHRI UPR submission, 5; Redress email to African Commission on Human and Peoples' Rights (2 June 2014) 11 available at <www.redress.org/downloads/meriam-yahia-ibrahim-complaint-2-june-2014.pdf> accessed 1 July 2017.

[252] SHRI UPR submission, 8.

[253] JS7 UPR submission, para 9.

[254] Unofficial translation of Appeal Court Judgement of 23 June 2014, Abrar Alhadi Mohammed Abdallah and Others Trial (on file with author).

> convert from Islam constitutes a danger to the Muslim community and there is a duty to keep the Muslim community safe by confronting outlaws of Islam. So dealing with apostasy is at the heart of the Islamic religion and depriving Muslims of the opportunity to punish apostates is a violation of the international human rights articles referred to above (Article 18 ICCPR)[255]

There are no legitimate grounds for this judicial reasoning and instead it shifts the focus away from the state's abuse of the right to freedom of religion and the right to life.

MPV addressed the role of *shari'a* which advocates for freedom of expression and justice 'in dealing with difference of opinions in a non-violent manner. Killing an individual for exercising his/her right to free speech is contrary to a main principle of sharia – the right to life- and is denounced in the Qur'an'.[256] Moreover, cases such a Meriam's and another in Al Gaderaf, where a woman was charged with apostasy but acquitted after she converted back to Islam to avoid punishment, are clear violations of the Constitution and international law. It also contradicts the Qurʾān which does not criminalise apostasy and provides no earthly punishment, but rather one's religion is a matter between the individual and God.[257] MPV was the only stakeholder to address the death penalty from an Islamic law and international law perspective and attempt to reconcile the two. The submissions could have been strengthened by also referencing the role of the *sunna* which is considered to play a large part in maintaining apostasy laws.

Meriam was also charged with adultery as Islamic law does not recognise marriages of Muslim women to non-Muslim men and sentenced to 100 lashes.[258] MPV challenged that under Article

[255] ibid (emphasis added).
[256] MPV UPR submission, 4
[257] ibid.
[258] ADF UPR submission, 2.

146 of the Criminal Act 1991, 'Sudanese women are overwhelmingly accused and convicted of crimes related to sexual conduct outside a legally recognised marriage: fornication and adultery'.[259]

In 2015, two South Sudanese Christian pastors, Reverend Yat Michael and Reverend Peter Yein Reith, were detained on charges of espionage, blasphemy, inciting hatred against sects, and other charges but in reality, they were targeted because of their Christian faith. Those charges had varying penalties including the death penalty. In August 2015, they were convicted on lesser charges and released from prison.[260]

In its submission, ECLJ noted that since 2011 more than 170 persons have been convicted of apostasy and nearly all, under government intimidation, have recanted out of fear of death. Suspected converts to Christianity have been intimidated by authorities and sometimes tortured. In December 2012, two priests and three Christians were arrested for baptising a young convert from Islam. The priests were eventually released however the fate of the other three Christians and the convert are undetermined.[261]

ECLJ argued that 'Sudan did not express any reservations to any provisions of the ICCPR, nor did it issue any interpretive declarations when it acceded to the ICCPR's authority thus it has no excuse for failing to abide by its provisions'.[262] The state was also in violation of Article 8 of the African Charter on Human and Peoples' Rights which guarantees the free practice of religion.[263]

It is clear that Sudan's apostasy and blasphemy laws violate Articles 18 (freedom of religion) and 19 (right to freedom of expression) of the ICCPR. ADF International cited the Human

[259] MPV UPR submission, 5.
[260] ADF UPR submission, para 10; MPV UPR submission, para II.V.
[261] ECLJ UPR submission, paras 7-9.
[262] ibid.
[263] ibid para 9.

Rights Committee's General Comment No. 34 on the right to freedom of expression, which declared that blasphemy laws are incompatible with the ICCPR. Amnesty International recommended Sudan abolish the criminalization of apostasy.[264]

Alkarama reported that NISS have powers to arrest individuals without legitimate suspicion that the individual in question is guilty of a criminal offence. He/she can be detained without charge for up to 45 consecutive days, 'often incommunicado, and without any obligation to be brought before a judge during the first 45 of detention'. This has been used against opposition members and human rights defenders in particular.[265]

The criminal law does not specify whether an individual is to be brought before a judge within 48 hours of arrest. Defendants are frequently denied the right to presence of a lawyer during interrogations. The introduction of a special courts system by the 2001 Anti-Terrorism Act allows for trials to be held in absentia and 'leave open the possibility of these courts to convict the accused on basis of confessions, notwithstanding the manner in these were obtained'.[266]

SHRI expressed concern over fair trial guarantees in Sudan. Many defendants are tried by public order courts and a lack of due process such as the right to legal counsel and a fair trial hinders the administration of justice. Defendants are often tried promptly or in the space of a few days of being arrested. They have limited access to defence counsel and in many cases, contact with friends or relatives is prevented. Judges fail to inform the accused about the appeals process.[267]

[264] AI UPR submission, 5; ECLJ UPR submission, para 11.
[265] Alkarama UPR submission, paras 15-16.
[266] ibid para 16.
[267] SHRI UPR submission, 5.

A harrowing example of the lack of due process was a case of 39 persons arrested and charged with causing a public disturbance. They appeared before different public order courts on the same day and were denied legal representation. The trial duration was less than an hour.[268]

This is inconsistent with state claims of establishing a council of human rights to disseminate a human rights culture and holding a number of workshops, for participants from the judiciary and law enforcement agencies, in order to ensure fair trial guarantees are effectively implemented as enshrined in international and regional human rights treaties.[269] With violations of the right to a fair trial being violated so frequently in Sudan, it begs the question of how the death penalty can be administered 'justly'.

4.5.4 The Review

4.5.4.1 Interactive Dialogue

The working group on the UPR held its review of Sudan on 4 May 2016. The troika selected to facilitate the review comprised of Albania, Indonesia, and Togo.[270] A list of questions was prepared in advance and transmitted to Sudan through the troika. Slovenia[271] and Belgium[272] asked questions specific to the application of the death penalty whilst the United Kingdom[273] addressed the issue of religious belief namely the right to change one's religion. This was not

[268] ibid.
[269] Sudan National Report 2, para 111, 114.
[270] Sudan Stakeholder Report 1, para 49.
[270] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Sudan' (11 July 2016) UN Doc A/HRC/33/8 [hereinafter Sudan Working Group Report 2], paras 1-2.
[271] We note the development of judicial practice on exemption of persons below the age of 18 from the application of the death penalty. What measures will the Government of Sudan take to strengthen this practice throughout the country?
[272] Which measures have been taken to address the concern of the Human Rights Committee and the Independent Expert that the death penalty was maintained for crimes below the threshold of the 'most serious crimes', contrary to the International Covenant on Civil and Political Rights (ICCPR)? How many individuals have been sentenced to death and/or executed since the first UPR? Could the delegation provide us an overview of the nature of the crimes for which those death sentences were imposed in Sudan?
[273] What is the government doing to ensure that religious freedoms, particularly in relation to Church groups, are protected, including the right to change ones religion?

answered by the state under review which can be interpreted as the state expressing its sovereign right in addressing the questions it chooses to answer.

In the state under review's presentation, Sudan highlighted its engagement with all stakeholders in preparing the national report in the form of broad public consultations, dialogue, and national and state level workshops. It further evidenced its commitment to the UPR mechanism by presenting a midterm report; however, the right to life was absent from its discussion save with respect to the juvenile death penalty. [274]

During the interactive dialogue, 102 delegations made statements and a total of 244 recommendations were issued.[275] Twenty-two recommendations were issued on the death penalty and all were noted by Sudan.[276]

Ireland expressed concern regarding the application of the death penalty.[277] Portugal noted that the death penalty was being applied for crimes that were not considered serious under the ICCPR.[278] Lithuania urged Sudan to continue to review its Constitution, calling for the primacy of the ICCPR over domestic law. [279] Poland,[280] Madagascar,[281] Honduras,[282] Montenegro,[283]

[274] Sudan Working Group Report 2, paras 6-7.
[275] ibid para 26. The number of recommendations that translated into domestic legal change is currently unavailable as the state's mid-term report, by UPR-Info, has not been released.
[276] ibid part II.
[277] ibid para 93.
[278] ibid para 122.
[279] 138.16 Continue the constitutional review process in full transparency and clarity on the primacy of the International Covenant on Civil and Political Rights over domestic law.
[280] 140.2 Ratify international human rights treaties, including the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.
[281] 140.14 Ratify the international treaties to which the state is not yet party, particularly the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.
[282] 141.1 Ratify the two Optional Protocols to the International Covenant on Civil and Political Rights.
[283] 141.2 Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Montenegro) (Albania); ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (Uruguay).

Albania,[284] Uruguay,[285] Portugal,[286] and Luxembourg[287] all recommended Sudan to ratify the Second Optional Protocol to the ICCPR.

Costa Rica,[288] Congo,[289] and Slovakia[290] recommended Sudan to abolish the death penalty. Italy,[291] Australia,[292] Portugal,[293] Belgium,[294] Austria,[295] Mexico,[296] Namibia,[297] Spain,[298] France,[299] Georgia,[300] and Sierra Leone[301] recommended a moratorium on the death penalty. Austria, Mexico, and Namibia also urged Sudan to ensure that the death penalty is never applied to persons under the age of 18. Sudan reaffirmed that the death penalty was not imposed against children under 18 years.[302] These recommendations are inadequate as they are generic, lack specificity, are not measurable, or time-bound. They consider the result to be achieved rather than the specific actions that reach the result and therefore implementation cannot be appropriately assessed.

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[284] ibid.
[285] ibid.
[286] 141.3 Adopt an official moratorium aiming at the formal abolition of the death penalty in the country and to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
[287] 141.4 Initiate the process of ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights with the view of definitely abolishing the death penalty.
[288] 141.6 Ratify the Convention against Torture and abolish the death penalty.
[289] 141.23 Put an end to the death penalty.
[290] 141.24 Abolish immediately the death penalty.
[291] 141.25 Establish a moratorium on capital executions with a view to abolishing the death penalty and to repeal all legislation that allows for the application of corporal punishment.
[292] 141.26 Establish a formal moratorium on the use of the death penalty with a view to ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights.
[293] 141.3 Adopt an official moratorium aiming at the formal abolition of the death penalty in the country and to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights.
[294] 141.27 Establish a moratorium on executions and reduce the number of crimes punishable by the death penalty
[295] 141.28 Impose an immediate moratorium on the death penalty with a view to abolishing it, and to ensure that it is never applied to persons under the age of 18.
[296] 141.29 Establish a moratorium on the death penalty and consider its eventual abolition, especially and urgently in relation to the execution of children under the age of 18 years.
[297] 141.30 Consider imposing a moratorium on the death penalty with a view to abolish it and to take measures to ensure that it is never applied to persons under the age of 18 years.
[298] 141.31 Establish a moratorium on the application of the death penalty with a view to its abolition (Spain); establish a moratorium on the death penalty as a first step towards complete abolition (France); introduce a moratorium on death sentences with a view to abolishing the death penalty (Georgia); consider establishing a moratorium on the death penalty with a view to abolishing it (Sierra Leone).
[299] ibid.
[300] ibid.
[301] ibid.
[302] Sudan Working Group Report 2, para 48.

A further six recommendations (Poland,[303] Slovakia,[304] Spain,[305] Australia,[306] Italy,[307] Honduras[308]) were issued on freedom of religion with Spain, Australia, and Italy specifically urging Sudan to revise the 1991 penal code and abolish the penalisation of apostasy. All six recommendations on this issue were accepted and whilst this may be attributed to their generic nature, it also suggests Sudan's changing attitude to this area of law.

Reflecting the previous cycle, none of the recommending states acknowledged the review criteria in their recommendations. No reference was made to Sudan's obligations under Articles 6, 7, 14, and 18 of the ICCPR and/or Article 37(a) CRC which could have strengthened recommendations on the death penalty.

Four out of the 22 countries issuing recommendations on the death penalty belonged to the African Union (Madagascar, Republic of Congo, Namibia, and Sierra Leone). These countries are abolitionist[309] and their anti-death penalty recommendations are reflective of the African Union's evolving position on capital punishment. Article 4 of the African Charter on Human and Peoples' Rights states, '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life'.[310] The African Commission on Human and Peoples' Rights has evolved its language over

[303] 138.28 Adopt legislation prohibiting the dissemination of ideas based on racial and ethnic hatred and incitement to racial discrimination and violence and ensure full respect for freedom of religion or belief and the human rights of the persons belonging to ethnic and religious minorities, in line with the international human rights law.
[304] 138.95 Take effective measures to respect the right to freedom of religion without discrimination.
[305] 140.24 Make progress towards the abolition of the crime of apostasy and the elimination of other laws and practices contrary to freedom of religion and/or belief.
[306] 140.25 Revise the 1991 Penal Code and abolish the penalization of apostasy (Australia) (Italy).
[307] ibid.
[308] 141.17 Adopt measures in the legislative and political spheres, including appropriate budget allocation, to guarantee, prevent and eradicate discrimination on religious grounds, ethnic composition, gender or sexual orientation.
[309] Sierra Leone is abolitionist de facto.
[310] For a detailed review of the death penalty in Africa, see Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria: Pretoria University Law Press 2007); Andrew Nowak, *The Death Penalty in Africa: Foundations and Future Prospects* (New York: Palgrave Macmillan 2014); Andrew Nowak, *The African Challenge to Global Death Penalty Abolition: International Human Rights Norms in Local Perspective* (Cambridge: Intersentia 2016).

the years calling for a more strengthened approach to the restriction, and ultimate abolition, of the death penalty.[311] In 2008 it adopted the Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty and further endorsed abolition in Africa by imploring 'all State Parties to give their full support to the Working Group on the Death Penalty of the African Commission on Human and Peoples' Rights in its endeavour to work towards the abolition of the death penalty in Africa'.[312] The Resolution's aspiration evolved from 'urging states to envisage a moratorium' in 1999 to a 'calling to observe a moratorium' in 2008.[313]

Two recommendations were received from the OIC (Albania and Sierra Leone). Although both countries are Muslim majority, they are secular states. No other recommendations were received from OIC states or the Arab League which is indicative of their attitude towards capital punishment, that it is an effective administration of punishment and a matter of state sovereignty rather than human rights.[314]

4.5.4.2 Adoption of the Outcomes

The outcome of the review of Sudan was adopted by the Human Rights Council at its 21st meeting on 21 September 2016.[315] In its introductory statement, the delegation reaffirmed Sudan's full commitment to the UPR process and 'commended the mechanism for its effective role in the promotion and protection of human rights through constructive cooperation'.[316]

[311] See African Commission on Human and People's Rights (ACHPR), 'Resolution Urging States to Envisage a Moratorium on the Death Penalty' (15 November 1999) ACHPR/Res.42 (XXVI) 9; 'Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty' (24 November 2008) ACHPR/Res.136 (XXXXIII) 8.
[312] ACHPR/Res.136 (XXXXIII) para 5.
[313] Jon Yorke and Amna Nazir, 'Imagining Utopia and the Global Abolition of the Death Penalty' in Carol Steiker and Jordan Steiker (eds), *Comparative Capital Punishment Law* (Edward Elgar, forthcoming 2019).
[314] See Chapter 2, section 2.7.6.
[315] 'Report of the Human Rights Council on its Thirty-Third Session' (16 December 2016) UN Doc A/HRC/33/2, paras 471-517.
[316] ibid para 473.

After highlighting the positive steps taken by Sudan to implement its accepted recommendations, the delegation also referred to the recommendations that did not comply with the legislative system of the state. Sudan noted them and remained open to dialogue and cooperation 'in accordance with its convictions…while taking into consideration the social and cultural specificity of their people'.[317] This study engages with such a dialogue by acknowledging that the state's capital punishment laws are principally derived from Islamic law and, therefore, challenges the Islamic use of the death penalty. This is addressed in Part Two by providing a reading that promotes the right to life over the right to execute.

Seventeen states expressed views on the review outcome of which only Belgium made reference to Sudan's application of the death penalty. It regretted that the state under review did not accept a moratorium on the death penalty and invited them to reconsider their stance and restrict the number of crimes punishable by death.[318]

Ten stakeholders made statement during the adoption of the review. Human Rights Watch noted that Sudan failed to implement majority of the 2011 UPR recommendations it accepted.[319] The International Federation for Human Rights and African Centre for Peace and Justice expressed regret over Sudan's failure to align domestic law with international human rights obligations such as implementing a moratorium on executions.[320]

4.6 Conclusion

Precolonial practices of the death penalty in Sudan were largely characterised by customary law. Present laws on the death penalty are, to a large degree, the result of Islamization efforts of the 1980s and the early 1990s. However, during both reviews in the UPR, Sudan failed to

[317] ibid para 481.
[318] ibid para 493.
[319] ibid para 511.
[320] ibid para 506.

acknowledge the role of Islamic law in maintaining the death penalty even though it forms the basis of its criminal laws and is the primary source of all legislation as stipulated in Article 5(1) of its Interim National Constitution. In fact, the state did not address the role of capital punishment in its legal system, in its first or second national report, which is consistent with the notion of the death penalty being a question of state sovereignty and criminal justice as opposed to human rights.

The only reference to its use of the death penalty came in response to state recommendations to abolish the punishment arguing that its application was consistent with the ICCPR and reserved for the most serious crimes. This demonstrates Sudan's lack of engagement with the evolving human rights jurisprudence on the death penalty, particularly when considering the Secretary-General's quinquennial reports, the Human Rights Committee's General Comment no. 36, and its concluding observations on the implementation of the ICCPR.

As the UPR is a state-led process, recommending states should issue specific and measurable recommendations to the state under review and desist from issuing unnecessarily praiseworthy comments that risk undermining the process and detract from the main issues at hand. In Sudan's case, reliance on relevant articles of the ICCPR and CRC would strengthen recommendations on removing the sovereign state's right to apply the death penalty.

Perhaps one issue, which has become apparent from a review of the state's UPR reports, is a lack of understanding on the true *fiqh* of the death penalty in Islam, a subject that is now engaged with in Part Two of this thesis.

PART TWO:

THE DEATH PENALTY IN ISLAMIC THEOLOGY

CHAPTER FIVE: *ḤUDŪD* CRIMES

5. *Ḥudūd* Crimes

5.1 Introduction

Islamic states tend to frame the death penalty as a mandatory application of Islamic law. A common defence by these states, on their failure to align with international human rights standards on the right to life, is the attractive claim of exceptionalism. In other words, Islam is afforded a privileged role over international law and therefore exempt from adhering to notions of universal human rights. This is because God mandated the punishment, so it is a legitimate expression of Islamic sovereignty to maintain a criminal justice process that includes the death penalty. It is therefore necessary to evaluate the Islamic use of the death penalty through a closer reading and deconstruct the notion that this punishment is a religious necessity.

This chapter critiques those punishments, under Islamic law, which are held to necessitate the death penalty and are considered to be God's right and therefore immutable. These fall under the category of what are known as *ḥudūd* crimes and encompass: 1) adultery; 2) sodomy; 3) apostasy; and 4) highway robbery. The chapter analyses the variety of doctrinal and procedural hurdles laid down by classical Muslim jurists to circumvent the application of the death penalty and considers the implications for *ḥudūd* today.

5.2 Islamic Legal Theory

It is pertinent to note that the *sharīʿa* is considered the ideal law in an objective and independent sense. It is commonly used to refer to the 'universal, innate, and natural laws of goodness'.[1] Islamic law encompasses the jurisprudential thought of the interpretive schools of thought and their legal determinations, all of which seek the divine will and its relation to public welfare.

[1] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham: Rowman & Littlefield 2014) xxxii.

It is undeniable that the existence of the death penalty is recorded in the religious texts of Islam. The history of Islamic law extends from the 7th century to the present.[2] Its primary sources, the Qurʾān and *sunna*, provide an authoritative basis for juristic study and interpretation. Islamic legal tradition is based upon these two sources due to their underlying theology which recognises the 'importance of the Qur'an as God's guidance to humanity, and the significance of the *hadith* as inspired prophetic guidance that both gives additional insight into the Qur'an and addresses those issues not covered expressly or impliedly by the Qur'an'.[3]

The Qurʾān has been preserved for fourteen centuries[4] hence verses dealing with *ḥudūd* have remained unaltered. It was initially preserved via oral transmission and the emergence of a canonical codex (*muṣḥaf*) has been dated to the caliph ʿUthmān's reign, approximately year 30/650.[5] He commissioned one of the Prophet's scribes, Zayd b. Thābit (d. 42-56/663-676), and others to collate an official copy after quarrels rose on the correct reading of the Qurʾān

[2] For a historical overview on the origins and evolutions of Islamic law, see Joseph Schahct, *An Introduction to Islamic Law* (Oxford: Clarendon Press 1964); NJ Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press 1997); Yasin Dutton, *The Origins of Islamic Law: The Qurʾān, The Muwatta', and Madinan 'Amal* (London: Curzon Press 1999); Wael B Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: CUP 2005).

[3] Anver M Emon, 'Shari'a and the Modern State' in Anver M Emon, Mark S Ellis and Banjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: OUP 2015) 54.

[4] See Behnam Sadeghi and Mohsen Goudarzi, 'Ṣan'ā' 1 and the Origins of the Qur'ān' (2012) 87(1) Der Islam: Journal of the History and Culture of the Middle East 1-40; Sean Coughlan, ''Oldest' Koran fragments found in Birmingham University' *BBC* (London, 22 July 2015) <www.bbc.co.uk/news/business-33436021> accessed 3 November 2015. Professor David Thomas has said regarding the fragments found: 'These portions must have been in a form that is very close to the form of the Koran read today, supporting the view that the text has undergone little or no alteration and that it can be dated to a point very close to the time it was believed to be revealed.'

[5] Modern scholarship has differed over the canonisation process, e.g. John Burton attributes it to the life of the Prophet Muḥammad himself (*The Collection of the Qur'ān* (Cambridge: CUP 1977) 230-40) whilst John Wansbrough attributes it to the Abbasid era circa 200/815 (*Quranic Studies: Sources and Methods of Scriptural Interpretation* (Andrew Rippin ed, New York: Prometheus Books 2004) 144). However, these views have not found many supporters, see CHM Versteegh, *Arabic Grammar and Qurʾānic Exegesis in Early Islam* (Leiden: E.J. Brill 1993) 48, and Fred M Donner, *Narratives of Islamic Origins: The Beginning of Islamic Historical Writing* (Princeton: Darwin Press 1998) 35-63. See also Harold Motzki, 'The Collection of the Qurʾān: A Reconsideration of Western Views in Light of Recent Methodological Developments' (2001) 78(1) Der Islam 1, 31; Nicolai Sinai, 'When Did the Consonantal Skeleton of The Qurʾān Reach Closure? Part I' (2014) 77(2) Bulletin of the School of Oriental and African Studies 273; Nicolai Sinai, 'When Did the Consonantal Skeleton of The Qurʾān Reach Closure? Part II' (2014) 77(3) Bulletin of the School of Oriental and African Studies 509; Michael Cook, 'The Stemma of the Regional Codices of the Koran' (2004) 9-10 Graeco-Arabica 89; Behnam Sadeghi and Uwe Bergmann, 'The Codex of a Companion of the Prophet and the Qurʾān of the Prophet' (2010) 57 Arabica 343.

and ‘at this point, the number and order of sūras were fixed as was the consonantal text’.[6] ʿUthmān then sent copies of his recension of the Qurʾān to other major Muslim territories and all other versions were burned.[7]

The Qurʾān has a non-linear structure and comprises of 114 chapters (*sūras*) and 6236 verses (*āyas*) however only a small portion of its content can be classified as legal. Commentators suggest that verses with legal content range anywhere from 80 to 600[8] and vary from concise to detailed injunctions.[9] The provisions for the death penalty would therefore fall under the legal content of the Qurʾān and need to be understood in their correct historical and social context in order to understand their implications for today.[10]

The traditional doctrine of legal theory acknowledges that where a certain matter may be ambiguous and requiring further clarification, the *sunna* must be relied upon.[11] The literal meaning of *sunna* is ‘habitual practice’, ‘customary procedure or action’, or ‘usage sanctioned by tradition’.[12] In Islam it symbolises all the acts and sayings of the Prophet. Scholars have divided the *sunna* into his sayings (*sunna qawliyya*), actions (*sunna fiʿliyya*), and tacit approval

[6] Herbert Berg, ‘The Divine Sources’ in Rudolph Peters and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Surrey: Ashgate Publishing 2014) 28. The introduction of diacritical marks on the Arabic script is said to have been introduced by al-Ḥajjaj b. Yūsuf al-Thaqafī (d. 95/714).
[7] ibid.
[8] For example, Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (3rd edn, Cambridge: Islamic Texts Society 2003) 26, notes that there are 320 legal verses in the Qurʾān. Abdullahi Ahmad An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press 1990) 20, observes that some scholars have considered 500 or 600 verses to be legally orientated but majority of those deal with worship rituals, leaving approximately 80 legal verses in a strict sense.
[9] See Abdur Rahman I Doi, *Shariʾah: The Islamic Law* (Kuala Lumpur: A S Noordeen 2007) 37; Jamila Hussain, *Islamic Law and Society: An Introduction* (Sydney: Federation Press 1999) 27.
[10] The author does not endorse the view that Qur’anic laws are solely the result of historical circumstances and therefore historically outdated or invalid. In the words of Khaled Abou El Fadl, ‘all Qur’anic determinations continue to be relevant, valid, and significant. The issue is, rather, what did the Qur’anic determination mean when it was revealed, and assuming that the Qur’an is an active and dynamic ongoing revelation, what should a historical determination mean for today?’ See El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, 301.
[11] Wael B Hallaq, *A History of Islamic Legal Theories* (Cambridge: CUP 1999) 195. See also Qurʾān 59:7; 4:113; 62:2.
[12] Hans Wehr, *Dictionary of Modern Written Arabic* (J Milton Cowan ed, Wiesbaden: Harrassowitz 1979) 505; Muḥammad Ibn Manẓūr, *Lisān al-ʿArab* (Beirut: Dār Ṣādir 1992) 13:225.

(*sunna taqrīriyya*). It is important to note, only that *sunna* which is said to be of a legal nature forms part of Islamic law.[13] The details of the *sunna* have been derived from *ḥadīth*, a term used for an aphorism of the Prophet as related by his companions. A *ḥadīth* consists of the chain of transmitters (*isnād*) and the text of the Prophet's statement (*matn*).[14]

Most of the authoritative compilations of *ḥadīth* were recorded in the mid-ninth century which means the *ḥadīth* were written more than two centuries after the Prophet's death.[15] One of the concerns of legal theory was the reliable transmission of the *ḥadīths* from one generation to the next. In order to verify the *ḥadīth* literature and guarantee the authenticity of sacred knowledge, jurists developed a complex taxonomy categorising the *ḥadīths* according to the chain of transmission and reliability of transmitters.[16]

Only that *isnād* which was found to have been transmitted reliably from the Prophet was accepted. Hence, ʿAbdullah b. Mubārak (d. 181/797) observed that 'the isnad is part of religion, were it not for the isnad, whoever wanted could say whatever they wanted'.[17] Each chain had to extend unbroken to the Prophet himself. A *ḥadīth* with a defective chain was considered weak and lacking in legal authority, for example, a narrator quoted from an untrustworthy source or from a person they had never met. This methodology was aptly summarised by al-Shāfiʿī who stated that, 'if a trustworthy person transmits [a *ḥadīth*] from another trustworthy

[13] Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge: CUP 2009) 16.
[14] Chibli Mallat, *An Introduction to Middle Eastern Law* (Oxford: OUP 2009) 32; Emon, 'Shari'a and the Modern State', 55.
[15] Jonathan Brown, *The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Cannon* (Leiden: Brill 2007).
[16] For a detailed overview of the debates surrounding the authenticity and history of *ḥadīth* literature see Herbert Berg, *The Development of Exegesis in Early Islam: The Authenticity of Muslim Literature from the Formative Period* (Oxford: Routledge 2009). See also, Scott C Lucas, *Constructive Critics, Ḥadīth Literature, and the Articulation of Sunni Islam: The Legacy of the Generation of Ibn Sa'd, Ibn Ma'in, and Ibn Hanbal* (Leiden: Brill 2004); Christopher Melchert, *Ḥadīth, Piety, and Law: Selected Studies* (Atlanta: Lockwood Press 2015); Jonathan AC Brown, *The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Cannon* (Leiden: Brill 2007); Harold Motzki, *Analysing Muslim Traditions: Studies in Legal, Exegetical and Maghāzī Ḥadīth* (Leiden: Brill 2010).
[17] Abū al-Ḥusayn Muslim Ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*: *Muqaddama*, no. 31.

person until the chain ends with the Messenger of God, then it is established as being from the Messenger of God'.[18]

The study of *ḥadīth* transmitters developed into a separate science known as *ʿilm al-rijāl*. *Ḥadīth* scholars researched and compiled many voluminous works[19] on *ḥadīth* transmitters which included biographical notes on their teachers, students, and proof of his or her credibility or the lack of it.[20] Therefore, *ḥadīths* on the death penalty must be reliably transmitted in order to guarantee their credibility.

Islamic law was not constituted by the Qurʾān and *ḥadīth* alone but rather through additional recourse to techniques of juristic analysis. Legal texts are finite whilst new circumstances are infinite and provide new areas for religious and legal reflection.[21] As a result, premodern Muslim jurists developed different methods that formed the authoritative bases of legal analyses. This enabled the law to respond to social realities without simultaneously undermining the legal tradition's authority.[22]

The jurists' debates surrounding the feasibility of these methods can be found in a genre of Islamic legal literature named *uṣūl al-fiqh* (Islamic legal theory). All human beings are fallible and therefore there will inevitably be differences of opinions amongst jurists. Such differences are born out of a range of factors including different methodologies that are adopted by certain jurists in interpreting the Qurʾān and *sunna* to derive *sharīʿa*-based laws, jurists giving

[18] Muḥammad b. Idrīs al-Shāfiʿī, *al-Umm* (Rifʿat Fawzī ʿAbd al-Muṭṭalib ed, Dār al-Wafāʾ 1422/2001).
[19] See eg, Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb* (Beirut: Dār al-Fikr 1404/1984).
[20] Jonathan AC Brown, *Misquoting Muhammad: The Challenge and Choices of Interpreting the Prophet's Legacy* (London: Oneworld 2015) 43.
[21] Hamid Harasani, 'The Role of *Ijtihad* in Progressing Islamic Law in Modern Times' (2013) 10 US-China Law Review 361, 363.
[22] Emon, 'Shari'a and the Modern State', 57.

preference to certain sources over others, and the specific needs of the communities which is linked to the time and geographical location of the jurists.[23]

5.2.1 Schools of Law (*Madhāhib*)

The result of the application of *uṣūl al-fiqh* is *fiqh*, which is the 'legal rulings of the Muslim scholars derived from the *sharīʿa*'[24] and is viewed as the human effort to understand and apply the divine ideal. The development of *fiqh* evolved throughout the first five centuries of Islam, namely the 7th to 12th centuries C.E.[25] Some of the greatest intellectual and literary achievements of Muslim scholarship are found in this juristic discipline which has been described as the 'epitome of Islamic thought'.[26] As a result of the different factors influencing the opinions of Islamic jurists, various doctrinal schools of law known as *madhāhib* (sing. *madhhab*) emerged. The four prominent ones being the Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī schools which were all named after their founders who were master-jurists.[27]

Contemporary Islamic scholar, Jonathan Brown, summarises the foundations of each *madhhab*:

> Each *madhhab* was an ocean of diversity and constant scholarly activity. The Hanafi school was based on the often contrasting opinions of Abu Hanifa, his two main disciples Shaybani and Abu Yusuf, as well as a more independent student named Zufar. The Maliki school built on the opinions of Malik and his senior disciples, who often disagreed with him and each other. Shafi'i's long years of

[23] ibid 56-59; Michael Mumisa, *Sharia Law and the Death Penalty* (London: Penal Reform International 2015) 9.
[24] JND Anderson, 'Law as a Social Force in Islamic Culture and History' (1957) 20 Bulletin of SOAS 13-40.
[25] M Cherif Bassiouni, 'Misunderstanding Islam on the Use of Violence' (2015) 37(3) Houston Journal of International Law 643, 666.
[26] Schacht, *An Introduction to Islamic Law*, 1.
[27] Hallaq characterises the *madhhab* as 'a body of authoritative legal doctrine existing alongside individual jurists who participated in the elaboration of, or adhered to, that doctrine in accordance with an established methodology attributed exclusively to the eponym', Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: CUP 2005) 163. See Christopher Melchert, *The Formation of the Sunni Schools of Law: 9th-10th Centuries C.E.* (Leiden: Brill 1997) 178.

> travel and intellectual maturation led to two whole eras in his legal opinions, 'the Old' and 'the New', both of which were incorporated into his *madhhab*. Ibn Hanbal's close attention to Hadiths led him to change his opinion on legal issues as new Hadiths were uncovered, and the Hanbali *madhhab* thus enjoyed a wide range of opinions even at its founding level.[28]

This highlights the pluralistic nature of Islamic law with each school developing its own legal methods and interpretations. Over time, each *madhhab* occupied its own geographical territory. The Ḥanafī school flourished amongst the Turks of Central Asia, becoming prevalent in India, and later in the Ottoman Empire. The Shāfiʿī school was based in Egypt and Yemen and spread to Southeast Asia where it is the central *madhhab* today. The Mālikī school proliferated from North Africa to the west, becoming the main *madhhab* from Andulusia to West Africa as well as Sudan. The Ḥanbalī school was the least wideapread of all. It was dominant in Baghdad through the fourteenth century and became 'increasingly influential in the eighteenth century, when the isolated Ḥanbalīs of Central Arabia formed the powerful Wahhabi movement'.[29]

The diversity of the *madhāhib* and the resulting interpretative plurality was explained by the scholars as different understandings of *fiqh.* Although there was difference of opinions amongst scholars from different schools, they recognised each other's legitimacy. The twelfth century Ḥanafī scholar, Abū Ḥafṣ ʿUmar b. Muḥammad al-Nasafī (d. 537/1142) articulated this approach by stating, '[o]ur school is correct with the possibility of error, and another school is in error with the possibility of being correct'.[30]

In order to interpret the primary sources of Islamic law, the jurist brought a wealth of knowledge and training about the Qurʾān and *sunna,* coupled with the rulings of his own legal

[28] Brown, *Misquoting Muhammad*, 49.
[29] ibid 53.
[30] ʿAlawī b. Aḥmad al-Saqqāf, *Majmūʿa Sabʿa Kutub Mufīda* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1940) 52.

school and possibly others, into his legal analysis. This required 'an awareness of the authority of source-texts, of where they were dispositive, of where they were ambiguous, and of the lacuna in the source-texts that needed to be supplemented with disciplined legal analysis'.[31] This encompassed laws derived through secondary sources.[32]

Hence if one seeks to discover a rule of Islamic law, the general starting point is a *fiqh* manual of a certain *madhhab*, rather than the Qurʾān or *ḥadīth* literature. These legal manuals are available in different sizes depending on the purpose of their usage. This can be in the form of a summary (*mukhtaṣar*) or an elaborate encyclopaedia where the jurist addresses opposing schools' doctrine too.[33] It is important to note that criminal law only takes up a small percentage of these books. The core subjects of the *sharīʿa* deal with forms of worship such as prayer, fasting, charity, Hajj, and slaughtering animals.[34]

5.3 Classification of Crimes

Penal law in *sharīʿa* adopts a classical trichotomy of crimes: *ḥudūd*, *qiṣāṣ*, and *taʿzīr*.[35] Rights are categorised as 'rights of God' (*ḥuqūq Allah*) and 'rights of God's servants' (*ḥuqūq al-ʿibād*). *Ḥudūd* primarily deal with violations of the 'rights of God'.[36]

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[31] Emon, 'Shari'a and the Modern State', 58.
[32] For a detailed study of the secondary (and tertiary) sources in Islamic law, see Kamali, *Principles of Islamic Jurisprudence*.
[33] Mohammad Fadel, 'The Social Logic of *Taqlid* and the Rise of the *Mukhtasar*' (1996) 3(2) *Islamic Law and Society* 193-233. For a bibliographical list of *fiqh* sources from the various *madhāhib* see John Makdisi and Marianne Makdisi, 'Islamic Law Bibliography: Revised and Updated List of Secondary Sources' (1995) 87 Law Library Journal 69.
[34] Jonathan AC Brown, 'Stoning and Hand Cutting: Understanding the Hudud and the Shariah in Islam' (Yaqeen Institute for Islamic Research 2017) 2.
[35] ʿAbd al-Qādir ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī: Muqāranā bi-l-Qānūn al-Waḍʿī* (Beirut: Dār al-Kitāb al-ʿArabī n.d.) 1:78-82; Muḥammad Abū Zahra, *al-Jarīma wa al-ʿUqūba fī al-Fiqh al-Islāmī* (Cairo: Dār al-Fikr al-ʿArabī 1998) 42-43.
[36] Anver M Emon, 'Huquq Allah and Huquq al-Ibad: A Legal Heuristic for a Natural Rights Regime' (2006) 13(3) Islamic Law and Society 325, 329.

Ḥadd (pl. *ḥudūd*) literally means limit or a separation between two things so that one does not intrude on the other.[37] In Islamic law, *ḥudūd* have been defined by jurists as offences whose punishments are fixed and are God's right (*'uqūba muqaddara wajabat ḥaqqan lillāh*).[38]

The Qurʾān discuses '*ḥudūd Allah*' (limits of God) cautioning Muslims against transgressing them or approaching them. It appears 14 times in the Qurʾān[39], indicating the 'limits' of acceptable and unacceptable behaviour, be it moral or legal.[40] Six references to *ḥudūd* are made in just one passage in the Qurʾān which deals with the subject of divorce. *Ḥudūd Allah* in this context refers to conduct of marital life and acting in accordance with good custom (*bi-l-maʿrūf*), advising the reader to not transgress these limits.[41]

The term is also used in *sūra al-Baqara* and *sūra al-Ṭalāq* concerning marital relations, the former dealing with spousal relations during the month of Ramaḍān and the latter with the waiting period (*idda*) a wife must observe after divorce.[42] A passage in *sūra al-Nisāʾ* deals with kindness to orphans and the destitute and stipulates fixed shares of inheritance for legal heirs.[43] In all these instances, the text warns against violating the *ḥudūd Allah*.

Ḥudūd is used in the Qurʾān to suggest a set of broad moral and legal guidelines that must be adhered to. It is thus evident that *ḥudūd* in the context of designating particular crimes and

[37] Ibn Manẓūr, *Lisān al-ʿArab*, 3:140.
[38] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ* (ʿAlī Muḥammad Mu'awwaḍ and ʿĀdil Aḥmad ʿAbd al-Mawjūd eds, 2nd edn, Beirut: Dār al-Kutub al-ʿIlmīyya 2003) 9:177; Muḥammad b. Aḥmad Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ* (Beirut: Dār al-Maʿrifa n.d) 9:36; Burhān al-Dīn Abū al-Ḥasan ʿAlī b. Abī Bakr al-Marghīnānī, *al-Hidāya Sharḥ Bidāya al-Mubtadī* (Karachi: Idāra al-Qurʾān wa al-ʿUlūm al-Islāmīyya 1417/1996) 4:78; Maḥmūd b. Aḥmad Badr al-Dīn al-ʿAynī, *al-Bināya fī Sharḥ al-Hidāya* (Ayman Ṣāliḥ Shaʿbān ed, Beirut: Dār al-Kutub al-ʿIlmīyya 1420/2000) 6:256; Zayd al-Dīn Ibn Najīm, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq* (Zakariyyā ʿUmayrāt ed, Beirut: Dār al-Kutub al-ʿIlmīyya 1997) 5:3; Ibrāhīm b. Muḥammad Ibn Ḍawayyān, *Manār al-Sabīl fī Sharḥ al-Dalīl* (Muḥammad ʿĪd al-ʿAbbāsī ed, Riyadh: Maktabat al-Ma'ārif 1996) 3:237.
[39] See Qurʾān 2:187; 2:229 (mentioned four times); 2:230 (mentioned twice); 4:13; 4:14; 9:63; 9:112; 58:4; 65:1 (mentioned twice).
[40] Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kentalan, Malaysia' (1998) 13(3) Arab Law Quarterly 203, 219.
[41] Qurʾān 2:229-30.
[42] Qurʾān 2:187; 65:1.
[43] Qurʾān 4:12-13.

punishments is non-existent in the Qurʾān. Rather, this is a concept that has been characterised by the juristic formulations of *fiqh*. Ibn Taymiyya (d. 728/1328) noted that the identification of crimes, their definitions, and corresponding punishments were the result of human reasoning rather than from scripture.[44] Brown has argued that 'early Muslim jurists probably inherited the concept of a category of crimes called *Ḥudūd* from references to it made by the Prophet (peace be upon him) and the early generations of Muslims'.[45]

There are five *ḥudūd* offences that are agreed upon: adultery/fornication (*zinā*), accusing someone of fornication (*qadhf*), consuming intoxicants (*shurb al-khamr*), certain types of theft (*sariqa*), and armed robbery or banditry (*ḥirāba*).[46] Some jurists have also added sodomy (*liwāṭ*) and apostasy (*ridda*).[47] Punishment for these offences vary from amputation, flogging, stoning, to crucifixion.

A frequently invoked argument, particularly by classical jurists, for such harsh *ḥudūd* punishments is the concept of deterrence (*zajr*).[48] However, the deterrent effects of the death penalty is a question that is empirical and practical in nature, not a theological one. Furthermore, there is no empirical evidence to support this claim,[49] particularly in an Islamic context. In fact, 'there is much to suggest that criminal deterrence, as opposed to moral denunciation and censure, was not part of the relevant epistemological dynamic of the hudud Qur'anic verses'.[50] This is further supported by the numerous procedural barriers to

[44] Jonathan AC Brown, 'Taʿzīr', *Oxford Encyclopedia of Islam and Law* (forthcoming).
[45] Brown, 'Stoning and Hand Cutting', 5.
[46] *al-Mawsūʿa al-Fiqhīyya*, 45 vols. (Kuwait: Wizārat al-Awqāf wa al-Shaʾūn al-Islāmīyya 1404/1983) 17:131.
[47] ibid. The crime of insurrection (*baghī*) has also been included by some scholars however it is highly disputed as to whether it is one of the *ḥadd* offences and so it has been excluded from this debate. For further reading about *baghī*, see Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: CUP 2001).
[48] Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: CUP 2009) 311; Anver M Emon, 'Natural Law and Natural Rights in Islamic Law' (2004-2005) 20(2) Journal of Law and Religion 351, 382.
[49] This was discussed in Chapter 3, section 3.3.4.
[50] El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, 302. El Fadl further argues that, 'it would make little sense to make an argument about deterrence in the twenty-first century without studying contemporary knowledge fields such as criminal psychology and sociology as well as the politics of criminal enforcement. It would be unreasonable to leap from the logic of deterrence in ancient Mosaic laws or the laws of

enforcement as discussed below, which suggest that *ḥudūd* penalties were not centred on the theme of deterrence.[51]

Of the *ḥudūd* offences, four have been interpreted to incur the death penalty: *zinā, liwāṭ, ridda,* and *ḥirāba*. Despite such severe punishments, stringent evidentiary criteria have been laid down which places an exorbitantly high burden of proof upon the prosecution. The establishment of a harsh regime of punishments alongside an almost unattainable standard of proof is indicative of a system based on maximising mercy. This is illustrated in the *ḥadīth* wherein the Prophet stated:

> Ward off the *Ḥudūd* from the Muslims as much as you all can, and if you find a way out for the person, then let them go. For it is better for the authority to err in mercy than to err in punishment.[52]

Muslim scholars have translated this *ḥadīth* into the well-known legal principle of 'ward off the *ḥudūd* by ambiguities (*idraʾū al-ḥudūd bi-l-shubuhāt*)'.[53] This concept of *shubuhāt* (ambiguities) is demonstrated clearly in the offence of *zinā*.

5.4 Adultery/Fornication (*Zinā*)

Zinā is linguistically defined as *al-fujūr* (immorality; iniquity; debauchery and licentiousness).[54] The word *zinā* can be used as a general or a specific term. In its general usage

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Medina in the seventh century to a claim about deterrence in the very different economic, sociological, and even biological realities of the often alienated and fragmented humanity of the twenty-first century.' (ibid).

[51] ibid.

[52] Muḥammad b. ʿĪsā al-Tirmidhī (d. 279/892), *Jāmiʿ al-Tirmidhī*, no. 1424.

[53] See Intisar Rabb, 'Islamic Legal Maxims as Substantive Canons of Construction: Ḥudud-Avoidance in Cases of Doubt' (2010) 17 Islamic Law and Society 63; Jamāl al-Dīn ʿAbdallāh b. Yūsuf al-Zaylaʿī, *Naṣb al-Rāya li-aḥādīth al-Hidāya* (Muḥammad ʿAwāma ed, Beirut: Muʾassasa al-Rayyān 1997) 3:309, 333; Abū al-Ḥasan ʿAli b. Muḥammad al-Māwardī, *al-Hāwi al-Kabīr* (Ādil 'Abd al-Mawjūd & 'Alī Muʾawwaḍ eds, Beirut: Dār al-Kutub al-ʿIlmīyya 1994) 13:210, 241; Muwaffaq al-Dīn Ibn Qudāma, *al-Mughnī Sharḥ Mukhtaṣar al-Khirqī* (ʿAbdallah b. ʿAbd al-Muḥsin al-Turkī and ʿAbd al-Fatāḥ Muḥammad al-Ḥalw eds, Riyadh: Dār Ālim al-Kutub n.d) 12:348; Kamāl al-Dīn Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī (Ibn al-Humām), *Sharḥ Fatḥ al-Qadīr ʿalā al-Hidāya Sharḥ Bidāya al-Mubtadī* (Beirut: Dār al-Kutub al-ʿIlmīyya 1424/2003) 5:237; al-Sarakhsī, *al-Mabsūṭ*, 9:38.

[54] Muḥammad b. Yaʿqūb al-Fayrūzābādī, *al-Qāmūs al-Muḥīṭ* (Beirut: Muʾassasa al-Risāla 1426/2005) 1292; Aḥmad b. Muḥammad al-Fayyūmī al-Muqrī, *al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr* (ʿAbd al-Aẓīm al-

it indicates any prohibited act which may lead to illicit sexual relations. This is based on the *ḥadīth* of the Prophet:

> Allah has decreed for every son of Adam his share of *zinā* which he will commit inevitably. The *zinā* of the eyes is the sight (to gaze at a forbidden thing), the *zinā* of the tongue is the speech, one may wish and desire, and the private parts confirm that or deny it.[55]

The specific meaning of *zinā* relates to the criminal act which necessitates the *ḥadd*. Its technical juristic definition is sexual intercourse; a) involving penile penetration, b) by persons of full legal competence, c) outside the legal bonds of marriage (*nikāḥ*) or lawful ownership of a slave woman (*milk yamīn*),[56] d) and without any element of doubt/ambiguity (*shubha*).[57]

Zinā encompasses both fornication and adultery however it is the latter which incurs the death penalty.[58] It is considered to be one of the greatest sins after *shirk* (practising idolatry or polytheism) and murder due to the Qurʾānic verses:

Shanāwī ed, Dār al Maʿārif n.d) 257; Ibn Manẓūr, *Lisān al-ʿArab*, 14:359; Hans Wehr, *Dictionary of Modern Written Arabic*, 816.

[55] Muḥammad b. Ismāʿīl al-Bukhārī, *al-Jāmiʿ al-Musnad al-Ṣaḥīḥ al-Mukhtaṣar min Umūr Rasūl Allāh wa Sunanihi wa Ayyāmihi* (commonly known as *Ṣaḥīḥ al-Bukhārī*), no. 6243; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 2657.

[56] Ownership of a slave woman in Islamic law is a redundant concept in contemporary society and will therefore be precluded from the current discourse.

[57] Muhyī al-Dīn Yaḥyā b. Sharaf al-Nawawī, *Rawḍa al-Ṭālibīn wa ʿUmda al-Muftīn* (Zuhayr al-Shāwīsh ed, 3rd edn, Beirut: al-Maktab al-Islāmī 1412/1991) 10:86; Muḥammad b. Yūsuf Mawāq, *al-Tāj wa-l-Iklīl fī Sharḥ Mukhtaṣar Khalīl*, printed on the margins of Ḥaṭṭāb, *Mawāhib al-Jalīl* (Beirut: Dār al-Fikr 1978) 6:290-91; ʿAlāʾ al-Dīn al-Samarqandī, *Tuḥfa al-Fuqahāʾ* (Beirut: Dār al-Kutub al-ʿIlmīyya 1984) 3:138; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:235; Muḥammad Amīn b. ʿUmar Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār ʿalā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār Fiqh Abū Ḥanīfa* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī n.d) 3:141; Shams al-Dīn Muḥammad b. Aḥmad al-Dusūqī, *Ḥāshiyat al-Dusūqī ʿalā al-Sharḥ al-Kabīr* (Muḥammad ʿAllīsh ed, Beirut: Dār al-Fikr n.d) 4:313; Shams al-Dīn Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Maʿrifa Maʿānī Alfāẓ al-Minhāj* (Muḥammad Khalīl ʿAytānī ed, Beirut: Dār al-Maʿrifa 1418/1997) 4:186-87; Sulaymān al-Jamal, *Hāshiya al-Jamal ʿalā Sharḥ al-Minhāj* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī n.d) 5:128; Ibrāhīm b. Muḥammad b. ʿAbd Allah Ibn Mufliḥ, *al-Mubdiʿ fī Sharḥ al-Mughnī* (Beirut: al-Maktab al-Islāmī 1979-80/1400) 9:60; Manṣūr b. Yūnus al-Buhūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ* (Beirut: ʿĀlim al-Kutub 1403/1983) 6:89; Muṣṭafā al-Suyūṭī al-Rahaybānī, *Maṭālib Ulī al-Nuhā fī Sharḥ Ghāyah al-Muntahā* (Damascus: al-Maktab al-Islāmī 1381/1961) 6:182-83.

[58] The punishment for fornication is 100 lashes, specified in Qurʾān 24:2.

> And those who do not invoke with Allah another deity or kill the soul which Allah has forbidden [to be killed], except by right, and do not commit unlawful sexual intercourse. And whoever should do that will meet a penalty. Multiplied for him is the punishment on the Day of Resurrection, and he will abide therein humiliated. Except for those who repent, believe and do righteous work. For them Allah will replace their evil deeds with good. And ever is Allah Forgiving and Merciful.[59]

> And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.[60]

It is also mentioned in a *ḥadīth* that ʿAbdullah b. Masʿūd asked the Prophet which sin is the greatest according to God. He said (in descending order) that you make partners with God, that you kill your child out of fear that he would eat with you, and that you commit *zinā* with the wife of your neighbour.[61]

5.4.1 Conditions (*shurūṭ*)

Jurists have detailed the conditions which must be met for the *ḥadd* of *zinā* to be liable upon a person. These have been derived from both the Qurʾān and *ḥadīth* literature, as discussed below.

One of the main conditions is the insertion of the penis (*dhakar,* sometimes *ḥashfa,* or glans) in the vagina, the absence of which nullifies the *ḥadd* because the act will not be considered as

[59] Qurʾān 25: 68-70.
[60] Qurʾān 17:32.
[61] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6811; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 86.

intercourse.[62] The *jumhūr* (majority) opinion (Mālikī, Shāfiʿī,[63] Ḥanbalī, Abū Yūsuf, and Shaybānī) also includes anal penetration because it is a natural genital orifice like the vagina. Abū Hanīfa does not consider *zinā* through anal intercourse subject to *ḥadd* but rather deems it a *taʿzīr* offence.[64]

The act must be committed by persons who are *compos mentis* (*mukallaf*), which includes being sane (*ʿāqil*) and mature (*bāligh*).[65] The insane and the minor are exempt from the *ḥadd* due to the *ḥadīth*, '[t]he pen has been lifted from three (i.e. their deeds are not recorded): from the one who is asleep until he wakes, from the minor until he matures, and from the insane until he regains sanity or recovers'.[66]

5.4.1.1 Age of Criminal Liability

The juvenile death penalty is absent from Islamic textual references with *ḥadīths* such as the above clearly exempting minors. Before proceeding further, it is necessary to ascertain who qualifies as a minor under Islamic law. Muslim jurists maintain that the criminal responsibility

[62] Al-Shaykh Niẓām and a group of Indian scholars, *al-Fatāwā al-Hindiyya: Fī Madhhab al-Imām al-Aʿẓam Abī Ḥanīfa al-Nuʿmān* (Cairo: al-Maṭbaʿa al-Kubrā al-Amīriyya 1310/1892-93) 2:143; Mawāq, *al-Tāj wa-l-Iklīl*, 6:290; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:95; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:141; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:313; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:186-87; Shams al-Dīn Muḥammad b. Shihāb al- Dīn Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj* (3rd edn, Beirut: Dār al-Kutub al-ʿIlmiyya 1424/2003) 7:422.

[63] The Shafis maintain that in *zinā* by anal intercourse, the female is flogged, whether married or single. The male is liable for the death penalty if married.

[64] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:249; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:155; al-Disūqī, *Ḥāshiya al-Disūqī*, 4:314; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:187; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:94.

[65] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:144; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:313; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:190; Ramlī, *Nihāyat al-Muḥtāj*, 7:426-27; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:96; Ibn Qudāma, *al-Mughnī* 12:357-59; Muḥammad Amīn al-Bukhārī (Amīr Bādshāh), *Taysīr al-Tahrīr* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1350/1932) 2:289; Shihāb al-Dīn Aḥmad al-Qalyūbī and Shihāb al-Dīn Aḥmad al-Burlasī ʿUmayra, *Ḥashiya al-Qalyūbī wa ʿUmayra ʿalā Sharḥ Mahallī ʿalā Minhāj al-Ṭālibīn* (Cairo: Muṣṭafā al-Babī al-Ḥalabī 1375/1956) 4:180.

[66] Abū Dāwūd Sulaymān b. al-Ashʿath al-Sijistānī (d. 275/889), *Sunan Abī Dāwūd*, no. 4398; Abū ʿAbd al-Raḥmān Aḥmad b. Shuʿayb al-Nasāʾī (d. 302/915), *Sunan al-Nasāʾī*, no. 3432; Muḥammad b. Yazīd Ibn Mājah (d. 273/886), *Sunan Ibn Mājah*, no. 2041. The Mālikīs and Ḥanbalīs also exempt the sleeping person(s) due to this *ḥadīth* (ibid).

of a child increases with age.[67] Once the child reaches the age of puberty, they are considered completely responsible for their actions.[68]

The age of puberty in Islam varies across the *madhāhib*. Some jurists determine puberty according to its physiological signs whilst others stipulate a certain age. Most jurists agree that it is 15 years of age whilst some Ḥanafīs and Mālikīs say 18.[69] This highlights a valid interpretation which sets the age of criminal liability to 18 years and can therefore be used to prevent the juvenile death penalty in Islamic states.

The Ḥanafīs also attach the condition of being able to articulate speech (*nāṭiq*) in order for the *ḥadd* to apply. Hence there is no *ḥadd* liable upon the mute (*akhras*) unless he confesses to *zinā* four times by way of writing or indication. Even if witnesses testify against him, the testimony is not accepted due to *shubha* because he may have an excuse but is unable to express himself properly.[70]

The perpetrator of the offence must be aware that the person he/she is having intercourse with is prohibited i.e. outside the legal bonds of marriage. Consequently, there is no *ḥadd* upon the one who is mistaken (*ghāliṭ*), the ignorant (*jāhil*), and the forgetful (*nāsī*).[71] If a man claims he is married to the woman in question (provided she is single) or vice versa, the *ḥadd* will drop. Even if a man claims that due to the darkness of the night, he slept with a woman assuming she

[67] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:600; Nagaty Sanad, *The Theory of Crime and Criminal Responsibility in Islamic Law: Sharia* (Chicago: Office of International Criminal Justice 1991) 89-90.
[68] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:602; Ahmed Alashhab, *The Criminal Liability in Law and Islamic Law* (Benghazi: National Publishing House 1994) 127-32.
[69] See e.g., al-Shāfiʿī, *al-Umm*, 7:331-332, 374; al-Sarakhsī, *al-Mabsūṭ*; al-Dusūqī, *Ḥāshiyat al-Dusūqī*; Ibn Qudāma, *al-Mughnī*; ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:602-604; Peter Hodgkinson, *Capital Punishment: New Perspectives* (London: Routledge 2016).
[70] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:141; Ṣāliḥ ʿAbd al-Samīʿ al-Azharī, *Jawāhir al-Iklīl Sharḥ Mukhtaṣar al-Shaykh Khalīl* (Beirut: Dār al-Maʿrifa n.d) 2:132; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:150; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:99; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:204. See also Ibn Qudāma, *al-Mughnī*, 14:180.
[71] al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:313; al-Nawawī, *Rawḍa al-Ṭālibīn*, 10:93, 95; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:96-97.

was his lawful wife, he is absolved.[72] Similarly, if a blind man called his wife to his bed but another woman responded, and he had intercourse with her, there will be no *ḥadd* due to the emergence of *shubha*.[73] Although such claims are quite far-fetched, it shows the extent to which scholars were willing to go in order to waive the *ḥadd* and preserve the right to life in Islam.

Even if a man and woman get married and later discover they are forbidden in marriage to each other (*maḥrams*), i.e. through blood or foster relations, there is no *ḥadd* upon them. Even if they knew of this relation and got married, there is no *ḥadd* but *taʿzīr* will apply.[74]

Knowledge of the prohibition of *zinā* must also be present as rulings in Islamic matters are not established without knowledge. This is due to the narration of Saʿīd b. Musayyib that a man committed *zinā* (fornication) in Yemen. ʿUmar wrote regarding that: 'If he knows that Allah has made *zinā* unlawful then flog him. If he does not know, then teach him. If he repeats it, then flog him'.[75] It is also narrated from ʿUmar that he excused a man who fornicated in al-Shām and then claimed ignorance regarding the prohibition of *zinā*. The same incident occurred with a young non-Arab woman.[76]

Ibn ʿĀbidīn (d. 1252/1836–7) clarified this issue stating that a claim of ignorance will not be accepted except from the one who exhibits signs of that. For example, the person in question was brought up alone on a mountain peak or amongst similar ignorant people who were not

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[72] ʿAbdullah Maḥmūd b. Mawdūd al-Mūṣilī, *al-Ikhtiyār li Taʿlīl al-Mukhtār* (Maḥmūd Abū Daqīqa ed, Beirut: Dār al-Kutub al-ʿIlmiyya n.d) 4:90-91; al-Māwardī, *al-Hāwi*, 13:227; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:261; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:184.
[73] al-Buhūtī, *Kashshāf al-Qināʿ*, 6:96.
[74] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:150; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:247; Fakhr al-Dīn al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq* (Beirut: Dār al-Maʿrifa n.d) 3:175; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya*, 2:147.
[75] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:142. See also Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:254; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:316; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:190; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:97; al-Shīrāzī, *al-Muhadhdhab*, 5:379-380; Ibn Qudāma, *al-Mughnī*, 12:345.
[76] ibid.

aware of the prohibition of *zinā* or they believed it was lawful. The existence of such a scenario is probable, however unlikely, and cannot be denied. As a result, the one who commits *zinā* in this state of ignorance will undoubtedly be exempt from the *ḥadd* because the legal responsibility of rulings is based on knowledge of them.[77]

The act must be voluntary i.e. with consent. There is no *ḥadd* upon the woman who is raped due to the saying of the Prophet: 'Allah has pardoned from my nation, mistakes and forgetfulness and that which they have been forced to do'.[78] It has also been narrated from ʿAbd al-Jābir b. Wāʾil, from his father, that a woman was raped during the era of the Prophet so the *ḥadd* was dropped from her.[79]

Jurists have restricted the application of the *ḥudūd* through a narrow construction of the law, particularly through the doctrine of *shubha*. This can also be seen when it comes to proving *zinā* which can be established in two ways: testimony and/or confession.

5.4.2 Testimony (*shahāda*)

Oral testimony (*shahāda*) is considered the most authoritative of evidences and thus a prerequisite in *ḥudūd* cases.[80] The *shahāda* must be based on 'certain knowledge' (*ʿilm al-yaqīn*) which involves seeing and hearing the incident in question. All testimony based on probability and/or conjecture is inadmissible.[81]

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[77] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:142.
[78] Ibn Mājah, *Sunan Ibn Mājah*, no. 2043.
[79] Ibn Qudama, *al-Mughnī*, 12:347. Juristic discussions of rape are usually considered under ikrah (compulsion) and not *zinā* see eg Ibrāhīm b. Muḥammad Halabī, *Multaqā al-Abḥūr* (Wahbī al-Albānī ed, Beirut: Mu'assasat al-Risāla 1409/1989) 2:81.
[80] Ibn Naqīb Misrī, *'Umdat al-Sālik* (NHM Keller ed and tr, Evanston: Sunna Books 1991) 635-38; Muhammad b. Ahmed Ibn Rushd, *The Distinguished Jurist's Primer* (Imran Khan Nyazee tr, Reading: Garnet Publishing 1994–96) 2:556-60.
[81] Ramlī, *Nihāyat al-Muḥtāj* (Cairo: Muṣṭafā Bābī al- Ḥalabī 1357/1938; repr. Beirut: Dār Iḥyā' al-Turāth al-ʿArabī 1939) 8:251-54; Muwaffaq al-Dīn Ibn Qudāma, *al-Kāfī fī Fiqh al-Imām Aḥmad Ibn Ḥanbal* (Ṣidqi Jamīl and Salīm Yūsuf eds, Beirut: Dār al-Fikr 1992) 4:290; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:593-94; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:266.

In cases of *ḥudūd* and *qiṣāṣ*, the witnesses have a choice between concealing or disclosing their testimony because they are between two laudable actions: establishing the law or preserving the accused's character.[82] The concealment of vice is preferable due to the *ḥadīth* where the Prophet said, 'it would have been better for you if you had concealed it'[83] and 'whoever conceals the vices of his brother, Allah will conceal his vices in this world and the hereafter'.[84]

With respect to *zinā*, four male witnesses must testify to the act because it is from the most severe indecencies (*aghlaẓ al-fawāhish*) and therefore the testimony needs to be subject to greater standards in order to conceal sins (*satr*) and protect the integrity of the accused.[85] Expounding upon this, the seventeenth century jurist ʿAlī al-Qāri al-Harawī held that 'it is a condition that the witnesses are four […] because God the Exalted likes [the vices of] his servants to remain concealed, and this is realised by demanding four witnesses, since it is very rare for four people to observe this vice'.[86]

The requirement of four males is derived from the Qurʾānic verses:

> Those who commit unlawful sexual intercourse of your women - bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way.[87]

[82] al-Marghīnānī, *al-Hidāya*, 5:416.
[83] ibid.
[84] Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 2699. See also Ramlī, *Nihāyat al-Muḥtāj*, 8:307 where he states that concealing *ḥudūd* is preferable (*al-sirr fī al-ḥudūd afḍal*).
[85] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:142; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya*, 2:151; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:197-98, 265-67; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:319; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:588; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:101; Ibn Qudāma, *al-Mughnī*, 12:362-63.
[86] ʿAli b. Sulṭān al-Qarī al-Harawī, *Fatḥ Bāb al-ʿInāyah bī Sharḥ al-Niqāyah* (Muḥammad Nizār Tamīm and Haytham Nizār Tamīm eds, Beirut: Dār al-Arqam 1418/1997) 3:195, quoted in Khaled El-Rouayheb, *Before Homosexuality in the Arab-IslamicWorld, 1500-1800* (Chicago: University of Chicago Press 2005) 123. See also Ramlī, *Nihāyat al-Muḥtāj*, 8:310.
[87] Qurʾān 4:15.

> 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 those are the defiantly disobedient.[88]
>
> 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.[89]

It is also narrated in a *ḥadīth* that, 'Abū Hurayra reported that Saʿd b. Ubāda said: Messenger of Allah, if I were to find my wife with a man, should I wait until I bring four witnesses? He said: Yes'.[90]

A number of conditions have been laid down regarding who qualifies as a valid witness in Islamic law and the subject of witnessing can be found in lengthy chapters solely dedicated to this topic in books of *fiqh*.[91] Amongst the numerous conditions are that the witness must be mature,[92] sane,[93] free[94] (not a slave), and upright (*'adl*).[95] An upright person is described as one

[88] Qurʾān 24:4.
[89] Qurʾān 24:13.
[90] Muwaṭṭaʾ, no. 1421.
[91] For a comprehensive overview, see *al-Mawsūʿa al-Fiqhīyya*, 26:214-260.
[92] Qurʾān 2:282; al-Sijistānī, *Sunan Abū Dāwūd*, no.4398 Abū Isḥāq Ibrāhīm b. Alī al-Fīrūzābādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shāfiʿī* (Muḥammad al-Zuḥaylī ed, 1417/1996) 5:596-97.
[93] ʿUlaysh, *Minaḥ al-Jalīl* 4:217; Ibn Qudāma, *al-Mughnī*, 12:363.
[94] Zakariyyā b. Muḥammad al-Ansāri, *Asnā al-Maṭālib fī Sharḥ Rawḍ al-Ṭālib* (Muḥammad Tāmir ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1422/2000) 5:939; Shams al-Dīn Ibn Qudāma al-Maqdisī, *al-Sharḥ al-Kabīr ʿalā Matn al-Muqniʿ* (Beirut: Dār al-Kitāb al-ʿArabī 1347/1983) 12:65; *Muntahā al-Irādāt* 2:662; ʿAlī b. Sulaymān al-Mirdāwī, *al-Inṣāf fī Maʿrifah al-Rājiḥ min al-Khilāf ʾalā Madhhab al-Imām Aḥmad Ibn Ḥanbal* (Muḥammad Ḥamid al-Fiqī ed, Cairo: Maṭbaʿa al-Sunna al-Muḥammadiyya 1375/1956) 12:60.
[95] Muḥammad b. Muḥammad b. ʿAbd al-Rahmān al-Ḥaṭṭāb, *Mawāhib al-Jalīl li-Sharḥ Mukhtaṣar Khalīl* (2nd edn, Beirut: Dār al-Fikr 1398/1978) 6:150; *Sharḥ Muntahā al-Irādāt* 3:546; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:569; Ḥasām al-Dīn al-Ṣadr b. Māza, *Sharḥ Adab al-Qaḍī li-l-Khaṣṣāf*, 3:8; Abū Bakr Aḥmad b. ʿAlī al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* (Muḥammad al-Ṣādiq al-Qamaḥāwī ed, Beirut: Dār Iḥyā Turāth al-ʿArabī 1412/1992) 2:233; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya* 3:450; Abū Ibrāhīm Ismāʿīl al-Yaḥyā al-Muznī, *Mukhtaṣar al-Muznī fī Furūʿ al-Shāfiʿiyya* (Abd al-Qādir Shāhīn ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1419/1998) 401; al-Shāfiʿī, *al-Umm*, 8:107; Abū al-Walīd Muḥammad Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid wa Nihāyat al-Muqtasid* (Abū Aws Yūsuf b. Aḥmad al-Bakrī ed, Amman: Bayt al-Afkār al-Dawliyya 2007) 971.

who abstains from major sins, does not persist on minor sins, his goodness exceeds his corruption, and his virtue exceeds his vice.[96]

Evidence of a blind man is inadmissible in *ḥudūd* cases.[97] If a witness becomes blind after having testified, the judgement is annulled because the witnesses must be competent at *the time of passing judgment* (emphasis added). The same principle applies if the witness, after testifying, becomes insane, dumb, or unjust.[98]

In cases of *ḥudūd* and *qiṣāṣ*, the probity of witnesses must be investigated both openly (*tazkiya al-ʻalāniya*) and privately (*tazkiya al-sirr*)[99] because in such cases punishment is to be averted due to doubt.[100] According to Abū Ḥanīfa and Abū Yūsuf, one investigator is sufficient whilst Shaybānī asserts that two are minimum. Furthermore, in an open investigation, the investigator must also possess all the qualifications necessary for a witness. Shaybānī maintains that the probity of witnesses in *zinā* cases require four investigators.[101]

5.4.2.1 Conditions of the testimony

The testimony must be detailed to such an extent that the witnesses must have seen the penis entering the vagina like the kohl stick entering the kohl container (*kamā yaghību al-mirwadu fī-l-mukḥula*) or a rope in a well (*rishāʾ fī-l-biʾr*).[102] They are required to expound upon the intimate details of the act such as the sexual position. Such detail is necessary in a confession

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[96] al-Marghīnānī, *al-Hidāya*, 5:421, fn 10; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 7:393; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:569-70.
[97] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 9:402-3; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 7:370; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya*, 3:464-65; al-Shīrāzī, *al-Muhadhdhab*, 5:642; Abū ʿAbd Allah Muḥammad al-Kharashī, *Sharḥ al-Kharashī ʿalā Mukhtaṣar Sayyidī Khalīl* (2nd edn, Cairo: Maṭbaʿa al-Kubrā al-Amīriyya 1317/1900) 7:179; ʿUlaysh, *Minaḥ al-Jalīl*, 4:221.
[98] al-Marghīnānī, *al-Hidāya*, 5:435. See also al-Zaylaʿī, *Tabyīn al-Haqāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Maṭbaʿa al-Kubrā al-Amīriyya 1315/1897) 4:218; ʿUlaysh, *Minaḥ al-Jalīl*, 4:221; al-Nawawī, *Rawḍa al-Ṭālibīn*, 11:260; Ibn Qudāma, *al-Mughnī*, 14:179-180.
[99] A private investigation is carried out, at the behest of the judge, by an investigator (known as the *maʿdūl* or *mūzkī*) whose business it is to enquire into the character of others. See al-Marghīnānī, *al-Hidāya*, 5:424.
[100] al-Marghīnānī, *al-Hidāya*, 5:423-24.
[101] ibid 426.
[102] al-Sijistānī, *Sunan Abī Dāwūd*, no. 4428.

of *zinā* and therefore it is also required in testimonial evidence. There is also the possibility that the witness(es) may consider something *zinā* which, in fact, is not *zinā*.[103]

Therefore, even if a man and woman were found in a highly compromising position, such as naked in a bed in a position that implies *zinā*, unless four witnesses can testify to having seen the penis inserted into the vagina, it will not be considered as *zinā*.

The Ḥanafīs clarify that if the judge questions the witnesses and they do not elaborate upon their testimonies which are simply restricted to the fact that 'they committed *zinā*', then there is no *ḥadd*. *Jumhūr* deem it necessary that the witnesses are also able to specify the woman involved. If they testify that a man committed *zinā* with a woman whom they are unable to recognise, there is no *ḥadd*.[104]

It is necessary for all the witnesses to specify the locality where the alleged *zinā* took place. Mālikīs, Shāfiʿīs, and Imām Zufar from the Ḥanafī school extend this further and require the witnesses to specify the exact place such as the area or room in a house whereas the Ḥanafīs and Ḥanbalīs don't require this unless it is a big house. The witnesses must also specify the time of the incident and any discrepancies in the date or time will nullify the *ḥadd*.[105]

According to the majority of scholars, the testimonies must be given in one court session with all four witnesses present. If some of the witnesses testify in one session and the remaining in another, their testimony is not accepted. The Mālikīs stipulate that after gathering all the witnesses before the judge, they are separated for individual questioning. Any inconsistency between them will invalidate the *ḥadd*. The Ḥanbalīs permit both concurrent or separate

[103] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:143; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:199-200; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya* 2:152; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:185; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:194, 588; Ramlī, *Nihāyat al-Muḥtāj* 7:429-430; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:101; Ibn Qudāma, *al-Mughnī*, 12:356, 364.
[104] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:269.
[105] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:271-73; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:197; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 971-72.

testimonies due to the story of Mughīra.[106] If any witnesses arrive after court is adjourned, their testimony is not accepted. The Shāfiʿīs are the most flexible in this regard and allow the testimonies to be given in single or multiple court sessions, concurrently or separately.[107] However, this will expand the application of the death penalty as it allows greater flexibility in convicting a person of the death penalty whereas the Mālikī method is more rigorous in ascertaining the truth.

Testimony of a secondary witness (*shahāda ʿalā al-shahāda*), although generally admissible in law, is not permitted in *zinā* cases because *ḥudūd* are based on concealing and dropping due to doubts.[108] Secondary testimony increases doubt because 'the channels of communication are multiplied [and so] the doubt of its truth increases in proportion'.[109] Only the Mālikī school permit secondary witnessing, with the condition that each original witness has to bring two witnesses for corroboration.[110]

Furthermore, there must be no conflict of interest attached hence testimony of a spouse against the other is not accepted according to the Mālikīs, Shāfiʿīs, and Ḥanbalīs due to the possibility of doubt. The Ḥanafīs have a dissenting opinion which permits the admissibility of such a testimony because it will have negative repercussions on both the accused and the accuser; hence, it is unlikely that he will lie. For example, if the husband testifies against his wife, it

[106] Mughīra b. Shʿuba was acused of *zinā* with a woman from the Banū Hilāl tribe named Umm Jamīl. Four witnesses came forward: Abū Bakra, Nāfiʿ b. al-Ḥārith, Shibl b. Maʿbad and Ziyād b. ʿUbayd. ʿUmar questioned them and Ziyād affirmed that he had seen something shameful, he saw feet intertwined and heard heavy breathing. However, he did not see anything like 'the kohl-stick into the kohl-container' (i.e. the act of penetration itself) and neither could he confirm the identity of the woman in question. Mughīra was acquitted and the other three witnesses were lashed for slander (*qadhf*). See al-Ṭabarī, *Tārīkh al-Ṭabarī: Tārīkh al-Rusul wa-l-Malūk* (Muḥammad Abū al-Faḍl Ibrāhīm ed, Cairo: Dār al-Maʿārif n.d) 4:70-72.

[107] Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:142; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya* 2:152; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:185; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:149; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:100; Ibn Qudāma, *al-Mughnī*, 12:355; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:190.

[108] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 7:431-32; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:205; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:603; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:438; al-Nawawī, *Rawḍa al-Ṭālibīn*, 11:289.

[109] al-Marghīnānī, *The Hedaya: Commentary on the Islamic Laws* (Charles Hamilton tr, Karachi: Darul Ishaat 1989) 2:45.

[110] *al-Mawsūʿa al-Fiqhīyya*, 24:40; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 7:431-32; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:205; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:438.

will bring shame to himself, especially if there are children involved, and it is as though he is accusing himself due to the close relation.[111]

The testimony in *zinā* cases must be timely. A lapse of time, without a reasonable excuse,[112] between the alleged *zinā* and the testimony will render it void. The Ḥanafīs have a twofold argument here. If the witness attributes the delay in testimony to the fact that he wished to conceal the vices of the accused, it thus follows that any subsequent evidence could only arise from malicious intent or personal interest which would raise doubt in the testimony. If the delay is for reasons other than what is mentioned, the witness is 'held unworthy of attention as having for so long a time neglected that which was incumbent upon him, namely the giving of evidence'.[113]

Jurists have differed regarding what is the appropriate time limit for witnesses to come forward. Abū Jaʿfar al-Ṭaḥāwī (d. 321/932) mentions six months whilst Abū Ḥanīfa leaves it to the judge's discretion which is to be determined according to societal norms and customs of each country.[114] Shaybanī stipulates a time limit of one month and this is the commonly agreed upon limit.[115]

5.4.3 Confession (iqrār)

Jurists agree that *zinā* can be established by way of confession because the Prophet ordered Māʿiz b. Mālik al-Aslamī and the woman from the tribe of al-Ghāmid (al-Ghāmidiyya)[116] to

[111] *al-Mawsūʿa al-Fiqhīyya*, 24:41; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 7:377; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:168; al-Nawawī, *Rawḍa al-Ṭālibīn*, 11:237; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:101.
[112] The example given in *fiqh* books is the distance from the court.
[113] al-Marghīnānī, *The Hedaya: Commentary on the Islamic Laws*, 2:36. See also Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:266.
[114] ibid 38.
[115] ibid.
[116] Other narrations associate the woman in question with the tribe of al-Juhayna (found in *Ṣaḥīḥ Muslim*) or al-Bāriq (found in *Muṣannaf Ibn Abī Shayba* and *Sunan Abī Dāwūd*). There is a difference of opinion whether these narrations refer to the same woman as Ghāmid is a subtribe of Juhayna (see al-Nawawī, *Ṣaḥīḥ Muslim bi-Sharḥ al-Nawawī* (Cairo: al-Maṭbaʿa al-Miṣriyya 1349/1930) 11:201; Muḥammad b. Ismā'īl al-Amīr al-Ṣan'ānī, *Subul al-Salām Sharḥ Bulūgh al-Marām* (Muḥammad Ṣubḥī Ḥasan Ḥallāq ed, 2nd edn, Jeddah: Dār Ibn al-Jawzī

be stoned to death as a result of their confessions.[117] The Ḥanafīs and Ḥanbalīs require the confession to be made four times, once is not deemed sufficient. The Ḥanafī school also stipulates each confession to be made in a different session with the judge sending the individual back each time. The Ḥanbalīs permit the four confessions to occur in one session or four separate sessions. The Mālikī and Shāfiʿī school consider one confession to suffice as valid proof of *zinā*.[118]

The confession should be clearly detailed to verify the occurrence of actual intercourse and remove any *shubha* or *tuhma* (suspicion). This is evidenced by the *ḥadīth* regarding Māʿiz:

> …The Prophet asked: "Perhaps you have only kissed, or touched, or looked at her?" He said, "No, O Messenger of Allah!" The Prophet said (using no euphemism): "Did you have sexual intercourse with her?" The narrator added: At that, (i.e. after his confession) the Prophet ordered that he be stoned (to death). In another narration he asked, "Have you done it so that your sexual organ penetrated hers?" He replied: "Yes". He asked: "Have you done it like a collyrium stick when enclosed in its case and a rope in a well?" He replied: "Yes". He asked: "Do you

1421/2000) 7:115; Muḥammad b. ʿAlī al-Shawkānī, *Nayl al-Awṭār min Asrār Muntaqā al-Akhbār* (Muḥammad Ṣubḥī Ḥasan Ḥallāq ed, Jeddah: Dār Ibn al-Jawzī 1427/2006) 13:288; Muḥammad Ashraf b. Amīr al-ʿAẓīm Ābādī, *ʿAwn al-Maʿbūd Sharḥ Sunan Abī Dāwūd* (2nd edn, Beirut: Dār al-Kutub al-ʿIlmiyya 1410/1990) 12:80; Mullā ʿAlī Qārī, *Mirqāt al-Mafātīḥ Sharḥ Mishkāt al-Maṣābīḥ* (Beirut: Dār al-Fikr 1422/2002) 11:170) or whether they refer to two separate women (see Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Tahdhīb al-Āthār Musnad ʿAlī wa Musnad ʿUmar b. al-Khaṭṭāb wa Musnad ibn ʿAbbās* (Maḥmūd Muḥammad Shākir ed, Cairo: Maṭbaʿa al-Madanī n.d) 3:264; Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī* (Ayman Fuʾād ʿAbd al-Bāqī and Muḥammad al-Dīn al-Khaṭīb eds, Cairo: Dār al-Rayyān 1407/1987) 12:150).

[117] The incident of Māʿiz is a well-known narration and can be found in the majority of hadith books. See eg al-Bukhārī, *Ṣaḥīḥ al-Bukhārī,* no. 5270, 6820, 6824, 6825, 7167; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim,* no. 1692-1695; al-Tirmidhī, *Jāmiʿ al-Tirmidhī,* no. 1427; al-Sijistānī, *Sunan Abī Dāwūd*, no. 3188, 4423, 4427, 4428, 4434; Ibn Ḥanbal, *Musnad Aḥmad*, no. 2129, 2202, 2433, 2874, 2998, 3028; Ibn Mājah, *Sunan Ibn Mājah*, no. 2004; Ḥākim al-Naysābūrī (d. 415/1014), *al-Mustadrak ʿala al-Ṣaḥīḥayn*, 4:402, no. 8076; al-Dāraquṭnī, *Sunan al-Dāraquṭnī,* 4:133, no. 3220; al-Dāramī, *Sunan al-Dāramī*, 1:12, no. 2361; al-Mawṣilī, *Musnad Abī Yaʿla*, 10:524, no. 6140 .

[118] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:203-205; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:318; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:194; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:98; Ibn Qudāma, *al-Mughnī*, 12:354; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 970-71.

know what *zinā* is?" He replied: "Yes. I have done with her unlawfully what a man may lawfully do with his wife".[119]

The judge is expected to actively investigate the confession to seek extenuating circumstances and offer the possibility of retraction. Jurists agree that even after confession, the defendant is at liberty to retract it at any point which will abate the punishment. This is demonstrated in the aforementioned *ḥadīth* of Māʿiz where the Prophet offered the chance to recant his confession and turned away from him repeatedly. A similar incident also occurred with the woman from the tribe of Ghāmid.[120]

The majority of doctrinal schools do not constitute pregnancy out of wedlock as an automatic confession of *zinā*. It is not considered the sole evidence of the crime unless four witnesses are able to testify against the woman or she confesses herself. It is enough to waive the *ḥadd* punishment for the accused to claim that she was raped.[121] The argument that external signs such as pregnancy are not considered conclusive proof of *zinā* is illustrated by the example that if a woman's husband was absent for a number of years 'he could have been miraculously transported to be with her'.[122]

[119] al-Sijistānī, *Sunan Abī Dāwūd*, no. 4428.

[120] The narration found in Muslim recounts how Ma'iz came to the Prophet and said: 'Allah's Messenger, I have wronged myself; I have committed adultery and I earnestly desire that you should purify me. He turned him away. On the following day, he (Ma'iz) again came to him and said: Allah's Messenger, I have committed adultery. Allah's Messenger turned him away for the second time and sent him to his people saying: Do you know if there is anything wrong with his mind? They denied of any such thing in him and said: We do not know him but as a wise good man among us, so far as we can judge. He (Ma'iz) came for the third time, and he (the Holy Prophet) sent him as he had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced judgment about him and he was stoned'. See Luqman Zakariyah, 'Confession and Retraction: The Application of Islamic Legal Maxims in Safiyyatu and Amina's Cases in Northern Nigeria' (2010) 30(2) Journal of Muslim Minority Affairs 251, 254.

[121] al-Māwardī, *al-Hāwi*, 13:227. See also Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:260; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:319; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:193; Ibn Qudāma, *al-Mughnī*, 12:347.

[122] Brown, 'Stoning and Hand Cutting', 10 citing ʿAbd al-Wahhāb al-Shaʿrānī, *al-Mīzān al-Kubrā*, 2 vols. in 1 (Cairo: Maktabat Zahrān [n.d]. Reprint of 1862 Cairo ed. from Maktabat al-Kastiliyya) 2:145.

It has also been narrated from Saʿīd that ʿUmar b. Khaṭṭāb questioned an unmarried pregnant woman about her pregnancy. She replied that she was a very deep sleeper and a man had intercourse with her whilst she was asleep. She did not awaken until he had finished and so the *ḥadd* was not applied. [123] Similarly a woman called Shurāḥa Hamdānya came to ʿAlī b. Abī Ṭālib and confessed that she was pregnant due to *zinā*. ʿAlī responded that perhaps a man had come upon her whilst she was asleep, or perhaps she was forced, or that her master had married her and she was concealing this; the purpose of these suggestions being to persuade her to say yes and thus exempt her from the *ḥadd*.[124] Furthermore, ʿAlī and Ibn ʿAbbās are reported to have said that 'if there is a "perhaps" (*laʿalla*) or "maybe" (*ʿasā*) in a case of *ḥadd*, it cannot be applied'.[125] These incidents show the reluctance of the authorities to impose the *ḥadd* and preserve the right to life.

Only the Mālikī school considers such pregnancy as proof of *zinā*, provided the woman does not claim to have been raped,[126] however the school also endorses the sleeping foetus doctrine (*al-rāqid*) which allows the period of gestation to extend up to seven years.[127] This allows a sufficient defence against the crime of *zinā* and clearly demonstrates the humanitarian concern

[123] Ibn Qudāma, *al-Mughnī*, 12:347-48; 378.
[124] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:208; al-Zaylaʿī, *Naṣb al-Rāya,* 3:319; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 972; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:213.
[125] Ibn Qudāma, *al-Mughnī*, 12:378.
[126] According to the Mālikīs, the woman's claim of rape will only be considered provided there is evidence (direct or circumstantial) to support her testimony such as she went asking for help; her physical state; she lodged a complaint with the authorities etc. See Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *al-Muntaqā Sharḥ Muwaṭṭaʾ al-Imām Mālik* (2nd edn, Cairo: Dār al-Kitāb al-Islāmī n.d) 7:146; Ibn Abī Zayd, *al-Risāla fī Fiqh al-Imām Mālik* (ʿAbd al-Wārith Muḥammad ʿAlī ed, Beirut: Dār al-Kutub al-ʿIlmīyya n.d) 93-94; Abū Muḥammad b. ʿAlī ʿAbd al-Wahhāb, *al-Maʿūna ʿalā Madhhab ʿĀlim al-Madina* (Beirut: Dār al-Kutub al-ʿIlmīyya 1998) 2:134; Abū ʿUmar Yūsuf b. ʿAbd Allāh Ibn ʿAbd al-Barr, *al-Istidhkār li Madhāhib Fuqahāʾ al-Amṣār* (Sālim Muḥammad ʿAṭāʾ and Muḥammad ʿAlī Muawwaḍ eds, Beirut: Dār al-Kutub al-ʿIlmīyya 2000) 7:145-47; Hina Azam, *Sexual Violation in Islamic Law: Substance, Evidence, and Procedure* (Cambridge: CUP 2015) 204-209.
[127] See Susan Gilson Miller, 'Sleeping Fetus: Overview', *Encyclopedia of Women & Islamic Cultures* (2009) <http://dx.doi.org/10.1163/1872-5309_ewic_EWICCOM_0205> accessed 11 August 2017. Imām Mālik was reported to have been a sleeping foetus. See Willy Jansen, 'Sleeping in the Womb: Protracted Pregnancies in the Maghreb' (2000) 90 The Muslim World 218–37; Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law, Iran and Morocco Compared* (London: IB Tauris 1993) 143-46.

to protect women from the death penalty. Thus all schools tried their best to make it impossible for a conviction of *zinā* to stand.

Brown has argued that '[n]ormally in the Shariah, such miraculous or fantastic claims would carry no weight in legal matters. But as possible ambiguities to prevent application of the *Ḥudūd*, they were accepted'.[128] The significance of the discretion provided for 'ambiguities' in ruling on sexual offences illustrates the historical theological affirmation for the inherent *ḥudūd* restriction and thus the rarity of implementing *ḥudūd* punishments.

5.4.4 Stoning (*rajm*)

The punishment for adultery is death by stoning (*rajm*) according to the consensus of scholars. Although there is no mention of *rajm* in the Qurʾān, this view is supported by *ḥadīths* in which the Prophet administered such a punishment, namely in the widely reported cases of Māʿiz b. Mālik and al-Ghāmidiyya, and it is also found in the practice of the early companions.[129] The first reported instance of *rajm* took place in the time of the Prophet with respect to a Jewish couple who were convicted of adultery. However it is unclear whether the Prophet ordered the sentencing according to the Torah or Islamic law.[130]

There are also *ḥadīths* which suggest that there was a verse on *rajm* (*ayat al-rajm*) in the Qurʾān[131] which some scholars maintain was abrogated but the ruling of implementation

[128] Brown, 'Stoning and Hand Cutting', 10.
[129] According to John Burton, stoning as a penalty for adultery was almost universally adopted 'in the oldest stage of Islamic intellectual activity.' See Burton, 'The Penalty for Adultery in Islam,' in GR Hawting and Abdul-Kader A Shareef (eds), *Approaches to the Qurʾān* (London: Routledge 1993) 269. For a comprehensive overview of all the narrations on *rajm* see Muḥammad Anas Sarmīnī, *al-ʿUqūbāt allatī Istaqallat bī Tashrīʿihā al-Sunna al-Nabawiyya* (Beirut: Dār al-Bashā'ir al-Islamīyya 2017) 393-491.
[130] ibid 456-57; al-Mūṣilī, *al-Ikhtiyār*, 4:88. Four reported instances of *rajm* took place during the life of the Prophet: 1) Jewish couple; 2) Māʿiz b. Mālik; 3) a woman from the tribe of al-Ghāmid; 4) a woman who committed zina with her husband's laborer (known as *hadith al-ʿAsīf*) (Sarmīnī, *al-ʿUqūbāt*, 408-446).
[131] Sarmīnī, *al-ʿUqūbāt*, 478-86. The verse stated, 'The noble man and woman, if they commit zinā, surely stone them both' (*al-shaykhu wa al-shaykha, idha zanayā farjumūhumā al-batta*).

remained (*naskh al-tilāwa dūn al-ḥukm*).[132] Other *ḥadīths* show that the Prophet disliked that the verse of *rajm* be written down and according to Suyūṭī (d. 911/1505), this was done 'with a view to lessening the burden of reciting and writing in the Qurʾān what is a rather difficult, and severe rule, and a harsh punishment, even though that law still applies. It also points to the virtue of concealing ills of this nature'.[133]

It is also reported that ʿUmar b. Khaṭṭāb addressed the people and said, 'Do not have doubts about the rule of stoning for it is the truth. I was tempted to write it into the Qurʾān and consulted Ubayy b. Kaʿb who said: "Did you [ʿUmar] not come to me when I was still studying it with the Prophet? You then hit me on the chest and said: You study the verse of stoning whilst they cohabit with each other like donkeys do"'.[134] Ibn Ḥajar al-ʿAsqalānī (d. 852/1449) observed that this indicated to the fact that the recitation was removed because of controversy.[135] If fornication was so rampant then many people would be at risk of such a punishment.

ʿAbdullah b. Muḥammad al-Ṣadīq al-Ghumārī (d. 1993), however, refuted the claim of *naskh al-tilāwa*. He argued that all the *ḥadīths* that allude to *rajm* as being a Qurʾānic verse are not widely transmitted enough to reach the epistemic value of the Qurʾān (*tawātur*) and thus cannot be considered part of it. Rather it is a highly irrational claim that the Qurʾānic text was altered and contradicts the Qurʾān's message about itself that it is a text that is intact and guarded by

[132] Most pre-modern Muslim scholars had no problem with such a concept of abrogation where the ruling remained intact. The famous Hadith scholar Abū Bakr al-Bayhaqī (d. 458/1066) stated that he knew of no disagreement on the possibility of *naskh al-tilāwa dūn al-ḥukm* for stoning; Abū Bakr al-Bayhaqī, *al-Sunan al-Kubrā* (Muḥammad ʿAbd al-Qādir ʿAṭā ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1420/1999) 8:367. For more on the concept of abrogation see, Joseph Schacht, *The Origins of Muḥammadan Jurisprudence* (Oxford: Clarendon Press 1950) 53, 73-74, 191; Christopher Melchert, 'Qurʾānic Abrogation Across the Ninth Century: Shāfiʿī, Abū ʿUbayd, Muḥāsibī and Ibn Qutaybah' in Bernard G Weiss (ed), *Studies in Islamic Legal Theory* (Leiden: Brill 2002), 81, 84-88; John Burton, *The Sources of Islamic Law* (Edinburgh: Edinburgh University Press 1990) 122-64.

[133] al-Ṣuyūṭī, *al-Itqān fī ʿUlūm al-Qurʾān* (Muneer Fareed tr, n.d) 65 available at <www.ashtoncentralmosque.com/wp-content/uploads/2014/07/al-Itqan-fi-Ulum-al-Quran.pdf> accessed 2 February 2016.

[134] ibid.

[135] ibid.

God.[136] El Fadl's concept of the 'conscientious pause' is also of significance here. He argues that any tradition that has serious ethical and legal consequences requires the reader to 'take a pause and ask: to what extent did the Prophet really play a role in the authorial enterprise that produced this tradition?'[137] It is therefore difficult to see how these narrations can be used as decisive legal proofs.[138]

Another dissenting view proposes that the Qurʾān's silence on *rajm* is indicative of a uniform punishment of 100 lashes, for both adultery and fornication, for which there is a clear provision in the Qurʾān. This opinion is mainly attributed to the Kharijites.[139] The renowned Egyptian scholar Abū Zahra (d. 1974) also rejected the punishment of stoning and quoted a *ḥadīth* recorded in *Ṣaḥīḥ al-Bukhārī*[140] wherein the companion, ʿAbdullah b. Abī Awfā, was questioned whether Sūra Nūr (which contains the provision for flogging) was revealed before or after the *ḥadīth* of *rajm*. He answered that he did not know.[141] In other words, it is possible that the Qurʾānic verse on flogging abrogated the practice of *rajm*.

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[136] Abdullah b. Muḥammad al-Sadīq al-Ghumārī, *Dhawq al-Ḥalāwa bi-Bayān Imtināʿ Naskh al-Tilāwa* (2nd edn, Cairo: Maktabat al-Qāhira 2006) 12, 14.

[137] El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (London: Oneworld Publications 2014) 213. El Fadl further substantiates his point by claiming that, '[t]his is not an invitation to the exercise of whimsy and feel-good determinations. The duties of honesty, self-restraint, diligence, comprehensiveness, and reasonableness demand that a Muslim make a serious enquiry into the origin, structure, and symbolism of the authorial exercise that produced the tradition before simply waving it away and proceeds on his merry way.' (ibid).

[138] Scott C Lucas, 'Perhaps You Only Kissed Her?' (2011) 34(3) Journal of Religious Ethics 399, 410.

[139] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:640; Muḥammad Abū Zahra, *Fatāwā* (Muḥammad ʿUthmān Bashīr ed, Damascus: Dār al-Qalam 2006) 672.

[140] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 804.

[141] In 1972, at an Islamic conference in Libya, Abū Zahra disclosed a jurisprudential opinion that he had kept secret for the past 20 years (out of fear that his character and reputation would be disparaged and vilified as happened in this conference). He stated that he believed stoning was a Jewish practice that the Prophet at first followed, until the practice was abrogated by the punishment of a hundred lashes in Sūra al-Nūr citing the above hadith as one of the proofs. He considered the punishment too cruel and contrary to the Prophet's nature arguing that stoning was Judaic law and fits the cruelty of Judaic culture (*hādhihi sharīʿa yahūdiyya wa hiya alīqu bi-qasāwati-l-yahūd*). This was reported by two scholars in attendance, Muṣṭafā Zarqā' and Yūsuf al-Qaraḍāwī, see Abū Zahra, *Fatāwā*, 673; ʿAlī A Manṣūr, *Niẓām al-Tajrīm wa al-ʿIqāb fī-l-Islām* (Madina: Mu'assasa al-Zahra 1396/1976) 181-83; al-Qaraḍāwī, 'Nadwa al-Tashrīʿ al-Islāmī fī Lībyā' (*Al-Qaradawi*, n.d) <www.al-qaradawi.net/node/4488> accessed 11 May 2017.

Extensive debates have emerged over the years regarding the validity of *rajm* in Islamic law. What is clear is that although it cannot be established from the Qurʾān, it is attested through the practice of the Prophet and companions.[142] Whether the Qurʾān abrogated it or not introduces an element of doubt into the whole debate and history shows that this punishment was rarely, if ever, applied.[143] It can be viewed as more symbolic rather than a literal application.

Nevertheless, even for those that insist on *rajm*, in order for such a brutal punishment to even apply, a number of stringent evidentiary criteria must be met for a person to be convicted and judges can use the doctrine of *shubha* to prevent the *ḥadd* being inflicted.

5.5 Sodomy (*Liwāṭ*)

Liwāṭ is defined as 'the act of the people of Lot' (*ʿamal qawm Lūṭ*)[144] i.e. sodomy and has been condemned in the *sharīʿa*.[145] This is principally derived from the Qurʾānic verses:

> And [We had sent] Lot when he said to his people, 'Do you commit such immorality as no one has preceded you with from among the worlds? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people.'[146]

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[142] See Mohamed S El-Awa, *Punishment in Islamic Law* (Plainfield: American Trust Publications 1993) 15-17; Waqar Akbar Cheema and Gabriel K Al-Romaani, 'Opposition to *Rajm*: Analysis and Refutation' (2013) 1(1) Journal of Islamic Sciences 14-24; Azman bin Mohd Noor, 'Stoning for Adultery in Christianity and Islam and its Implementation in Contemporary Muslim Societies' (2010) 18(1) Intellectual Discourse 97-113; Reza Aslan, 'The Problem of Stoning in the Islamic Penal Code: An Argument for Reform' (2003) 3 UCLA J. Islamic & Near E. L.; Pavel Pavlovitch, 'The Stoning of a Pregnant Adulteress from Juhayna: The Early Evolution of a Muslim Tradition' (2010) 17 Islamic Law and Society, 1-62; John Burton, 'The Penalty for Adultery in Islam' in GR Hawting and Abdul-Kader A Shareef (eds), *Approaches to the Qurʾān* (London: Routledge 1993) 269.

[143] Brown ('Stoning and Hand Cutting', 15-18) details the historical application of *ḥudūd* in Islamic civilization and notes that '[i]n the roughly five hundred years that the Ottoman Empire ruled Constantinople, records show that only one instance of stoning for adultery took place'.

[144] Ibn Manẓūr, *Lisān al-ʿArab*, 7:396.

[145] For a useful study, see Sara Omar, 'From Semantics to Normative Law: Perceptions of Liwāṭ (Sodomy) and Sihaq (Tribadism) in Islamic Jurisprudence (8-15th Century CE)' (2012) 19 Islamic Law and Society, 222-56.

[146] Qurʾān 8:80-81.

> Do you approach males among the worlds and leave what your Lord has created for you as mates? But you are a people transgressing.[147]

Based on the scriptural texts, it is agreed amongst scholars that *liwāṭ* is prohibited in Islam however there is no consensus that it is liable for the death penalty.[148] Jurists identified *liwāṭ* as an action rather than a desire or inclination, it is 'inserting the penis into the anus of a man'.[149] It thus follows that tribadism (*siḥāq*) is not treated as severely as *liwāṭ* due to the absence of penetration and therefore exempt from the death penalty.[150]

The punishment for *liwāṭ* varies among the four sunnī schools from *taʿzīr* to *ḥadd*.[151] The Mālikī school holds that both the active and passive partner are executed by *rajm* irrespective of marital status.[152] The Shāfiʿī position states that *liwāṭ* incurs a similar penalty to *zinā*, the active partner is executed whilst the passive is lashed 100 times and exiled for a year.[153] According to the Ḥanbalīs, *liwāṭ* is punished exactly like *zinā* so the married will be sentenced to death and the single will be lashed 100 times and exiled for a year.[154] It is only the Ḥanafī

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[147] Qurʾān 42:165-66.

[148] On the prohibition of *liwāṭ* see Badr al-Dīn Muḥammad al-Zarkashī, *al-Baḥr al-Muḥiṭ* (Beirut: Dār al-Kutub al-ʿIlmiyya 2007) 4:556; al-Nawawī, *Rawḍa al-Talībīn*, 10:90; al-Buhūtī, *Kashshāf al-Qinā'* (Beirut: Dār al-Fikr 1402/1982) 6:172; ʿAlī b. Aḥmad b. Saʿīd Ibn Ḥazm, *al-Muḥallā* (Cairo: Idāra al-Ṭibāʿa al-Munīriyya 1352/1933) 11:380; Muḥammad b. Ahmad al-Qurṭubī, *al-Jāmi li-Aḥkām al-Qur'ān* (ʿAbd Allah b. ʿAbd al-Muḥsin al-Turkī ed, Beirut: Muʾassasa al-Risāla 1427/2006) 9:274ff; al-Ṣan'ānī, *Subul al-Salām*, 7:120-21; Ibn Qudāma, *al-Mughnī*, 12:348ff.

[149] Ramlī, *Nihāyat al-Muḥtāj*, 7:423-24.

[150] Camilla Adang, 'Ibn Ḥazm on Homosexuality: A Case-Study of Ẓāhirī Legal Methodology' (2003) 24(1) Al-Qantara, 10. See also Ibn Ḥazm, *al-Muḥallā*, 11:390-94.

[151] Scott Siraj al-Haqq Kugle provides a detailed analysis of each school's reasoning on *liwāṭ* and its punishment in his monograph *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (Oxford: Oneworld Publications 2010) 145-159.

[152] Muḥammad b. Aḥmad Ibn Juzayy al-Gharnāṭī, *al-Qawānīn al-Fiqhīyya* (Mājid al-Ḥimawī ed, Beirut: Dār Ibn Ḥazm 1434/2013) 584; al-Dusūqī, *Ḥāshiyat al-Dusūqī* 4:314; al-Hattāb, *Mawāhib al-Jalīl*, 6:296; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:404-405; Jalāl al-Dīn al-Suyūṭī, *Miṣbāh al-Zujāja Sharḥ Sunan Ibn Mājah* (Karachi: Qadīm Kutubkhāna n.d) 184; Ṣāliḥ ʿAbd al-Salām al-Ābī, *al-Thamar al-Dānī fī Taqrīb al-Maʿānī Ḥāshiya Risāla Ibn Abī Zayd al-Qayrawānī* (2nd edn, Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1944) 438.

[153] al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:187; Muḥammad Nawawī b. ʿUmar al-Jāwī, *Qūt al-Ḥabīb al-Gharīb* (Cairo: Maṭbaʿa Muṣṭafā al-Bābī al-Ḥalabī 1938) 246.

[154] al-Buhūtī, *Kashshāf al-Qināʿ*, 6:94; al-Mirdāwī, *al-Inṣāf* 10:176-77; Manṣūr b. Yūnus al-Buhūtī, *al-Rawḍ al-Murbiʿ* (Bashīr Muḥammad ʿUyūn ed, Damsacus: Maktabat Dār al-Bayān 1999) 463-464; Abū Jaʿfar Aḥmad b. Muḥammad al-Ṭaḥāwī, *Sharḥ Mushkil al-Āthār* (Shuʿayb al-Arnāʾūṭ ed, Beirut: Muʾassasat al-Risāla 1994) 9:442-43.

school that does not consider *liwāṭ* a *ḥadd* offence and therefore does not impose the death penalty. It considers *liwāṭ* to be a *taʿzīr* offence; however, a habitual offender may be executed in the interest of public order by the judicial authority's discretion (*siyāsa*).[155]

The basis for the *sharīʿa* positions on *liwāṭ* and its punishment is derived from a number of factors. These include: 1) the Qurʾān's explicit censure of going to men out of desire instead of women; 2) several *ḥadīths* denouncing *liwāṭ* and laying down severe punishments for it; 3) the use of legal analogy (*qiyās*) based on *zinā*; and 4) a range of legal edicts from the founding generations of the companions (*saḥāba*) and their successors (*tābi'īn*), based on their interpretation of the primary sources and legal reasoning.[156] These individuals regarded *liwāṭ* either like *zinā* or distinct from it. Consequently, punishments prescribed for the offence ranged from capital punishment i.e. stoning to death, corporal punishment i.e. lashing, to burning or throwing the offender from tall buildings.[157]

Ibn al-Humām (d. 861/1457) argued that the wide berth of disagreements between the companions and successors over the punishment of *liwāṭ* was in itself an indication that the offence cannot be categorised as one of *ḥudūd*. It also demonstrated that *ḥadīths* on *liwāṭ* which advocated for the death penalty were not reliable or they must not be interpreted as a general rule. If *liwāṭ* was a *ḥudūd* crime then there would not be such a large variation of opinions amongst the early scholars.[158]

Liwāṭ finds its staunch condemnation not only in the Qurʾān but in explicit *ḥadīths*, some of which endorse the death penalty as its punishment. The most famous *ḥadīth* from the Prophet

[155] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 4:150, 5:249-50; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:155; Safia Safwat, 'Offences and Penalties in Islam' (1982) 26(3) Islamic Quarterly, 158.
[156] Jonathan AC Brown, 'A Pre-Modern Defense of the *Ḥadīth*s on Sodomy: al-Suyuti's Attaining the Hoped-for in Service of the Messenger (s)' (2017) 34(3) American Journal of Islamic Social Sciences (2017) 1, 2-3.
[157] al-Bayhaqī, *al-Sunan al-Kubrā*, 8:404-406; al-Haytamī, *Zawājir*, 2:296.
[158] Brown, 'A Pre-Modern Defense of the *Ḥadīth*s on Sodomy', 5.

advocating the death penalty for *liwāṭ* has been narrated on the authority of Ibn ʿAbbās that the Messenger of God said: 'Whoever you find doing the action of the people of Lot, kill the one who does it, and the one to whom it is done'.[159]

Other variations of the *ḥadīth* have been narrated from Abū Hurayra and Jābir b. ʿAbdullah. Abū Hurayra reported that 'the Prophet said concerning the one who commits the act of the people of Lot, "stone both the upper and the lower [partner], stone them both"'. [160] Jābir narrated that the Prophet said, 'Whoever has committed the action of the people of Lot, kill him'.[161]

These *ḥadīths* have been contentious amongst many classical scholars due to defects found in their *isnād*. The great Shāfiʿī scholar, Ibn Ḥajar al-ʿAsqalānī, acknowledged that the *ḥadīths* used to establish *liwāṭ* as a *ḥudūd* crime were not reliable enough. He identified the *ḥadīth* of Ibn ʿAbbās as 'differed in terms of its reliability' (*mukhtalaf fī thubūtihi*) and graded the chain of Abū Hurayra's *ḥadīth* as much weaker than that of Ibn ʿAbbās, arguing that it was not correct

[159] There are a number of isnād for this hadith. (1) The sanad is: ʿAbd al-ʿAziz b. Muḥammad - ʿAmr b. Abī ʿAmr - ʿIkrima - Ibn ʿAbbās – the Prophet. Found in: al-Sijistānī, *Sunan Abī Dāwūd*, no. 4464; al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no.1456; Ibn Mājah, *Sunan Ibn Mājah*, no. 2561; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:231, no. 17475; Aḥmad b. Muḥammad Ibn Ḥanbal Abū ʿAbdallāh al-Shaybānī (d. 241/855), *Musnad Aḥmad*, 4:464, no. 2732; ʿAlī b. ʿUmar al-Dāraquṭnī (d. 385/995), *Sunan al-Dāraquṭnī* (ʿAbdallāh Hāshim Yamānī ed, Beirut: Dār al-Maʿrifa 1966) 3:124. (2) The sanad is: Sulaymān b. Bilāl - Amr b. Abi Amr - ʿIkrima - Ibn ʿAbbās – the Prophet. Found in: al-Bayhaqī, *al-Sunan al-Kubrā*, no. 8:231, no. 17475; al-Naysābūrī, *al-Mustadrak*, 4:395, no. 8047. (3) The sanad is: Abdullah b. Ja'far - Amr b. Abi Amr - ʿIkrima - Ibn ʿAbbās – the Prophet. Found in: al-Ṭabarī, *Tahdhīb al-Āthār – Musnad Ibn ʿAbbās*, 1:554, no. 870; ʿAbd b. Ḥumayd (d. 249/863), *Musnad ʿAbd b. Ḥumayd* (Ṣubḥī Badrī al-Sāmarrā'ī and Maḥmūd Muḥammad Ṣaʿīdī eds, Cairo: Maktaba al-Sunna 1408/1988) 200; al-Naysābūrī, *al-Mustadrak*, 4:395, no. 8049.

[160] (1) The sanad is: ʿAṣim b. ʿUmar - Suhayl - his father - Abū Hurayra – the Prophet. Found in: Ibn Mājah, *Sunan Ibn Mājah*, no. 2062; Abū Yaʿlā al-Mawṣilī (d. 307/919-20), *Musnad*, 12:42, no. 6687; al-Ṭaḥāwī, *Sharḥ Mushkil al-Āthār*, 9:445, no. 3833; al-Khaṭīb al-Baghdādī (d. 463/1071), *al-Muwaḍḍiḥ li-Awhām al-Jamʿ wa al-Tafrīq*, 1:156. (2) The sanad is: ʿAbd al-Rahmān b. ʿAbdullah al-ʿUmarī - Suhayl - his father - Abū Hurayra – the Prophet. Found in: al-Naysābūrī, *al-Mustadrak*, 4:395, no. 8048; al-Kharāʾiṭī, *Masāwiʾ al-Akhlāq*, 1:444, no. 417; Ibn Jawzī, *Dham al-Hawā*, 1:202.

[161] The sanad is: ʿAbbād b. Kathīr - ʿAbdullah b. Muḥammad b. ʿAqīl - Jābir b. ʿAbdullah – the Prophet. Found in: Ibn Jawzī, *Dham al-Hawā*, 1:202; al-Kharāʾiṭī, *Masāwiʾ al-Akhlāq*, 1:443, no. 416; Abū Muḥammad al-Ḥārith, *Musnad al-Ḥārith*, 2:340, no. 509.

(*lam yasiḥḥu*).[162] Ibn al-Ṭallāʿ (d. 497/1104) also claimed, in his Aḥkām, that *rajm* for sodomy was not established from the Prophet.[163]

Jamāl al-Dīn al-Zaylaʿī (d. 762/1361), the renowned *ḥadīth* scholar and jurist, provided a critique of all the different chains relating to the above *ḥadīths* and cited a number of prominent *ḥadīth* experts who challenged their reliability.[164] Amongst them were al-Tirmidhī (d. 279/892) and al-Bazzār (d. 292/905) who considered the chain of Abū Hurayra unreliable due to the presence of a narrator named ʿĀṣim b. ʿUmar who was known for weak retention (*ḥifz*).[165] Aḥmad Ibn Ḥanbal (d. 241/855), Yaḥya Ibn Maʿīn (d. 233/848), Abū Ḥātim al-Rāzi (d. 277/890), and al-Jūzajānī (d. 259/873) all declared him weak (*ḍaʿīf*); al-Bukhārī (d. 256/870) and al-Tirmidhī noted that he was rejected in *ḥadīth* (*munkar al-ḥadīth*).[166]

In the chain of Jābir, both ʿAbdallāh b. Muḥammad b. ʿAqīl and ʿAbbād b. Kathīr were criticised thereby weakening the chain considerably.[167] Similarly, the chain of Ibn ʿAbbās was criticised due to the presence of ʿAmr b. Abī ʿAmr and ʿIkrima. Scholars have differed regarding both narrators' reliability. ʿAmr b. Abī ʿAmr was generally deemed to be a credible

[162] Ibn Ḥajar al-ʿAsqalānī, *Talkhīṣ al-Ḥabīr Takhrīj Aḥādīth al-Rafiʿi al-Kabīr* (Ḥasan ʿAbbās Quṭb ed, Mu'assasa Qurṭuba 1416/1995) 4:102-103.

[163] ibid 102; Muḥammad b. Faraj al-Qurṭubī Ibn al-Ṭallāʿ, *Aqḍiyat Rasūl Allāh* (also known as *al-Aḥkām*) (Fāris Fatḥī Ibrāhim ed, Cairo: Dār Ibn al-Haytham 1426/2006) 24.

[164] See al-Zaylaʿī, *Naṣb al-Rāya*, 3:339-343.

[165] Ibn Ḥajar al-ʿAsqalānī, *Tahdhīb al-Tahdhīb*, 5:51-52.

[166] ibid. Ḥākim, al-Kharāʾiṭī, and Ibn Jawzī narrate the same *ḥadīth* via a different chain using ʿAbdur Rahman b. ʿAbdullah al-ʿUmarī (see fn 151) however al-ʿUmarī was also identified as a weak narrator. Aḥmad Ibn Ḥanbal and Yaḥya Ibn Maʿīn said his narrations are rejected and he is a liar (*laysa bi shayʾayn, aḥādīthuhu aḥādīth manākīr, kāna kadhdhāban*); Abū Zurʿa, Abu Ḥātim and al-Nasā'ī said he was *matrūk al-ḥadīth*; al-Bukhārī also commented: *laysa min man yurwā anhu*. Ibn Ḥajar, *Tahdhīb al-Tahdhīb*, 6:213.

[167] For ʿAbdallāh b. Muḥammad b. ʿAqīl, see Ibn Ḥajar al-ʿAsqalānī, *Talkhīṣ al-Ḥabīr*, 2:255; Ibn Jawzī, *Kitāb al- Ḍuʿafāʾ wa al-Matrūkīn* (ʿAbdallah al-Qāḍī ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1406/1986) 2:140, no. 2112; al-Bukhārī, *al-Tārīkh al-Kabīr* (al-Sayyid Hāshim al-Nadwī ed, Beirut: Dār al-Fikr n.d) 5:183, no. 576; al-Nawawī, *Tahdhīb al-Asmāʾ wa al-Lughāt* (Beirut: Dār al-Kutub al-ʿIlmiyya n.d) 1:287, no. 330; Ibn Ḥajar al-ʿAsqalānī, *Taqrīb al-Tahdhīb* (Muḥammad ʿAwāma ed, Syria: Dār al-Rashīd 1406/1986) 321, no. 3592; al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl* (Bashār ʿAwād Maʿrūf ed, Beirut: Muʾassasa Beirut 1400/1980) 16:78, no. 3543. For ʿAbbād b. Kathīr, see al-Bukhārī, *al-Tārīkh al-Kabīr*, 6:43, no. 1642; Ibn Ḥajar al-ʿAsqalānī, *Taqrīb al-Tahdhīb*, 290, no. 3139; al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl*, 14:145, no. 3090; ʿAbdallah Ibn ʿAdī al-Jurjānī, *al-Kāmil fī Ḍuʿafāʾ al-Rijāl* (Yaḥyā Mukhtār Ghazāwī ed, Beirut: Dār al-Fikr 1409/1988) 4:333, no. 1165.

narrator by *ḥadīth* critics and he was used by both al-Bukhārī and Muslim (d. 260/875) in their canonical texts. Abū Ḥātim, Aḥmed Ibn Ḥanbal and Abū Aḥmad b. ʿAdī said there was 'no harm in him' (*lā baʾsa bihi*). Abū Zurʿa al-Rāzī (d. 264/878) deemed him a reliable narrator (*thiqa*).[168]

ʿAmr b. Abī ʿAmr was, however, criticised for his narrations from ʿIkrima in particular. al-Bukhārī questioned whether ʿAmr had indeed heard from ʿIkrima and consequently he did not include any *ḥadīth* in which ʿAmr had directly narrated from ʿIkrima in his Ṣaḥīḥ. Yaḥya Ibn Maʿīn, Abū Dāwūd (d. 275/889), and al-Nasāʾī (d. 303/915) also categorised ʿAmr's *ḥadīths* as 'not strong' (*laysa bi-l-qawī*).[169] ʿIkrima's reliability has also been challenged, arguably more so than ʿAmr, with both classical and contemporary scholars writing critiques and rebuttals in his defence.[170]

The Shāfiʿī jurist, Muḥammad b. Ismā'īl al-Ṣanʿānī (d. 211/1768) affirmed that 'the origin, wording and authenticity of the tradition stipulating punishments for homosexual acts were disputed by authorities of *ḥadīth*'.[171] In each *ḥadīth*, we find an individual whose credibility was questioned in *rijāl* books and therefore cannot say with absolute certainty that they provide for the death penalty since it is based on questionable grounds.

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[168] al-Mizzī, *Tahdhīb al-Kamāl fī Asmāʾ al-Rijāl*, 12:169-171 no. 4418.

[169] ibid 170-171; al-Zaylaʿī, *Naṣb al-Rāya*, 430; Ibn Ḥajar al-ʿAsqalānī, *Tadhhīb Taqrīb al-Tahdhīb* (Riyadh: Maktaba Rushd 1431/2010) 4:127. See also *al-Kāmil fī Ḍuʿafāʾ al-Rijāl*, 5:116, no. 1282.

[170] See Kugle, *Homosexuality in Islam*, 103-109; Taha Jabir Alalwani, *Apostasy in Islam* (London: International Institute of Islamic Thought 2011) 78-80; Ibn Ḥajar al-ʿAsqalānī, *Huda li al-Sārī Muqaddimat Fatḥ al-Bārī* (Ayman Fu'ād ʿAbd al-Bāqī and ʿAbd al-ʿAziz Bin Bāz eds, Beirut: Dār al-Kutub al-ʿIlmiyya 1997) 596-601; Atabek Shukrov, 'Ikrima as "Imam" of Modern Hanafis' (13 June 2016) <https://shaykhatabekshukurov.com/2016/06/13/ikrima-as-imam-of-modern-hanafis/>; Atabek Shukrov, 'Ikrima as "Imam" of Modern Hanafis – Part 2' (9 July 2016) <https://shaykhatabekshukurov.com/2016/07/09/ikrima-as-imam-of-modern-hanafis-part-2/>; 'Response to Atabek Shukurov on Ikrimah the Mawlā of Ibn 'Abbās' (13 July 2016) <http://ahlussunnah.boards.net/thread/499/response-atabek-ikrimah-mawl-ibn53> accessed 3 July 2017.

[171] Michael Mumisa, 'The Death Penalty for Homosexual Acts is a Violation of Shari'a' (*altMuslimah*, 14 June 2016) <www.altmuslimah.com/2016/06/death-penalty-homosexual-acts-violation-sharia/> accessed 2 August 2016. See al-Ṣanʿānī, *Subul al-Salām*, 7:121.

The Ḥanafī scholar, Abū Bakr al-Jaṣṣāṣ (d. 370/981) argues that the death penalty for adultery is restricted to heterosexual intercourse only. He supports his argument with the *ḥadīth* of the Prophet which specified the three occasions when a Muslim can be executed,[172] and *liwāṭ* was not one of them. Al-Jaṣṣāṣ affirms that the *ḥadīths* containing provisions for the death penalty for *liwāṭ* have unreliable narrators in their chains and cannot be used as conclusive evidence to sentence a Muslim to death.[173]

Although great scholars such as Ibn Ḥajar questioned the reliability of *ḥadīths* on *liwāṭ*, they still endorsed it as a *ḥudūd* offence based on it being analogous to *zinā*.[174] The Ḥanafī school did not accept the use of analogy (*qiyās*) to include crimes under the remit of *ḥudūd* (*lā qiyāsa fī-l-ḥudūd*).[175] Abū Bakr b. Masʿūd al-Kāsānī (d. 587/1191), in his seminal work on Ḥanafī *fiqh*, concluded that according to Abū Ḥanīfa, even though anal intercourse with a man is prohibited, it does not incur the *ḥadd* because ultimately it is not *zinā*.[176]

A semantic and lexicographical argument also arises here as some scholars[177] argued that *zinā* and *liwāṭ* are lexically congruent (*al-liwāṭa bi zinā haythu li-ism*).[178] They are both associated with the Qurʾānic word for 'indecency' (*fāḥisha*) so they deserve to be punished equally.[179] However, the nouns *zinā* and *liwāṭ* signify two different acts because if they were the same, there would be no need to use two different verbs (*zanā* and *lāṭa*) to denote the same action. Al-Sarakshī put forth this argument in his *Mabsūṭ* and also cited the famous second-century

[172] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6878.
[173] Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 5:104-105.
[174] Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, 12:119, 212.
[175] al-Marghīnānī, *al-Hidāya*, 2:102; al-Sarakhsī, *al-Mabsūṭ*, 9:78. For a detailed analysis of the Ḥanafī and Shāfiʿī' arguments on the permissibility of *qiyās* in *ḥudūd* law, see Christian Lange, *Justice, Punishment and the Medieval Muslim Imagination* (Cambridge: CUP 2008) 183-199.
[176] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:184.
[177] This was mainly within the Ḥanafī *maddhab*. A minority group, who claimed to follow Abū Ḥanīfa's disciples Abū Yūsuf Yaʿqūb b. Ibrāhīm (d.182/798) and Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804), considered *liwāṭ* to be a *ḥadd* offence. See al-Jassas, *Ikhtilāf*, 3:303-304; al-Sarakhsī, *al-Mabsūṭ*, 9:77.
[178] al-Sarakhsī, *al-Mabsūṭ*, 9:78.
[179] ibid; Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 205; Vanja Hamzić, *Sexual and Gender Diversity in the Muslim World: History, Law and Vernacular Knowledge* (London: IB Tauris 2016) 86.

AH poet, Abū Nuwās (d. 200/815), who distinguished between the *lūṭī* (sodomite) and *zānī* (adulterer/fornicator) suggesting that he thought of two completely different persons and personalities.[180]

Ḥanafī jurists argued that:

> Since this act [sodomy] is known to be different [in nature] from adultery, it should not be treated as a *ḥadd* crime equivalent to adultery…This act is a kind of sexual intercourse in a bodily opening that has no relation to legal marriage and does not necessitate giving a dowry or determining parentage [as adultery does]. Therefore it has no relation to the *ḥadd* punishment for adultery.[181]

In other words, *liwāṭ* lacks the anatomical interaction which may lead to procreation and legitimate offspring nor does it involve penetration that can validate a legal marriage.[182]

Although he was from the now extinct Ẓāhirī school,[183] Ibn Ḥazm (d. 456/1064) makes a cogent argument against 'some impudent and foolish people who may say that refraining from killing such people will only encourage them in this act [sodomy]'.[184] He argues that, by extension, refraining from killing every fornicator would therefore be equivalent to declaring *zinā* licit and refraining from killing the consumer of pork, carrion, blood, and wine would be equivalent to declaring their consumption permissible. 'God forbid that we express anger for him [the offender] more or less than what God expresses in His *dīn* (religion), and that we legislate

[180] In his verse he states: *Min kaffi dhāti hirin fī ziyi dhi dhakarin / laha muḥibbāni lūṭiyun wa zanna'u'* (A maid dressed in a man's clothing/ she has two lovers: the sodomite and the fornicator). al-Sarakhsī, *al-Mabsūṭ,* 9:78.
[181] Kugle, *Homosexuality in Islam,* 158 citing Muḥammad b. Aḥmad al-Qurṭubī, *al-Jamiʿ li-Ahkām al-Qur'ān* (Cairo: Dār al-Kātib al-ʿArabī 1967) 7:244.
[182] Kugle, *Homosexuality in Islam,* 158.
[183] See Camilla Adang, 'From Mālikism to Shafiʿism to Ẓāhirism: the "conversion" of Ibn Ḥazm' in Mercedes García-Arenal (ed), *Islamic Conversions: Religious Identities in Mediterranean Islam* (Paris: Maisonneuve et Larose 2002) 73-87.
[184] Ibn Ḥazm, *al-Muḥallā,* 11:385-86.

corrupt laws based on our own opinions, and we praise God abundantly for granting us adherence to the Qurʾān and *sunna'*.[185]

Liwāṭ was quintessentially a private matter, morally reprehensible but not legally punishable by death. The Ḥanafī line of reasoning is more credible as *ḥudūd* are to be severely restricted with jurists using procedural technicalities to insist on their suspension yet using analogy is doing the opposite and arguably extending the application of *ḥudūd* and therefore the death penalty.

5.6 Apostasy (*ridda*)

The term for apostasy in Islamic law is *irtidād* or *ridda*. *Ridda* is linguistically defined as turning away from something (*al-rujūʿ ʿan al-shayʾ*) such as turning away from Islam.[186] Its technical definition is disbelief of a Muslim by a clear statement, or an utterance that refers to it [the disbelief], or an action that includes or indicates to it [the disbelief].[187]

In all four classical schools, the punishment for apostasy is death as illustrated in their *fiqh* literature. In order for the apostasy to be valid, the apostate must be Muslim,[188] sane,[189]

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[185] ibid.

[186] Ibn Manẓūr, *Lisān al-ʿArab*, 3:172; Muḥammad b. Muḥammad al-Murtaḍā al-Zubaydī, *Tāj al-ʿUrūs min Jawāhir al-Qāmūs* (Kuwait: al-Turāth al-ʿArabī 1392/1972) 8:88, 90; Ibrāhīm Muṣṭafā et al, *al-Muʿjam al-Wasīṭ* (4th edn, Cairo: Maktaba al-Shurūq al-Dawliyya 1425/2004) 337. al-Zamakhsharī lists more than twenty different meanings for its literal usage and over ten more meanings for its figurative usage in Abū Qāsim Maḥmūd b. ʿUmar al-Zamakhsharī, *Asās al-Balāgha* (Cairo: Maṭbaʿa Dār al-Kutub 1972-73) 1:332-33.

[187] al-Samarqandī, *Tuḥfa al-Fuqahāʾ*, 7:134; al-Qalyūbī wa ʿUmayra, *Ḥashiya al-Qalyūbī wa ʿUmayra*, 4:174; Ibrāhīm b. Muḥammad al-Bājūrī, *Ḥāshiya al-Bājūrī* 2:328; al-Kharashī, *Sharḥ al-Kharashī*, 8:62; *Hidāya al-Rāghib* 437; Ibn Qudāma, *al-Mughnī*, 12:264; *Muntaha al-Irādāt li ibn Najār* 2:497. See also Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (London: Routledge 2016) 44-48, Saeed and Saeed have demonstrated the fluid nature of the concept of apostasy by using four 'apostasy lists', created by different scholars, which illustrate the various ways a Muslim may become an apostate. They argue that these apostasy lists 'do not reflect the earliest period of Islam in which the *ulama's* careful approach to the declaration of other Muslims as unbeliever or apostates adhered to the limits imposed within the Qurʾān. Today, there is a plethora of apostasy lists which can only be described as fluid, ambiguous and highly problematic'. ibid 49.

[188] al-Ḥusayn al-Baghawī, *al-Tahdhīb fī Fiqh al-Imām al-Shāfiʿī* (Beirut: Dār al-Kutub al-ʿIlmiyya 1997) 7:288; Ibn Qudāma, *al-Mughnī*, 12:264.

[189] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾi* 9:526; Sharaf al-Dīn Musā b. Aḥmad al-Ḥajjāwī, *al-Iqna' fī fiqh al-Imām Aḥmad bin Ḥanbal* (ʿAbd al-Laṭīf Muḥammad Musā al-Subkī ed, Beirut: Dār al-Maʿrifa n.d) 4:301; Ibn Qudāma, *al-Kāfi fī Fiqh al-Imām Aḥmad b. Ḥanbal*, 3:155; Ibn Qudāma, *al-Mughnī*, 12:266; *al-Muhaddhab* 2:222; al-Shāfiʿī, *al-Umm*, 7:399-400; *al-Shamil* 2:159; al-Qalyūbī wa ʿUmayra, *Ḥashiya al-Qalyūbī wa ʿUmayra*, 4:176.

mature,[190] and free from duress.[191] Kamali notes that, 'despite the remarkable consistency that one finds on this point, the issue of punishment by death for apostasy is controversial, and various opinions have been recorded on the matter ever since the early days of Islam'.[192]

There are two main areas where Muslim scholars have differed on the legal rulings of apostasy. First is whether an apostate is given the chance to repent and second is whether female apostates are executed. Generally, the apostate is given three days to reconsider and revert back to Islam, failure of which results in his execution. Unlike the other three doctrinal schools, the Ḥanafī school does not consider offering a chance to repent as mandatory but rather as desirable.[193] However, the same school also takes a more nuanced approach to the killing of women apostates by exempting them altogether from the death penalty, whereas the majority treat both men and women equally.[194]

Moreover, the manner in which the term apostasy was used and interpreted in the early days of Islam suggests a separation between apostasy *simpliciter* and political apostasy akin to treason or warfare. In agreement with this, Brown has argued that '[t]he way that the early Muslim community seems to have understood apostasy differs strikingly from the decisive rulings of the later schools of law'.[195]

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[190] al-Sarakhsī, *al-Mabsūṭ*, 10:123; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 4:257; Ibn Qudāma, *al-Mughnī*, 12:281; al-Mirdāwī, *al-Inṣāf*, 10:328; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾi* 9:526; *al-Hidāyah* 2:126; al-Ḍawayyān, *Manār al-Sabīl*, 2:407; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab li-l-Shirāzī* (Muḥammad Najīb al-Muṭīʿī ed, Jeddah: Maktaba al-Irshād n.d) 21:57.

[191] Qurʾān 16:106; al-Sarakhsī, *al-Mabsūṭ*, 10:123-24; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 4:224; al-Shāfiʿī, *al-Umm*, 7:398; *al-Shamil* 6:147; *Sharḥ al-Anṣārī* 4:239; Ibn Qudāma, *al-Mughnī*, 12:291-95; al-Ḥajjāwī, *al-Iqna'*, 4:306; ʿUlaysh, *Minaḥ al-Jalīl*, 4:407; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 21:57-58.

[192] Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society 1997) 213.

[193] al-Sarakhsī, *al-Mabsūṭ*, 10:99-100; ʿAbd al-Raḥmān al-Jazirī, *Min Kitāb al-Fiqh 'alā al-Madhāhib al-Arbaʿa* (Beirut: Dār al-Fikr n.d) 5:423-425; Wahba al-Zuhaylī, *al-Fiqh al-Islamī wa Adillatuhu* (Damascus: Dār al-Fikr 1997) 6:186-188; al-Marghīnānī, *al-Hidāya*, 4:330-331; al-ʿAynī, *al-Bināya fī Sharḥ al-Hidāya*, 7:267-68. Ibn Taymiyya maintains that the well-known and the prevalent (*mashhūr*) view of the whole Ḥanafī *madhhab* is that asking an apostate to repent is only desirable, see *al-Ṣārim al-Maslūl 'alā Shātim al-Rasūl* (Muḥammad Muḥyi al-Dīn 'Abd al-Ḥamīd ed, Ṭanṭa: Maktaba al-Tāj 1960) 321. Cf. al-Shīrāzī, *al-Muhadhdhab*, 5:208-209; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 21:65-66.

[194] See section 'Muslim Jurists' Views on Apostasy' below.

[195] Jonathan AC Brown, 'The Issue of Apostasy in Islam' (Yaqeen Institute for Islamic Research 2017) 14.

5.6.1 *Ridda* in the Qurʾān

The debate on whether apostasy is a capital offence is positioned on the legal and theological hermeneutic *tafsīr* (exegetical) interpretations of specific Qurʾānic verses. Although the Qurʾān, per se, cannot differ, a number of interpretive possibilities arise regarding those verses' meaning.[196]

The Qurʾān's emphasis on freedom of religion[197] is prima facie incompatible with a criminalisation of apostasy. *Irtidād* is used only twice in the Qurʾān, in 2:217 and 5:54.[198] A return to unbelief after belief is explicitly mentioned in both verses yet neither stipulate death as the punishment for return to disbelief:

> They ask you about the sacred month - about fighting therein. Say, 'Fighting therein is great [sin], but averting [people] from the way of Allah and disbelief in Him and [preventing access to] al-Masjid al-Haram and the expulsion of its people therefrom are greater [evil] in the sight of Allah. And fitnah is greater than killing.' And they will continue to fight you until they turn you back from your religion if they are able. 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.[199]

> O you who have believed, whoever of you should revert from his religion - Allah will bring forth [in place of them] a people He will love and who will love Him

[196] Declan O Sullivan demonstrates how both positions are defended on the very same verses. See Declan O Sullivan, 'The Interpretation of Qurʾānic Text to Promote or Negate the Death Penalty for Apostates and Blasphemers' (2001) 3(2) Journal of Qurʾānic Studies 63-93.
[197] See eg 22:17; 2:256; 109:1-6; 88:22-24; 10:99-100; 18:29.
[198] Al-Awani (*Apostasy in Islam*, 25-27) also cites a number of other verses he believes serve to expound the essence of apostasy: 3:86; 3:90; 3:91; 3:98; 3:106; 3:177; 4:137; 16:106: 22:11; 47:32.
[199] Qurʾān 2:217.

> [who are] humble toward the believers, powerful against the disbelievers; they strive in the cause of Allah and do not fear the blame of a critic. That is the favor of Allah; He bestows it upon whom He wills. And Allah is all-Encompassing and Knowing.[200]

After assessing all the commentaries by the classical exegetes on these verses of *irtidād*, Declan O' Sullivan argues that what becomes apparent is that none of them indicate or make any reference to the death penalty as a fitting punishment for apostasy, or that such a ruling is derived from these verses.[201]

Furthermore, Nuʿmān ʿAbd al-Razzāq al-Samarāʾi collated a number of classical exegetes' *tafsīr* comments on 5:54 including al-Ṭabarī, al-Nīshāpūrī, al-Qurṭubī, al-Zamakhsharī, al-Rāzī, and al-Tabarasī. All of whom interpreted the verse as merely a warning and a prophecy of the *ridda* wars following the death of the Prophet:

> The warning conveyed was that apostasy would not affect Divine purposes in the least. The prophecy foreshadowed the apostasy of several tribes on the death of the Prophet and gave the glad tidings that they would be replaced by God-loving and God-loved true Muslims. The main inference derivable from the ayah is that there is no punishment for apostasy to be enforced in this world, for such human aberrations cannot frustrate God's purposes.[202]

The *ridda* wars (*ḥurūb al-ridda*) were a series of military campaigns led by the first caliph, Abū Bakr al-Siddīq (d. 13/634). Following the Prophet's death, several tribes refused to pay their tax obligations (*zakā*) and reverted to their former religions. Different perceptions of the

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[200] Qurʾān 5:54.
[201] See Declan O Sullivan, *Punishing Apostasy: The Case of Islam and Shari'a Law Re-considered* (DPhil thesis, Durham University 2003) for a comprehensive assessment of the *āyas* dealing with *ridda*; SA Rahman, *Punishment of Apostasy in Islam* (2nd edn, New Delhi: Kitab Bhavan 2006) 54.
[202] Rahman, *Punishment of Apostasy in Islam*, 46 citing Nuʿmān ʿAbd al-Razzāq al-Samarāʾi, *Aḥkām al-Murtad fī al-Sharīʿa al-Islāmiyya* (Beirut: Dār al-ʿArabiyya li-l-Ṭabāʿat wa al-Nashr wa al-Tauzīʾn.d.).

ridda wars suggest that they were a manifestation of political rebellion by Muslims and/or a consequence of several tribes' renunciation of Islam.

Dispelling the notion that the persons Abū Bakr fought against were all apostates, a number of historical reports suggest that some of the tribes did not actually reject Islam but felt they did not need to pay *zakā* as the Prophet was no longer alive and it was only paid to him. Fighting arose due to their rebellion and hostility against the state and they actively waged war against the Muslims.[203] Badr al-Dīn al-ʿAynī and Abū Ḥanīfa therefore maintain that those who reject paying the *zakā* are not to be killed and are only to be fought when they take up arms which is what happened here.[204]

Saeed and Saeed note that:

> Had Abū Bakr not pursued his policy, it is conceivable that the nascent Muslim community would have disappeared and any expansion of Islam within or outside Arabia would have been blocked, and the mission of the Prophet might not have endured. It was Abū Bakr's political acumen as well as his strategic thinking that led him to fight for survival.[205]

Hence the battles fought in the *ridda* wars were not religious per se but largely political. As such, the justification for the death penalty based on these events is not convincing evidence.

In line with this reasoning, Shaikh Abdur Rahman, the retired Chief Justice of Pakistan, argued that the mere act of apostasy does not necessitate the death penalty because 'in the early years

[203] Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, 65. For a detailed analysis of the causes of apostasy wars see Samuel Hosain Lamarti, The Development of Apostasy and Punishment Law in Islam 11AH/632AD - 157AH/774AD (DPhil thesis, Glasgow University 2002) 129-130; Khurshid Ahmad Fariq (ed), *Tarikh al-Ridda: Gleaned from al-Iktifa of al-Balansi* (New Delhi: Asia Publishing House 1970).
[204] Maḥmūd b. Aḥmad Badr al-Dīn al-ʿAynī, *ʿUmdat al-Qārī: Sharḥ Ṣaḥīḥ al-Bukhārī* (Beirut: Dār al-Kutub al-ʿIlmīyya 1421/2001) 23:122-23.
[205] Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, 66.

of Islam, the fact that persons who defected from the religion also joined the enemy groups, may have obscured the distinction between peaceful renegades and apostates who actively opposed the faithful'.[206]

Another verse linked to apostasy addresses those who repeatedly believe and disbelieve: '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'.[207]

A prominent argument is that the repeated apostasies and reversions to the faith, without mention of any temporal punishment for these defections, is strong evidence against the death penalty for apostasy. The act of apostasy must therefore be a sin and not a crime. If the individual was killed due to his very first defection, a history of conversions would not be possible.[208]

Reaffirming this point, Kamali argues that:

> The implication [of the ayah] is unmistakable. The text would hardly entertain the prospect of repeated belief and disbelief if death were to be the prescribed punishment for the initial act. It is also interesting to note that the initial reference to disbelief is followed by further confirmation of disbelief and then "increase in disbelief". One might be inclined to think that if the first instance of apostasy did not qualify for capital punishment, the repeated apostasy might have provoked it - had such a punishment even been intended in the Qurʾān.[209]

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[206] Rahman, *Punishment of Apostasy in Islam*, 45.
[207] Qurʾān 4:137.
[208] Rahman, *Punishment of Apostasy in Islam*, 39.
[209] Mohammad Hashim Kamali, *Freedom of Expression in Islam*, 97-98. It must be noted that Ibn ʿAbbās, al-Bayḍāwī, al-Shawkānī, and al-Ṭabarī (amongst others) have provided different interpretations to this verse. The two main interpretations put forth by this group are: 1) the verse refers to those who believed in Moses and then renounced their faith in him. They later believed in Uzayr but rejected that belief by following Jesus, eventually settling into a state of disbelief. 2) the verse refers to either the Jews or some apostates who increased in their

5.6.2 *Ridda* in *Ḥadīth* Literature

Whilst the Qurʾān is largely silent on the death penalty for apostasy, the punishment takes root in the *ḥadīth* literature. The death penalty for apostasy is primarily derived from three *ḥadīths* found in *al-Bukhārī*.[210] The first is narrated on the authority of Ibn ʿAbbās that the Prophet said:

'Whoever changes their religion, kill them' (*man baddala dīnahu fa-qtuluhu*).[211]

This is a general (*ʿāmm*) command which needs specification (*takhṣīṣ*).[212] If taken on face value it would mean that persons who change their religion *to* Islam or from one religion to another such as Christianity to Judaism, would be included in the scope of the *ḥadīth* (emphasis added).[213] The *ḥadīth* has been further specified in the Qurʾān to preclude those who publicly renounce Islam under duress so long as the person remains faithful in his heart.[214] The Ḥanafīs have further restricted the reach of the *ḥadīth* by exempting female apostates from the sentence of death.[215]

The *ḥadīth* must also be read in light of other *ḥadīths* such as 'the blood of a Muslim who confesses that none has the right to be worshipped but Allah and that I am His Messenger,

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disbelief. See eg al-Bayḍāwī, *Anwār al-Tanzīl wa Asrār al-Taʾwīl* (also known as *Tafsīr al-Bayḍāwī*) (Muḥammad ʿAbd al-Raḥmān al-Marʿashlī ed, Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī n.d) 2:103.

[210] See Sarmīnī, *al-ʿUqūbāt*, 128-158 for a complete list of hadiths associated with *ridda*.

[211] This is part of a longer hadith, it is mentioned *inter alia* in the context of the fourth caliph Alī burning some heretics (*zanādiqa*). See al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 3017; al-Sijistānī, *Sunan Abī Dāwūd*, no. 4353; al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no. 1407; al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, 4:108, no. 3182; al-Nasāʾī, *Sunan al-Nasāʾī*, 7:104, no. 4060; Ibn Ḥanbal, *Musnad Aḥmad*, no. 1871, 2551, 2552; al-Naysābūrī, *al-Mustadrak*, 3:620, no. 6295; ʿAbdallah b. al-Zubayr al-Ḥumaydī, *Musnad al-Ḥumaydī*, 1:244, no. 533; al-Shāfiʿī, *Musnad al-Shāfiʿī*, 2:86, no.285; ʿAbdallah b. Muḥammad Ibn Abī Shayba, *Muṣannaf Ibn Abī Shayba*, 10:143, no. 29614; Abū Bakr ʿAbd al-Razzāq b. Hammām al-Ṣanʿānī, *Muṣannaf ʿAbd al-Razzāq*, 5: 213, no. 9413; *Sunan Sughrā*, 7:189, no. 3225; *Sunan Kubrā*, 8:195, no. 17270; Abū Ḥātim Muḥammad Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, 12:421, no. 5606. The hadith is also summarized without the mention of the burning incident in other narrations (Sarmīnī, *al-ʿUqūbāt*, 136-37).

[212] Muḥammad Anas Sarmīnī, *al-ʿUqūbāt*, 143-44.

[213] ibid 144; al-Shawkānī, *Nayl al-Awṭār*, 13:515-16.

[214] Qurʾān 16:106; al-Shawkānī, *Nayl al-Awṭār*, 13:514.

[215] See 'Muslim Jurists Views on Apostasy' below for the rationale behind such a ruling.

cannot be shed except in three cases: a life for a life, a married person who commits *zinā*, and the one who reverts from Islam (apostate) and leaves the community'.[216]

This *ḥadīth* has been narrated with minor variations[217] which seem to qualify what is meant by a person who has abandoned his religion. In some versions, such as above, the apostate is qualified with the phrase *al-mufāriq li-l-jamāʿa* (the one who forsakes the community)[218] which suggests hostility and political betrayal. In another version, the one who 'makes war on God and His Messenger' (*yuḥārib Allāh wa rasūlahu*) is added.[219]

The third *ḥadīth* is regarding Muʿādh b. Jabal who informed another companion, Abū Mūsā al-Ashʿarī, that killing an apostate 'was the judgment of Allah and His Messenger and he repeated it thrice. Then Abū Mūsā ordered that the man be killed, and he was killed'.[220]

A full reading of the *ḥadīth* shows that the political aspect of apostasy was not mentioned however this is because no contextual information is provided to give an informed and nuanced reading of the text.[221] Furthermore, it is found in *al-Muwaṭṭaʾ* that ʿUmar did not agree with

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[216] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6878; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 1676; al-Nasāʾī, *Sunan al-Nasāʾī*, no. 4016; al-Tirmidhī, *Jāmiʿ Tirmidhī*, no. 1402; al-Sijistānī, *Sunan Abī Dāwūd*, no. 4354; Ibn Mājah, *Sunan Ibn Mājah*, no. 2534; *Sunan Sughra*, 8:8, no. 2959; *Sunan Kubra*, 8:194, no. 18268; Ibn al-Jārūd, *al-Muntaqā min al-Sunan al-Musnada*, 1:212, no. 832; al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, 4:60, no. 3092; Abū Muḥammad ʿAbdallah b. ʿAbd al-Raḥmān al-Dāramī, *Sunan al-Dāramī*, 1:161, no. 2344; Ibn Ḥibbān, *Ṣaḥīḥ Ibn Ḥibbān*, 10:256, no. 4407; Abū ʿAwāna Yaʿqūb b. Isḥāq al-Asfarāʾinī, *Musnad Abī ʿAwāna*, 4:97, no. 6164; al-Mawṣilī, *Musnad Abī Yaʿlā*, 8:206, no. 4767; Ibn Ḥanbal, *Musnad Aḥmad*, no. 4065.

[217] Six companions are reported to have narrated the hadith regarding the three types of people who are allowed to be killed in Islam: (1) Ibn Masʿūd (2) ʿĀʾisha (3) ʿUthmān b. ʿAffān (4) Jābir b. ʿAbd Allah (5) Ibn ʿAbbās (6) Abū Qilāba. See Sarmīnī, *al-ʿUqūbāt*, 146-158 for details.

[218] This is narrated from Ibn Masʿūd, see fn 204. The main narrations of this Hadith all have the wording *al-tārik li-dīnihi al-mufāriq li-l-jamāʿa* or *al-mufāriq li-dīnihi al-tārik al-jamāʿa*. Some narrations of this Hadith that are both less reliable and less common instead contain the wording 'for unbelief after Islam' and 'for apostasy after Islam.'

[219] This is narrated from Aisha. See al-Sijistānī, *Sunan Abī Dāwūd*, no. 4355; al-Nasāʾī, *Sunan al-Nasāʾī*, no. 4048; *Sunan Nasāʾī al-Kubrā*, 2:299, no. 3497; al-Naysābūrī, *al-Mustadrak*, 4:408, no. 8095; al-Ṭabarānī, *al-Muʿjam al-ʾAwsaṭ*, 4:118, no. 3760; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:283, no. 17774; al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, 4:57, no. 3087; Ibn al-Jawzī, *al-Taḥqīq fī ʾaḥādīth al-Khalāf*, 2:309, no. 1755; al-Ṭaḥāwī, *Sharḥ Mushkil al-Athār*, 5:51 no. 1800, 1801. Abu Qilaba also narrates this hadith with similar wording (ḥāraba Allāha wa rasūlahu). See al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 4610, 6899; Ibn Abī Shayba, *Musannaf Ibn Abī Shayba*, 9:393, no. 28433; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:128, no. 16900; ʿAlī b. Ḥasan b. Hibat Allah al-Dimashqī (Ibn ʿAsākir), *Tārīkh Dimashq* (ʿAlī Shīrī ed, Dār al-Fikr n.d) 21:481.

[220] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6923.

[221] Brown, 'The Issue of Apostasy in Islam', 20.

Abū Mūsā's decision and questioned why he did not imprison the apostate for three days, feed him every day, and preach Islam to him so that he may revert back. He then said, 'O Allah, I did not attend the execution, and did not order it, and I did not know about it'.[222]

Ibn Ḥazm also narrates another incident regarding the people of Juhayna whom Abū Mūsā executed for being apostates. ʿUmar said, 'Had you brought them [to me], I would have offered Islam to them. Had they repented, I would have accepted this; otherwise I would have put them in prison'.[223]

Scholars have also made references to the practice of the Prophet to demonstrate that apostasy *simpliciter* was not a death penalty offence.[224] Moreover, Ibn al- Ṭallāʿ observes that no reliable instance is reported where the Prophet executed anyone for apostasy.[225]

5.6.3 Muslim Jurists' Views on Apostasy

Some scholars have compared the apostasy condemned in *ḥadīth* literature as being analogous to high treason, thus differentiating between political apostasy and apostasy *simpliciter*.[226] The location of apostasy in books of *fiqh* indicates that early Muslim jurists were concerned regarding the public nature of apostasy and its ramifications for maintaining political order. Notable Ḥanafī jurists such as al-Sarakhsī (d. 1096), Ibn al-Humām (d. 861/1457), and Ibn al-Sāʿātī (d. 694/1295) discussed apostasy in their chapter of foreign relations (*kitāb al-siyar*) and

[222] Muwaṭṭa Imam Mālik, no. 1420.
[223] Ibn Ḥazm, *al-Muḥallā*, 11:191.
[224] See eg Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: CUP 2003) 125-26; Mohammad Hashim Kamali, 'Freedom of Religion in Islamic Law' (1992) 21 Capital University Law Review 63, 74; Alalwani, *Apostasy in Islam*, 42-67; Rahman, *Punishment of Apostasy in Islam*, 63; ʿAbd al-Ḥakīm Ḥasan al-ʿĪlī, *al-Ḥuriyya al-Āma fī al-Fikr wa al-Niẓām al-Siyāsī fī al-Islām* (Cairo: Dār al-Fikr 1983) 339; Ṣubḥī Maḥmaṣānī, *Arkān Ḥuqūq al-Insān fī al-Islām* (Beirut: Dār al-ʿIlm li-l-Malāyīn 1979) 123-24.
[225] Ibn al-Ṭallāʿ, *al-Aḥkām*, 24.
[226] See eg, Alalwani, *Apostasy in Islam*, 65; Brown, *Misquoting Muhammad*, 186-89.

not criminal punishments.[227] Similarly, the Shāfiʿī *fiqh* treatise, the *Muhadhdhab* of Abū Isḥāq al-Shīrāzī (d. 476/1083), dealt with apostasy under the chapter of rebellion (*al-baghī*).[228]

Notwithstanding the above, a number of scholars have incorrectly held that al-Sarakhsī did not view apostasy as a death penalty offence.[229] A cursory glance of *bāb al-murtaddīn* (chapter of the apostates) in al-Sarakshī's *Mabsūṭ* dismisses this argument. The opening statements of the chapter assert that when a Muslim commits apostasy, Islam is presented to him. He either embraces Islam or is killed.[230]

Nevertheless, his legal reasoning for the offence provides a unique insight into the way he perceived the crime of apostasy. It is noteworthy that he does not include *bāb al-murtaddīn* under *kitāb al-ḥudūd* (book of *ḥudūd*) and furthermore, the use of the plural noun *al-murtaddīn*, instead of the singular *al-murtadd*, indicates towards a political element attached to the rulings.

Engaging in a polemic with al-Shāfiʿī who held that both male and female apostates are executed, al-Sarakshī favours the ruling of Abū Ḥanīfa that female apostates are exempt from the death penalty and are to be imprisoned until they repent.[231] He relies on narrations wherein female apostates were killed only when they were enemy combatants or inciting war against the Muslims.[232]

Al-Sarakshī further expounds upon this issue by clarifying that:

> The meaning in [not executing a female apostate] is that she is a disbeliever (kāfir), so she is not killed just like the one who is initially a female disbeliever. This is

[227] al-Sarakshī, *al-Mabsūṭ* (Beirut: Dār al-Maʿrifa n.d) 10:2; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*,6:64ff; Muẓaffar al-Dīn Aḥmad b. ʿAlī (known as Ibn al-Sāʿātī), *Majmaʿ al-Baḥrayn wa Multaqā al-Nayyirayn* (Ilyās Qablān ed, Beirut: Dār al-Kutub al-ʾIlmiyya 2005) 792.
[228] al-Shīrāzī, *al-Muhadhdhab*, 5:191
[229] See eg, Kamali, *Freedom of Expression in Islam*, 94; Omar Edaibat, 'Public Reason, Reasonable Pluralism, and Religious Freedom: Re-visiting the Criminalization of Apostasy in Pre-modern Islamic Law' (2013) 41 The Journal of the Faculty of Religious Studies, McGill University, 121, 136.
[230] al-Sarakshī, *al-Mabsūṭ*, 10:98.
[231] ibid 10:108.
[232] ibid 10:110.

> because execution is not the punishment for apostasy [alone] but is necessitated due to *persisting on disbelief*…Indeed changing the religion [away from Islam] as well as the initial state of disbelief are from the greatest of offences. However, they are between the person and his Lord. Thus, punishment of them is delayed to the Abode of Recompense…*By persisting on disbelief, he becomes a belligerent to Muslims, so he is killed to ward off warfare*.[233]

What becomes evident here is that although al-Sarakshī held apostasy as a capital offence, it was linked to the meaning of apostasy as a political act, not mere renunciation of faith. In agreement with this is the widely cited opinion of Ibn al-Humām who argued that:

> It is necessary to punish apostasy with death in order to avert the evil of war, not as punishment for the act of unbelief, its punishment [disbelief] is greater and with Allah, Most High. This [punishment of death] is specifically for *him who comes with war* and is a man; this is because the Prophet prohibited killing women.[234]

This is a significant statement which is in harmony with the letter and spirit of the Qurʾān, demonstrating that mere apostasy does not incur a death sentence.

The Mālikī jurist Abū al-Walīd al-Bājī (d. 474/1081) noted that apostasy is 'a sin for which there is no *ḥadd* punishment'.[235] Other prominent Islamic jurists such as Ibrāhīm al-Nakhaʿī (d. 96/717) and Sufyān al-Thawrī (d. 161/778) held that the apostate should be given the opportunity to repent forever (*yustatābu abadan*)[236] or in another version, as long as there is hope for his repentance (*yuʾajjal mā rujiyat tawbatuhu*).[237] It is likely that al-Nakhaʿī meant a

[233] ibid (emphasis added).
[234] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 6:68 (emphasis added).
[235] al-Bājī, *al-Muntaqā Sharḥ Muwaṭṭa' al-Imām Mālik*, 5:282.
[236] Ṣanānī, *Muṣannaf*, 10:166; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:197; Nazwī, *Muṣannaf*, 11:190; Ibn Qudāma, *al-Mughnī*, 12:268; Dimashqī, *Raḥmat al-Umma*, p. 491; al-ʿAynī, *al-Bināya fī Sharḥ al-Hidāya*, 7:268; Ibn Ḥazm, *al-Muḥallā*, 11:191; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 21:66.
[237] Ibn Taymiyya, *al-Ṣārim al-Maslūl*, 321.

repeat apostate is to be given a chance to repent each time.[238] However, Ibn Qudāma observed that this position will lead to the apostate never being killed which contradicts the *sunna* and *ijmāʿ* (consensus of scholars).[239]

Maḥmūd Shaltūt, Shaykh al-Azhar (d.1963) further argued that the death penalty for apostasy is based on solitary *ḥadīth* and *ḥudūd* cannot be established with them.[240] Furthermore, it should be noted that classical jurists who advocated the death penalty for apostasy were writing from within the context of a specific state. It is therefore entirely plausible that the death penalty is predicated on the political element of apostasy which is tied with hostility and war. Insisting on the death penalty for the apostate demonstrates a lack of critical awareness since the notion of apostasy is often employed by political and religious authorities to curtail freedom of religion.

5.7 Highway Robbery (*Ḥirāba*)

The final *ḥudūd* offence to incur the death penalty is *ḥirāba* which is defined as banditry or highway robbery. It is derived from the root word '*ḥarb*' which means war. The one who commits *ḥirāba* is known as a *muḥārib* (pl. *muḥāribūn*).[241]

[238] al-Sarakhsī, *Sharḥ Kitāb al-Siyar al-Kabīr* (Beirut: Dār al-Kutub al-ʿIlmiyya 1417/1997) 5:166-67; Brown, 'The Issue of Apostasy in Islam', 14.
[239] Ibn Qudāma, al-*Mughnī*, 12:268. Cf. al-ʿAynī, *al-Bināya fī Sharḥ al-Hidāya*, 7:268.
[240] Maḥmūd Shaltūt, *al-Islām: Aqīda wa Sharīʿa* (Kuwait: Matbabi' Dār al-Qalam n.d) 292-93.
[241] See Ibn Manẓūr, *Lisān al-ʿArab*, 1:302-303; al-Zubaydī, *Tāj al-ʿUrūs*, 2:254. Cf Ibn Mufliḥ, *al-Mubdiʿ fī Sharḥ al-Mughnī*, 9:144; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:150. See also Edward William Lane, *An Arabic-English Lexicon* (Beirut: Librairie Du Liban 1968) 2:540.

The Mālikīs[242] and Ḥanbalīs[243] use the term '*al-ḥirāba*' whilst the Ḥanafīs[244] and Shāfiʿīs[245] employ the term '*qaṭʿ al-ṭarīq*'. Some jurists, predominantly of the Ḥanafī school,[246] also use the phrase '*al-sariqa al-kubrā*' (the great theft).

5.7.1 Verse of *ḥirāba*

The basis of *ḥirāba* is found in the Qurʾān itself, under 5:33-34:

> Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption (*fasād*) 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.
>
> Except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.

Verse 5:33 is commonly referred to as the *ḥirāba* verse or *āyat al-ḥirāba*. The occasion for revelation differs amongst the classical exegetes. Some reports refer to a group from the *ahl al-kitāb* (People of the Book) who broke a covenant with the Prophet and caused corruption on

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[242] Mawāq, *al-Tāj wa al-Iklīl*, 6:314-317; al-Hattāb, *Mawāhib al-Jalīl*, 6:314-317; Aḥmad al-Dardīr, *al-Sharḥ al-Kabīr* (Muḥammad 'Allīsh ed, Beirut: Dār al-Fikr n.d) 4:348-352; Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī, *al-Dhakhīrah* (Muḥammad Būkhubza ed, Beirut: Dār al-Gharb al-Islāmī 1994) 12:123-140; Muḥammad ʿUlaysh, *Minaḥ al-Jalīl Sharḥ 'alā Mukhtaṣar Sayyid Khalīl* (Beirut: Dār al-Fikr 1409/1989) 9:335-348.

[243] Ibn Qudāma, *ʿUmdat al-Fiqh* (ʿAbd Allah Safar al-ʿAbdalī and Muḥammad Dughaylib al-ʿUtaybī eds, Taif: Maktaba al-Ṭarafayn n.d.) 149; al-Mirdāwī, *al-Inṣāf*, 10:291-299; Ibn Mufliḥ, *al-Mubdiʿ fī Sharḥ al-Mughnī*, 9:144-154; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:149-154.

[244] al-Sarakhsī, *al-Mabsūt*, 9:195-205; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:360-366; Ibn Najīm, *al-Baḥr al-Rāʾiq*, 5:113.

[245] Zakariyyā b. Muḥammad al-Anṣārī, *Manhaj al-Ṭullāb* (Beirut: Dār al-Kutub al-ʿIlmiyya 1418/1997-8) 128; Muḥammad al-Ghazālī, *al-Wajīz fī Fiqh al-Imām al-Shāfiʿī* (ʿAlī Muʿawwaḍ and ʿĀdil ʿAbd al-Mawjūd eds, Beirut: Dār al-Arqam Ibn Abī al-Arqam 1418/1997) 2:177-179; al-Ghazālī, *al-Waṣīt fī al-Madhhab* (Aḥmad Maḍmūd Ibrāhīm and Muḥammad Tāmir eds, Cairo: Dār al-Salām 1997/1417) 6:491-503.

[246] al-Sarakhsī, *al-Mabsūt*, 9:133, 176, 195; al-Mūṣilī, *al-Ikhtiyār*, 4:114; Ibn Najīm, *al-Baḥr al-Rāʾiq*, 5:113; Muḥammad Amīn b. ʿUmar Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār 'alā al-Durr al-Mukhtār: Sharḥ Tanwīr al-Abṣār Fiqh Abū Ḥanīfa* (Beirut: Dār al-Fikr 1421/2000) 4:116. See also Nik Wajis, 'The Crime of Ḥirāba in Islamic Law' (DPhil thesis, Glasgow Caledonian University 1996) 63.

the land.[247] Other reports refer to a group of polytheists,[248] or Banū Isrāʾīl (Israelites),[249] or the Ḥarūriyya (the early Khawārij)[250] as the intended subjects of the verse.

Most of the exegetes assert that the *ḥirāba* verse was revealed regarding a group from the tribe of ʿUrayna and/or ʿUkal who came to the Prophet and embraced Islam. They complained that the climate of Medina did not suit them, so the Prophet sent them with some camels to support them and a young Nubian shepherd called Yasār.[251] The men later apostatized and tortured Yasār by severing his limbs and inserting thorns into his eyes until he died. They then stole the camels and escaped. Upon capture, the Prophet severed their hands and feet, blinded them, and left them to die in the desert.[252] Scholars have differed over whether the verse abrogated or reprimanded the Prophet for his actions.[253]

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[247] Jalāl al-Dīn al-Suyūṭī, *al-Durr al-Manthūr fī al-Tafsīr bi al-Maʾthūr* (Cairo: Maṭbaʾat al-Anwār al-Muḥammadiyya n.d) 2:307; Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 4:53; Abū al-Farāj ʿAbd al-Raḥmān b. Muḥammad al-Baghdādī Ibn al-Jawzī, *Zād al-Masīr fī ʿIlm al-Tafsīr* (Beirut: al-Maktab al-Islāmī 1965) 2:343; Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Jāmiʿ al-Bayān fī Tafsīr al-Qurʾān* (ʿAbd Allāh b. ʿAbd al-Muhsin al-Turkī ed, Cairo: Dār Hajar 1422/2001) 8:360.

[248] al-Suyūṭī, *al-Durr al-Manthūr*, 2:307; Ibn Kathīr, *Tafsīr*, 2:55, 59; Ibn al-Jawzī, *Zād*, 2:344; al-Ṭabarī, *Jāmiʿ al-Bayān*, 8:360-61; Quṭb al-Dīn Saʿīd b. Hibat Allāh al-Rāwandī, *Fiqh al-Qurʾān* (Aḥmad al-Ḥusaynī ed, Qum: Maktabat al-Marʿashī, 1405/1985) 1:366; Abū ʿAlī al-Faḍl b. al-Ḥasan al-Ṭabrīsī, *Majmaʿ al-Bayān fī Tafsīr al-Qurʾān* (Beirut: Dār Maktabat al-Ḥayāt n.d) 2:82. This is the most credible cause of revelation according to Ibn al-ʿArabī (*Aḥkām*, 2:594-95).

[249] Fakhr al-Dīn Muḥammad b. ʿUmar al-Rāzī, *al-Tafsīr al-Kabīr: Mafātīḥ al-Ghayb* (Beirut: Dār al-Kutub al-ʿIlmiyya 1990) 11:169. al-Ṭabarī (*Jāmiʿ al-Bayān*, 8:367-68) considers this as the most credible cause for revelation. Ibn al-ʿArabī (*Aḥkām*, 2:595) rejects this view.

[250] al-Suyūṭī, *al-Durr al-Manthūr*, 2:305; Ibn Kathīr, *Tafsīr*, 2:55.

[251] Aḥmad b. Muḥammad al-Ṣāwī, *Ḥāshiya al-ʿAllāma al-Ṣāwī ʿalā Tafsīr al-Jalālayn Qurʾān* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī n.d) 1:280.

[252] al-Rāzī, *al-Tafsīr*, 11:169; Ibn Kathīr, *Tafsīr*, 2:55–57; Ibn al-Jawzī, *Zād*, 2:343; Abū al-Qāsim Maḥmūd b. ʿUmar al-Zamakhsharī, *al-Kashshāf* (Beirut: Dār al-Maʿrifa n.d) 1:335; al-Ṭabrīsī, *Majmaʿ*, 2:82–84; Ibn Ḥajar al-Asqalānī, *Fatḥ al-Bārī*, 12:111-14. El Fadl (*Rebellion and Violence in Islamic Law*, 50) notes that the early works of Ibn Sulaymān Muqātil (d. 150/767), *Tafsīr al-Qurʾān* (Manuscript, Saray Ahmet III Library) 74/2:98, and Abū Muḥammad Ismāʾīl b. ʿAbd al-Raḥmān al-Suddī (d. 128/745), *Tafsīr al-Suddī al-Kabīr* (Muḥammad ʿAṭā Yūsuf ed, Riyadh: Dār al-Wafāʾ 1993) 227, report this as the only cause for revelation. The incident is reported to have taken place in 6/627. For more details on the incident, see Ibn al-Jawzī, *al-Muntaẓam fī Taʾrīkh al-Umam wa al-Mulūk* (Muḥammad ʿAbd al-Qādir ʿAṭā and Muṣṭafā ʿAbd al-Qādir ʿAṭā eds, Beirut: Dār al-Kutub al-ʿIlmiyya 1992) 3:263-64. According to Muḥammad Ibn Saʿd, *al-Ṭabaqāt al-Kubrā* (Beirut: Dār Ṣādir 1985) 2:93, Yasār was not sent with the group but gave chase to them after they stole the camels. They captured him and tortured him to death by severing his limbs and sticking thorns in his tongue and eyes. The incident of ʿUkal and ʿUrayna also appears in the hadith literature, see eg al-Bukhārī, *Ṣaḥīḥ Bukhari*, no. 6802.

[253] See El Fadl, *Rebellion and Violence in Islamic Law*, 50.

Regardless of the true cause of revelation, Muslim jurists agree that the *ḥirāba* verse lays down the punishment(s) for such a crime. The commonly agreed upon juristic definition of *ḥirāba* is the taking of wealth, or killing, or terrorizing of people, openly and forcefully.[254]

5.7.2 Conditions (*shurūṭ*)

The schools of law differ on certain elements of *ḥirāba*, for example the use of weapons, the act of robbery, and the site of commission of the crime.[255] The use of weapons is an important element to the crime and is emphasised by the Ḥanafī, Shāfiʿī, and Ḥanbalī jurists. This must be done overtly (*mujāhara*) and forcefully (*mukābara*).[256] The Mālikīs focus on the act of terrorizing the victims as the central element to *ḥirāba*, whether the criminal uses a weapon or not.[257] The spreading of fear and rendering victims helpless is the *sine qua non* of *ḥirāba* and based on this principle, the Mālikīs broaden the scope of *ḥirāba* so that the act of robbery is not a necessary element.[258] The majority however consider robbery as an important element of *ḥirāba* in their definitions.[259]

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[254] *al-Mawsūʿa al-Fiqhīyya*, 17:153. See also al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:360; *Rawḍ al-Tālib* 4:154; Shams al-Dīn Muḥammad al-Khaṭīb al-Shirbīnī, *al-Iqnāʿ fī Ḥall Alfāẓ Abī Shujā* (Beirut: Dār al-Kutub al-ʿIlmīyya 1425/2004) 2:475; Ibn Qudāma, *al-Mughnī*, 12:474; al-Azharī, *Jawāhir al-Iklīl*, 2:294; Abū Saʿīd ʿAbd al-Salām b. Saʿīd al-Tanūkhī (al-Saḥnūn), *al-Mudawwana al-Kubrā* (Riyadh: al-Awqāf al-Saʿūdīyya n.d) 16:98; al-Sarakhsī, *al-Mabsūt*, 9:195; al-Mūṣilī, *al-Ikhtiyār*, 4:114-116; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 4:113-116; al-Shāfiʿī, *al-Umm*, 7:385; al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, 84; Mawāq, *al-Tāj wa al-Iklīl*, 6:314; al-Dardīr, *al-Sharḥ al-Kabīr*, 4:348; al-Qarāfī, *al-Dhakhīrah*, 12:123; al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:314; ʿUlaysh, *Minaḥ al-Jalīl*, 9:335; Ibn Qudāma, *ʿUmdat al-Fiqh*, 149; al-Zarkashī, *Sharḥ al-Zarkashī*, 3:137; al-Mirdāwī, *al-Inṣāf*, 10:291; al-Buhūtī, *al-Rawḍ al-Murbiʿ*, 3:330; Ibn Mufliḥ, *al-Furūʿ*, 6:137; Ibn Muflih, *al-Mubdiʿ fī Sharḥ al-Mughnī*, 9:145; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:150; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:251; Ahmed al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan 2011) 188.

[255] For a detailed study on *Ḥirāba* see Nik Wajis, 'The Crime of *Ḥirāba* in Islamic Law'; El Fadl, *Rebellion and Violence in Islamic Law*, 47-61; El-Awa, *Punishment in Islamic Law*, 7-13.

[256] Ibn Qudāma, *al-Mughnī*, 12:475. Al-Dawoody (p. 189) observes that the Ḥanafī and Shāfiʿī jurists express the use of force using the terms *manʿah* and *shawkah* respectively. See eg al-Mūṣilī, *al-Ikhtiyār* 4:114, 116; al-Rāzī, *al-Tafsīr al-Kabīr*, 11:169; al-Ramlī, *Nihāyat al-Muḥtāj*, 8:3; al-Ansāri, *Asnā al-Maṭālib*, 4:154.

[257] al-Azharī, *Jawāhir al-Iklīl*, 2:294.

[258] Sherman A Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91(3-4) The Muslim World 293, 297-98.

[259] See fn 239.

Another main difference is that Abū Ḥanīfa, and some Ḥanbalī jurists, restrict the crime of *ḥirāba* to the desert and uninhabited areas.[260] This is because the victims cannot be helped in these places whereas they can be rescued in towns, villages or other inhabited areas by the authorities or members of the public.[261]

The majority however do not make such a distinction between populated and unpopulated areas. They argue that the verse of *ḥirāba* is general and does not make this distinction, moreover, committing a crime in a populated area is more deserving of the *ḥadd* than committing it in a deserted place.[262]

5.7.3 Scope of *Ḥirāba*

The term *fasād* in the *ḥirāba* verse is interpreted to include all the crimes that fall under the remit of *ḥirāba*. Classical exegetes agreed that *fasād*, in such a context, was defined as forms of extreme violence such as armed robbery, mass murder, rape and murder.[263]

Al-Dawoody notes that due to the evolution of time and place, the types of *fasād* are expected to change such as the use of modern weaponry to cause indiscriminate destruction on lives and property.[264] Certain scholars have therefore advocated for broadening the crime of *ḥirāba* to

[260] See eg, Sarakhsī, *al-Mabsūṭ,* 9:195; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:364; Ibn Qudāma, *al-Mughnī*, 12:474; Ibn Mufliḥ, *al-Mubdiʿ fī Sharḥ al-Mughnī*, 9:146; Muḥammad ibn ʿAbd al-Wahhāb, *Mukhtaṣar al-Inṣāf wa al-Sharā al-Kabīr* (ʿAbd al-ʿAzīz b. Zayd al-Rūmī, Muḥammad Biltājī and Sayyid Ḥijāb eds, Riyadh: Maṭābiʿ al-Riyādh n.d) 721; al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizyah wa Aḥkām al-Muḥāribīn min Kitāb Ikhtilāf al-Fuqahā' li-Abī Ja'far Muḥammad Ibn Jarīr al-Ṭabarī* (Joseph Schacht ed, Leiden: Brill 1933) 251; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 987; Ṣubḥī Maḥmaṣānī, *al-Qānūn wa al-'Alāqāt al-Dawliyyah fī al-Islām* (Beirut: Dār al-ʿIlm li-l-Malāyīn 1392/1972) 199; El-Awa, *Punishment in Islamic Law*, 9; Nik Wajis, 'The Crime of Ḥirāba in Islamic Law', 69.

[261] al-Mūṣilī, *al-Ikhtiyār*, 4:123; al-Rāzī, *al-Tafsīr al-Kabīr*, 11:170. Abū al-Ḥasan ʿAli b. Muḥammad al-Māwardī, *al-Aḥkām al-Sulṭāniyyah* (Aḥmad Jād ed, Cairo: Dār al-Ḥadīth 1427/2006) 109; Jackson, 'Domestic Terrorism in the Islamic Legal Tradition', 296; Nik Wajis, 'The Crime of Ḥirāba in Islamic Law', 69.

[262] Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 987; al-Shāfiʿī, *al-Umm*, 7:385; El-Awa, *Punishment in Islamic Law*, 9; al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 190.

[263] al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 174. See al-Ṭabarī, *Jāmiʿ al-Bayān*, 8:372; al-Suyūṭī, *al-Durr al-Manthūr*, 2:70; Riḍā, *Tafsīr al-Manār*, 6:356, 359.

[264] al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, 174.

include other crimes such as abduction for ransom,[265] organised assassinations,[266] terrorism,[267] and drug trafficking.[268] This is based on the principle that they terrorize the victims and their families and/or inflict damage on lives of individuals and society as a whole.

However, this means that the crime of *ḥirāba* could be broadened to include a wide range of activities and allow the death penalty to be applied indiscriminately, and frequently, which is at odds with the consensus of many Islamic scholars, as discussed above, on restricting the *ḥudūd.* Furthermore, concepts such as 'terrorism' lack an agreed international definition and risk the politicisation of *ḥirāba* to include peaceful political opposition.[269]

5.7.4 Punishment of *Ḥirāba*

The *ḥirāba* verse is the only verse in the Qurʾān which stipulates an earthly punishment for an offence that relates to corruption on earth.[270] The four prescribed punishments for *ḥirāba* are: 1) death (*qatl*) 2) crucifixion (*ṣalb*) 3) cross amputation of hands and feet (*qaṭʿ aydīhim wa arjulihim min khilāf*) 4) exile (*nafī*).[271]

The grammatical structure of the verse of *ḥirāba*, namely the function of the connector '*aw*' (or), has resulted in two main juristic opinions with regard to the imposition of the punishment. The Ḥanafīs, Shāfiʿīs, and Ḥanbalīs interpret the *aw* to indicate towards *tartīb* (order) i.e. the order of punishments commensurate with the severity of the crimes committed.[272]

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[265] El Fadl, *Rebellion and Violence*, 337 citing Rashīd Riḍā (d. 1354/1935).
[266] Abū Zahra, *al-Jarīma wa al-Uqūba*, 147.
[267] ʿAbd al-ʿAzīz b. ʿAbd Allah b. Muḥammad, 'Al-Irhāb: Asbābuh wa Wasā'il al-ʿIlāj' (2004/1425) 17 The Islamic Fiqh Council Journal, 38.
[268] Nik Wajis, 'The Crime of Ḥirāba in Islamic Law', 225.
[269] Michael Mumisa, *Sharia Law and the Death Penalty* (London: Penal Reform International 2015) 24.
[270] For other *āyas* in the Qurʾān which condemn perpetrators of corruption on earth see Qurʾān 2:11, 2:27, 2:60, 2:205, 5:32, 5:64, 7:56, 7:85, 11:85, 13:25, 18:94, 26:152, 26:183, 28:77, 30:41, 38:28, 40:26, 47:22.
[271] Qurʾān 5:33-34.
[272] *Rawḍ al-Ṭālib* 4:155; Ibn Qudāma, *al-Mughnī*, 12:475; al-Nawawī, *Rawḍa al-Ṭālibīn*, 10:156-57; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:252-53; al-Ramlī, *Nihāyat al-Muḥtāj*, 8:3ff.

They assert that if the individuals kill and rob, they will be executed and crucified; the Ḥanafīs maintain the judge has discretion to add crucifixion or amputation.[273] It is agreed upon that if the offenders kill but do not rob, they will be executed but not crucified. If they only rob, their hands and feet will be amputated from opposite sides. If they merely terrorise the victims, they will face exile.[274]

It must be noted here that Khaled Abou El Fadl identifies that crucifixion (*ṣalb*) in Arabic does not mean nailing someone's hands or feet to a cross which would be considered heretical in Islamic theology. Rather the term used in the Qurʾān and Islamic law simply means tying and hanging someone on the bark of a tree (*yurbaṭ fī jizʿi al-nakhla*).[275] When questioned about crucifixion, Imam Mālik replied that 'I have never heard of anyone who was crucified except a man called al-Ḥārith who was crucified in the time of Abdul-Mālik b. Marwān after claiming to be a prophet'.[276] El-Awa maintains that this suggests the punishment was prescribed solely to deter a potential criminal without having to administer the actual punishment.[277]

According to the Mālikīs, the *aw* indicates to *takhyīr* (choice) so the judge has the discretion to apply any of the four punishments prescribed in the Qurʾān, excluding cases involving homicide.[278] Therefore an individual guilty of *ḥirāba* could be executed even if no homicide

[273] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ* 9:366; Ibn ʿĀbidīn, *Ḥāshiya Radd al-Muḥtār*, 3:213; *al-Ikhtīyār* 4:114.
[274] al-Shāfiʿī, *al-Umm*, 7:386; Ibn Qudāma, *al-Mughnī*, 12:475; El-Awa, *Punishment in Islamic Law*, 1-13; Nik Wajis, 'The Crime of Ḥirāba in Islamic Law', 90-92.
[275] El Fadl, *Rebellion and Violence in Islamic Law*, 47 citing Abū al-Ṭayyib Ṣiddīq b. Ḥasan b. ʿAlī al-Ḥusayn al-Bukhārī al-Qanūjī, *al-Rawḍa al-Nadiyya Sharḥ al-Durar al-Bahiyya* (ʿAbd Allāh b. Ibrāhīm al-Ansārī ed, Beirut: Maktaba al-ʿAṣriyya n.d) 2:415, 417.
[276] al-Saḥnūn, *al-Mudawwana al-Kubrā*, 16:99.
[277] El-Awa, *Punishment in Islamic Law*, 11. It must be noted that El Fadl (*Rebellion and Violence in Islamic Law*, 59) documents several cases of crucifixion before that of al-Ḥārith (which took place in 79/698) and suggests that perhaps Mālik was referring to the Christian concept of nailing to a cross. Nonetheless he agrees that Mālik's statement is indicative of the rarity of such a punishment ever being administered.
[278] al-Saḥnūn, *al-Mudawwana al-Kubrā*, 16:98ff; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 988.

or robbery took place. Al-Qarafī asserts that 'the judge has to do his best to determine what is most beneficial for the community and then to act on it'.[279]

However, this risks the death penalty being arbitrarily applied. An example of this can be seen during the reign of the Umayyad Caliph, ʿUmar bin Abd al-ʿAzīz (r. 99/717 – 101/720). He admonished his governor who wrote that he had captured a group of rebels and then quoted the *ḥirāba* verse to ʿUmar but omitted the part regarding banishment. In other words, the governor was implying that the robbers should either be killed, crucified, or have their limbs amputated but not exiled or banished. ʿUmar wrote in response 'do not alter things [according to your whim]. Have you dedicated yourself to killing and crucifying people?...If you get my letter, banish the robbers to Shaghab'.[280]

As with all other *ḥudūd*, the jurists are unanimous that the insane and the minors are exempt from the *ḥadd* penalty of *ḥirāba*. According to the Ḥanafī jurist al-Marghinānī (d. 593/1197), if there is a minor, or an insane, or a *maḥram* (prohibited relation) of the person robbed, amongst the *muḥāribūn*, then the *ḥadd* is waived from both the individual and the rest of the group. This is because all the offenders share the responsibility of the crime so if the *ḥadd* is not liable on one, it will not be liable upon the rest.[281] He clarifies this by stating that:

> Where it happens that the act of *some* of them is not an occasion of punishment, the act of the others is then only *a part* of the cause, and an effect cannot be established by *a part* of a cause; in the same manner as when two persons kill a

[279] Shihāb al-Dīn Aḥmad b. Idrīs al-Qarāfī, *Kitāb al-Furūq al-Thāniya* (Cairo: n.p 1939) 3:18 quoted in El-Awa, *Punishment in Islamic Law*, 11. For more on *takhyīr* in *ḥirāba*, see al-Qarāfī, *al-Dhakhīrah* (Muḥammad Būkhubza ed, Beirut: Dār al-Gharb al-Islāmī 1994) 12:126; Ibn ʿAbd al-Barr, *al-Kāfī fī Fiqh Ahl al-Madīna* (Beirut: Dār al-Kutub al-ʿIlmiyya 1407/1986-7) 222ff.; Ibn Abī Zayd, *al-Risāla*, 93; Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 988-89.

[280] al-Ṭabarī, *Jāmiʿ al-Bayān*, 8:387. For other versions of the incident, see al-Bājī, *al-Muntaqā*, 7:189-191; Ibn Abī Zayd, *al-Nawādir wa Ziyādāt ʿalā mā fī al-Mudawwana min ghayrihā min al-Ummahāt* (ʿAbd al-Fatāḥ al-Ḥalw and Muḥammad al-Amīn Būkhubza eds, Beirut: Dār al-Gharb al-Islāmī 1999) 14:465.

[281] However, the offenders are still liable for *qiṣāṣ* if it is a case of homicide or bodily injuries. See S Sābiq, *Fiqh al-Sunna* (Beirut: Dār al-Kitāb al-ʿArabī) 2:466-67.

> man by one of them striking him *wilfully*, and the other *accidentally*, in which case retaliation [*qisas*] does not take place, as the act of the person who struck *wilfully* is only *a part* of the cause.[282]

Similarly, Abū Ḥanīfa argues that a woman's participation in the crime will drop the *ḥadd* from her and the group as a whole. This is based on the jurists viewing a woman's disposition as gentle in nature and she would not be expected to cause chaos and fear in society. Thus, a woman's participation will raise *shubha* and void the *ḥadd* penalty.[283]

The Mālikīs and Ḥanbalīs, however, do not consider the participation of a minor and/or insane as affecting the *ḥadd* punishment for the other offenders. They argue that *ḥirāba* committed by a *compos mentis* individual is deserving of the stipulated punishment because *ḥirāba* is connected to the right of Allah which considers the crime, not the individuals.[284] Likewise they assert that men and women are to be treated equally in *ḥudūd* and so they are both liable for the *ḥadd* punishment.[285]

Although this argument seems more plausible as 'excluding punishments of *ḥadd* for those who commit crime simply because of the participation of children and insane [and women] would jeopardise the criminal justice system in Shari'a law',[286] it is not necessary that the offenders are exempt from *any* charges being brought forward (emphasis added). A discretionary punishment can be imposed without resorting to the *ḥadd*.

Although the death penalty for *ḥirāba* is explicitly found in the Qurʾān, it is not mandatory per se as it depends on the severity of the crime(s) perpetrated. Furthermore, like other *ḥudūd*, it

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[282] al-Marghīnānī, *The Hedaya: Commentary on the Islamic Laws*, 2:135. See also al-Mūṣilī, *al-Ikhtiyār*, 4:116.
[283] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 9:361; al-Sarakhsī, *al-Mabsūṭ*, 9:197-98.
[284] al-Saḥnūn, *al-Mudawwana al-Kubrā*, 16:102.
[285] See ibid; al-Nawawī, *Rawḍa al-Ṭālibīn*, 10:155; Ibn Qudāma, *al-Mughnī*, 12:486-87; ʿAbd al-Bāqī b. Yūsuf al-Zurqānī, *Sharḥ al-Zurqānī ʿalā Mukhtaṣar Sayyidī Khalīl* (ʿAbd al-Salām Muḥammad Amīn ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1422/2002) 8:190.
[286] Nik Wajis, 'The Crime of Hiraba in Islamic Law', 73.

must be proven beyond reasonable doubt that the accused committed the offence and the crime must be brought before the judge at the time of commission.[287] The provision of repentance is a way of avoiding punishment altogether. If the offenders repent before they are apprehended, repentance acts as a bar to the *ḥadd* punishment. Jurists can rely on the maxim of 'dropping *ḥudūd* due to doubt' to preserve the right to life and impose a discretionary sentence.

5.8 Repentance (*tauba*)

The provision for a believer's repentance in Islam cannot be overstated. In all four instances where the Qurʾān prescribes a punishment for an offence, a provision for repentance and reformation immediately follows which is a notably consistent characteristic of the merciful penological philosophy of the Qurʾān.[288]

Bassiouni argues:

> Repentance is surely grounds for remission of all penalties. Why repentance is not recognised and applied by contemporary Muslim legal systems, which apply the *Shari'a*, as part of contemporary theories of rehabilitation for crimes of offenders can only be attributed to their selective application of the letter of the law taken without regard for *Shari'a's* enlightened spirit.[289]

Jurists have held differing views on repentance and its impact on the *ḥudūd*. ʿAbd al-Qādir ʿAwdah (d. 1954) has categorised them into three main groups. Some jurists of the Shāfiʿī and Ḥanbalī school maintain that repentance suspends the *ḥudūd* if offered before completion of

[287] Ibn Najīm, *al-Baḥr al-Rāʾiq*, 5:115-16. al-Sarakhsī (*al-Mabsūṭ*, 9:204) considers a lapse of time as *shubha* due to the possibility of the offender having repented from his crime. He relies on a narration where a bandit named Ḥārith b. Yazīd committed *ḥirāba* and travelled to Baṣra without being apprehended. His offence was considered to be lapsed and Alī b. Abi Talib wrote to the ruler of Baṣra to waive the *ḥadd*.
[288] See Qurʾān 5:34 (*ḥirāba*); 5:38-39 (*sariqa*); 24:2-6 (*qadhf* and *zinā*).
[289] M Cherif Bassiouni, 'Death as a Penalty in the Shari'a' in Peter Hodgkinson and William A Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge: CUP 2004) 184.

the crime. Since this is allowed in the crime of *ḥirāba* which is considered the most serious then the admissibility of repentance is stronger in lesser crimes such as *zinā*.

The second view, maintained by Mālik, Abū Hanīfa, and some Shāfiʿī and Ḥanbalī jurists, is that repentance has no effect on *ḥudūd* except for *ḥirāba* which is based on clear scriptural text. They argue that the wording of the Qurʾānic verses on *ḥudūd* are general and apply to the repentant and unrepentant alike. Moreover, the case of Māʿiz and al-Ghāmidiyya, who despite their repentance and confession (of *zinā*) were still punished, is further support of this argument. Therefore, repentance does not nullify punishment but constitutes expiation for the guilt.

Proponents of the third view are Ibn Taymiyya and his disciple, Ibn Qayyim al-Jawziyya (d. 751/1350), from the Ḥanbalī school. They held that punishment purifies the offender from sin as does repentance. Thus if the offender repents, the punishment is annulled unless he insists on being punished in order to purify himself.[290]

Repentance is largely overlooked by Islamic states and according to Kamali, it has not been adequately reflected in juristic doctrine.[291] The evolution of the theological interpretation which protects life rather than uses the criminal justice process to take it away needs to be advocated in current religious and legal discourse. Translating this into practice, Islamic communities will significantly benefit from criminal justice policies that promote the flourishing of life and not from punishment that takes it away.

5.9 Application of *Ḥudūd* Today[292]

[290] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī,* 1:352-55.
[291] Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the Hudud Bill of Kentalan, Malaysia' (1998) 13(3) Arab Law Quarterly 203, 221.
[292] This section draws upon Jon Yorke and Amna Nazir, 'Draft Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to Life, Submission to the Human Rights Committee' (October 2017).

El Fadl argues for an approach that considers both the historical context of Qurʾānic discourses and the moral trajectory or objective of the text, it needs to 'go beyond immediate material causes to look at the Qurʾān as a transcendental project of divine guidance'.[293] Taking a look at the *ḥudūd* penalties mentioned in the Qurʾān:

> There is no indication that by choosing particular punishments, the Qur'an intended to be particularly severe or cruel. The punishments decreed were well within the range of criminal penalties imposed at the time, and indeed when compared to the various forms of corporal punishments prevalent in the medieval era, these penalties were not understood by its contemporaries as exceptional or unusual.
>
> …In an age of cosmopolitanism, it is impossible to apply the same penalties without communicating a message of cruelty and barbarism, which would completely undermine and corrupt the original intended message of the Qur'anic determinations.[294]

The application of Islamic criminal law to reflect the evolution of social and political policies can be traced back to the actions of the Prophet and the early caliphs who considered the prevailing conditions with respect to enforcing *ḥudūd*.[295] The *ḥudūd* were suspended during times of military engagement with enemy forces to mitigate the risk of disunity, desertion, and military weakness.[296] The Caliph ʿUmar b. Khaṭṭāb also suspended the *ḥadd* of theft (*sariqa*) during the period of famine as it would be unjust to enforce such punishments in these circumstances.[297] This emphasises the ability of Islam to consider and evaluate a social

[293] El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, 301.
[294] ibid 301-302.
[295] The author is aware that following the Prophet's example in *every* instance is not as straightforward as it may appear. For example, he is known to have had eleven wives, but this ruling does not apply to the rest of the Muslims. This is simply being raised as a possibility.
[296] al-Sijistānī, *Sunan Abī Dāwūd*, no. 4408; al-Sarakhsī, *al-Mabsūṭ*, 9:140-41; Yusuf al-Qaradawi, *Sharīʿa al-Islām Ṣāliha li-l-Taṭbīq fī Kulli Zamān wa Makān* (Cairo: Dār al-Sahwa 1393/1973) 35.
[297] ibid.

injustice and prevent retributive criminal law in such circumstances. Hence the Ḥanafī jurist, al-Kāsānī (d. 587/1191), observed that 'it is not permissible to establish *ḥudūd* without some benefit'.[298]

The evolution of society with respect to imposing *ḥudūd* has been addressed by Muslim scholars such as Muḥammad al-Ghazālī (d. 505/1111) who noted that:

> We do not dispute that [the *ḥudūd*] are part of Islam, but we find it strange that they are considered to be the whole of it. We wish to see the punishments enforced so that the rights and the security and the virtues may be preserved, but not that the hand of a petty thief be cut off while those punishments are waived in the case of those who embezzle fantastic sums from the state treasury.[299]

Similarly, Muṣṭafa al-Zarqa (d. 1999), relying on the legal maxim that 'necessity makes the unlawful permissible' (*al-ḍarūra tabīḥ al-maḥẓūrāt*), concluded that current social realities are inappropriate for the enforcement of *ḥudūd*.[300] Consistent with this reasoning, Tariq Ramadan argues that Muslim-majority societies fail to guarantee a fair and equal treatment of individuals before the law and, therefore, 'it is our moral obligation and religious responsibility to demand for the immediate suspension of the application of the *ḥudūd* which is inaccurately accepted as an application of "Islamic *sharia*"'.[301]

Ramadan identifies that the *ḥudūd* are applied indiscriminately to women, the poor and the most vulnerable in society but never to the wealthy or those in power. Furthermore, prisoners

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[298] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:248 (*lā yajūzu iqamat al-ḥudūd maʾa iḥtimāl ʿadam al-fāʾida*).
[299] al-Ghazālī, *Min Hunā Naʿlam* (Cairo: n.p 1948) 30-31 (English tr by Ismail al-Faruqi entitled *Our Beginning in Wisdom* (New York: Octagon Books 1975)). Also discussed by Hamid Enayat, *Modern Islamic Political Thought* (ACLS Humanities eBook 2008) 89-90.
[300] Muṣṭafā Aḥmad Zarqā, *al-Madkhal al-Fiqhī al-ʿĀmm* (Damascus: Dār al-Fikr 1387/1968).
[301] Tariq Ramadan, 'An International Call for Moratorium on Corporal Punishment, Stoning and the Death Penalty in the Islamic World (*Tariq Ramadan*, April 2005) <https://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/> accessed 13 June 2016.

lack adequate recourse to defence counsel with death sentences handed out against women, men, and children without due process; '[i]n resigning ourselves to having a superficial relationship to the scriptural sources, we betray the message of justice of Islam'.[302]

Ramadan's call for a moratorium on the *ḥudūd* was met with criticism from both sides of the spectrum. Some Muslim scholars viewed it as contradictory to Islamic principles whilst others saw it as an attempt in 'trying to please the West'.[303] Ramadan defended his stance by declaring that:

> In the name of the higher objectives of the message that call for respect for the life and dignity of women and men, equality and justice, it was urgent to put an end to an instrumentalization of religion through literalist, formalist implementations that continued to affect poor people, women, political opponents who have never had the means to defend themselves and who are punished for example's sake and without justice.[304]

Using the doctrine of *shubha*, it can be argued that the Muslim community is in an 'era of doubt' due to extreme difficulty of meeting the necessary conditions for applying these penalties which is also the position put forth by Egypt's Grand Mufti of Al-Azhar, Shawki Allam.[305]

There can be no justification for a particular punishment without supplying the right to a fair trial following *sharīʿa* principles. To bypass the protective guidelines and evidentiary safeguards laid down in Islamic law, would be to initiate an arbitrary and cruel criminal justice system. In the context of a right to a fair trial and providing equitable circumstances and

[302] ibid.
[303] Tariq Ramadan, *Radical Reform: Islamic Ethics and Liberation* (Oxford: OUP 2009) 274-75.
[304] ibid 276.
[305] Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (2014) 68-69.

fairness, if those safeguards were applied, the ability to justifiably administer the death penalty would be severely restricted and be practically impossible.

In agreement with Jonathan AC Brown, perhaps the most crucial interpretive point in this area of Islamic law is that 'Muslim scholars have affirmed that what is essential for Muslims is to believe that the Shariah is ideal law and that the *Ḥudūd* are valid in *theory*. The actual implementation of the *Ḥudūd* comes at the discretion of the ruler/state and is not necessary for people to be Muslim'.[306]

Therefore, it is only necessary for Muslims to believe that the death penalty exists in *theory* in the *sharīʿa,* but it is not imperative for Muslims to believe that the death penalty *must* be administered in our modern-day society (emphasis added). It is an acceptable expression of faith for a Muslim to be against the imposition of the death penalty because the punishment cannot be practically applied fairly.[307] It is an acceptable practice for Muslims around the world to believe that Islam can contribute to the global promotion of flourishing lives and the protection of the right to life by the non-application of the death penalty.

5.10 Conclusion

The classical period fenced around these crimes so effectively that they could never be punished. In effect, what these jurists were doing was adopting a liberal stance. Islamic jurisprudence on the *ḥudūd* allows so much interpretation, whether to restrict enforcement or to question the status of an offence as a *ḥadd,* that any definitive conclusion based on them is highly doubtful and that those who advocate harsh punishments are probably going against both the letter and the spirit of what they are teaching. Muslim jurisdictions that apply the

[306] Brown, 'Stoning and Hand Cutting', 28 citing ʿAbd al-Ḥalīm Maḥmūd, *Fatāwā* (Cairo: Dār al-Shurūq 2002) 45; ʿAlī Jumʿa, *al-Bayān li-mā Yashghalu al-Adhhān* (Cairo: al-Muqaṭṭam 2005) 71; ʿAbdallāh Bin Bayyah, *Tanbīh al-Marājiʿ ʿalā Taʾṣīl Fiqh al-Wāqiʿ* (UAE: Muntadā Taʿzīz al-Silm fī al-Mujtamaʿāt al-Muslima 2014) 83-84 (emphasis added).
[307] See chapters 3 and 4 for examples of this.

ḥudūd can take inspiration eclectically from the different *madhāhib* in a way that curtails the death penalty so much so that it should be near impossible to apply in practice.

CHAPTER SIX: NON-*ḤUDŪD* CRIMES

6. Non-*Ḥudūd* Crimes

6.1 Introduction

The remaining two categories of crimes in Islamic penal law are *qiṣāṣ* and *taʿzīr*. The former deals with cases of injury through to homicide whilst the latter deals with offences of a discretionary nature. Although the death penalty is found in these categories, a retributive system is not the only framework present in Islamic penal justice. A closer look at Islamic jurisprudence highlights alternative recourses to the death penalty depending on the seriousness of the crime, damage caused, the personal status of the offender, and the victim's position.

This chapter analyses how, in the early centuries of Islamic legal scholarship, alternative practices were present in *qiṣāṣ* and *taʿzīr* crimes such as compensation, reconciliation, pardon, warning, fines, and reintegration. It traces the origins of the death penalty in both categories of crimes and discusses the implications of its application today.

6.2 Sanctity of Life

In order to understand *qiṣāṣ* laws, an appreciation of the right to life in Islam is required. The tale of Cain and Abel, the sons of Prophet Adam, deals with the sanctity of human life and the very first violation of this right. According to the Qurʾānic narrative, Cain intended to kill his brother Abel to which Abel responded: 'If you should raise your hand against me to kill me - I shall not raise my hand against you to kill you. Indeed, I fear Allah, Lord of the worlds'.[1] Abel refused to pre-emptively terminate Cain's life in order to preserve his own and chose the morally superior option of preserving the right to life.[2] He did not wish to contribute towards the destruction of life through murder for 'the very act of spilling blood, even if for justifiable

[1] Qurʾān 5:28.
[2] Khaled Abou El Fadl, 'The Death Penalty, Mercy, and Islam: A Call for Retrospection' in Erik C Owens, John D Carlson and Eric P Elshtain (eds), *Religion and the Death Penalty: A Call for Reckoning* (Cambridge: William B Eerdmans 2004) 79.

reasons, destroys the life created by God and, in fact, disassembles and subverts the very logic of creation'.[3]

Murder, a significant violation of the right to life, is viewed as a great sin in the *sharīʿa*.[4] The magnitude of such a crime is described in both the Qurʾān and *sunna*:

> 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].[5]

> And those who do not invoke with Allah another deity or kill the soul which Allah has forbidden [to be killed], except by right, and do not commit unlawful sexual intercourse. And whoever should do that will meet a penalty.[6]

> And do not kill the soul which Allah has forbidden [to be killed] except by [legal] right. This has He instructed you that you may use reason.[7]

> 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. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.[8]

There are also numerous *ḥadīths* which emphasise the sanctity of life and its value in Islam.[9] In one *ḥadīth* it is narrated that the Prophet said there are three types of people who are most

[3] ibid 50.
[4] See eg, al-Shīrāzī, *al-Muhadhdhab*, 5:7; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:3.
[5] Qurʾān 17:33.
[6] Qurʾān 25:68.
[7] Qurʾān 6:151.
[8] Qurʾān 5:32.
[9] See al-Ṣanʿānī, *Subul al-Salām*, 7:5-14.

hated by God: 'Whoever kills another in the sacred area of *ḥaram* (sanctuary), whoever kills anyone other than the one who killed him, or whoever kills anyone in revenge as in times of *jāhiliyya* (pre-Islamic times)'.[10]

Early Muslim jurists acknowledged that human beings are granted universal rights by default, simply by virtue of being a human being, the most important being the right to life. Al-Sarakhsī wrote:

> As Allah the Exalted created man to carry His trusts, He honoured him with intellect and sacred inviolability in order to be responsible for the duties and rights of Allah placed upon him. Then He granted man sanctity, freedom, and ownership rights to continue upholding His trusts. Hence, this freedom, sanctity, and ownership rights are granted to a person from the time of birth. The one capable of discernment and the one who is not are both equal in this regard. Likewise, sacred inviolability is established at birth whether he is of sound mind or not.[11]

Nonetheless, the right to life in Islam is not absolute. This is demonstrated in the Qurʾānic verses and *ḥadīths* which prohibit killing 'except by right'. The introduction of *qiṣāṣ* laws in Islam qualified what is meant by this 'right' and the circumstances which warrant such a penalty.

6.3 *Qiṣāṣ*: A Historical Background

Qiṣāṣ is derived from the verb '*qaṣṣa*' which means 'to cut' or 'to follow a track in pursuit' and is defined as retaliation by killing for killing or injuries for injuries (*al-qatl bi-l-qatl aw al-jurḥ bi-l-jurḥ*). It has also been given the meaning of '*qawad*' which means 'to drive' or 'to

[10] Ibn Ḥajar al-Asqalānī, *Fatḥ al-Bārī*, 12:219-20.
[11] al-Sarakshi, *Usūl al-Sarakhsī* (Abū al-Wafā al-Afghānī ed, Hyderabad: Lajna Iḥyāʾ al-Maʿārif al-Nuʿmāniyya 1372/1953) 2:334.

lead'.[12] Safia Safwat argues that to define *qiṣāṣ* as retaliation is incorrect as it has a wider meaning in English, 'equivalent to almost returning evil for evil and would more fitly apply to blood-feuds'.[13] Rather *qiṣāṣ* deals with making the punishment equal or appropriate to the crime and should therefore be translated as 'just retribution'.[14] Similarly, Mohammad Habash remarks that the word retribution is not synonymous with execution rather, 'execution is the abolition of life, but retribution means to seeking [sic] justice and clarification, equality and compensation'.[15] Using this as a starting point to understand *qiṣāṣ* laws will help develop a more enlightened reading on the right to life in Islam.

The origins of *qiṣāṣ* law date back to pre-Islamic Arabia where tribal feuding and vengeance (*tha'r*)[16] was rife and unrestricted in its scope. Trivial reasons such as an insulting word or killing an animal would result in blood feuds between tribes and sometimes last for several years. An example of this was the notorious Basūs war (*ḥarb al-Basūs*), a forty-year war (494-534 CE) between the tribes of Banū Bakr and Banū Taghlīb over the killing of a female camel.[17]

The Arab tribesmen believed that the soul of the victim who was not avenged became a *hāma*, a small night-bird, which would stand on his grave exclaiming: 'quench my thirst, quench my

[12] Ibn Manẓūr, *Lisān al-ʿArab*, 7:73; Abū Husayn Aḥmad b. Fāris, *Muʿjam Maqāyīs al-Lugha* (ʿAbd al-Salām Muḥammad Hārūn ed, Beirut: Dār al-Fikr 1399/1979) 5:11.
[13] Safia M Safwat, 'Offences and Penalties in Islamic Law' (1982) 26 Islamic Quarterly 149, 154.
[14] ibid.
[15] Mohammad Habash, 'Islamic Visions for the Abolition of the Death Penalty' in Lill Scherdin (ed), *Capital Punishment: A Hazard to a Sustainable Criminal Justice System?* (London: Routledge 2014) 235.
[16] *Thaʾr* has been defined as 'blood or seeking blood' (*al-dam aw al-ṭalb bi-l-dam*). See Ibn Manẓūr, *Lisān al-ʿArab*, 4:97; Abū al-Saʿādāt al-Mubārak Ibn al-Athīr, *al-Nahāya fī Gharīb al-Ḥadīth wa al-Athar* (Ṭāhir Aḥmad al-Zāwī and Maḥmūd Muḥammad al-Ṭanāḥī eds, Cairo: n.p 1383/1963) 1:204; al-Rāghib al-Iṣfahānī, *Mufradāt Alfāẓ al-Qurʾān* (Ṣafwān ʿAdnān Dāwūdī ed, Damascus: Dār al-Qalam 1430/2009) 181; Ibrāhīm Muṣṭafā et al, *al-Muʿjam al-Wasīṭ*, 92; *Muʿjam Maqāyīs al-Lugha*, 1:397.
[17] Kulayb b. Rabiʿah (of Banū Taghlīb) killed a she-camel belonging to a woman called al-Basūs bint Munqidh (of Banū Bakr). al-Basūs complained of this to her nephew Jassās b. Murrah who, enraged by her words, killed Kulayb and this, in turn, triggered a war between the two tribes. See Abū ʿUmar Aḥmad b. Muḥammad Ibn ʿAbd Rabbih, *al-ʿIqd al-Farīd* (Beirut: Dār al-Kutub al-ʿIlmiyya 1983) 3:10, 6:69-76; Jawād ʿAlī, *al-Mufaṣṣal fī Tārīkh al-ʿArab Qabl al-Islām* (4th edn, Beirut: Dār al-Sāqī 2001) 8:217, 10:28; Abū Manṣūr ʿAbd al-Malik b. Muḥammad al-Thaʿālabī, *Thimār al-Qulūb fī-l-muḍāf wa-l-mansūb* (Muḥammad Abū al-Faḍl Ibrāhīm ed, Beirut: al-Maktaba al-ʿAṣriyya 2003) ch 21, 252-53; Aḥmad b. ʿAlī al-Qalqashandī, *Nihāyat al-ʿArab fī Maʿrifa Ansāb al-ʿArab* (Beirut: Dār al-Kutub al-ʿIlmiyya 821/1418) 10:397-400.

thirst with the blood of my murderer!' (*isqūnī, isqūnī min dam qātilī*). When the victim was avenged, it would fly away.[18]

Under these tribal customs, the death of a killer did not appease the victim's tribe because they considered him to be socially inferior. The victim's family would seek revenge not only against the perpetrator but also from his family and/or tribe members thus perpetuating a malicious cycle of revenge and hostility. Afraid of bringing dishonour to the tribe, they would abstain from women, wine, meat, and refuse to wash or change their clothes until they sought revenge.[19] *Qiṣāṣ* laws were introduced to reform such practices.

The Qurʾān introduced these reforms in the following verses:

> O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment.[20]
>
> And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.[21]

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[18] Abū ʿUthmān ʿAmr b. Baḥr al-Jāhiẓ, *Kitāb al-Ḥayawān* (ʿAbd al-Salām Muḥammad Hārūn ed, 2nd edn, Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1385/1965) 2:298; Muḥammad b. Mūsā al-Damīrī, *Ḥayāt al-Ḥayawān al-Kubrā* (2nd edn, Beirut: Dār al-Kutub al-ʿIlmiyya 1424/2003) 2:509-11.

[19] See Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya fī Iṣlāḥ al-Rāʿī wa al-Raʿiyya* (ʿAlī b. Muḥammad al-ʿImrān ed, Jeddah: Dār ʿĀlim al-Fawāʾid 1429/2008) 198; Abū al-Ḥasan ʿAlī b. Abī al-Karam Muḥammad (Ibn al-Athīr), *al-Kāmil fī al-Tārīkh* (Beirut: Dār al-Kutub al-ʿIlmiyya 1407/1987) 1:391ff.; al-Shāfiʿī, *al-Umm*, 7:22; Abū al-Faḍl Shihāb al-Dīn al-Sayyid Maḥmūd al-Alūsī, *Rūḥ al-Maʿānī fī Tafsīr al-Qurʾān al-ʿAẓīm wa al-Sabʿa al-Mathānī* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī n.d) 2:51-52; Muḥammad b. Ahmad al-Qurṭubī, *al-Jāmiʿ li-Aḥkām al-Qurʾān* (ʿAbd Allah b. ʿAbd al-Muḥsin al-Turkī ed, Beirut: Muʾassasa al-Risāla 1427/2006) 3:64-65, 89; al-Ṭabarī 2:60; 15:57; Abū Bakr Muḥammad b. ʿAbdallah (Ibn al-ʿArabī), *Aḥkām al-Qurʾān* (Beirut: Dār al-Kutub al-ʿIlmiyya n.d) 1:89; Abū Bakr Aḥmad b. ʿAlī al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qurʾān* (Muḥammad al-Ṣādiq al-Qamaḥāwī ed, Beirut: Dār Iḥyā Turāth al-ʿArabī 1412/1992) 1:164ff; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:43.

[20] Qurʾān 2:178.

[21] Qurʾān 2:179.

> 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.[22]

> 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.[23]

Early classical exegetes such as al-Ṭabarī[24] (d. 310/923), al-Thaʿlabī[25] (d. 427/1035), Nisaburī[26] (d. 728/1328), Gharnatī[27] (d. 745/1344) and Ibn ʿAtiyya[28] (d. 541/1147) interpreted verse 2:179 (‘and there is [saving of] life for you in *qiṣāṣ*’) as a response to the tribal culture

[22] Qurʾān 4:92.
[23] Qurʾān 5:45.
[24] Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Jāmiʿ al-Bayān fī Tafsīr al-Qurʾān* (ʿAbd Allāh b. ʿAbd al-Muhsin al-Turkī ed, Cairo: Dār Hajar 1422/2001) 3:122.
[25] Abū Isḥāq Aḥmad b. Muḥammad al-Thaʿlabī, *al-Kashf wa al-Bayān ʿan Tafsīr al-Qurʾān* (Muḥammad b. ʿĀshūr ed, Beirut: Dār Iḥyā’ al-Turāth al-ʿArabī 1422/2002) 2:56.
[26] Niẓām al-Dīn al-Ḥasan b. Muḥammad al-Naysābūrī, *Tafsīr Gharāʾib al-Qurʾān wa Raghāʾib al-Furqān* (Beirut: Dār al-Kutub al-ʿIlmiyya 1416/1995) 1:485.
[27] Abū Ḥayyān Muḥammad b. Yūsuf al-Andalusī al-Gharnāṭī, *Tafsīr al-Baḥr al-Muḥīṭ* (ʿĀdil Aḥmad and ʿAlī Muʿawwaḍ eds, Beirut: Dār al-Kutub al-ʿIlmiyya 1413/1993) 2:29.
[28] Abū Muḥammad ʿAbd al-Ḥaqq Ibn ʿAṭiyya, *al-Muḥarrar al-Wajīz fī Tafsīr al-Kitāb al-ʿAzīz* (Dār Ibn Ḥazm n.d) 159.

of revenge in pre-Islamic Arabia.[29] Al-Ṭabarī explained that verse 2:179 refers to the preservation of life for others because only the killer should be held to account. Hence innocent family and/or tribe members would be saved from death.[30]

It is reported in a *ḥadīth* that the Prophet said:

> The most hated persons to Allah are three: (1) A person who deviates from the right conduct, i.e., an evil doer, in the Haram (sanctuaries of Mecca and Medina); (2) a person who seeks that the traditions of the Pre-lslamic Period should remain in Islam (3) and a person who seeks to shed somebody's blood without any right.[31]

Ibn Ḥajar has explained that what is meant by the second type of person is the one who has a right against a person (i.e. to seek retribution) but takes it from another.[32]

El Fadl adopts an evolutionary interpretive approach toward *qiṣāṣ* laws by arguing that it was:

> part of an evolutionary process towards a greater fulfilment of divinity and justice. Furthermore, there is an aspirational element to the law – under certain conditions talion might be a necessary step in the development of moral law. It was a step towards weaning human beings away from strongly ingrained practices of classicism and inequality, but the moral hope is to take further steps towards forgiveness, or towards supernal moral behaviour as exhibited by Abel towards Cain.[33]

6.4 *Qiṣāṣ* for Homicide

[29] Michael Mumisa, *Sharia Law and the Death Penalty* (London: Penal Reform International 2015) 12.
[30] al-Ṭabarī, *Jāmiʿ al-Bayān*, 3:120-23.
[31] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6882; Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:165.
[32] Ibn Ḥajar al-Asqalānī, *Fatḥ al-Bārī*, 12:219-20; al-Alūsī, *Rūḥ al-Maʿānī*, 15:69.
[33] El Fadl, 'The Death Penalty, Mercy, and Islam: A Call for Retrospection', 85.

Qiṣāṣ deals with instances concerning bodily harm and homicide. Of these crimes, it is homicide that is tied to the death penalty.[34] The crime of homicide has been classified into various subdivisions which differ from one school to another. The largest number of classifications are attributed to the Ḥanafī school which recognises five types. They are: 1) intentional homicide (*qatl al-ʿamd*); 2) quasi-intentional homicide (*shibh al-ʿamd*); 3) accidental homicide (*khaṭaʾ*); 4) equivalent to accidental (*jari majra-l- khaṭaʾ*); 5) indirect (*bi-sabab*).[35] The Shāfiʿī and Ḥanbalī schools acknowledge only three types of homicide: intentional, quasi-intentional, and accidental[36] whilst the Mālikī school disposes of the intermediate category and only recognises homicide as either intentional or accidental.[37]

There are varying degrees of criminal intent which will give rise to different legal effects. It is only the first type of homicide, intentional, which results in *qiṣāṣ* whilst the others result in payment of blood-money (*diya*). Intentional homicide consists of three elements: (1) the offence must be committed against a living person; (2) the homicide is a result of the offender's act; and (3) the offender intends to take the life of the victim.[38]

Killing an animal or attacking a person who is already dead (even if the killer is unaware) will not be treated as intentional homicide. The action of the killer must be one that generally causes death. However, 'since the weapons and means of homicide substantially vary in their effectiveness of killing as well as on their impact on the human body, the jurists have laid down

[34] See Qurʾān 2:178.
[35] See Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 5:339; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 10:220; al-Mūṣilī, *al-Ikhtiyār*, 5:22-23; Ibn Najīm, *al-Baḥr al-Rāʾiq*, 9:5.
[36] Ramlī, *Nihāyat al-Muḥtāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1967) 7:239; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:6; al-Shāfiʿī, *al-Umm*, 7:14; Ibn Qudāma, *al-Mughnī* 11:444-45; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:504-505; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:5.
[37] Ibn Rushd al-Qurṭubī, *Bidāya al-Mujtahid*, 928; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:6; Aḥmad b. Muḥammad al-Ṣāwī, *al-Sharḥ al-Ṣaghīr alā Aqrab al-Masālik ilā Madhhab al-Imām Mālik* (Muṣṭafā Kamāl Waṣfī ed, Cairo: Dār al-Maʿārif n.d) 4:327.
[38] ʿAbd al-Qādir ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī: Muqāranā bi-l-Qānūn al-Waḍʿī* (Beirut: Dār al-Kitāb al-ʿArabī n.d.) 2:12.

different injunctions and conditions in consideration of the nature and effects of such means and weapons'.[39]

Jurists acknowledge that ascertaining the accused's state of mind (*mens rea*) is a highly subjective and difficult endeavour hence they adopt an external criterion to determine whether the homicide is intended. This is dependent on the weapons or means employed to carry out the crime. Abū Ḥanīfa argues that just as the penalty for intentional murder is severe to the highest degree (death), the criminal intent in such a case must also be to the highest degree (absolute). In other words, the intention must be unconditional and free from any doubt.[40] Based on this rationale, if the killer uses a sharp weapon which cuts or pierces the body it would be classified as intentional homicide thus judging intention by the overt act. According to Abū Ḥanīfa, the word '*ʿamd*' signifies '*qaṣd*' which means intention. Intention is an action of the heart and cannot be ascertained except by external evidence which, in this context, is using a tool that results in killing (*huwa mubāshara al-ʾāla al-mawjūba li-l-qatl ādatan*).[41]

Therefore, if the murder is committed with a deadly weapon which is made for the purpose of killing, the homicidal intent is clear as the instrument used is clearly indicative of the murderer's intention. For example, a sword, knife, spear, gun, or anything that penetrates the body such as fire or glass.[42] Killing by all other weapons or means which may generally kill but do not wound or penetrate (such as a blunt instrument like a stone or a stick, drowning, physical assault etc) would be classified as quasi-intentional hence, according to Abū Ḥanīfa, many forms of wilful manslaughter could not be subject to the death penalty.[43]

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[39] ibid 2:26.
[40] Ibid.
[41] al-Mūṣilī, *al-Ikhtiyār*, 5:23; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 5:339; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:233.
[42] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:29.
[43] ibid; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:234; Ibn Najīm, *al-Baḥr al-Rāʾiq*, 9:4-5; Fakhr al-Dīn ʿUthmān b. ʿAlī al-Zaylaʿī, *Tabyīn al-Haqāʾiq Sharḥ Kanz al-Daqāʾiq* (Cairo: Maṭbaʿa al-Kubrā al-Amīriyya 1315/1897) 6:98.

Imam Shāfiʿī and Aḥmad, however, stipulate that the instrument for murder should be one that usually causes death, whilst Imam Mālik also looks at the circumstances surrounding the murder if death is caused by an instrument or act that is generally not fatal.[44] According to these three schools, killing by way of a sharp or blunt instrument, asphyxiation,[45] drowning,[46] burning,[47] confinement and starvation,[48] and sorcery[49] are all forms of intentional homicide and would therefore be liable to *qiṣāṣ*.

6.5 The Right of *Qiṣāṣ*

Retaliation for intentional homicide (death penalty) is regarded as the right of the victim's heirs (*walī al-dam*, pl. *awliyāʾ al-dam*). *Qiṣāṣ* can only be carried out if all the heirs demand it otherwise it is waived even if one of them chooses to remit the penalty.[50] According to Imām Abū Ḥanīfa, if the guardian or heir of the victim is unknown, *qiṣāṣ* is inhibited because it is only obligatory when the victim's heir demands it to be enforced. Since *qiṣāṣ* cannot be exercised on behalf of an unknown person, the question of its enforcement does not arise at all.[51]

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[44] See eg, al-Nawawī, *Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn* (Muḥammad Ṭāhir Shaʿbān ed, Beirut: Dār al-Minhāj 1426/2005) 468; ʿAbd al-Ḥamīd al-Sharwānī, Aḥmad b. Qāsim al-ʿAbbādi and Aḥmad Ibn Ḥajar al-Haytamī, *Ḥawāshī Tuḥfa al Muḥtāj bi-Sharḥ al-Minhāj* (Cairo: Dār al-Fikr n.d) 8:377-79; Sulaymān al-Bujayramī, *Hāshiya al-Bujayramī ʿala Sharḥ al-Manhāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1345/1927) 4:130; *Nihāyat al-Muḥtāj* 7:238; al-Shīrāzī, *al-Muhadhdhab*, 5:20-21; Ibn Qudāma, *al-Mughnī* 11:447ff.; al-Maqdisī, *al-Sharḥ al-Kabīr*, 9:320; al-Ḥajjāwī, *al-Iqna'*, 4:163; ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:26-28.

[45] al-Mūṣilī, *al-Ikhtiyār*, 5:29; al-Dusūqī, *Ḥāshiyat al-Dusūqī,* 4:242; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:59; Ibn Qudāma, *al-Mughnī* 11:449-50; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:508; al-Mirdāwī, *al-Inṣāf*, 9:439; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:9.

[46] Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār* 5:340; al-Dusūqī, *Ḥāshiyat al-Dusūqī,* 4:243; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:13; al-Nawawī, *Rawḍat al-Ṭālibīn* 9:143; Ibn Qudāma, *al-Mughnī*, 11:450; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:507; al-Mirdāwī, *al-Inṣāf*, 9:438; al-Shīrāzī, *al-Muhadhdhab*, 5:22-23; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:8.

[47] ibid.

[48] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:238; al-Dusūqī, *Ḥāshiyat al-Dusūqī,* 4:242; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:9; al-Nawawī, *Rawḍat al-Ṭālibīn*, 9:126; Ibn Qudāma, *al-Mughnī*, 11:453; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:508; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:13; al-Mirdāwī, *al-Inṣāf*, 9:439; al-Shīrāzī, *al-Muhadhdhab*, 5:23; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:9.

[49] al-Buhūtī, *Kashshāf al-Qināʿ*, 5:509; al-Mirdāwī, *al-Inṣāf*, 9:440-41; al-Shīrāzī, *al-Muhadhdhab*, 5:27; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:10.

[50] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*; al-Ḥajjāwī, *al-Iqna'*, 4:181-82; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:45

[51] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:264.

All schools, except the Mālikī, hold that the victim's heirs for *qiṣāṣ* are all those who inherit a share in the victim's property whether they are male or female, adult or minor. Even those heirs who may be deprived of inheriting due to the victim's debts taking precedence would be entitled to *qiṣāṣ*.[52] Adopting a wider definition of which family members have the right of *qiṣāṣ* would make it more improbable for all relatives to reach unanimity in comparison to the Mālikī school.

The Mālikī school considers retaliation as a right exclusive to the victim's closest adult male agnatic relatives. This follows the same rules governing inheritance of the agnatic relations (*aṣaba bi-l-nafs*) in the Islamic law of succession. There are four main classes: (a) descendants; (b) ascendants; (c) brothers and sons of brothers; (d) paternal uncles. Thus, hierarchy of classes, closeness of relations, and strength of blood-ties will exclude some relatives. Relatives of a higher class exclude those of a lower (e.g. a father excludes a brother) and within each class, the closer relatives exclude the more remote ones (e.g. a father excludes the grandfather). Similarly, a germane brother will take precedence over a consanguine brother.[53]

Females will only be considered if three conditions are met: (1) she is an heir of the victim, e.g. sister or daughter; (2) no male heir is present otherwise he must have a more remote relation to the victim, e.g. a daughter will have the right of *qiṣāṣ* in the presence of a paternal uncle; (3) the female heir is such that had she been a male, she would have been from the male agnatic heirs, e.g. a daughter or germane sister.[54]

6.5.1 A Joint or Exclusive Right?

[52] *al-Mawsūʿa al-Fiqhiyya*, 33:271; al-Shāfiʿī, *al-Umm*, 7:33; al-Shawkānī, *Nayl al-Awṭār*, 13:74-76.
[53] al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:358; al-Dusūqī, *Ḥāshiyat al-Dusūqī,* 4:256; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:35-37; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: CUP 2005) 45.
[54] al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:360-61; al-Dusūqī, *Ḥāshiyat al-Dusūqī,* 4:257; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:37.

If there is a single heir of the victim, then he/she has the exclusive right to *qiṣāṣ*. Where there are two or more heirs present, two juristic opinions arise. Imām Abu Ḥanīfa and Imām Mālik maintain that the right of *qiṣāṣ* is exclusive to each heir in its totality; it is not a divisible right and therefore cannot be shared between claimants.[55] Imām Shāfiʿī, Aḥmad, Abū Yūsuf, and Shaybānī hold that the right to *qiṣāṣ* is shared amongst the heirs. Since the victim is subjected to the crime, the right of *qiṣāṣ* is his but death incapacitates him from exercising this right. Consequently, his heirs will take over the responsibility and so the right to *qiṣāṣ* will be shared between them all.[56]

The difference between these diverging views becomes apparent when there is a minor and/or insane amongst the heirs. According to the first view, execution will not be delayed until the minor reaches puberty, or the insane recovers from his insanity, and the adult heir(s) will be entitled to *qiṣāṣ* on the basis of exclusive and independent power.[57] On the other hand, the second view means that the adult heir(s) will have to wait for the minor to reach puberty, or insane to recover, as it is a joint right and therefore cannot be exercised without the consent of the other party.[58]

All jurists endorse the principle that an absentee heir will be waited for. *Qiṣāṣ* cannot be executed until their return due to the possibility of remission. It is possible that the absent heir(s) may have pardoned the killer without informing those who are present thus annulling the right to *qiṣāṣ*. The Ḥanafī jurists, however, do not consider the possibility of remission by

[55] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:270; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār* 5:364; al-Dardīr, *al-Sharḥ al-Kabīr*, 4:227; Ibn Qudāma, *al-Mughnī*, 11:576.
[56] al-Shīrāzī, *al-Muhadhdhab*, 5:53; Ibn Qudāma, *al-Mughnī*, 11:576.
[57] al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:360. There is also another opinion amongst the Ḥanbalīs which, although not their substantive position, allows the sensible and adult heirs to execute qiṣāṣ without waiting for the puberty or the recovery of the insane person. See Ibn Qudāma, *al-Mughnī*, 11:576.
[58] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:271; al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, 6:109; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:36; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:53-54; Ibn Qudāma, *al-Mughnī*, 11:576; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:533; al-Mirdāwī, *al-Inṣāf*, 9:478, 481-82; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:45; al-Nawawī, *Minhāj al-Ṭālibīn*, 479.

a child or insane person as they lack the qualification to do so.[59] The preferred opinion according to the Mālikīs is that the absent person who is not far away will be awaited and the one who is at a great distance will not be waited for. Another opinion is that no differentiation is made based on distance.[60]

6.6 Limits of *Qiṣāṣ*

There are a number of factors that will impede the imposition of *qiṣāṣ* and preserve the right to life. These are explained below.

6.6.1 Minors and those Suffering from Insanity

If a minor or insane commits intentional homicide, they are exempt from *qiṣāṣ*.[61] However, their *ʿāqila* (family) will have to pay *diya* to the victim's heirs. *ʿĀqila* is an institution created in Islamic law to assist in compensating victims and preventing conflicts. Scholars agree that it consists of the offender's family members but there is a difference of opinion on which members these may be.[62] The word *ʿāqila* is derived from *ʿaql* which can mean 'to bind' or 'to protect and defend'. After payment of *diya*, the victim's heir is restrained (corresponding to the first meaning) and if the second meaning is taken, it refers to the family protecting its individual guilty of homicide, against *qiṣāṣ*, through payment of *diya*.[63]

6.6.2 Pregnancy

A pregnant woman cannot be executed until she gives birth and completes weaning of her child. This is because *qiṣāṣ* does not prejudice anyone other than the offender. Executing a

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[59] ʿAwdah 2:146; Ibn Qudāma, *al-Mughnī*, 11:576; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:535; al-Nawawī, *Minhāj al-Ṭālibīn*, 479.
[60] al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 6:250-51; al-Dardīr, *al-Sharḥ al-Kabīr*, 4:228; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:271-73; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:36; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:359.
[61] al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:23; al-Shīrāzī, *al-Muhadhdhab*, 5:10.
[62] See Muḥammad b. ʿAli al-Ḥaṣkafī, *al-Durr al-Mukhtār ʿalā Sharḥ Tanwīr al-Abṣār wa Jāmiʿ al-Biḥār* (Beirut: Dār al-Kutub al-ʿIlmiyya 1423/2002) 730-31; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:136.
[63] See Ibn Manẓūr, *Lisān al-ʿArab*, 11:461-62.

pregnant woman is considered an excess in killing due to the presence of another life (the unborn child) and the burden of one person cannot be shouldered by another.[64] The Qurʾānic verse 17:33 clearly states: 'do not commit excess in killing' (*fa-lā yusrif fī-l-qatl*).

Furthermore there is a *ḥadīth* which states that if a pregnant woman kills a person, she shall not be subjected to *qiṣāṣ* until she gives birth and tends to her child.[65] Execution is to be delayed until weaning is complete otherwise the child may suffer harm. The incident of the Ghāmidiyya woman demonstrates this principle at work. The Prophet delayed the woman's execution until she had given birth and when she came to him again, he turned her away until she completed weaning of her child.[66]

6.6.3 Relationship Between the Killer and Victim

The relationship between the killer and his victim can also act as a bar to *qiṣāṣ*. For example, a father cannot be executed for killing his child. This is according to all schools except the Mālikī. It is based on the *ḥadīths* 'the father will not be subjected to *qiṣāṣ* for the killing of the son' (*lā yuqādu-l-wālidu bi-l-waladi*) and 'you and your belongings are property of your father' (*anta wa mālika li-abīka*). The former *ḥadīth* contains an explicit prohibition whilst the latter, although ambiguous, involves doubt hence invalidating the punishment based on the principle of 'drop *ḥudūd* in cases of doubt'. Doubt arises here as this 'ownership', though it is not legal ownership per se, indicates that the father killing the son is not the same as him killing another person.[67] The three Imāms agree that the words 'father' and 'son' encompass all those

[64] al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:60; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:41; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:58; Ibn Qudāma, *al-Mughnī*, 12:327; ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:149; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:535; al-Mirdāwī, *al-Inṣāf*, 9:484; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:48; al-Nawawī, *Minhāj al-Ṭālibīn*, 480

[65] al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no. 1435; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:535-36.

[66] See Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 4206; al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6825.

[67] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:115-17; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:241; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:27-28; Ibn Qudāma, *al-Mughnī*, 11:483-84; al-Buhūtī, *Kashshāf al-Qināʿ*, 5:527; al-Ṣanʿānī, *Subul al-Salām*, 7:14-16; al-Mūṣilī, *al-Ikhtiyār*, 5:24; al-Shāfiʿī, *al-Umm*, 7:86-87; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 10:240-41; al-Mirdāwī, *al-Inṣāf*, 9:473; al-Nawawī, *Minhāj al-Ṭālibīn*, 472.

individuals from their ascendants and descendants. Hence the word 'father' also applies to the paternal grandfather, the maternal grandfather and so on. Similarly, 'son' also applies to the grandson, great grandson and so on.[68]

This exception of *qiṣāṣ* also applies to the mother as the injunction in the *ḥadīth* uses the word *wālid* which encompasses both the mother and father; therefore, the mother is equally included with the father in the judgment. Moreover, as she is accorded a higher honour than the father, she is more deserving than him in being exempt from *qiṣāṣ*. Like the grandfather, the principle is also extended to the paternal and maternal grandmothers.[69] Imām Mālik, on the other hand, argues that the father will be liable for *qiṣāṣ* if he wilfully kills his son. He will only be exempt in the case of inadvertent homicide, such as by way of chastisement.[70]

If the child of the perpetrator is also amongst the victim's heirs, *qiṣāṣ* will not take place due to conflict of interest. For example, a husband killing his wife cannot be sentenced to death if they have children as the children are amongst the heirs of the mother.[71]

6.6.4 Significance of the Victim's Religion

Imām Mālik and Shāfiʿī hold that a Muslim is not liable to *qiṣāṣ* for the murder of a non-Muslim because a condition for *qiṣāṣ* is equality and 'since disbelief is a deficiency, equality ceases to be valid in the presence of disbelief and thus *qiṣāṣ* is inhibited'.[72] They cite the *ḥadīth* which mentions that the lives of Muslims are equal and a believer is not killed in retaliation for the murder of a disbeliever.[73]

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[68] ibid.
[69] ibid.
[70] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:117; *al-Mudawwanah*, 4:106-108; al-Dardīr, *al-Sharḥ al-Kabīr*, 4:267
[71] Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: CUP 2005) 48.
[72] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:122; al-Dardīr, *al-Sharḥ al-Kabīr*, 4:237-38; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:5-6; al-Shāfiʿī, *al-Umm*, 7:97-99; al-Mirdāwī, *al-Inṣāf*, 9:462, 469; al-Shīrāzī, *al-Muhadhdhab*, 5:11.
[73] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6915.

Conversely, Imām Abu Ḥanīfa does not differentiate between punishments on the basis of religion. All the injections of *qiṣāṣ* laid down in the Qurʾān are of a general nature (ʿ*āmm*) and do not discriminate between the victims. Hence there is no clear proof for such a claim of specification.[74]

6.7 Annulment of *Qiṣāṣ*

Qiṣāṣ can be annulled due to 3 reasons: (1) lapse of the object of *qiṣāṣ* (*fawāt maḥal al-qiṣāṣ*); (2) remission (by *diya* or ʿ*afw*); (3) reconciliation (*ṣulḥ*).

6.7.1 Lapse of the Object of *Qiṣāṣ* (*fawāt maḥal al-qiṣāṣ*)

The purpose of *qiṣāṣ* is seeking retaliation i.e. the life of the offender. If the offender dies then the purpose is non-existent, and the punishment is invalidated. Although the heirs lose their right to *qiṣāṣ*, Imām Shāfiʿī and Aḥmad maintain that they are still entitled to blood money from the killer's property because *diya* is obligatory if *qiṣāṣ* does not apply. If it is impossible to enforce one punishment on grounds of death of the offender, the other punishment will become necessary. Imam Abū Ḥanīfa and Mālik hold that the heirs cannot seek blood-money from the killer's estate because *diya* depends on the consent of the killer to pay it.[75]

6.7.2 Remission (*diya* or ʿ*afw*)

An alternative to the retaliatory principle is remission of *qiṣāṣ*. This can be done in lieu of compensation or without compensation. Compensation entails the payment of blood money (*diya*) and without compensation is a complete pardon (ʿ*afw*). Jurists agree that remission is

[74] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:123.
[75] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:155-56; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:283-84; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:337; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:8, 39; al-Shāfiʿī, *al-Umm*, 7:34; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:64; al-Mirdāwī, *al-Inṣāf*, 10:6.

better than exercising *qiṣāṣ* based on the Qurʾānic verses 2:178 and 5:45 and the practice of the Prophet.[76]

Although remission of *qiṣāṣ* is a laudable action, the main juristic difference here concerns whether foregoing *qiṣāṣ* in lieu of *diya* is considered as remission or reconciliation. According to Imām Abū Ḥanīfa and Mālik, the heirs only have two options, the right to demand *qiṣāṣ* or a complete pardon (*ʿafw*). Foregoing *qiṣāṣ* in lieu of *diya* is therefore classed as reconciliation (*ṣulḥ*) because consent of the offender is essential for payment of *diya* and agreement of both parties is viewed as a compromise.[77]

Imām Shāfiʿī and Aḥmad, on the other hand, hold that the heirs only have the option to choose between exercising *qiṣāṣ* or accepting *diya*. This means *diya* automatically becomes mandatory as a result of foregoing *qiṣāṣ* and so consent of the offender is not required. They treat *diya* as remission and invalidation of *qiṣāṣ* in absolute terms.[78]

6.7.2.1 Right of Remission

Qiṣāṣ can only be remitted by the person who enjoys such a right as a right can only be invalidated by the one to whom it belongs. It thus follows that if a minor has the right of *qiṣāṣ*, his father or grandfather cannot forfeit it because the right belongs to the minor and their guardianship is restricted only to the child's interest. This is the opinion of Imām Abū Ḥanīfa and Mālik whilst Imām Shāfiʿī and Aḥmad hold that the father, grandfather, or sovereign can forfeit *qiṣāṣ* in lieu of compensation.[79]

According to Imām Mālik, the right of remission follows the (Mālikī) principle that only male agnatic relatives have the right of *qiṣāṣ*. If all the heirs entitled to seek *qiṣāṣ* are males of equal

[76] See section 6.7 on the significance of *diya* and *ʿafw*.
[77] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:157-58.
[78] ibid; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:58; al-Nawawī, *Minhāj al-Ṭālibīn*, 480.
[79] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:158.

rank, then each of them possesses the right of remission. If one of them has a greater right of inheritance, then only he will be entitled to remit *qiṣāṣ*. The same principle will apply if the heirs happen to be female. For example, in the presence of a daughter and sister, the former will possess the right in question. If there are only females of equal ranks, remission will be effective once the authorities endorse it. If male and female heirs are of equal ranks, or if the male heirs enjoy a greater share of inheritance, the females will be exempt from the right of remission.[80]

6.7.3 Reconciliation (*ṣulḥ*)

There is no difference of opinion amongst jurists regarding reconciliation as annulment of *qiṣāṣ*. Reconciliation may take effect in lieu of *diya* or more or less than *diya*. It is similar to an out of court settlement.[81]

ʿUmar b. Shuʿayb narrates that the Prophet said: 'Whoever commits homicide, he is to be handed over to the heirs of the victim, and if they wish they will kill the offender and if they wish they may take *diya*, thirty *hiqqa*, thirty *jadhʿa*, forty *khalfa* (different types of camels). It will be right for them on whichever alternative they come to a compromise upon'.[82]

Reconciliation is mentioned in the Qurʾān thirteen times. People are encouraged to resolve their disputes, from spousal problems through to bloody wars, by adopting a conciliatory approach. Using this general guidance and examples of the past, 'Islamic jurisprudence has thoroughly elaborated on the question of conciliation between offenders and victims to settle criminal cases

[80] ibid 2:159; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:365.
[81] ibid 2:167; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:368.
[82] al-Tirmidhī, *Jāmiʿal-Tirmidhī*, no 1387.

for the purpose of restoring peace and love'.[83] Al-Nasafī explains that the objective here is to end conflict and friction, viewing it as 'closing the eye i.e. easement and forgiveness'.[84]

Al-Sarakhsī elaborates that if the victim has no family, the government acting as the legal heir should accept conciliation by providing money from the treasury (*bayt al-māl*). In such circumstances the offender would escape capital punishment and al-Sarakhsī states that 'conciliation by getting money is more useful for the community than execution'.[85] It is interesting to note that at every stage, jurists are emphasising the alternative to capital punishment and seemingly reluctant to impose it.

There is also consensus amongst scholars that the conciliatory role can be delegated to another person on behalf of the victim. Mutaz Qafisheh believes that 'such possibility opens the door for indirect contacts between offenders and victims and their families, especially in the cases in which direct interaction between rival parties poses an emotional difficult. This way can be viewed as a form of systematic mediation upon parties' request'.[86]

According to al-Kasānī, Islam introduced compensation and conciliation by striking a balance between Judaism and Christianity. In the Torah, the only punishment for murder is talion: an eye for an eye and a tooth for a tooth.[87] In the New Testament, the only choice for the victim

[83] Mutaz Qafisheh, 'Restorative Justice in the Islamic Penal Law: A Contribution to the Global System' (2012) 7 International Journal of Criminal Justice 487, 491. For a *fiqh* discussion on *ṣulḥ*, see al-Mirdāwī, *al-Inṣāf*, 5:234; al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, 5:29-30; al-Ḥaṣkafī, *al-Durr al-Mukhtār*, 539.
[84] al-Nasafī, *Ṭulba al-Ṭalaba* (Baghdad: Amera Press 1142) 144.
[85] al-Sarakhsī, *al-Mabsūṭ*, 21:16.
[86] Mutaz Qafisheh, 'Restorative Justice in the Islamic Penal Law: A Contribution to the Global System' (2012) 7 International Journal of Criminal Justice 487, 493. See generally, Ibn Taymiyya, *Fatāwa Kubrā* (Beirut: Dār al-Kutub al-ʿIlmiyya 1327/1909) 3:464-66 where he discusses the process of conciliation by a mediator or third party in large scale conflicts.
[87] See eg, Exodus 21:23-24; Leviticus 24:17-22; Deuteronomy 19:16-21 (*ayin tachat ayin* (an eye for an eye) is the common Hebrew phrase used in the texts).

is forgiveness.[88] Islam balanced the two approaches by urging victims to accept a third option which stands in the middle between systematic retaliation and pardon.[89]

6.8 Alternative Actions

6.8.1 *Diya*

Diya, often known as 'blood money', is a form of financial compensation paid to the victim or victim's heirs for injury or death caused by a serious offence against the person. It provides the offender relief from the administration of quantitative retribution.[90]

Originating as a pre-Islamic tribal custom, *diya* was used as a peaceful alternative to tribal feuds that were characteristic of Arabian society at the time. The obligation to pay *diya* was on the paternal relatives of the murderer and payment was due to the victim's heirs, failure of which entitled the heirs to vengeance. *Diya* was integrated into Islam to prevent inter-tribal warfare and unify various tribes.[91]

The option of *diya* as an alternative to *qiṣāṣ* is stipulated in the Qurʾān, under verse 4:92, and it has been compared to 'a settlement in a wrongful death tort action, precluding the aggrieved party from fully enforcing their civil right in court'.[92] Daniel Pascoe argues that although it has similar features to clemency and pardon as understood in secular common law legal systems, the practice of *diya* constitutes elements of both civil and criminal law and should therefore be

[88] See eg, Matthew 5:38-41: 'You have heard that it was said, "eye for eye, and tooth for tooth". But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. And if anyone wants to sue you and take your shirt, hand over your coat as well. If anyone forces you to go one mile, go with them two miles.'
[89] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:288; al-Alūsī, *Rūḥ al-Maʿānī*, 2:51.
[90] See *al-Lubāb Sharḥ al-Kitāb* 3:44; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 10:294; *Nihāyat al-Muḥtāj* 7:298; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:71; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:75; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:5; al-Ḥaṣkafī, *al-Durr al-Mukhtār*, 711.
[91] MJL Hardy, *Blood Feuds and the Payment of Blood Money in the Middle East* (Beirut: Catholic Press 1963) 37; Joseph Schact, *An Introduction to Islamic Law*, 186; Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, 285; Siti Zubaidah Ismail, 'The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of Homicide and Personal Injuries' (2012) 26 Arab Law Quarterly 361, 364-67.
[92] Daniel Pascoe, 'Is *Diya* a Form of Clemency?' (2016) 34 Boston University International Law Journal 149, 156.

viewed as a *sui generis* institution of Islamic law.[93] It appears to operate at the intersection of civil law which resolves disputes between individuals (through the payment of money) and criminal law which resolves offences against the state (through the collective imposition of punishment). This involves substituting the criminal sentence of death with another corrective measure aimed at upholding social order i.e. a fine.[94] M. Cherif Bassiouni maintains that *diya* 'embodies a concept of collective responsibility'[95] as it involves multiple parties i.e. the offender, the victim or the victim's family, and the state.

6.8.1.1 Amount of *diya*

The amount of *diya* set under classical doctrine is the value of a hundred camels for a free Muslim male. This is based on the *ḥadīth*, 'there are hundred camels for [the killing of] a soul'.[96]

All jurists agree that the basic form of *diya* is camels, but the difference arises in payment other than camels. Imām Abu Ḥanīfa and Mālik maintain that *diya* can be paid in camels, gold, and silver. This is because during his lifetime, the Prophet prescribed 'a thousand dinars for people of gold and 12,000 dirhams for people of silver'.[97] According to Imām Aḥmad, Abū Yūsuf, and Muḥammad, *diya* can be paid in six kinds: camel, gold, silver, cow, goat, and suits of clothes. This is based on the practice of ʿUmar when he became the caliph. He held that camels had become expensive and fixed the value of *diya* for those who possessed gold at 1000 dinars, those who possessed silver at 12000 dirhams, those who possessed cattle at 200 cows, those

[93] ibid 152.
[94] ibid 168.
[95] Mahmoud Cherif Bassiouni, 'Quesas Crimes' in M Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (New York: Oceana Publications1982) 207.
[96] See al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6898; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:308-310; Aḥmed b. Ghunaym al-Nafrāwī, *Fawākih al-Dawānī ʿalā Risāla ibn Abī Zayd al-Qayrawānī* (Beirut: Dār al-Fikr 1415/1995) 2:186; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:266; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:71; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:18-19; Ibn Qudāma, *al-Mughnī*, 12:6; al-Nawawī, *Minhāj al-Ṭālibīn*, 483.
[97] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:176.

who possessed sheep at 2000 sheep, and those who possessed suits of clothing at 20 suits.[98] The *raison d'etre* behind ʿUmar's legislation was based on the availability and accessibility of commodities.[99] Imām Shāfiʿī's old opinion matched that of Imām Abū Ḥanīfa and Mālik but he later recanted and argued that *diya* is to be paid in the form of camels only.[100]

The practice of assessing *diya* today varies across jurisdictions. According to Pascoe:

> Given the vast geographical spread of these societies, and their respective political and economic conditions and cultural norms, the modern law of *diya* is complex. The modern law of *diya* also results from the interplay between tribal traditions, classical Islamic jurisprudence, and the colonial influences evident in [such] jurisdictions.[101]

Some still take the camel as the standard criterion and use its equivalent market price in monetary terms to determine the amount of *diya* such as Saudi Arabia and Sudan.[102] As of 2011, the *diya* price for a Muslim male in Saudi Arabia was SR400,000 (approx. £75,778) for premeditated murder, triple the previous amount due to a sharp rise in the price of camels.[103]

In other jurisdictions, the *sharīʿa* judge can set the *diya* amount which may vary depending on the degree of judicial authority over the price, the extent of damages, the financial position of the victim, and the status and resources of the offender.[104] Another practice of determining the

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[98] al-Sijistānī, *Sunan Abī Dāwūd*, no. 4542; Ibn Qudāma, *al-Mughnī*, 12:6-7; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:308-310.
[99] Sayed Sikander Shah, 'Homicide in Islam: Major Legal Themes' (1999) 14 Arab Law Quarterly 159, 166.
[100] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:177. The value of *diya* varies if the victim is non-Muslim, a woman, or a slave, see *al-Mawsūʿa al-Fiqhiyya*, 21:59-65.
[101] Daniel Pascoe, 'Is *Diya* a Form of Clemency?' (2016) 34 Boston University International Law Journal 149, 158.
[102] See eg, Sudan's Criminal Act 1991, art 42(1).
[103] 'Saudi Arabia triples blood money to SR300,000' (*Emirates 24/7 News*, 11 September 2011) <www.emirates247.com/news/region/saudi-arabia-triples-blood-money-to-sr300-000-2011-09-11-1.417796> accessed 14 July 2017.
[104] Mashood A Baderin, *International Human Rights Law and Islamic Law* (Oxford: OUP 2003) 140-41; Bassiouni, 'Quesas Crimes', 205-206; Evan Gottesman, 'The Reemergence of Qisas and Diyat in Pakistan' (1991) 23 Columbia Human Rights Law Review 433, 455.

diya price involves negotiation between the offender and the victim's heirs, 'even at the last moment before execution'.[105]

6.8.1.2 When is *Diya* Paid?

With the exception of the Ḥanafī school, all three schools are of the position that *diya* is to be paid immediately and a postponement is only permissible with the consent of the victim's heirs. They argue that since *diya* is a substitute for *qiṣāṣ* and *qiṣāṣ* should be carried out immediately, its substitute should also be payable immediately. Imām Abū Ḥanīfa, however, allows delay in payment of *diya*. According to him, *diya* can be paid in three annual instalments for 'it is enough that *diya* is proven and is chargeable on the property of the killer'.[106]

Pascoe argues that like clemency and pardons in secular common law systems, '*diya* is oftentimes arbitrarily granted and legally unimpeachable'.[107] The practice of *diya* can be discriminatory and favour the wealthy resulting in the elites 'paying off' their crimes whilst the poor suffer. However, in certain jurisdictions, after a *diya* settlement is reached, a discretionary sentence (*taʿzīr*) by way of imprisonment is imposed. Countries such as Saudi, Pakistan, and Nigeria have introduced this at varying degrees into their legal systems.[108]

Although the right to remit *qiṣāṣ* in lieu of *diya* remains with the heirs, the state may still encourage such actions. *Diya* differs from clemency and pardon as the decision to substitute a death sentence with a lesser penalty is the prerogative of the victim's heir(s) rather than the executive authority of the state. This 'private exercise of leniency' by the victim's family is a

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[105] Daniel Pascoe, 'Is *Diya* a Form of Clemency?' (2016) 34 Boston University International Law Journal 149, 159.

[106] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 2:181; Ibn Qudāma, *al-Mughnī*, 12:13ff; al-Ramlī, *Nihāya al-Muḥtāj*, 7:373; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 10:316-17.

[107] Daniel Pascoe, 'Is *Diya* a Form of Clemency?', 178. See also Nesrine Mālik, 'Paralysis or Blood Money? Skewed Justice in Saudi Arabia' *The Guardian* (London, 5 April 2013) <www.theguardian.com/commentisfree/2013/apr/05/sharia-law-diya-saudi> accessed 12 July 2017.

[108] Pascoe, 'Is *Diya* a Form of Clemency?', 160.

salient feature of *diya*, particularly in its historical context since *diya* was implemented before the development of a state mechanism to prosecute crimes and maintain public order.[109] However, in modern Islamic legal systems, *diya* is 'explicitly authorised and regulated by a legislative framework'.[110]

6.8.2 The Role of Forgiveness

In accordance with the Qurʾānic verse 5:45, the third option in homicide cases is to pardon the offender. As seen above, *diya* refers to remission with full compensation, conciliation involves remission with partial compensation, and pardon refers to forgiveness without something in return, hence it can be called 'complete forgiveness'. In *qiṣāṣ* laws, the human instinct for punishment competes with the religiously inspired qualities of mercy, compassion, and forgiveness.[111] Forgiveness is another *sharīʿa*-prescribed alternative to the sentence of death and can serve as a powerful antidote to retributivism. According to Abdelaziz Sachedina:

> The alternative to retributive justice assumes that no peace can result from retaliatory measures until forgiveness enters to provide the healing process needed to restore human relationships. Forgiveness is a human capacity that makes genuine social change possible, it can also affect a just and peaceful political order by bringing individuals, families, and groups closer together.[112]

The Arabic word *ghafara* (to forgive), along with all its derivatives, appears 124 times in the Qurʾān.[113] These references are either attributed to the forgiving character of Allah or to humans, encouraging them to forgive.[114] The Qurʾān does not enforce a legal requirement to

[109] ibid 167.
[110] ibid 170.
[111] Abdulaziz Sachedina, *The Islamic Roots of Democratic Pluralism* (Oxford: OUP 2001) 125.
[112] ibid 105. See also Donald W Shriver, *An Ethics for Forgiveness in Politics* (Oxford: OUP 1995) 6.
[113] See eg, Qurʾān 2:175; 4:106; 4:110; 39:5.
[114] See eg, Qurʾān 2:109; 42:37; 43:40.

forgive, although 'there may be a moral imperative to forgive as an imitation of Allah's mercy and justice'.[115]

All but one of its 114 chapters begin with a pronouncement of Allah's endless mercy and compassion (*bismillah al-raḥmān al-raḥīm).*[116] An entire *sūra* is named after the merciful quality of Allah (*al-Raḥmān*) and the subject matter itself, from its beginning to end, highlights the manifestations of God's merciful and forgiving nature.[117]

In sura al-Shuʿarāʾ, the believers are described as 'those who avoid the major sins and immoralities, and when they are angry, they forgive'.[118] Three verses later it mentions, 'the retribution for an evil act is an evil one like it, but whoever pardons and makes reconciliation - his reward is [due] from Allah. Indeed, He does not like wrongdoers'.[119] The Qurʾān also narrates the story of the first man to be created, Adam, who sought forgiveness from his Lord for eating from the forbidden tree. He supplicated, 'Our Lord, we have wronged ourselves, and if You do not forgive us and have mercy upon us, we will surely be among the losers'.[120]

Similarly, *ḥadīth* collections are replete with references to forgiveness, a notable trait of the Prophet. Abū Hurayra reports that the Prophet would seek forgiveness from God more than seventy times a day.[121] He advised people to 'be merciful to others and you will receive mercy. Forgive others and Allah will forgive you'.[122] Several notable incidents in Islamic history also shed light on the concept of forgiveness in Islam. Biographical accounts of the Prophet's life

[115] Russell Powell, 'Forgiveness in Islamic Ethics and Jurisprudence' (2011) 4 Berkeley Journal of Middle Eastern and Islamic Law 17, 19.
[116] Sūra al-Tauba is the only chapter which does not begin with this proclamation. This is due to the possibility that it may not be an independent surah but being part of the previous surah, sura al-Anfāl. See Muḥammad ʿAlī al-Sabūnī, *Mukhtaṣar Tafsīr Ibn Kathīr* (7th edn, Beirut: Dār al-Qurʾān al-Karīm 1402/1981) 2:123.
[117] See Qurʾān 55:1-78.
[118] Qurʾān 42:37.
[119] Qurʾān 42:40.
[120] Qurʾān 7:23.
[121] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6307.
[122] Ibn Ḥanbal, *Musnad Aḥmad*, no. 7001. See also al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no. 3540.

describe how he travelled to the city of Ṭā'if to propagate the religion but was persecuted by its residents and injured. He was given the choice to either destroy or forgive the people and despite suffering great abuse, he opted for the latter in the hope that future generations would follow Islam.[123] In Hudaybiyya, a group of eighty people intended to attack the Muslims and were apprehended, but the Prophet set them all free. It was on this occasion that verse 48:24 was revealed.[124]

Another prominent example is the conquest of Makkah after which the Prophet pardoned many enemies of Islam. He announced: 'I say to you what Yūsuf (Joseph) said to his brother: There is no blame upon you. Go, for you are free!'.[125] His mercy even extended to the woman, Hind bint 'Utba, who orchestrated the murder of his uncle Ḥamza. She mutilated his body and is infamously known to have chewed his liver. However, when she accepted Islam, the Prophet forgave her and also forgave Wahshī, the slave who killed Ḥamza.[126]

The virtue of forgiveness can also be demonstrated in medieval Islamic ethics, namely between the ninth to twelfth centuries CE. Major works of *adab* literature (Arabic literature) and *akhlāq* (Islamic ethical discourse) dealt with forgiveness as a laudable virtue.[127] Examples include Ibn Miskawayh's (d. 421H/1030) moral treatise *Tahdhīb al-Akhlāq*[128] (Refinement of Character), al-Isfahānī's (d. 502/1109) *al-Dharī'a*[129] (The Path to Virtue), and al-Ghazālī's magnum opus *Iḥyā 'Ulūm al-Dīn*[130] (Revival of Religious Sciences).

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[123] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 3231.
[124] al-Qurṭubī, *al-Jāmiʿ li-Aḥkām*, 19:324.
[125] Martin Lings, *Muhammad: His Life Based on the Earliest Sources* (Cambridge: The Islamic Texts Society 1991) 302-303; Al-Tabari, *The History of Al-Tabari: The Victory of Islam* (Micheal Fishbein tr, New York: University of New York Press 1997) 8:182.
[126] Martin Lings, *Muhammad: His Life Based on the Earliest Sources*, 173, 182, 189.
[127] Russell Powell, 'Forgiveness in Islamic Ethics and Jurisprudence' (2011) 4 Berkeley Journal of Middle Eastern and Islamic Law 17, 24.
[128] See al-Miskawayh, *The Refinement of Character (Tahdīb al-Akhlāq)* (Constantine K Zurayk tr, Chicago: Kazi Publications 2003). Powell notes that although it does not elaborate much on the context of forgiveness, it does list it as a subsidiary virtue of temperance, see ibid.
[129] See al-Rāghib al-Isfahānī, *al-Dharīʿa ilā Makārim al-Sharīʿa* (Beirut: Dār al-Kutub al-ʿIlmīyya 1980).
[130] See al-Ghazālī, *Iḥyaʿ Ulūm al-Dīn* (Beirut: Dār Ibn Ḥazm 2005).

Ibn Ḥazm's *al-Akhlāq wa-l-Siyar* (Morals and Behaviour), one of his notable works in ethics, indicates towards forgiveness reflecting a higher virtue:

> Do not deliver your enemy to an oppressor, and do not oppress him yourself. Treat him as you would treat your friend, except for trusting him…The greatest of good deeds is to refrain from punishing your enemy and from handing him over to an oppressor…Magnanimity consists not of mingling with our enemies but of showing mercy to them…A man undergoes many trials during his life, but the worst are those inflicted by his fellow men.[131]

In terms of Islamic criminal law, the right to forgive has been provided in *qiṣāṣ* offences through the Qurʾān itself, the *sunna*, and the writings of classical jurists. Manṣūr b. Yūnus al-Buhūtī (d. 1052/1641) in his influential Islamic legal text, *Kashshāf al-Qināʿ*, wrote 'there is legal consensus that it is permissible to pardon [the guilty party] in *qiṣāṣ* cases and that this option is better'.[132] He cites a report from Anas b. Mālik that whenever a case involving *qiṣāṣ* was brought to the Prophet, he would order the party to forgive.[133]

Al-Shawkānī (d. 1249/1834) included a chapter on the merits of forgiveness in *qiṣāṣ* where he mentioned 'it is narrated on the authority of Abū al-Dardāʾ that he said: "I heard the Prophet of God saying: whoever 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"'.[134] Ibn Ḥazm emphasises that the death penalty is 'permissible' in *qiṣāṣ*, not mandatory. Pardon is the preferable option and the preferable should take priority over the permissible.[135]

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[131] Ibn Ḥazm, *In Pursuit of Virtue* (Muhammad Abu Laylah tr, London: Ta-Ha Publishers 1990) 188.
[132] al-Buhūtī, *Kashshāf al-Qināʿ*, 5:542. See also al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:57.
[133] al-Sijistānī, *Sunan Abī Dāwūd*, no. 4497.
[134] al-Shawkānī, *Nayl al-Awṭār*, 13:77.
[135] Ibn Ḥazm, *al-Muḥallā* 11:125. See also al-Mirdāwī, *al-Inṣāf*, 10:3.

ʿAwdah argues that as *qiṣāṣ* offences are of a personal nature, they have a greater impact on the life of the victim than on collective security and tranquillity. Therefore, the *sharīʿa* sees no danger to public peace by pardoning on the part of the victim or his lawful heir. He explains this by comparing homicide to theft. Homicide is committed due to personal motives and if one person is wronged, it does not mean that everyone will also fear being wronged whereas everybody fears a thief because he knows that the thief does not need the goods of any particular person but simply steals goods wherever he can find them.[136] Hence punishment of the latter is required to protect public order whereas the former is not necessary:

> In allowing the victim, or the victim's heirs, the right to forgive, the *sharīʿa* has taken a logical position, for punishment is primarily designed to eradicate crime, but in most cases punishment does not prevent the occurrence of crime, whereas remission can often serve as a deterrent. Pardon occurs only when the parties are reconciled, the minds are clear of animosity and the criminal motivation diminishes. Thus pardon virtually plays the role of punishment and succeeds in achieving the result which punishment fails to achieve.[137]

Daniel Philpott argues that forgiveness instantiates justice only if justice extends beyond rights or deserved punishment. Such a concept of justice can be found in the Qurʾān where justice means 'righteousness or right relationship understood comprehensively as the entire set of obligations of everyone in the community in relationship to one another and to God'.[138] Philpott lists five ways that forgiveness restores relationships and participates in the justice of

[136] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:666.
[137] ibid 1:666-67.
[138] Daniel Philpott, 'The Justice of Forgiveness' (2013) 41(3) Journal of Religious Ethics 400, 403. See also Majid Khadduri, *The Islamic Conception of Justice* (John Hopkins University Press 1984) 3-12; Omar A Rashied, 'Between Compassion and Justice: Locating an Islamic Definition of Peace' (2005) 7 Peace Colloquy 9.

reconciliation.[139] This does not deny the difficulty of forgiveness, or how the restorations will occur to greater or lesser degrees, or the rarity of forgiveness, but it demonstrates how forgiveness enacts the justice that restores.[140]

Forgiveness is an inherent principle in Islam and nearly all offences against human beings can be subject to forgiveness in one shape or another. Using a system based on pardon and conciliation could help contribute to defining the question of amnesty in Islamic criminal systems worldwide.

Although mercy and forgiveness are principal elements in Islamic theology, El Fadl rightly notes that:

> It is nothing short of tragic that these are not the values that most people associate with Islam in the contemporary age. Furthermore, one would be hard pressed to claim that modern Muslims have led the world in setting an example in promoting systems of justice that are premised on the core values of mercy and compassion. This could represent a serious failure in discharging the covenant that binds Muslims to God. Furthermore, observing the amount of despotism that exists in the Muslim world today, a Muslim cannot help but be concerned that indeed the unjust have come to rule the unjust.[141]

[139] (1) Forgiveness aims to overcome what may be called the standing victory of political injustice; (2) forgiveness helps to restore the agency of the victim and to overcome the corrosive effects of anger and resentment; (3) forgiveness brings restoration to the soul of a perpetrator; (4) forgiveness brings recognition to the suffering of victims, who often languish unacknowledged in social isolation; (5) A fifth primary restoration that forgiveness performs is 'the rebuilding of respect for human rights, which are justly enshrined in law and enforced by the state. When a victim practices constructive political forgiveness, he wills a relationship between himself and his perpetrator that involves mutual respect for human rights and he sets an example for others in the political order to do likewise…Forgiveness can elicit several secondary restorations as well. The dramatic reversal of forgiveness manifests the potential to break cycles of revenge and further violence'. ibid 408-411.
[140] ibid 411.
[141] Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham: Rowman & Littlefield 2014)148.

El Fadl proposes that the concept of mercy and forgiveness in Islamic discourse is linked to a state of genuine perception of others in society. Hence, in the Qurʾān, mercy is linked to human beings practising tolerance and patience. One of the constituent elements to build a just society and achieve justice is '[g]enuine perception that enables persons to understand, appreciate and become enriched by the diversity of humanity…[Hence] the divine mandate for a Muslim polity is to pursue justice by adhering to the need for mercy'.[142] It is argued that the primacy of *diya* and forgiveness in *qiṣāṣ* must be utilised by Islamic states to counter the application of the death penalty.

6.9 *Taʿzīr* Crimes

Taʿzīr is a verbal noun in Arabic corresponding to the verb *azara* which means to restrain and prevent. It also has the meaning of aid and support (*azzara*) hence it is accordingly categorised as one of the *asmāʾ al-aḍdād* (words that have meanings which are contrary to one another).[143] Both meanings are connected in the sense that to prevent someone from committing an offence is to help him.[144] It is narrated in *al-Bukhārī* that the Prophet said, 'help your brother, whether he is an oppressor or he is an oppressed one'. The companions asked, 'O Messenger of Allah! It is all right to help him if he is oppressed, but how should we help him if he is an oppressor?' to which he replied, 'by preventing him from oppressing others'.[145]

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[142] Khaled Abou El Fadl, *Islam and the Challenge of Democracy* (Princeton: Princeton University Press 2004) 22.
[143] Muḥammad b. al-Qāsim al-Anbārī, *al-Aḍdād* (Muḥammad Abū al-Faḍl Ibrāhīm ed, Beirut: al-Maktaba al-ʿAsriyya 1407/1987) 147; Abū al-Ṭayyib ʿAbd al-Wāhid al-Ḥalabī, *Kitāb al-Aḍdād fī Kalām al-ʿArab* (ʿIzza Ḥasan ed, 2nd edn, Damascus: Dār al-Ṭalās 1996) 319.
[144] Ibn Manẓūr, *Lisān al-ʿArab*, 4:561-62; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:251; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 22:304; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:220; Muhammad Abdel Haleem, 'Compensation for Homicide in Islam' in Muhammad Abdel Haleem, Adel Omar Sherif and Kate Daniels (eds), *Criminal Justice in Islam* (London: IB Tauris 2003) 104; Abuhamid M. Abdul-Quadir, 'Ta'zīr: The Authority of the Qādī to Administer the Discretionary Judgement in the Penal System of Islamic Law' (1995) 18(2) Hamdard Islamicus 83, 84-85 .
[145] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 2444.

Taʿzīr is therefore aimed at disciplining, reforming, and deterring the offender.[146] Jurists have defined *taʿzīr* as a 'discretionary punishment to be delivered for transgression against God, or against an individual for which there is neither fixed punishment nor penance' (*ʿuqūba ghayr muqaddara sharʿan, tajibu haqqan lillāh aw li-ʾādmī, fī kulli maʿsiyya laysa fīhā ḥadd wa lā kaffāra ghāliban*).[147] This means that all crimes for which *ḥadd*, *qiṣāṣ*, or *kaffāra*[148] are applied are automatically excluded. *Taʿzīr* may be applied as an alternative and/or additional punishment in some of these cases but not as the sole punishment.

6.9.1 Origins

The word *taʿzīr* has not been used in the Qurʾān or *sunna* in the same manner that it is employed in Islamic legal writing. However, the Qurʾān has laid down the principles from which *taʿzīr* punishment is deduced.[149] The origin of *taʿzīr* punishment (*al-ʾaṣl fī-l-taʿzīr*)[150] can be found in verse 4:34 of the Qurʾān which deals with the treatment of disobedient wives:

> …But those [wives] from whom you fear rebellion - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand.

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[146] al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, 3:207; Burhān al-Dīn Ibrāhīm b. ʿAlī (Ibn Farḥūn), *Tabṣira al-Hukkām fī ʿUṣūl al-Aqḍiya wa Manāhij al-Aḥkām* (Jamāl Marʿashlī ed, Riyadh: Dār ʿĀlim al-Kutub 1423/2003) 2:217; Ramlī, *Nihāyat al-Muḥtāj*, 7:174; al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, 344; al-Buhūtī, *Kashshāf al-Qinā'*, 6:121; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 3:183; ʿUthmān b. Shaṭā al-Damyāṭī al-Bakrī, *Iʿāna al-Ṭālibīn ʿalā Ḥall Alfāẓ Fatḥ al-Maʿīn* (Beirut: Dār Iḥyāʾ al-Kutub al-ʿArabīyya n.d) 4:166.

[147] al-Sarakhsī, *al-Mabsūṭ*, 9:36; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:329; al-Buhūtī, *Kashshāf al-Qinā'*, 6:121; al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, 344; Ramlī, *Nihāyat al-Muḥtāj*, 7:72; al-Qalyūbī wa ʿUmayra, *Ḥashiya al-Qalyūbī wa ʿUmayra*, 4:205; al-Mirdāwī, *al-Inṣāf*, 10:239; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 22:305; al-Shīrāzī, *al-Muhadhdhab*, 5:462; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:220; al-Bakrī, *Iʿāna al-Ṭālibīn*, 4:166; ʿAlā al-Dīn ʿAlī b. Khalīl al-Ṭarābalsī, *Maʿīn al-Ḥukkām fī mā Yatraddad Bayn al-Khaṣmayn min al-Aḥkām* (Beirut: Dār al-Fikr n.d) 194; al-Nawawī, *Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn* (Muḥammad Ṭāhir Shaʿbān ed, Beirut: Dār al-Minhāj 1426/2005) 514.

[148] *Kaffāra* refers to acts of personal penance such as observing a fixed number of fasts when the fast of Ramaḍān is broken intentionally.

[149] Mohamed S El-Awa, *Punishment in Islamic Law* (Plainfield: American Trust Publications 1993) 97.

[150] al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:252; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 22:306; al-Bakrī, *Iʿāna al-Ṭālibīn*, 4:166.

Although the corrective steps detailed in the verse are to be used consecutively, it allows the husband to act under discretion. Some jurists interpret this verse based on analogy (*qiyās*). The husband is considered the head of the household and given the authority to safeguard the interests of the family and its members; similarly, the ruler of society and his judges must have the ability to safeguard the interests of society when confronted with acts or omissions that fall outside the purview of *ḥudūd* or *qiṣāṣ*.[151]

There are several crimes mentioned in the Qurʾān with no specific punishment stipulated hence it is left to the judge to impose the appropriate sentence. An example is verse 4:16: 'And the two [males] who commit it among you, punish them both…' which according to exegetes refers to homosexual relations between men. The command to 'punish them both' is delegated to the ruler/judge without specifying the type of punishment, its quantity, or the method of sentencing.[152]

El-Awa presents another verse, 42:40, which he claims is more directly connected to *taʿzīr*. The first part articulates a general principle: 'the recompense of an evil is a like evil…'. This establishes the legal rule that punishment is to be commensurate with the offence committed. The 'equality' indicates the maximum threshold of the penalty not the minimum due to the latter part of the verse which states: 'but if a person forgives and makes reconciliation, his reward is due from God…'. Hence this verse can be considered as a valid origin of *taʿzīr* as it assumes that the person liable to *taʿzīr* has acted to the detriment of another individual and/or society. Based on the above Qurʾānic verses, El-Awa argues the legal principles of *taʿzīr* are expressed in the Qurʾān either implicitly or explicitly.[153]

[151] El-Awa, *Punishment in Islamic Law*, 98.
[152] See Chapter 5 for the differing opinions on whether this is *taʿzīr* or *ḥadd*.
[153] El-Awa, *Punishment in Islamic Law*, 98.

Other examples can be found in the *sunna* where the Prophet deprived a man of his share of the war booty due to a misdeed committed against the leader of the army.[154] The Prophet also enforced the social boycott of three individuals who failed to respond to his call to arms without any legitimate reason. The boycott lasted until a verse was revealed absolving them and accepting their repentance.[155]

Another example from *ḥadīth* is the theft of fruit. When the value of the stolen fruit is less than that which incurs the *ḥadd* penalty (amputation), the offender is to pay 'twice its value and be punished'.[156] The double amount is a fine which can be interpreted as a *taʿzīr* punishment but the kind and type of punishment referred to in the latter part is left to the discretion of the judge.[157]

Similarly, a fine can be imposed as a *taʿzīr* punishment for failure to pay *zakā* as stated in the following *ḥadīth*:

> He who pays zakat with the intention of getting reward will be rewarded. If anyone evades zakat, we shall take half the property from him as a due from the dues of our Lord, the Exalted. There is no share in it (zakat) of the descendants of Muhammad.[158]

El-Awa asserts that based on examples from the Qurʾān and *sunna* it can be said that *taʿzīr* punishments originated from the foundational texts of Islamic law but the development of this system of punishment was expressed at a comparatively later date by the different juristic

[154] Ibn Qayyim, *Ighāthat al-Lahfān fī Maṣāyid al-Shayṭān* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1357/1939) 1:332; *Iʿlām al-Muwaqqiʿīn ʿan Rabb al-ʿĀlamīn* (Cairo: n.p 1955) 2:98.
[155] Ibn Qayyim, *Zād al-Maʿād fī Hadyi Khayr al-ʿIbād* (Beirut: Mu'assasa Risāla 1997) 3:483-86.
[156] al-Sijistānī, *Sunan Abī Dāwūd*, no. 1710, 4390; al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no. 1289; al-Nasāʾī, *Sunan al-Nasāʾī*, no. 4958.
[157] There is a longer and similarly worded *ḥadīth* in *Sunan al-Nasāʾī* (no. 4959) which seems to qualify the punishment by stating 'flogging' however the amount is not specified.
[158] al-Sijistānī, *Sunan Abī Dāwūd*, no. 1575; al-Nasāʾī, *Sunan al-Nasāʾī*, no. 2444.

schools.[159] It must be noted that Islamic penal law does not specify a definitive penalty for every *taʿzīr* offence and not all *taʿzīr* crimes are explicitly mandated within the *shari'a*, for example, those Islamic countries which apply the death penalty for drug offences – such as in Iran.[160] The significance of this in present-day Islamic legislation will be taken up in section 6.12 where its status as a *sharīʿa* punishment has been questioned.

Since *taʿzīr* punishments are discretionary it is up to the judge to decide which punishment fits the crime in question, taking into account the offender's background and psychological condition.[161] There are a number of punishments available to the judge ranging from admonition to severe penalties. ʿAwdah details the different type of *taʿzīr* punishments in length and asserts that moderation and leniency in such cases are more likely to reform the offender.[162] Since there is such an emphasis on the corrective and reformative nature of *taʿzīr*, imposing the death penalty in this category of crimes is at odds with these objectives.

The judge's authority is restricted by the breadth of punishments that may be imposed. No judge can order a punishment that contravenes Islamic law for example, ordering the offender to be whipped naked.[163] *Taʿzīr* punishments vary and are broad in scope hence addressing them all in sufficient detail is beyond the confines of this research. It is important to note that any punishment which fulfils the role of *taʿzīr*, that is to reform the offender(s) and deter future crime is permissible as long as it does not infringe upon the general principles of Islamic law. The main *taʿzīr* punishments as found in the traditional legal texts and practice are illustrated below.

6.10 Types of *Taʿzīr* Punishments

[159] El-Awa, *Punishment in Islamic Law*, 100.
[160] M Cherif Bassiouni, 'Death as a Penalty in the Shari'a' in Peter Hodgkinson and William A Schabas (eds), *Capital Punishment: Strategies for Abolition* (Cambridge: CUP 2004) 183-84.
[161] Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 3:183; ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:685.
[162] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:686.
[163] El-Awa, *Punishment in Islamic Law*, 100.

6.10.1 Admonition (*al-waʿiẓ*)

Admonition entails reminding the offender of his transgression and this method has been enjoined in verse 4:34 of the Qurʾān as the first step in dealing with disobedient wives. It is restricted to those offenders whom the court believes will be reformed by such treatment and usually applies to minor offences.[164]

6.10.2 Censure (*al-tawbīkh*)

This can be through 'any word or act which the judge feels to be sufficient to serve the purpose of *taʿzīr*'.[165] The Prophet also used censure as a way to reform the offender. Abū Dharr narrated that he argued with a man and insulted his mother to which the Prophet rebuked him saying 'O Abū Dharr, you have called his mother names, there is still pagan ignorance in you'.[166]

It has also been reported that the Prophet warned that delaying payment by the one who possesses means makes it lawful to dishonour and punish him (*layyu-l-wājidi yuhillu ʿirḍahu wa ʿuqūbatahu*). Ibn al-Mubārak said that 'dishonour' means that he may be reprimanded and 'punish' means that he may be imprisoned for it.[167]

6.10.3 Warning (*al-tahdīd*)

A warning is another preventative measure aimed at reforming and deterring the offender out of fear of punishment. For example, the court may threaten the offender with imprisonment or any other severe penalty if he repeats the offence.[168] This is comparable with the concept of suspended sentences in modern legal systems.[169]

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[164] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:702.
[165] El-Awa, *Punishment in Islamic Law*, 101. See also al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:253; al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:223; al-Bakrī, *Iʿāna al-Ṭālibīn*, 4:168.
[166] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 30; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 1661a.
[167] al-Sijistānī, *Sunan Abī Dāwūd*, no. 3628.
[168] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:703-704.
[169] El-Awa, *Punishment in Islamic Law*, 102. He cites s39 of the Criminal Justice Act (UK) 1967 as a comparison.

A warning can take a variety of forms such as sending a representative of the judiciary to notify the offender that the judge has learnt of his/her crime, by giving official notice to cease and desist from perpetrating certain crimes, or by summoning the offender to court. Scholars have also mentioned that warning may be achieved by talking in a 'tough' manner or frowning at the offender as the judge sees fit.[170]

6.10.4 Boycott (*al-hajr*)

The basis of boycott as a *taʿzīr* punishment can be found in the same verse that deals with admonition, 4:34, which permits husbands to admonish disobedient wives and 'forsake them in bed'.[171] The Prophet also practisedᵃ a social boycott of Kaʿb b. Mālik, Murāra b. al-Rabīʿ, and Hilāl b. Umayya for not participating in the battle of Tabūk. The community severed all social relations with them for fifty days until verse 9:118 was revealed forgiving them.[172] The Caliph ʿUmar is reported to have imposed a boycott upon a man who used to deliberately question difficult words in the Qurʾān in order to confuse people.[173]

6.10.5 Public exposure (*al-tashhīr*)

This punishment requires the offender's crime to be publicly disclosed and generally concerns cases relating to fraud or fake testimony. During the early stages of Islam, the common method adopted was to announce the crime committed at public places. Using *al-tashhīr*, the Prophet punished a tax collector who kept a portion of the money for himself claiming it had been given as a gift. The Prophet stood on his pulpit and addressed the public saying:

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[170] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 9:271; al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, 3:207-208; al-Shaykh Niẓām, *al-Fatāwā al-Hindiyya*, 3:479; Muḥammad b. Farāmūz Mulla Khusraw, *Durrar al-Ḥukkām fī Sharḥ Ghurar al-Aḥkām* (Karachi: Mīr Muḥammad Kutubkhāna n.d) 2:75.
[171] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:702.
[172] al-Qurṭubī, *al-Jāmiʿ li-Aḥkām*, 10:412-15; Ibn al-Qayyim, *Zād al-Maʿād*, 3:483-486; al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 4418.
[173] Ibn Farḥūn, *Tabṣira al-Hukkām*, 2:219.

> What is wrong with the employee whom we send (to collect *zakāt* from the public) that he returns to say, "This is for you and that is for me." Why didn't he stay at his father's and mother's house to see whether he will be given gifts or not? By Him in Whose Hand my life is, whoever takes anything illegally will bring it on the Day of Resurrection by carrying it over his neck…[174]

Another method was for the authorities to parade the offender around the city informing the public that he had committed a crime deserving of a *taʿzīr* punishment.[175] Al-Sarakshī records Shurayh, a prominent judge who served under the Caliphs ʿUmar and ʿAlī, affirming that an individual guilty of perjury must be publicly identified by taking him to the markets and streets. The public must then be informed of his crime and warned against trusting him.[176]

As access to information has advanced significantly in today's age, this would generally be done through announcements in the newspaper, television and/or radio broadcasts, or publishing court judgements.[177]

6.10.6 Fines (*al-gharāma*)

Jurists have differed regarding the validity of imposing a financial penalty as a *taʿzīr* punishment. Abū Ḥanīfa, Aḥmad, and the new opinion of Shāfiʿī all declare it an invalid form of *taʿzīr* punishment arguing that financial penalties were only applicable during the beginning of Islam and abrogated later on. They also contend that this is an ineffective method of reducing crime as corrupt rulers will use it as a tool to extort money from the people.[178]

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[174] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 7174.
[175] Ibn Farhun, *Tabsira al-Hukkam*, 2:219; ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:704.
[176] al-Sarakhsī, *al-Mabsūṭ*, 16:145.
[177] El-Awa, *Punishment in Islamic Law*, 103.
[178] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:706. See eg, Abū al-Ḍayāʾ ʿAlī b. ʿAlī al-Shubrāmalsī, *Ḥashiya al-Shubrāmalsī ʿalā Sharḥ al-Minhāj* (Beirut: Dār al-Fikr 1404/1984) 8:22.

ʿAwdah acknowledges that the second objection is untenable because, in today's modern law, public finances are generally thought to be in safe hands with the legislative authority prescribing the minimum and maximum limits of fine to be imposed and the function of awarding punishments has been delegated to the courts.[179]

Ibn Taymiyya and Ibn Qayyim from the Ḥanbalī school strongly reject the claim of abrogation using evidence based on the practice of the Prophet and his companions.[180] Ibn Qayyim further adds that:

> After the death of the Prophet, the actions of the *Khulafāʾ Rāshidūn* (rightly guided caliphs) and the great companions of the Prophet negate the claim of abrogation [of financial penalties]. Those who claim abrogation do not have any evidence from the Qurʾān or *sunna*, nor does *ijmāʿ* (consensus) support their claim. They can only say that our school does not permit it therefore their position is between the parameters of acceptability and rejection i.e. in limbo. When this genre of evidences has been removed (i.e. Qurʾān and *sunna*), the only thing left [to rely upon] is *ijmāʿ* which is also wrong because there is no consensus on its abrogation and it is impossible that consensus abrogates the *sunna*. If there is a consensus established there would be scriptural evidence which acts as the abrogator.[181]

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[179] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:706.

[180] Among the evidence that *taʿzīr* may take the form of a financial penalty are the following: The Prophet allowed seizing the property of one who hunted in the sanctuary of Madīna for the one who found it; he commanded that the amphorae and vessels for wine should be smashed; he commanded 'Abdallah b. 'Umar to burn the two garments which were dyed with safflower; he increased the penalty for one who stole something that was not secured; he destroyed the mosque built by the hypocrites by way of harm (*masjid al-ḍirār*); he denied the murderer the right to inherit or to be a beneficiary of a will.
Ibn Taymiyya has said financial penalties are of three kinds: (1) Destruction. This means the destruction of evil items, such as breaking and burning idols, breaking musical instruments, smashing wine vessels (2) Changing, such as destroyed forged money and curtains on which there are images, and making them into cushions and so on; (3) Confiscation. Such as confiscating stolen dates or adulterated saffron and giving it in charity. Such things should be confiscated and given in charity, or their price should be given in charity. See Ibn Farḥūn, *Tabṣira al-Hukkām*, 2:220.

[181] Muḥammad Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-Ḥukmīyya fī al-Siyāsa al-Sharʿiyya* (Bashīr Muḥammad ʿUyūn ed, Beirut: Maktaba al-Muʾayyad 1410/1989) 226-27.

Abū Yūsuf, Mālik, and some Shāfiʿī jurists hold that fines are a valid punishment. Abū Yūsuf permits financial penalty in order to reform the offender. However, the money will not go to the public treasury, but the judge will seize it until the offender repents. This is because it is not permissible to take the wealth of another without a valid legal reason. Failure to repent allows the judge to spend the money on public welfare requirements.[182]

Although there are differing views on the validity of financial punishment, it is evident that this punishment does form part of the Islamic penal system as there is nothing in the Qurʾān and *sunna* which clearly indicates otherwise.

6.10.7 Banishment (*al-taghrīb*)[183]

This is resorted to when the offender's acts are communicable and influence others who may commit criminal activity to their own detriment.[184] The period of expulsion varies across the schools from less than a year (according to some Shāfiʿīs and Ḥanbalīs) to any period extending a year.[185] El-Awa argues that this is not practical in recent times since states do not permit convicted criminals to cross their borders. Rather, 'the only form banishment can take is imprisonment'.[186]

6.10.8 Imprisonment (*al-ḥabs*)

[182] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:706; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 3:183; al-Zaylaʿī, *Tabyīn al-Haqāʾiq*, 3:208.
[183] Also known as *al-nafī*.
[184] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:699. See also *al-Mawsūʿa al-Fiqhyya*, 33:269.
[185] For a discussion on *taghrīb* see, al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, 344; al-Ṭarābalsī, *Maʿīn al-Ḥukkām*, 195; *Bidāyat al-Mujtahid* 2:364-365, 381; Ibn Farhun, *Tabṣira al-Hukkām*, 2:219; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:504; al-Zaylaʿī , *Tabyīn al-Haqāʾiq*, 3:174; al-Ramlī, *Nihāya al-Muḥtāj*, 8:18; al-Shīrāzī, *al-Muhadhdhab*, 5:394-95; al-Bujayramī, *Hāshiya al-Bujayramī*, 4:153; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:124; Abū Yaʿlā Muḥammad b. al-Ḥusayn al-Farrāʾ, *Aḥkām al-Sulṭāniyya* (Muḥammad al-Ḥāmid al-Fiqī ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1421/2000) 279; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:253; al-Bakrī, *Iʿāna al-Ṭālibīn*, 4:168.
[186] El-Awa, *Punishment in Islamic Law*, 106.

There are two kinds of imprisonment in Islamic law: limited imprisonment (*al-ḥabs muḥaddad*) and unlimited imprisonment (*al-ḥabs ghayr muḥaddad*). Under limited imprisonment, the minimum term is one day whilst jurists differ over the maximum period.[187]

The Shāfiʿī school restricts the maximum term of imprisonment to less than a year based on analogy between imprisonment and banishment. They argue that the period fixed for banishment in *zinā* cases is one year and *zinā* is a *ḥudūd* offence. Therefore, punishment for a non-*ḥudūd* offence should be less so that it does not turn into a *ḥadd*. Other schools reject this use of analogy between imprisonment and banishment. They do not fix a maximum prison term, instead allowing the judge to determine the period depending on the offence perpetrated and the individual concerned.[188]

An unlimited term of imprisonment is imposed upon those guilty of heinous crimes and habitual offenders who do not desist from their crimes despite undergoing prescribed punishment. All schools agree that imprisonment continues until the offender's death unless he repents.[189]

6.10.9 Lashing (*al-jald*)

The punishment of lashing is a common penalty laid down by Islamic penal law. It already constitutes a *ḥadd* punishment for the crime of *zinā* by unmarried persons (100 lashes) and the crime of *qadhf* (80 lashes). Jurists have differed over the maximum number of lashes permissible in *taʿzīr* cases.[190] This is a lengthy discussion in itself and falls beyond the scope of this research.

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[187] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:694-95.
[188] ibid.
[189] ibid 1:697.
[190] See al-Māwardī, *al-Aḥkām al-Sulṭāniyya*, 344-45; Ibn Farḥūn, *Tabṣira al-Hukkām*, 2:221-22; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:254; Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 5:334-35; al-Mirdāwī, *al-Inṣāf*, 10:244; al-Nawawī, *al-Majmuʿ Sharḥ al-Muhadhdhab*, 22:305-306; al-Astarūshnī, *al-Faṣūl al-Khamsa Ashar fī mā yūjibu al-Taʿzīr wa mā lā yūjibu* (manuscript)16; El Awa, *Punishment in Islamic Law*, 106-108.

6.11 Death Penalty by *Taʿzīr* (*al-qatl bi-l-taʿzīr*)

Since the emphasis on *taʿzīr* is on the reformation and rehabilitation of the offender, appropriate *taʿzīr* is that which does not violate the right to life otherwise it defeats the purpose for which it was created. Nevertheless, all schools have permitted derogation from this rule for what they consider as 'exceptional' cases but they do not all agree on what circumstances warrant such a harsh punishment.

Imām Mālik and some Ḥanbalī jurists allow the death penalty for treason in opposition to Abū Ḥanīfa, Shāfiʿī, and Abū Yaʿlā from the Ḥanbalī *madhhab*. Propagating heretical doctrines and innovations is another death penalty offence according to most Mālikī jurists as well as a group of Ḥanbalīs. According to the Ḥanafīs, death penalty as *taʿzīr* is only warrantable in terms of *siyāsa* i.e. based on public policy.[191] Some Ḥanbalīs, particularly Ibn Taymiyya and Ibn Qayyim, as well as some Mālikīs also subscribe to this view. Ibn Taymiyya opines that if the only way a person's corruption can be rectified is by killing them then it is lawful to do so.[192]

The Ḥanafīs permit the death penalty for the habitual offender such as the habitual homosexual (*man takarrar minhu al-liwāṭ*) or in homicide cases where the instrument used does not meet the criteria for *qiṣāṣ* (*al-qatl bi-l-muthqil*). It must be noted that offences for which the Ḥanafīs impose the death penalty as *siyāsa* are considered to be *ḥudūd* or *qiṣāṣ* crimes according to the other schools. For example, *liwāṭ* and *al-qatl bi-l-muthqil* may warrant execution on the basis of *taʿzīr* whereas the other three schools consider the first a *ḥudūd* offence and the second as a *qiṣāṣ* offence, both which incur the death penalty as punishment.[193]

[191] *al-Mawsūʿa al-Fiqhiyya*, 33:263; Ibn ʿĀbidīn, *Ḥāshiyah Radd al-Muḥtār*, 3:184-85; Ibn Farhun, *Tabṣira al-Hukkām*, 2:223; al-Māwardī, *al-Aḥkām al-Sulṭānīyya*, 329; al-Buhūtī, *Kashshāf al-Qināʿ*, 6:124.
[192] Ibn Taymiyya, *al-Siyāsa al-Sharʿiyya*, 99. See also al-Rahaybānī, *Maṭālib Ulī al-Nuhā*, 6:223.
[193] ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī*, 1:688.

It is important to note that there are certain *ḥadīths* that permit the death penalty as a *taʿzīr* punishment, such as in cases of spying for the enemy where the Prophet ordered the offender to be executed. However, the death penalty as *taʿzīr* is an exception to the rule and there are only a limited number of cases, as explained above, that warrant such a severe punishment. ʿAwdah argues that there are only five *taʿzīr* offences that can be punished by death and that such cases will not be left to the discretion of the judge but determined by the ruler or person in authority.[194]

Ultimately, *taʿzīr* is discretionary and the death penalty, although restricted to a few crimes, is argued not to be mandatory in such a context. There should be no bar to achieving abolition in this category.

6.11.1 The Judge's Power of Discretion

A judge's discretion in *taʿzīr* is far more restricted than commonly perceived. *Taʿzīr* offences fall under two main categories: (1) those crimes that are of the same nature as *ḥudūd* and *qiṣāṣ* crimes but fail to reach the qualifying criteria; (2) those that may simply qualify as 'transgressions'.[195]

The judge is required to reach a fair *taʿzīr* sentence by means of conscientious reasoning (*ijtihād*). Hence, he must not deliver penalties based on his personal predilections or turn from one punishment to the other in an arbitrary manner as this would be unjust and contrary to consensus.[196] In response to the claim that a judge has arbitrary power in *taʿzīr* offences, ʿAwdah cogently argues that:

> The texts of the sharia have explained the offences and penalties, the judge's authority is confined to applying the text to the case under consideration. If it

[194] ibid 1:689.
[195] El-Awa, *Punishment in Islamic Law*, 111.
[196] ibid; Shihāb al-Dīn Aḥmad b. Idrīs al-Qarafī, *Kitāb al-Furūq al-Thāniya* (Cairo: n.p 1939) 4:182.

> applies to the case, he will apply the penalty. The freedom given to the judge is in choosing the penalty he considers fit from those stated for the crime. The sharia leaves it to the judge, in choosing the penalty, to consider the character of the accused, his past record and the effect of the penalty on him and consider also the offence and its effect on society. It gives the judge the freedom to apply the maximum down to the minimum penalty. He can implement the penalty or suspend it.[197]

The Qurʾān and *sunna* determine what is prohibited in Islam therefore the judge must determine the appropriate punishment applicable but has no relation to the actual determination of the offence since it has already been stipulated by the source texts. There are a number of examples but the main *taʿzīr* offences cited in the Qurʾān include usury (*ribā*),[198] false testimony (*shahādat al-zūr*),[199] breach of trust (*khiyānat al-amāna*),[200] insults (*sabb*),[201] and bribery (*rishwa*).[202]

Although possible offences have been clearly mentioned in the Qurʾān and *sunna*, there are numerous others that are not explicitly found therein such as drug offences. Here the ruler has the power to establish these offences and determine their penalties. This does not contradict God's legislative prerogative as exercised through the Qurʾān and *sunna* because 'neither the Qurʾān nor the *sunna* has given, nor is expected to give, detailed laws to control every aspect of human life; it is only the general principles that may be found therein'.[203] The details are left

[197] Translated by Muhammad Abdel Haleem, 'Compensation for Homicide in Islamic Sharia' in Muhammad Abdel Haleem, Adel Omar Sharif and Kate Daniels (eds), *Criminal Justice in Islam* (London: IB Tauris 2003) 104.
[198] Qurʾān 2:275, 279.
[199] Qurʾān 4:135, 22:30; 15:72.
[200] Qurʾān 4:58; 8:27.
[201] Qurʾān 49:11.
[202] Qurʾān 2:188.
[203] El-Awa, *Punishment in Islamic Law*, 115.

to the ruler who must ensure that legislation passed does not contradict the principles laid down by the primary texts. This governmental authority to pass such laws is translated as *siyāsa shar'iyya*. Shihāb al-Dīn al-Qarafī (d. 1285), the great Mālikī scholar, described *siyāsa* as 'that power entrusted to the government to improve society. Exercises of this power were valid insofar as they were undertaken with the purpose of enhancing the community's welfare and did so improve it in fact'.[204] Furthermore, the ruler must act in a way that preserves the five basic interests in Islamic law: religion, life, lineage, intellect, and property. In other words, it must promote *maṣlaḥa* (public welfare).[205]

Of the *ta'zīr* offences cited above, *sabb* is of particular relevance since it has been used to justify the death penalty which, it is argued, has a questionable basis in Islamic law and neither does it promote *maṣlaḥa* in today's globalised society.

6.11.2 Blasphemy (*sabb*)

The death penalty for blasphemy rests upon questionable jurisprudential grounds due to the differences and ambiguity in the source-texts of Islamic law.[206] Blasphemy is generally subsumed under two main words in Arabic: *sabb* (abuse, insult) and *shatm* (revilement, vilification).[207] The most common terms used by jurists for blasphemy in Islam are *sabb Allah*,

[204] Asifa Quraishi-Landes, 'The Sharia Problem with Sharia Legislation' (2015) 41(16) Ohio Northern University Law Review 545, 551.

[205] El-Awa, *Punishment in Islamic Law*, 114; Felicitas Opwis, '*Maṣlaḥa* in Contemporary Islamic Legal Theory' (2005) 12(2) Islamic Law and Society 182, 188. Opwis notes that the Shāfi'ī jurist Abū Ḥāmid Muḥammad al-Ghazālī argued that '*maṣlaḥa* was God's purpose (*maqṣad*, pl. *maqāṣid*) in revealing the divine law, and, more concretely, that this intention was to preserve for humankind the five essential elements of their well-being, namely their religion, life, intellect, offspring, and property. What protects these essential elements and averts harm from them al-Ghazālī considered a *maṣlaḥa* and what fails to do so its opposite, namely *mafsada*'. See Muḥammad al-Ghazālī, *al-Mustaṣfā min 'Ilm al-Uṣūl* (Jedda: Sharika al-Madīna al-Munawwara n.d.) 2:481-82, 502-503. For more detail on *maṣlaḥa*, see Felicitas Opwis, *Maṣlaḥa and the Purpose of the Law: Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century* (Leiden: Brill 2010).

[206] Isabel Fierro argues that there is much disagreement, and little consensus, between Islamic jurists on the punishment for blasphemy in Islam in her article 'Andalusian "Fatāwa" on Blasphemy' (1990) 25 Annales Islamologiques 103.

[207] al-Zubaydī, *Tāj al-'Urūs*, 3:34; 'Ulaysh, *Minaḥ al-Jalīl*, 4:476; al-Kharashī, *Sharḥ al-Kharashī*, 8:70; al-Zurqānī, *Sharḥ al-Zurqānī*, 8:120-21; al-Dusūqī, *Ḥāshiyat al-Dusūqī*, 4:309; al-Ṣāwī, *al-Sharḥ al-Ṣaghīr*, 4:439.

sabb al-Rasūl (or *sabb al-nabī*), and *sabb al-sahabī*. The one who blasphemes is known as a *sabbāb*.[208]

Lutz Weiderhold elaborates upon the terminology stating that 'there are a number of other terms that are used less frequently in order to describe acts of blasphemy, such as *laʿn* (cursing, malediction), *ṭaʿn* (accusing, attacking), *īdhāʾ* (harming, hurting) or the verb *nāla* with the preposition *min* (do harm to somebody, defame)'.[209]

The verb *sabba* is only used in the Qurʾān to warn Muslims against blaspheming the deities of those who would retaliate by blaspheming against God:

> And do not insult (*la tasubbu*) those they invoke other than Allah, lest they insult Allah in enmity without knowledge. Thus We have made pleasing to every community their deeds. Then to their Lord is their return, and He will inform them about what they used to do.[210]

Verse 33:57, using the word *īdha*, also states: 'Indeed, those who abuse Allah and His Messenger (*yuʾdhūna allāha wa rasūlahu*) - Allah has cursed them in this world and the Hereafter and prepared for them a humiliating punishment.'

It is notable that neither of these verses endorse a worldly punishment and Siraj Khan argues that 'after the Prophet's demise, the punishment for blasphemy is a cursed existence in this world and the hereafter and the promise of a humiliating punishment, all of which are explicitly for Allah to carry out and not for any worldly or clerical authority'.[211]

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[208] Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society 1997) 326.
[209] Lutz Wiederhold, 'Blasphemy Against the Prophet Muhammad and His Companion (*sabb al-rasūl*, *sabb al-ṣaḥābah*): The Introduction of the Topic into Shāfiʿī Legal Literature and its Relevance for Legal Practice under Mamluk Rule' (1997) 42(1) Journal of Semitic Studies 39, 40.
[210] Qurʾān 6:108.
[211] Siraj Khan, 'Blasphemy Against the Prophet' in Coeli Fitzpatrick and Adam Hani Walker (eds), *Muhammad in History, Thought, and Culture: An Encyclopedia of the Prophet of God* (Santa Barbara: ABC-Clio 2014) 61.

There are a number of *ḥadīths* which depict the Prophet's non-violent response to those who insulted, defamed, and even physically abused him because of his religion. Instead he chose to retaliate with patience and mercy. The Prophet's wife, ʿĀʾisha, narrates that he would never take revenge (over anybody) for his own sake.[212]

However, the picture becomes more complicated once *fiqh* works are taken into consideration owing to the breadth of interscholastic disagreement. The two harshest interpretations belong to the twelfth-century Mālikī Qāḍī ʿIyāḍ[213] and Ibn Taymiyya[214] of the Ḥanbalī school who endorsed the death penalty for the blasphemer. According to Ibn Taymiyya, the blasphemer of the Prophet, Muslim or non-Muslim, has committed a capital *ḥadd* crime and repentance or conversion to Islam does not annul the punishment.[215] Despite this, 'support may be found in each of the four Sunni *madhāhib* for either repentance or the impossibility of repentance'[216] for the Muslim blasphemer.

Furthermore, there is no scriptural evidence that mandates this as a *ḥadd* offence. Instead, it has been justified as a subcategory of apostasy (*ridda*) due to the expression of unbelief by the Muslim.[217] The rationale behind this is based on the argument that to curse God (or the Prophet)

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[212] al-Bukhārī, *Ṣaḥīh al-Bukhārī*, no. 3560.
[213] See Qāḍī ʿIyāḍ, *al-Shifāʾ bi-Taʿrīf Ḥuqūq al-Muṣṭafā* (ʿĀmir al-Jazzār ed, Cairo: Dār al-Ḥadīth 1425/2004).
[214] See Ibn Taymiyya, *al-Ṣārim al-Maslūl*. Mark S Wagner observes that, '[Ibn Taymiyya's] book seems to be aimed primarily at contemporary Ḥanafīs and Shāfiʿīs who allowed themselves considerable latitude in defining the crime of insulting the Prophet and its proper punishment. There were other Ḥanafīs, however, who wanted to circumvent such leniency but remain Ḥanafīs; they argued that a discretionary punishment for insulting the Prophet could extend to the imposition of the death penalty. In a fatwa on the case of a Christian who had insulted the Prophet, for example, the Ḥanafī Khayr al-Dīn al-Ramlī (d. 1671) wrote that "our scholars have stated clearly that increasing a discretionary punishment to death (al-taraqqiya fī l-taʿzīr ilā l-qatli) is permissible if the motivating factor for it (mūjibuhu) is great, and what motivating factor for discretionary punishment could be greater than insulting the Prophet.'" Wagner, 'The Problem of Non-Muslims Who Insult the Prophet Muḥammad' (2015) 135(3) Journal of the American Oriental Society 529, 538.
[215] Ibn Taymiyya, *al-Ṣārim al-Maslūl*, 307.
[216] Wagner, 'The Problem of Non-Muslims Who Insult the Prophet Muḥammad', 530; Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: CUP 2003) 149.
[217] Intisar A Rabb, 'Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: OUP 2015) 158.

is to blaspheme Him which implicitly signals a departure from the community of Muslims and the laws governing them:

> The presumption [is] that a person could not possibly be a Muslim, fitting squarely within its systems of laws and confessing to the oneness and supremacy of God, if he or she at the same time curse[s] God. The same applie[s] to cursing the Prophet. If blasphemy could be so defined with respect to God, then, this reasoning would extend to protect any figure that Muslim 'orthodoxy' held to have been sent or otherwise revered by God.[218]

This interpretation ties the offence to the punishment of death. This is because 'since the punishment for apostasy is death (according to some Muslim jurists) the blasphemer, by virtue of mere apostasy, deserves the death penalty'.[219] However, it must be noted at this juncture that there is a more nuanced understanding of apostasy in Islamic law involving military hostility against the Muslim polity as opposed to mere disbelief, as detailed in the previous chapter.

According to Weiderhold, 'in the relevant chapters of the formative texts of the *madhhabs*, insulting the Prophet or the *Ṣaḥābah* (companions of the prophet) is not mentioned among the punishable acts that constitute *riddah* or *kufr*'.[220] He cites the absence of any passage that equates *sabb* to *ridda* in texts such as Mālik's (d. 179/795) *Muwaṭṭā'*, nor in Saḥnūn's (d. 240/854) *Mudawwana*, nor in al-Shāfiʿī's (d. 204/820) *al-Umm*, nor in al-Shaybānī's (189/805) *Kitāb al-Aṣl*.[221]

[218] ibid.
[219] Siraj Khan, 'Blasphemy Against the Prophet' 64.
[220] Lutz Weiderhold, 'Blasphemy Against the Prophet Muhammad and His Companion (sabb al-rasūl, sabb al-sahābah): The Introduction of the Topic into Sharī Legal Literature and its Relevance for Legal Practice under Mamluk Rule' (1997) 42(1) Journal of Semitic Studies 39, 44.
[221] ibid.

The Shāfiʿī jurist al-Muzanī (d. 264/878), in his book *al-Mukhtaṣar* (a marginal summary on Shāfiʿī's *al-ʿUmm*), did not mention those who blaspheme against God or the Prophet amongst the apostates and therefore it would seem that he did not advocate for the death penalty in such a context.[222] In contrast, another Shāfiʿī jurist, Ibn al-Mundhir (d. 318/930) permitted the death penalty against those who blaspheme against the Prophet, citing the consensus of jurists as his only source.[223] Al-Nawawī (d. 676/1277) went one step further and opined that blasphemy against any of the prophets is akin to apostasy.[224] It therefore seems that punishment for the offence was developed later by the jurisprudential schools. Khan observes that:

> Although al-Nawawī fails to mention blasphemers in his chapter on *ridda*, he does make some reference to the act of blasphemy within his definition of *ridda*. This does not seem to be a mistaken omission on the author's part, but may be a subtle attempt to suggest that some forms of blasphemy can constitute apostasy.[225]

As for the non-Muslim blasphemer, the picture does not get any clearer. The Shāfiʿī jurist, al-Khaṭṭabī (d. 388/998), noted that the authorities 'differed in the matter when the insulter was a non-Muslim'.[226] The most lenient in this regard were the Ḥanafīs whose eponym, Abū Ḥanīfa, held that non-Muslims who insult the Prophet 'are not to be killed, because their [overall] unbelief is worse' (*lā yuqtalu yaʿnī lladhī hum ʿalayhi min al-shirki aʿẓamu*).[227] Furthermore, non-Muslim blasphemers, by virtue of their blasphemy, do not violate their pact with the

[222] See Abū Ibrāhīm Ismāʿīl al-Yaḥyā al-Muznī, *Mukhtaṣar al-Muznī fī Furūʿ al-Shāfiʿiyya* (Abd al-Qādir Shāhīn ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1419/1998) 341, 349.
[223] Abū Bakr Muḥammad Ibn al-Mundhir, *al-Ijmāʿ* (Beirut: Dār al-Kutub al-ʿIlmiyya 1405/1985) 76.
[224] al-Nawawī, *Minhāj al-Ṭālibīn wa ʿUmdat al-Muftīn* (Muḥammad Ṭāhir Shaʿbān ed, Beirut: Dār al-Minhāj 1426/2005) 501.
[225] Siraj Khan, 'Blasphemy Against the Prophet', 66.
[226] Abū Sulaymān Ḥamd ibn al-Khaṭṭabī al-Bustī, *Maʿālim al-Sunan fī Sharḥ Sunan Abī Dāwūd* (Muḥammad Rāghib al-Ṭabākh ed, Ḥalab: al-Maṭbaʿa al-ʿIlmiyya 1352/1933) 3:296. See also Ibn ʿAbd al-Barr, *Al-Tamhīd li-mā fī al-Muwaṭṭāʾ min al-Maʿānī wa al-Asānīd* (Cairo: Maktaba Ibn Taymiyya n.d) 6:167-68.
[227] Ibn Taymiyya, *al-Ṣārim al-Maslūl*, 3.

Islamic state that they reside in.[228] In support of this argument, al-Marghīnānī (d. 593/1197) remarked:

> We argue that blaspheming the Prophet is an expression of unbelief from him [the dhimmi] and the unbelief that he has [due to his disbelief in Islam] does not prevent his covenant, so this supervening act of disbelief does not remove it. His covenant is not dissolved unless he joins the enemy territory, or the enemy overpowers a territory and wages war against us.[229]

Other Ḥanafī jurists such as al-Taḥāwī (d. 321/933),[230] al-Qudūrī (d. 428/1037),[231] and Ibn al-Humām (d. 861/1457)[232] also agreed. Therefore, the Ḥanafī school is largely of the opinion that if the blasphemer belongs to a protected group (e.g. *ahl al-ʿahd* (treaty in place); *ahl al-dhimma* (non-Muslims under protection of Muslim law); *ahl-al kitāb* (people of the book)) then the person is exempted from the death penalty and the judge is given the discretion to rule on an appropriate punishment by way of *taʿzīr*.

Al-Bukhārī records the following *ḥadīth* which further expands upon the issue of blasphemy and its status as a non-capital offence:

> A Jew passed by Allah's Messenger and said, "As-Sāmu ʿAlaika". Allah's Messenger said in reply, "Wa ʿAlaika". Allah's Messenger then said to his companions, "Do you know what he (the Jew) has said? He said, As-Sāmu

[228] Taqī al-Dīn al-Subkī, *al-Sayf al-Maslūl ʿalā man Sabba-l-Rasūl* (Iyād al-Ghūj ed, Amman: Dār al-Fatḥ 2000) 251–52, 262, 265, 270.
[229] al-Marghīnānī, *al-Hidāya*, 4:326.
[230] Abū Jaʿfar Aḥmad b. Muḥammad al-Taḥāwī, *Mukhtaṣar Ikhtilāf al-ʿUlamāʾ* (ʿAbdallāh Nadhīr Aḥmad ed, Beirut: Dār al-Bashāʾir al-Islāmiyya 1416/1995) 3:504–6; Abū Bakr al-Rāzī al-Jaṣṣāṣ, *Sharḥ Mukhtaṣar al-Taḥāwī* (Muḥammad ʿUbayd Allāh Khān ed, Beirut: Dār al-Sirāj 2010) 6:142. According to al-Taḥāwī a non-Muslim blasphemer 'is given a discretionary punishment but is not killed' (*ʿuzira wa-lam yuqtal*).
[231] Aḥmad b. Muḥammad al-Qudūrī, *al-Mawsūʿa al-Fiqhiyya al-Muqārana: al-Tajrīd* (Muḥammad Aḥmad Sarrāj and ʿAlī Jumʿa Muḥammad eds, Cairo: Dār al-Salām 2004) 12:6266–67.
[232] Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr*, 6:58–59.

ʿAlaika." They said, "O Allah's Messenger! Shall we kill him?" The Prophet said, "No. When the people of the Book greet you, say: Wa ʿAlaikum".[233]

In this incident, the Jew, using a play on words, wished death upon the Prophet whilst also mocking the Muslim greeting. The Muslim greeting is '*as-salāmu ʿalaykum*' (peace be upon you) whilst '*as-sām*' means death. The Jewish passerby used the singular form of 'upon you' (*ʿalayka*) rather than the commonly used plural form (*ʿalaykum*), 'implying not only inappropriate familiarity but also specificity'.[234] However, the Prophet did not retaliate. Commenting on this *ḥadīth*, Badr al-Dīn al-ʿAynī (d. 855/1451), a Ḥanafī scholar, observed that 'al-Bukhārī has adopted the opinion of the Kufans, for according to them, whoever insults or berates the Prophet and he is a non-Muslim citizen (*dhimmī*) then he is rebuked (*azara*) and not killed'.[235] He also reported that Sufyān al-Thawrī (d. 161/778), an early jurist and *ḥadīth* scholar, held the same opinion.[236] Other Ḥanafī scholars who adopted the same position include al-Jaṣṣāṣ (d. 370/981),[237] al-Qudūrī,[238] al-Kāsānī (d. 587/1191),[239] al-Manbajī (686/1287),[240] and al-Ḥaddād (d. 1132/1720).[241]

An incident often quoted by supporters of the death penalty for blasphemy is when the Prophet ordered the execution of certain individuals after the conquest of Makkah, with the case of Kaʿb b. Ashraf, a Jewish leader, regularly cited in this regard.[242] Kaʿb b. Ashraf was known to write satire about the Prophet and would incite the community to take up arms against him.[243]

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[233] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6926.
[234] Ismail Royer, 'Pakistan's Blasphemy Law and Non-Muslims' (Lampost Education Inititaive 2018) 5.
[235] al-ʿAynī, *ʿUmdat al-Qārī*, 23:124; 24:124.
[236] ibid.
[237] al-Jaṣṣāṣ, *Sharḥ Mukhtaṣar al-Taḥāwī*, 6:142.
[238] al-Qudūrī, *al-Tajrīd*, 12:6266.
[239] al-Kāsānī, *Badāʾiʿ al-Ṣanāʾi*, 9:520.
[240] ʿAlī b. Zakariyyā al-Manbajī, *al-Lubāb fī Jamaʿ Bayn al-Sunna wa al-Kitāb* (Muḥammad Faḍl ʿAbd al-Azīz al-Murād ed, Peshawar: al-Maktaba al-Haqqāniyya 1414/1994) 765.
[241] Abū Bakr b. ʿAlī al-Ḥaddad, *al-Jawhara al-Nayyira ʿalā Mukhtaṣar al-Qudūrī* (Ilyās Qablān ed, Beirut: Dār al-Kutub al-ʿIlmiyya 1427/2006) 2:606.
[242] al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 4037.
[243] See ibid; al-Sijistānī, *Sunan Abī Dāwūd*, no. 3000; Ibn Ḥajar al-Asqalānī, *Fatḥ al-Bārī*, 7:390ff.

Ibn Kathir reported that Kaʿb went to Medina, 'where he proclaimed his enmity and incited people to go to war. He had not left Mecca before he had united them to fight the Messenger of God'.[244]

Commenting on the story of Kaʿb and other narrations, al-ʿAynī explains that 'in these traditions it is shown that they were not killed merely for their insults. They were only killed due to their assistance of the enemy and gathering together for war and supporting it'.[245] Ibn Ḥajar elaborates that the author (al-Bukhārī) has alluded to Kaʿb being an enemy combatant by including the *ḥadīth* under different chapters such as 'killing enemy combatants' (*al-fatk bi ahl al-ḥarb*).[246] These narrations are therefore interpreted on the basis of public interest; in other words, the individuals in question were executed for sedition and insurrection. This is in line with the dominant Ḥanafī opinion that blasphemy is punishable, not as a matter of *ḥadd*, but as a matter of *taʿzīr* i.e. for reasons owing to public policy (*siyāsa*) and welfare (*maṣlaḥa*).[247]

The first awareness of *sabb* as a mandatory capital crime (*ḥadd*) in the Ḥanafī jurisprudence emerged in the works of a fourteenth-century jurist from the Crimea, Ibn al-Bazzāz.[248] In his commentary on Ḥanafī *fiqh*, Ibn al-Bazzāz relied upon Ibn Taymiyya's *al-Ṣārim al-Maslūl* as the authoritative work on blaspheming the Prophet, arguing that '[the insulter of the Prophet] be killed as a *ḥadd* without any possibility for repentance'.[249] Ibn al-Bazzāz's opinion enjoyed much success in the following years and:

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[244] Ibn Kathir, *The Life of the Prophet Muhammad* (Trevor Gassick tr, Reading: Garnet Publishing) 3:7.
[245] al-ʿAynī, *ʿUmdat al-Qārī*, 23:124. Supporting this view, see also al-Ṭabarī, *The History of Al-Ṭabarī: The Foundations of The Community* (MV McDonald tr, Albany: State University of New York Press 1987) 7:94, 101; *The Life of Muhammad: A Translation of Ibn Ishaq's Sirat Rasul Allah* (A Guillaume tr, Oxford: OUP 2004) 482; Safiur-Rahman al-Mubarakpuri, *The Sealed Nectar: Biography of the Noble Prophet* (Riyadh: Darussalam 2002) 241; Muhammad Ali, *Muhammad the Prophet* (Lahore: Anjuman Isha'at Islam 1993) 202-206.
[246] Ibn Ḥajar al-Asqalānī, *Fatḥ al-Bārī*, 7:395.
[247] Ibn ʿĀbidīn, *Tanbīh al-Wulāt wa-l-Ḥukkām ʿalā Aḥkām Shātim Khayr al-Anām* (Cairo: Dār al-Athār 1428/2007) 107-108, 110. cf Ibn Taymiyya, *al-Ṣārim al-Maslūl*, 3ff.
[248] Mark S Wagner, 'The Problem of Non-Muslims Who Insult the Prophet Muḥammad', 538.
[249] Muḥammad b. Shihāb al-Bazāz, *al-Fatāwā al-Bazāziyya*, printed on the margins of *al-Fatāwā al-Hindiyya* (Beirut: Dār al-Maʿrifa n.d) 6:321-22.

> created an intellectual framework that would justify the Ottoman persecution of Shiʿis and other Muslim schismatics a century later. Soon after al-Bazzāz's death, the Ottoman jurist Mullā Khüsrev (d. 1480) cited his work approvingly for the position that the Ḥanafī school calls for both Muslim and non-Muslim insulters of the Prophet to be killed and that repentance for the crime is impossible.[250]

Two later Ḥanafī scholars, Ḥusām Chelebī (d. 1520) and the aforementioned Ibn ʿĀbidīn (d. 1836) refuted Ibn al-Bazzāz's introduction of the draconian blasphemy law into the *madhhab* and attempted to discredit him. Chelebi, an Ottoman judge and professor of Islamic law, advanced that 'the Ḥanafī school had historically been loath to impose the death penalty for insulting the Prophet and he identified the source of the contagion as Ibn al-Bazzāz'.[251] Ibn ʿĀbidīn elaborated upon Chelebi's argument asserting that the death penalty was not mandatory in such a context. He wrote, '[o]n the issue [of insulting the Prophet] [Ibn al-Bazzāz] approached his sources in the sloppiest possible manner (*qad tasāhala ghāyata al-tasāhhuli*)'.[252]

Al-Qudūrī's concept of 'interpretive doubt' (*shubhat al-khilāf*) is of relevance here.[253] He maintained that the very fact of different juristic opinions as to whether an offence fell under the technical definition of a *ḥadd* crime created doubt about the appropriateness of the penalty and 'automatically required avoidance of the *ḥadd* punishment, for fear that it would not be

[250] Mark S Wagner, 'The Problem of Non-Muslims Who Insult the Prophet Muḥammad', 538. See also Mulla Khusraw, *Durrar al-Ḥukkām*, 1:299-300.
[251] Mark S Wagner, 'The Problem of Non-Muslims Who Insult the Prophet Muḥammad', 539.
[252] ibid 539. For a rebuttal of Ibn al-Bazzāz's argument and how he relied upon Ḥanbalī texts rather than following the Ḥanafī opinion, see Ibn ʿĀbidīn, *Tanbīh al-Wulāt*, 66ff.
[253] For an excellent analysis on the notion of 'interpretive doubt' see Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (New York: CUP 2015) 211ff.

authorized by God'.[254] Therefore the interpretive plurality apparent in categorising blasphemy as a *ḥadd* or *taʿzīr* should act as a barrier to the imposition of the death penalty.

To summarise, Ismail Royer argues that there is no *ijmāʿ* (consensus) amongst scholars about applying this specific punishment to non-Muslims.[255] He notes that from the Shāfiʿī school, al-Nawawī held that some punishment short of death was acceptable but not mandatory whilst Ibn Ḥajar argued that insulting the Prophet could be overlooked in the interest of maintaining ties with non-Muslims.[256] Furthermore, at least one Ḥanbalī scholar, Qāḍī al-Ḥulwānī (d. 546/1151), held that a non-Muslim blasphemer should not be killed.[257] The Yemeni jurist al-Shawkānī (d. 1250/1834) agreed with Ibn Ḥajar that such insults could be overlooked in the interest of harmonious relations.[258]

Furthermore, the intent and context of blasphemy laws would be lost in a modern application due to being superimposed onto quite different structures of law and governance. According to Intisar Rabb, geopolitics have radically shifted from the premodern period to the modern era of globalisation:[259]

> Indeed, the shift in economic power and the type of global interconnectedness and geopolitics that left Muslims politically subordinate were key factors that made the recent worldwide Danish cartoon controversy possible. These factors also

[254] ibid 192. See also al-Qudūrī, *al-Tajrīd*, 11:5910 (al-Qudūrī makes this argument with regards to the offence of sodomy).
[255] Royer, Pakistan's Blasphemy Law and Non-Muslims', 18.
[256] Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, 11:46.
[257] Quoted in Ibn Taymiyya, *al-Ṣārim al-Maslūl*, 6, for having said: 'The one who insults God and His messenger is not killed if he is a dhimmi' (*yuḥtamalu an lā yuqtala man sabba llāha wa-rasūlahu idhā kāna dhimmiyyan*).
[258] al-Shawkānī, *Nayl al-Awṭār*, 13:508.
[259] Intisar A Rabb, 'Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expression' in Anver M Emon, Mark S Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law: Searching for Common Ground?* (Oxford: OUP 2015) 164.

facilitated the international profile and outrage at cases like those of Aasiya Bibi[260] and Lina Joy[261].[262]

Hence, for most jurists, blasphemy laws articulated in classical Islamic jurisprudence were applicable 'to a Muslim society of earlier times and particular places of shared moral norms according to a narrow set of justifications'.[263] It is apparent that blasphemy developed from a specific socio-political context. It is argued that blasphemy is not a capital crime. It is neither a *ḥadd* or *qiṣāṣ* crime, rather it is purely *taʿzīr* and therefore there is a political choice of whether or not to categorise such an offence as one that deserves the death penalty.

6.12 Application of *Qiṣāṣ* and *Taʿzīr* Today

Many Muslim jurisdictions around the world incorporate *qiṣāṣ* and *taʿzīr* laws in their legal systems albeit to varying degrees as discussed below.

6.12.1 Nigeria

In *qiṣāṣ* cases, instances where the heirs of the victim pardon the offender can still result in punishment on the strength of *taʿzīr* thereby ensuring that offenders do not go scot-free. A case in point is the Nigerian Zamfara State Shariah Penal Code of 2005 which contains offences of homicide and bodily injuries.[264] Section 198 defines intentional homicide as:

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[260] Aasiya Noreen Bibi was sentenced to death in 2009 by the Pakistani courts after purportedly making derogatory statements about the Prophet Muhammad. See Jon Boone, 'Asia Bibi blasphemy case to be heard by Pakistan supreme court' *The Guardian* (London, 11 Oct 2016) <www.theguardian.com/world/2016/oct/11/asia-bibi-pakistan-blasphemy-law-supreme-court-death-sentence-salmaan-taseer> accessed 12 July 2018.

[261] Lina Joy was unable to formally convert from Islam to Christianity in Malaysia. See Ian MacKinnon, 'Malaysia rejects convert's bid to be recognised as Christian' *The Guardian* (London, 30 May 2007) <www.theguardian.com/world/2007/may/30/ianmackinnon> accessed 12 July 2018.

[262] Intisar A Rabb, 'Negotiating Speech in Islamic Law and Politics', 162.

[263] ibid 162.

[264] It must be noted that Nigeria, being a federation, does not have a uniform code for *sharīʿa*. Islamic criminal law is limited to the 11 Northern states viz: Borno, Bauchi, Jigawo, Kaduna, Kano, Katsina, Kebbi, Niger, Soloto, Yobe and Zamfara. On the history of Nigeria and influence of *sharīʿa*, see Musa Usman Abubakar, *Gender Justice in Islamic Law: Homicide and Bodily Injuries* (Oxford: Hart Publishing 2018) 169ff; Gunnar J Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam: Amsterdam University Press 2010) 58ff; Vincent O Nmeheille, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to

> Except in the circumstances mentioned in section 203, whoever being a *mukallaf* causes the death of a human being by an act: (a) with the intention of causing death or such bodily injury as is probable or likely to cause death; or (b) in a state of fight, combat, strife or aggression, which is not intrinsically likely or probable to cause death; or (c) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of bodily injury which the act was intended to cause, commits the offence of intentional homicide (*qatl al-amd*).

and Section 199 punishes the crime:

> (a) with death; or (b) where the relatives of the victim remit the punishment in (a) above, with the payment of *diyah*; or (c) where the relatives of the victim remit the punishment in (a) and (b) above, with caning of one hundred lashes and with imprisonment for a term of one year:
>
> Provided that in cases of intentional homicide by way of *ghilah* or *hirabah*, the punishment shall be with death only.

The basic principle of *qiṣāṣ* is respected in that the heirs can demand retaliation, blood money, or issue a pardon. What is more interesting is that the Mālikī school is dominant in Muslim Northern Nigeria;[265] however, Section 49 of the Zamfara Code provides an open-ended definition to who constitutes a legal heir in *qiṣāṣ* cases. A legal heir 'include[s] male agnatic heirs, daughter, full sisters, paternal aunts and consanguine sisters'. This is a clear departure from the Māliki principle which creates a hierarchy in that the right to *qiṣāṣ* belongs to the

Implement, the Constitutionality is the Question' (2004) 26(3) Human Rights Quarterly 730; Ruud Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum Books 2003) 5-12.

[265] Allan Christelow, 'Islamic Law and Judicial Practice: An Historical Perspective' (2002) 22(1) Journal of Muslim Minority Affairs 186, 188; Gunnar J Weimann, 'Judicial Practice in Islamic Criminal Law in Nigeria - A Tentative Overview' (2007) 14(2) Islamic Law and Society 240, 246.

closest adult male agnatic relatives in order of priority. Female relatives only have the right to seek redress in the absence of such relatives or where the relationship between the female and the deceased is closer compared to the male relative.[266] Furthermore, the Code does not contain any provision which, according to Mālikī *fiqh* discourse, requires the endorsement of the Head of State when a female relative chooses to exercise her right.[267]

Musa Usman Abubakar observes that:

> Drafters of the law may have been inspired by the application of the shariah in other jurisdictions operating different schools of thought. This is because the Maliki School recognises gender-based hierarchisation of a deceased's heirs, but no difference exists in the other Sunni schools…Giving heirs of the deceased the authority, regardless of gender, ensures justice to all as none of them can be said to incur more loss than his/her co-heir as a result of the demise of their relative…It also shows some progressive thought might have been put in the drafting process by viewing the Code as a legal document that will be in accord with modern form of social intercourse.[268]

In the Niger State Shariah Procedure Code 2014, the governor can exercise his prerogative of mercy or order execution if six months have elapsed post-conviction without the sentence of *qiṣāṣ* being carried out.[269] Following this, if the governor fails to take action within three months, the sentence is remitted and the offender can apply to court for remission of the sentence.[270] In terms of *qiṣāṣ*, retribution will not apply but the court can impose *diya* as it

[266] See section 6.3 for a discussion of this.
[267] ibid.
[268] Abubakar, *Gender Justice in Islamic Law*, 178.
[269] S259(1), (2) and (3).
[270] S259(4) and (5).

deems necessary.[271] In this instance, the state's rights override the individual's rights whereas the opposite should occur under classical *fiqh* doctrine on *qiṣāṣ* laws.

6.12.2 Sudan

Sudan is another country whose laws, at times, diverge from its main doctrinal school and this can be seen in *qiṣāṣ* laws where the killer and the victim belong to different faiths. In a case that reached the Sudanese Supreme Court, concerning the intentional killing of a Christian by a Muslim, the Court held that the religion of the victim was of no significance in *qiṣāṣ* cases. The Court referred to Article 130(2) of the Criminal Act 1991 whose wording is unequivocal and does not distinguish between a Muslim and a non-Muslim, treating them on a par. The Supreme Court also acknowledged the different juridical opinions amongst the four sunnī schools on this matter. In the case at hand, the Court adopted the minority opinion belonging to the Ḥanafī school in that the religion of the killer and/or victim plays no role in homicide cases.

This demonstrates that Islamic law is not a uniform entity but encompasses a plethora of interpretations and courts have, at times, embraced an eclectic approach in favour of ensuring justice and equality. Unfortunately, the opposite has also held true, such as Pakistan's blasphemy laws which wrongly categorise *sabb* as a *ḥadd* offence.

6.12.3 Pakistan

Under Section 295-C of the 1986 Pakistan Penal Code:

> Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name

[271] S260(1)(c).

of the Holy Prophet Mohammed (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Pakistan is a country whose laws follow the Ḥanafī *madhhab* yet Ismail Royer identifies that during parliamentary debate in 1986, advocates of the blasphemy provision 'based their argument on the supposed unanimity (ijma') among Islamic religious scholars that death for insulting the Prophet is a hadd (divinely fixed) punishment for everyone, regardless of religion'.[272]

In 1990, a petition was brought before the Federal Shariat Court (FSC)[273] arguing that the alternative punishment of life imprisonment was repugnant to the Qurʾān and *sunna* and should therefore be held void.[274] Rather, blasphemy 'comes within the purview of hadd and the punishment of death provided in the Holy Quran and Sunnah cannot be altered'.[275] The FSC endorsed the petition declaring, 'the penalty for the contempt of the Holy Prophet is death and nothing else. We have also noted that no one after the Holy Prophet exercised or was authorised the right of reprieve or pardon'.[276] Although the imprisonment clause still remains, FSC judgements are legally binding and therefore the court declared that such a clause 'shall cease to have effect'[277] leaving death as the only punishment. It is important to note that the FSC largely relied upon non-Ḥanafī Islamic legal treatises to promote blasphemy as a mandatory capital offence.[278]

[272] Royer, 'Pakistan's Blasphemy Law and Non-Muslims', 12. See National Assembly of Pakistan Debates, '2nd Session of 1986' (9 July 1986) Doc NAP(II)/DE-86, sections 3209-3238 available at <www.scribd.com/document/327051790/9th-July-Parliamentary-Debate-on-295C>.
[273] The Federal Shariat Court is a court of Islamic law which was set up in the 1980s. Its primary purpose is to ascertain whether laws passed by parliament are consistent with the precepts of Islam.
[274] 'Federal Shariat Court 1990: Shariat Petition No.6/L of 1987', para 2 available at <http://khatm-e-nubuwwat.org/lawyers/data/english/8/fed-shariat-court-1990.pdf>.
[275] ibid.
[276] ibid para 32.
[277] ibid para 69.
[278] Royer, 'Pakistan's Blasphemy Law and Non-Muslims', 19.

Discussing the implications of a conviction under Section 295-C, Osama Siddique and Zahra Hayat argue that:

> A grave consequence of the death penalty is the implicit sanction it grants extremist elements which invariably demand such penalty in blasphemy cases, to themselves inflict the penalty through vigilante justice if the court does not deliver according to their wishes. That acts of this nature have occurred make the barbarism of the extremists evident. While it is arguable that even in the absence of the death penalty, the bigoted attitude of the extremists would remain unaltered, it is undeniable that legal sanction for death to the accused is an added impetus to their taking the law into their own hands.[279]

This can be seen in the case of Salman Taseer. In January 2011, Governor Taseer of Punjab was assassinated by his bodyguard Mumtaz Qadri for working on a blasphemy case. Taseer intended to appeal for clemency on behalf of Asia Bibi who was on death row for the alleged crime of blasphemy. He was met with widespread criticism from the nation's religious establishments and was declared a blasphemer and apostate for his actions.[280] Qadri argued that the murder was justified because the governor was an apostate.[281] In February 2016, the state executed Qadri for Taseer's murder and '[h]is supporters subsequently turned his grave into a shrine, where they have since held rallies and honored him in other ways'.[282]

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[279] Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan-Controversial Origins, Design Defects, and Free Speech Implications' (2008) 17(2) Minnesota Journal of International Law 303, 383.

[280] 'Blasphemy Law Claims Another Life' *Dawn* (Karachi, 5 January 2011) <www.dawn.com/news/596277/blasphemy-law-claims-another-life> accessed 3 April 2018; 'Sunni Ittehad Council Warns of Anarchy if Aasia Pardoned' *Dawn* (Karachi, 26 November 2010) <www.dawn.com/news/585859/sunni-ittehad-council-warns-of-anarchy-if-asia-pardoned> accessed 3 April 2018.

[281] 'Salman Taseer Murder: Mumtaz Qadri Sentenced to Death' *BBC* (London, 1 October 2011) <www.bbc.co.uk/news/world-south-asia-15135502> accessed 3 April 2018.

[282] Royer, Pakistan's Blasphemy Law and Non-Muslims', 7. See also Asad Hashim, 'In Pakistan, A Shrine to Murder for 'Blasphemy'' *Al Jazeera* (Doha, 17 February 2017)

6.12.4 The Breadth of *Taʿzīr*

In terms of *taʿzīr*, punishments vary from country to country. Bassiouni states that the 'penalty choices for these crimes reflect cultural perspectives and social policy choices'.[283] For example, in Bangladesh possession of more than 25 grams of heroin is a death penalty offence[284] whilst in Iran, possession of drugs is a death penalty offence for recidivist offenders.[285] In Sudan, crimes such as undermining the constitutional system,[286] waging war against the state,[287] espionage,[288] terrorism-related offences,[289] and drug trafficking[290] all incur the death penalty. The diversity of punishments in different Islamic countries reveals that there is not a theological consensus on the extent of punishments for *taʿzīr* offences. What is apparent, however, is that countries are expanding *taʿzīr* crimes punishable by death contrary to the restricted application that is found in classical jurisprudence.

6.13 Conclusion

This chapter has provided the backdrop to *qiṣāṣ* and *taʿzīr* crimes in Islamic jurisprudence. *Qiṣāṣ* laws emerged as a way to tackle tribal feuding and vengeance in pre-Islamic Arabia. Although it provides for the death penalty in cases of intentional homicide, it also offers two alternative actions which are considered to be the morally superior options: compensation or

<www.aljazeera.com/indepth/features/2017/02/pakistan-shrine-murderblasphemy-170206103344830.html> accessed 3 April 2018.

[283] Bassiouni, 'Death as a Penalty in the Shari'a', 184. Ibn Farḥūn (*Tabṣira al-Hukkām*, 2:219) notes that '*taʿzīr* differs between regions and localities; because what is considered as a discretionary punishment in one region may be an honourable action in another. For example, not donning the robe in the Levant is considered noble. Another example, uncovering the head is not considered an unworthy action according to the Spaniards, whilst it is considered an offense to remove headwear in Iraq and Egypt.'

[284] Bangladesh Intoxicant Control Act of 1990, arts 9 and 19.

[285] Iran Anti-Narcotics Law of 1997, arts 5 and 9.

[286] Sudan Criminal Act of 1991, art 50.

[287] Sudan Criminal Act of 1991, art 51.

[288] Sudan Criminal Act of 1991, art 53.

[289] See eg, Terrorism Combating Act of 2000, arts 5 and 8.

[290] Sudan Narcotics Drug and Psychotropic Substance Act of 1994, arts 15, 16 and 17.

forgiveness. There needs to be a greater emphasis on the latter two options as way of embracing and preserving the right to life.

The fact that there is no consensus on the type of *taʿzīr* offence necessitating a death sentence, coupled with the discretionary nature of the offence and the objectives behind it, bolsters the claim that the death penalty for *taʿzīr* offences can be removed from current Islamic penal systems.

CHAPTER SEVEN: CONCLUDING OBSERVATIONS

7. Concluding Observations

7.1 Introduction

A number of Islamic nations retain the death penalty; however, its application is seen to vary. Some employ the use of capital punishment at alarmingly high levels (such as Iran)[1] whilst others apply it in the rarest of cases (such as Maldives).[2] Although religious justifications are often invoked by such states, the diversity of practice implies that there is a lack of consensus amongst Muslims as to the nature and scope of the death penalty and this is reflected in Islamic law.

This study has considered the effectiveness of the Universal Periodic Review as a platform for scrutinising the death penalty, and case studies have been offered on the extent to which the punishment has been scrutinised appropriately in the UPR through an analysis of Saudi Arabia's and Sudan's reviews. Moreover, it has sought to identify the extent to which the death penalty is a religious necessity in Islam by providing an intricate exposition and interpretation of Islamic law. This thesis has demonstrated, through an application of international human rights law and a theological interpretation of the *sharīʿa*, that Islamic states make erroneous claims of sovereignty and domestic criminal justice to justify the use of the punishment.

7.2 Summary of Research

Part One of this study presented the role of Islamic states in the UPR and their attitude towards the continued application of the death penalty. Chapter 2 provided the UPR framework for which the Islamic context would be reviewed and a history of Islamic state engagement with the death penalty. What emerged in Chapter 2 was a common theme of state sovereignty and internal criminal justice acting as a bulwark against a constructive discussion on the status of

[1] Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018) 6.
[2] ibid 7.

capital punishment, in the context of human rights. This attitude has endured from the debates on the drafting of the ICCPR-OP-2 in the 1980s through to the present UPR cycles. For example, during the drafting of the ICCPR-OP-2, Oman observed that abolition is 'inconsistent with the legal system of Islamic countries'[3] and Iran declared that it is the 'sovereign right of every state to choose the most appropriate penal system, taking into account its society's cultural, religious and historical characteristics'.[4]

This mindset is reflected in the UPR. Islamic retentionist states consistently receive death penalty recommendations, either to restrict its application in line with international standards, establish a moratorium, or to abolish the death penalty. However, these recommendations fail to enjoy support from such states. Furthermore, these states rarely issue any death penalty recommendations themselves, but this has known to occur in the UPR. Most notable is Egypt's recommendation to Afghanistan, Viet Nam, the Central African Republic, and Chad to, 'continue using its sovereign right to apply the death penalty as a tool of criminal justice in accordance with the proper safeguards specified under international human rights law'.[5] Going one step further, it recommended an abolitionist state, the Netherlands, to 'initiate a debate on the death penalty, with a view to reaching responsive conclusions consistent with international human rights law'.[6] Not only does this demonstrate attempts at problematising the death penalty but also has significant implications for safeguarding the right to life, especially if a state decides to implement such recommendations.

[3] UN Doc A/C.3/37/SR.67, para 45.
[4] UN Doc A/C.3/49/SR.43, para 62.
[5] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Afghanistan' (20 July 2009) UN Doc A/HRC/12/9, recommendation 95.46; UNHRC, 'Report of the Working Group on the Universal Periodic Review: Viet Nam (2 April 2014) UN Doc A/HRC/26/6, recommendation 143.114. The recommendation to the Central African Republic and Chad is worded slightly differently: 'Continue exercising its sovereign right of implementing its penal code in conformity with universally agreed human rights standards, including the application of the death penalty.'
[6] UNHRC, 'Report of the Working Group on the Universal Periodic Review: The Netherlands' (13 May 2008) UN Doc A/HRC/8/31, para 78.2.

Statements concerning cultural relativism are often used in the UPR to act as a shield for non-compliance, for example, Maldives maintained that, 'any efforts to introduce values and practices that [are] contrary to the values of Islam…[will] not be entertained'.[7] Islamic states are therefore using obscurantist attitudes towards religion as a way to avoid scrutiny of their international law obligations such as safeguarding the right to life under Article 3 UDHR and Article 6 ICCPR. An enlightened interpretation of Islam reveals cogent symmetries of the right to life in Islam and the right to life in international law.

Chapter 3's case study on Saudi Arabia analysed how the state failed to address the question of the right to life in its first UPR, in 2009, but this issue was picked up by recommending states, the OHCHR, and relevant stakeholders. This was not surprising given its pro death penalty position. It has consistently signed the *note verbale* of disassociation, for the General Assembly Resolution on the moratorium on the use of the death penalty, arguing that capital punishment is primarily a matter of criminal justice and also an important deterrent.[8]

Whilst Saudi Arabia provided a generally self-affirming national report in its UPR, submissions from the OHCHR aimed to provide a more balanced picture and scrutinised the Kingdom's position on capital punishment. The OHCHR report noted that the state was executing juveniles in contravention of the CRC and imposing the death penalty for crimes not considered the most serious. This was echoed by civil society and NGOs such as Amnesty International and Human Rights Watch. Hence, where the sovereign has chosen to remain silent and subjugate the right to life, other actors in the UPR have contributed to its advancement.

Other Member States also made recommendations on Saudi Arabia's use of the death penalty; however, a large number of these states issued vague recommendations such as, 'establish a

[7] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Maldives' (13 July 2015) UN Doc A/HRC/30/8, para 11.
[8] See eg UN Doc A/69/993.

moratorium on death penalty as a first step towards its total abolition'[9] and failed to cite the source of their recommendations (e.g. Article 3 UDHR or Article 37(a) CRC) which suggested a lack of time and investment in the UPR process. States need to go beyond mere lip-service to the UPR and provide concrete S.M.A.R.T recommendations to the state under review in order to facilitate legislative change for the preservation of life. If a recommendation is too vague it can result in insufficient actions by the state under review or actions which are contrary to the goal in mind.

In response to recommendations received on the death penalty, Saudi Arabia stated that it, 'has a clear position on capital punishment, which is considered a deterrent in Islamic Sharia. It's not simple to impose it'.[10] Its excessive and regular use of the punishment, as demonstrated by stakeholders, revealed the inaccuracy of such a statement. Amnesty International identified that Saudi Arabia imposed the death penalty for non-violent offences and noted its extensive use in defiance of international standards. The NGO's global report on death sentences and executions revealed that at least 102 individuals were executed in 2008, the year before its first UPR.[11] This polarisation of submissions is a common pattern that transpired from the UPR mechanism.

In its second review, Saudi Arabia dedicated a section in its national report to its criminal legal system and addressed the question of capital punishment. The state under review argued that the death penalty in Islam has 'no leeway for interpretation'[12] and failed to acknowledge other legitimate views; an uncompromising attitude which this research has directly challenged. Nevertheless, the incorporation of its criminal procedures into its report can be seen as an achievement of the UPR whereby, due to the negative attention received in the first cycle, the

[9] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Saudi Arabia' (4 March 2009) UN Doc A/HRC/11/23, para 65.
[10] ibid para 82.
[11] Amnesty International, *Global Report: Death Sentences and Executions 2008* (2009) 15.
[12] UNHRC, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/1: Saudi Arabia' (5 August 2013) UN Doc A/HRC/WG.6/17/SAU/1, para 36.

state under review felt it necessary to provide a justification for its death penalty laws even if the explanation was somewhat lacking.

Chapter 4 focused on the second case study of Sudan. Although its capital punishment laws are based on an interpretation of Islamic law which is one of the sources of legislation under Article 5(1) of the Interim National Constitution, Sudan failed to cite this as a justification. In fact, it did not address the right to life in either of its national reports, cycle one or two, which is consistent with the propositions of state sovereignty and domestic criminal justice. Its justification for the use of the death penalty only surfaced when confronted with state recommendations to abolish the punishment. Recommendations received on the death penalty, similar to Saudi Arabia's review, were also generic and lacked specificity.

Sudan argued that its application is consistent with the ICCPR and reserved for the most serious crimes. Providing the death penalty for crimes such as apostasy, adultery, drug trafficking, and rebellion against the state do not meet the restricted definition provided by the Human Rights Committee which confines the punishment to intentional killing. Sudan's misinterpretation of the relevant international law is further compounded by the existence of Article 6(6) of the ICCPR which states that, '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant'. Hence, invoking criminal justice policies to prevent abolition is inadequate.

Part One revealed that Islamic states are disconnected from: (1) the evolving human rights jurisprudence on the right to life, for example, failing to acknowledge the position of the Human Rights Committee and the Secretary-General reports on the death penalty; and, (2) alternative approaches in Islamic law that diminish the status of the death penalty. Nevertheless, the UPR can still be considered an effective mechanism for the delivery of human

rights protection as it allows such attitudes to be brought to the fore and respectfully challenged during the interactive dialogue and stakeholder submissions.

Since Islamic states such as Saudi Arabia tend to rely on a form of religious argument to preserve the right to apply the death penalty, the impetus for change must come from within; in other words, from the Islamic legal tradition. One way to improve Islamic state engagement with the death penalty, and strengthen submissions in the UPR, is to raise awareness of the theological underpinnings of the death penalty in Islam and the enlightened reading of the *fiqh* to promote the right to life.

This is what Part Two of this study has aimed to demonstrate. Hence, when Islamic states identify sovereignty and criminal justice and/or deterrence to maintain the death penalty, based on religious norms, the pushback from other recommending states and stakeholders must now be more complex based on this research.

Chapter 5 analysed the status of those *ḥudūd* crimes in Islamic law which warrant the death penalty through a comparative lens of the four sunnī doctrinal schools (*madhāhib*). What emerged was a reluctance by classical jurists to actually impose the punishment and the extent to which they were willing to create procedural and technical hurdles to overcome scriptural text in order to preserve the sanctity of life. This is reflected in the crime of *zinā* which places exorbitantly high evidentiary requirements thereby making a conviction, for all practical procedural purposes, not achievable. The doctrine of *shubha* provides numerous defences against a conviction of *zinā* such as the defence of mistaken identity. Furthermore, its penalty of *rajm* (death by stoning) has been contested on questionable jurisprudential grounds and therefore any definitive conclusion on the punishment is improbable.

Similarly, the offence of *liwāṭ* (sodomy) is open to different interpretations; Abū Ḥanīfa does not consider it a death penalty offence arguing that the basis for such a punishment rests on

weak scriptural evidence. If *ḥudūd* are to be narrowly construed and suspended when faced with even the slightest of doubt, then adopting a pro death penalty stance for *liwāṭ* surely goes against this.

A critique of the *ḥadd* offence of *ridda* (apostasy) revealed a more nuanced understanding of the crime in that apostasy *simpliciter* is not viewed as a capital offence but only when accompanied with military hostility and warfare against the Muslim polity. This understanding seems to have been lost with individuals being sentenced to death today for merely changing their faith such as the 2014 case of Meriam Ibrahim in Sudan. Although apostasy *simpliciter* is considered a sin in Islam it does not warrant a secular punishment.

Whilst the crime of *ḥirāba* stipulates an earthly punishment in the Qurʾān, one of which is the death penalty, it is not mandatory but depends on the severity of the crime and a number of mitigating factors hinder its application. For example, the participation of minors or the insane, the location of the crime, and most importantly repentance of the offender.

Repentance in Islam is of great significance with the Qurʾān and *ḥadīth* corpus replete with references to it. Where the Qurʾān mentions worldly punishment of offences, it is followed by a provision on repentance and reformation thereby emphasising the merciful nature of the religion. Current religious and legal discourse needs to adequately reflect the importance of repentance to protect life rather than using the criminal justice system to take it away.

El Fadl has cogently observed that:

> The real paradox of the hudud is that while in contemporary Islam they are often imagined to be the harbinger and flagship of Islamic law, in the classical tradition

> the hudud penalties were rarely applied precisely because of the space occupied by the divine in defining and redressing the crime.[13]

Under each of the *ḥudūd* crimes, we find differing criteria amongst the *madhāhib* as to what will warrant a sentence of death or whether such crimes fall under the remit of *ḥudūd*. For example, according to the Ḥanafīs, confession of *zinā* must be made four times, a woman apostate is not killed, and *liwāṭ* is not a *ḥadd* offence; all of which are contrary to the other schools. One then wonders how the death penalty can be applied with such confidence especially when claiming to act in the name of God?

Furthermore, deterrence is an oft-repeated justification for capital punishment in Islam. However, it is not based on a theological principle, rather it is an empirical question and one that has no definitive conclusion to support such claims. Islamic states should, therefore, refrain from using the deterrence argument to inform their position on the death penalty.

It is submitted that Islamic retentionist states should adopt an eclectic approach that draws upon the legal opinions of the different *madhāhib* which favour the preservation of life. For example, the opinion that sodomy and apostasy *simpliciter* are not capital crimes, pregnancy out of wedlock does not constitute *zinā*, or that repentance nullifies all *ḥudūd*. There is evidence of Islamic states diverging from their main doctrinal school to apply legal principles of other *madhāhib*, such as Pakistan and Nigeria, and this study, in a similar vein, advocates for an eclectic approach that promotes and preserves the right to life rather than curtail it.

This approach is also advocated in Chapter 6 which dealt with *qiṣāṣ* and *taʿzīr* crimes. *Qiṣāṣ* laws developed from tribal Arabia where blood feuds and vengeance were widespread, with whole tribes being slain in revenge for the murder of a single individual. Although *qiṣāṣ* gave

[13] El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Lanham: Rowman & Littlefield 2014) 1.

the victim or the victim's heir(s) the option of retribution (death of the killer), it also provided two alternatives to the retaliatory principle: *diya* (blood money) and *ʿafw* (pardon). A greater emphasis on the latter two principles is required to help define the question of clemency in Islamic states.

Taʿzīr crimes are of a discretionary nature and vary from country to country. Punishment of these offences are aimed at disciplining and reforming the offender. Hence execution defeats the objectives of *taʿzīr* and furthermore, there is no scholarly consensus as to which *taʿzīr* crime requires the death penalty. A very restricted reading of *taʿzīr bi-l-qatl* (death penalty by *taʿzīr*) is found in the *fiqh* literature, but this is also open to intra-*madhhab* polemics. There should be no bar to abolition in this category of crimes.

The interpretative plurality of the Islamic legal traditions is also reason why broad generalizations about Islam should be avoided. Ibrahim Warde, for example, notes that:

> Any religion that has survived for fourteen centuries, and that has some 1.2 billion followers spread in every part of the globe must have some measure of flexibility and diversity. Any such religion should be resistant to broad-brush generalizations. Statements to the effect that 'Islam says... ' or 'Muslims believe ... ' must include significant qualifiers and caveats.[14]

7.3 Limitations and Future Research

This research is limited to two Islamic countries of the sunnī denomination. A future research project may benefit from considering other Islamic states including those which constitute a shīʿa majority such as Iran and Iraq. There also remains considerable scope to extend the

[14] Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh: Edinburgh University Press) 13.

current research to extend to a wider analysis of Article 7 of the ICCPR to encompass all the issues that the UPR does not currently consider.

7.4 Conclusion

This study has demonstrated that at the UPR level the continued justification of the death penalty by Islamic states appears increasingly untenable, as a reasonable interpretation of Islamic law, and this is aggravated by the possibility of judicial errors and unfair trials in capital cases. The notion of Islamic law as an immutable and static ideal inclines to produce, 'legal doctrines that are far more rigid, explicitly harsh, and resistant to change than Islam's historical tradition would have it – especially in criminal law'.[15] It is pertinent to note that this study has not challenged the authority of the *sharīʿa* nor is it about challenging the unique natures of Islam; there are certain features of Islam which should remain distinct and Muslims should be able to take pride in. Rather, this study is about providing an alternative interpretation on the question of the death penalty which is found under the *fiqh* genre. *Fiqh* is a man-made endeavour which is configured to varying degrees on, 'epistemological hurdles and the elaboration of alternative viewpoints'.[16]

It is these alternative viewpoints on the status of the death penalty in Islam that must be given a platform in the international community, i.e. at the UPR, in order to effect real change. For example, apostasy, blasphemy, and homosexuality, whilst prohibited in the *sharīʿa*, are not capital crimes deserving of death. Peer reviewing states and stakeholders can use the arguments made in this study to specifically challenge the assertion that capital punishment is mandated

[15] Intisar A Rabb, *Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law* (New York: CUP 2015) 321.
[16] Mona Siddiqui, *The Good Muslim: Reflections on Classical Islamic Law and Theology* (Cambridge: CUP 2012) 6.

by Islam and utilise the UPR as a forum for such discussion, for example during the interactive dialogue and in the stakeholder submissions.

Islam does not teach that the state *must* execute those guilty of serious crimes and neither does it *insist* on applying the death penalty (emphasis added). Whilst Muslims cannot deny the legitimacy of the death penalty in Islam, in principle, an enlightened reading of the faith demonstrates that it can contribute to the global promotion of flourishing lives and the protection of the right to life by the non-application of the punishment. The death penalty precludes the benefit of amnesty, pardon, or commutation of sentence. An execution is irreversible and an erroneous guilty verdict, whilst possible to be corrected on the record, cannot bring the person executed back to life.[17] The finality of the death penalty is recognised in Islam by the Prophet Muhammad's injunction, which was adapted into a legal maxim, that any doubt must suspend the application of the *ḥudūd*. Furthermore, he advocated that, 'it is better for the authority to err in mercy than to err in punishment'.[18]

Islam is a universal religion addressed to all of humanity and not a specific socio-cultural group hence Islamic states must evaluate their actions in light of how they are viewed by their people and the rest of the world. This is of great significance as:

> A universal religion and a merciful faith must be accessible and accountable to others so that it can remain pertinent to humanity at large. A universal religion that is neither accessible nor accountable to humanity at large becomes like a private and closed club with bylaws and practices that make sense only to its members. Even worse, a merciful faith whose mercifulness is not comprehensible to others

[17] Working Group on the Death Penalty in Africa, 'Study on the Question of the Death Penalty in Africa' (The Gambia: Baobab Printers) 39.
[18] al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, no. 1424.

> or whose logic of mercy is not understood by others becomes self-serving and ultimately arrogant.[19]

This study has revealed that the above generic observations of a self-serving and closed faith are demonstrated in the question of the death penalty. Using repentance, forgiveness, and doubt as barriers to the enforcement of capital punishment will restrain the power of the state to act as God's executor. Acknowledging that Islam is founded upon certain universal values such as dignity, mercy, and justice will reduce state reliance on using religion to evade scrutiny on their right to life obligations and also challenge their status as the protectors of an Islamic authenticity.

[19] El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age*, 187.

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