

**Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – the Right to life**

The Human Rights Committee

UNOG-OHCHR

CH-1211 Geneva 10

Switzerland

6th October 2017

Submission by Professor Jon Yorke[[1]](#footnote-1) and Miss Amna Nazir[[2]](#footnote-2) of the BCU Centre for Human Rights, School of Law, Birmingham City University, UK

1. **General Remarks**
2. This submission provides observations and recommendations for an exegesis of *shari’a law* that respectfully and faithfully allows for the abandoning of the death penalty by Islamic theocracies. An Islamic hermeneutics derived from the central theological pillars of peace, mercy, love and benevolence, can demonstrate an enlightened view for the denunciation of this punishment as an expression of the right to life in the Muslim world.
3. It is acknowledged and affirmed that the religion of Islam has provided significant contributions for the fostering and flourishing of life,[[3]](#footnote-3) and the many manifestations of the promotion of the right to life worldwide. The removal of the death penalty from Islamic criminal justice systems would be a further commendable example of Islam’s contributions to the fostering and flourishing of life and the right to life.
4. **Part II** of this submission will present relevant references to the *Qur’an* and *Hadith* to provide a reading of how the death penalty is: (a) incompatible with the prominence of beneficence; (b) that *shari’a law’s* high evidentiary standards demonstrate a preference for promoting mercy over retribution; (c) the capital judicial process cannot guarantee that innocent Muslims will not be executed; (d) the death penalty can be seen to have a brutalizing effect upon Muslim societies, and; (e) there are alternative punishments which demonstrates the disutility of the death penalty.
5. These principles can be used to inspire theological reasoning to render the death penalty incompatible with the central tenets within Islam of peace, mercy, and love.
6. **Part III** of this submission will focus on relevant international law which relates to the Islamic exegetical discussion in **Part II**. It will place the exegesis in context with the General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, with particular emphasis on: Section IV Imposition of the Death Penalty.
7. Recommendations are offered in **Part III** for the editing of the text of General Comment No. 36.
8. To provide a respectful transparency of the exegesis of *shari’a law*, an **Appendix** is included of the Arabic translation of the *Qur’an* and *Hadith* scriptures cited in this submission.

1. **The Religion of Islam, the Death Penalty, and Procedural Safeguards within *Shari’a Law***
   1. ***The Foundation of Shari’a Law and Jurisprudence***
2. The *shari’a*, Islamic law, is based upon two primary sources; the *Qur’an* (recording the spoken word of Allah and constitutes the principle teachings of the *shari’a*) and the *Sunna* (which includes the *Hadith* that records the sayings and actions of the Prophet Muhammad). These two sources are utilised with *fiqh* (Islamic jurisprudence or the “science of law” [[4]](#footnote-4)) which comprises the rulings of Muslim scholars.[[5]](#footnote-5)
3. The *shari’a* requires interpretation. Several schools of Islamic jurisprudence apply the *shari’a* using *ilm usul al-fiqh* (“the science of the principles of the interpretation of the law”[[6]](#footnote-6)) and these interpretive discourses have developed into schools of thought known as *Madhahib.[[7]](#footnote-7)*  It is commonly stated that one of the most significant doctrinal questions for the *Madhahib* is whether the *Qur’an* and *Sunna* are to eternally be applied literally from their historical context or whether the intent and purpose of the text can evolve to accommodate contemporary political, legal, economic, scientific, and social circumstances.
4. The *shari’a* categorises penal law into three types of crime: *hudud*, *qisas* and *ta’zir*.[[8]](#footnote-8)
5. *Hudud* (singular *hadd*) literally means “limits” which have been defined by jurists as offenses whose punishments are fixed and are God’s right.[[9]](#footnote-9)
6. The *Qur’an* discuses “*hudud Allah*” (limits of God) cautioning Muslims against transgressing them or approaching them.[[10]](#footnote-10) *Hudud* in the context of designating particular crimes do not appear in the *Qur’an*, but rather have been characterised by the juristic formulations of *fiqh*. Ibn Taymiyyah (d. 728H/1328AD) noted that the categorisation of crimes, their definitions and corresponding punishments, were the result of human reasoning rather than scripture.[[11]](#footnote-11) The contemporary Islamic scholar, Jonathan Brown, has argued that “early Muslim jurists probably inherited the concept of a category of crimes called *Hudud* from references to it made by the Prophet (peace be upon him) and the early generations of Muslims.”[[12]](#footnote-12)
7. There are five *hudud* offences: adultery/fornication (*zina*), accusing someone of fornication (*qadhf*), consuming intoxicants (*shurb alkhamr*), some types of theft (*sariqa*), and armed robbery or banditry (*ḥiraba*). Two remain without consensus amongst Muslim jurists: apostasy (*ridda*) and insurrection (*baghi*).[[13]](#footnote-13)
8. Of these *hudud* offences, three have been previously interpreted to incur the death penalty. They are *zina*, *ridda* and *hiraba*.[[14]](#footnote-14)
9. *Qesas* crimes follow the *lex talionic* principle and cover intentional murder, voluntary killing, involuntary killing, intentional physical injury, and unintentional physical injury.[[15]](#footnote-15)
10. Of these, it is the crime of intentional murder that carries the death penalty.[[16]](#footnote-16)
    1. ***The Capital Judicial Process***
       1. ***Sexual Offences (zina)*** 
          1. *Zina* is defined in the *shari’a* as illicit sexual intercourse by persons of full legal competence and involving actual penetration.[[17]](#footnote-17) This encompasses both fornication and adultery. However, it is adultery which carries the death penalty whilst fornication incurs 100 lashes.[[18]](#footnote-18)
          2. There must not be the existence of doubt (*shubha*) as to the context of intercourse in the bonds of marriage. If a man claims that he is married to the woman he is accused of committing *zina* with (provided the woman is not married to anybody else), then he is vindicated. This is due to the possibility of doubt arising as to whether the couple in question were married or not under Islamic law. Even if a man claims that due to the darkness provided by the cover of night, he assumed that the woman in question was his wife, the *hadd* punishment will be waived.[[19]](#footnote-19)
          3. To prove *zina*, four just (*adl*) male eyewitnesses must testify in the same court session in great detail and clear language to the alleged crime, in order to avoid doubt and attempt to create legal certainty.[[20]](#footnote-20)
          4. Primary importance is given to oral testimony (*shahada*) as it is the most authoritative of evidences and thus a prerequisite in *hudud* cases.[[21]](#footnote-21) The *shahada* must be based on ‘certain knowledge’ (*ilm al-yaqin*) which involves seeing and hearing the incident in question. All testimony reliant on probability and/or conjecture is inadmissible.[[22]](#footnote-22)
          5. In *zina* cases, each of the four witness must have seen the act with their own eyes and it must be to such an extent that they are able to say that they saw “his penis enter into her vagina like the Kohl stick entering the Kohl container.”[[23]](#footnote-23) For such an event to occur, it would require public intercourse in front of a group of people at a very close proximity. As a strict criteria of the evidence, the witnesses must have had an unimpaired view of the act.
          6. For the case to be heard by the judge, the (male) witness must meet the necessary evidentiary criteria otherwise his testimony is rejected. He must be able to clearly, and accurately, describe the event. He must not be deaf, mute or incompetent. A blind person’s testimony is inadmissible.[[24]](#footnote-24) There must be no conflict of interest (*tuhma*) involved and the witnesses must all have a trustworthy and impeccable character. Each witness must not indulge in sins.[[25]](#footnote-25)
          7. The testimony must be considered inadmissible if the witness is found to lack any of the above characteristics. The judgemust dismiss the charges if the witness is found to lack credibility.[[26]](#footnote-26)
          8. However, if a judgment has already been made the implementation of the *hadd* penalty should be suspended on appeal due to the possibility of doubt existing.[[27]](#footnote-27)
          9. The confession of the accused is a significant piece of evidence. It is one of the *prima facie* sources for establishing criminal liability and follows the Islamic legal maxim: *al-Mar’u mu’aakhadh bi ’iqraarihi* (one is held responsible for his confession).[[28]](#footnote-28) In the case of *zina* the confession must be made four separate times on four separate occasions.
          10. There are a number of conditions for what is deemed to be a valid confession. For example, the accused must be *baligh* (mature), competent, and the confession must be presented without any form of coercion or perceived necessity.[[29]](#footnote-29)
          11. The judge is expected to actively investigate the confession to determine whether there exists any extenuating circumstances so as to be able to 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 illustrated in the *hadith* where a man named Ma’iz confessed to committing adultery but the Prophet offered the chance to recant his confession and so he turned away from Ma’iz repeatedly. A similar incident also occurred with a woman from the tribe of Ghamidi.[[30]](#footnote-30)
          12. According to the majority of Muslim scholars, pregnancy out of wedlock does not constitute an automatic confession of *zina*.[[31]](#footnote-31) Jurists do not deem it as 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 *hadd* punishmentfor the accused to claim that she was raped.[[32]](#footnote-32)
          13. The argument that external signs such as pregnancy are not considered conclusive proof of *zina* 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.”[[33]](#footnote-33)
          14. Furthermore it can be deemed that a sufficient defence against the crime of *zina* is allowed when it is claimed that in pregnancy the period of gestation can extend up to five years.[[34]](#footnote-34) Jonathan Brown has argued:

[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 Hudud, they were accepted.[[35]](#footnote-35)

* + - 1. The significance of the discretion provided for “ambiguities” in ruling on sexual offenses illustrates the historical theological affirmation for the inherent *hudud* restriction and thus the rarity of implementing *hudud* punishments.
      2. 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 *hadith* wherein the prophet stated:

[w]ard off the Hudud 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.[[36]](#footnote-36)

* + - 1. Muslim scholars have translated this hadith into the well-known legal principle of “ward off the hudud by ambiguities (*shubuhat*).”[[37]](#footnote-37)
    1. ***Changing Religion or Choosing Not to Believe in a Religion***
       - 1. The *Qur’an’s* emphasis on freedom of religion[[38]](#footnote-38) is *prima facie* incompatible with a contemporary criminalisation of apostasy (*ridda*).
         2. Not a single reliable instance is reported where the Prophet executed anyone for apostasy.[[39]](#footnote-39)
         3. Some scholars have argued the “apostasy” condemned in *hadith* literature is analogous to the committing of high treason, thus differentiating between “political apostasy” and “religious apostasy”.[[40]](#footnote-40) Early Muslim jurists analysing apostasy wanted to ensure the specific categorising of political apostasy and its ramifications for maintaining political order. Notable Hanafi jurists such as al-Sarakhsi (d. 490H/1096), Ibn Humam (d. 861H/1457) and Ibn al-Sa’ati (d. 694H/1295) discussed apostasy in their writings on interstate politics (*kitab al-siyar*) and not criminal punishments.[[41]](#footnote-41) For example, Ibn Humam stated:

[i]t 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 *he who comes with war* and is a man; this is because the Prophet prohibited killing women (emphasis added).[[42]](#footnote-42)

* + - * 1. The famous jurist al-Sarakhsi considered leaving Islam as an issue “between the human being and his Lord” with punishment stipulated in the hereafter.[[43]](#footnote-43) Other prominent Islamic jurists such as Ibrahim al-Nakhai (d. 96H/715), Sufyan al-Thawri (d. 161H/778), Maliki jurist Abu al-Walid al-Baji (d. 474H/1081) and Hanbali jurist Ibn Taymiyyah (d. 728H/1328) have also held the position that apostasy does not carry the legal punishment of death.[[44]](#footnote-44)
        2. The way in which Muslim jurists have described apostasy showed that it was understood as a threat to political order. Some jurists have considered apostasy to fall within the remit of *ta’zir* (see ***section v.*** below).[[45]](#footnote-45)
        3. As is seen below with the crime of *hirabah*, there is significant scope for the application of punishment for political apostasy to be arbitrarily applied, and for political opposition members to be unfairly tried and cruelly put to death.
        4. Furthermore, there is no evidence that the death penalty is a deterrent for either religious apostasy or political apostasy. It is thus an ineffective implementation of *hadd* punishment. The death penalty does not contribute to maintaining nor improving the social and political lives of Muslims. In many instances it will have an adverse effect. It will serve to brutalise Muslim societies and the sentiments of the people.
    1. ***Waging War Against God (Hirabah)*** 
       - 1. There is no clear definition of *hirabah*, but it focuses upon acts constitutive of waging war against God. Early Islamic jurisprudence included acts of mass murder, war crimes and deliberate extreme violence resulting in death. Unfortunately, the definition of *hirabah* has been broadened and manipulated by a number of Islamic governments in order to silence political opposition.[[46]](#footnote-46)
         2. The *Qur’anic* verse offers more than one punishment for *hirabah* in that “they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from land.”[[47]](#footnote-47)
         3. Many Islamic jurists have argued that the death penalty is therefore not mandatory for this offence. It is discretionary as there is more than one punishment that can be administered depending on the circumstances and the severity of the offence.[[48]](#footnote-48)
         4. It is possible that the application of such discretion for *hirabah* may lead to the capital judicial system becoming arbitrarily applied. This is because in factually similar cases, some Muslim defendants will be executed but some will be allowed to have their life to remain.
         5. It is affirmed that the enlightened application of the *sharia* reveals that judicial flexibility in this context should be applied for the exercise of discretion in favour of preserving life. This is the beneficent and commendable application of Islamic faith.
    2. ***The Imposition of Death as Punishment should Reside within the Monopoly of the State***

1. *Qesas* are those instances concerning the private treatment of crimes against the person, including the infliction of various examples of physical harm through to the act of committing homicide.[[49]](#footnote-49)
2. For these crimes, the victim or the victim’s family (if a homicide has occurred) has in theory the *prima facie* right to impose upon the criminal the same harm that was inflicted upon them, including up to death.[[50]](#footnote-50)
3. This is a form of quantitative retribution which is expressed in the *Qur’an* as “[a]nd We ordain 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.”[[51]](#footnote-51)
4. However, the *Qur’an* also provides victim forgiveness and restitution as alternatives to the retaliatory principle.[[52]](#footnote-52)
5. For *Qesas* crimes, *Diyya* may be applied which provides for victim compensation as an alternative to the administration of quantitative retribution. Muhammad Moheiddin Awad has identified the appropriateness of the primacy of *Diyya* over retribution as it represents the preferable choice within the overall promotion of peace in Islam, and appropriately reflects the fundamental attributes of the beneficent and exonerating nature of Allah.[[53]](#footnote-53)
6. It is argued that there is a potential for the application of *Diyya* to lead to an arbitrary circumstance that will render an unfairness in the punishment process. Some Muslims will be allowed to pay compensation whist others will be executed.
7. It is recommended that in the promotion of peace, love, mercy and beneficence, that Islamic national legislation identifies the prominence of *Diyya* to be utilised to nullify the application of the death penalty.
   * + 1. ***The Extra-Shari’a Punishment derived from Ta’zir Offences*** 
          1. *Ta’zir* crimes are those which are formulated by Islamic theocracies through the democratic processes of state legislatures.[[54]](#footnote-54)
          2. Punishment for these crimes are not explicitly mandated within the *shari’a*, for example, those Islamic countries which apply the death penalty for drug offences – such as in Iran.[[55]](#footnote-55) M. Cherif Bassiouni states that the “penalty choices for these crimes reflect cultural perspectives and social policy choices.”[[56]](#footnote-56)
          3. The *shari’a* does not affirm that the death penalty must be applied for *ta’zir* crimes.
          4. The diversity of punishments in different Islamic countries reveals that there is not a theological consensus on the extent of punishments for *ta’zir* offences.
          5. There is no theological impediment, and thus there should not be any adverse theological implications, for removing the death penalty for all *ta’zir* offences.
       2. ***The Possibility of Executing Innocent Muslims***

* + - * 1. It is very likely in the initiation of an Islamic capital judicial system that innocent Muslims will be sentenced to death and executed.
        2. The main reason for the possibility of innocent people being sentenced and executed, is that in many instances there is an incorrect perception that a fair capital judicial process can be created to ensure that there will always be safe convictions with the appropriate verdicts of guilt or innocence.
        3. By way of example was the wrongful conviction and miscarriage of justice in the case of Laila Bint Abdul Muttalib Basim in 2015. A video recording demonstrated that Laila was dragged by four police officers through the streets in Mecca as she shouted, “I did not kill. I did not kill.”[[57]](#footnote-57) But she received a torturous and inhumane execution as she was beheaded following three sword lashes.
        4. The execution of innocent Muslims will inflict both psychological and physiological trauma on Muslim families, and also cause inhuman treatment by the state on the families of those executed. When innocent Muslims are executed, the criminal justice system itself is creating new victims of state violence which is completely against the inherent attributes of peace and mercy within the *shari’a.*
        5. The possibility of innocent Muslims being executed is a clear example of how the death penalty can inflict a grave injustice, and have a brutalising effect, upon Islamic communities.
      1. ***The Prominence of Mercy and Repentance*** 
         1. The provision for a believer’s repentance in *shari’a law* cannot be overstated.
         2. In all four instances where the *Qur’an* stipulates a specified punishment for an offence, it is followed with a provision for repentance and reformation which is a notably consistent characteristic of the merciful penological philosophy of the *Qur’an*.[[58]](#footnote-58) According to Mohammad Hashim Kamali, this has not been adequately reflected in juristic doctrine which

pays undivided attention to the enforcement of punishment so much so that once the offender has been convicted of a *hadd* offence repentance is of no account and no one has the authority to pardon him. [[59]](#footnote-59)

* + - * 1. The application of the death penalty makes it impossible for a criminal to repent of their crimes. The cognitive process to change an opinion and belief can only happen in this life and not in the afterlife.[[60]](#footnote-60) It is a principle of Islamic theology that in *hudud* crimes there should be an opportunity for repentance to be demonstrated, thus bringing the Muslim back into a reconciled relationship with Allah and his or her fellow Muslims. Bassiouni argues:

[r]epentance 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.[[61]](#footnote-61)

* + - 1. ***The Abolition of the Death Penalty as a Faithful Expression of Islam*** 
         1. The application of Islamic criminal law to reflect the evolution of social and political policies is evidenced by the actions of the prophet and the *Khulafa Rashidun* (rightly guided caliphs) who considered the prevailing conditions with respect to enforcing *hudud*. The *hudud* were suspended during times of military engagement with enemy forces to counter the risk of desertion, disunity and military weakness. The Caliph Umar al-Khattab also suspended the *hadd* of theft (*sariqa*) during the period of famine as it would be unjust to enforce such punishments in these circumstances.[[62]](#footnote-62)
         2. This illustrates the ability of Islam to consider and evaluate a social injustice and not to apply retributive criminal law in those social injustice circumstances.
         3. The evolution of modern society with respect to imposing *hudud*, has been addressed by a number of scholars such as Muhammad al-Ghazali (d. 505H/1111AD),[[63]](#footnote-63) Mustafa al-Zarqa,[[64]](#footnote-64) Yusuf al-Qaradawi,[[65]](#footnote-65) and more recently, Tariq Ramadan.[[66]](#footnote-66) Zarqa, relying on the legal maxim that “necessity makes the unlawful permissible,” argues that current social realities are inappropriate for the enforcement of *hudud*.[[67]](#footnote-67) Consistent with this reasoning, Ramadan states that:

political systems and the state of the majority Muslim societies do not guarantee a just and equal treatment of individuals before the law, [therefore] it is our moral obligation and religious responsibility to demand for the immediate suspension of the application of the *hudud* which is inaccurately accepted as an application of “Islamic *sharia.*”[[68]](#footnote-68)

* + - * 1. There can be no justification for a particular punishment without supplying the right to a fair trial following *shari’a* principles. To bypass the protective guidelines and evidentiary safeguards laid down in *shari’a law*, would be to initiate an arbitrary and cruel criminal justice system.
        2. In the context of a right to a fair trial and providing equitable circumstances and fairness, if those safeguards were applied, the ability to justifiably administer the death penalty would be severely restricted, and perhaps be practically impossible.
        3. There is a clear social, political and criminal justice problem in that the capital judicial system is inherently unfair in all jurisdictions in the world, including Islamic states. The right to life cannot be eliminated within such an unfair and arbitrary criminal justice process.
        4. In agreement with Jonathan 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 Hudud are valid in *theory*. The actual implementation of the Hudud comes at the discretion of the ruler/state and is not necessary for people to be Muslim.[[69]](#footnote-69)

* + - * 1. Therefore, it is only necessary for Muslims to *believe* that the death penalty exists in *theory* in the *shari’a*, but it is not imperative for Muslims to *believe* that the death penalty must be administered in our modern-day society.
        2. It is an acceptable expression of faith for a Muslim to be against the death penalty because, as demonstrated, the punishment cannot be practically applied fairly, and it is thus a manifestation of a cruel and harsh criminal justice policy.
        3. Considering the enlightened exegesis of the *fiqh* it is a more perfect expression of faith to promote a modern day criminal justice system that does not take away the life of a Muslim brother or sister.
        4. So the enlightened expression of faith is for the removal of the death penalty from retentionist Islamic states. 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 abolishing the death penalty.

1. **General Comment No. 36 on article 6 of the ICCPR: Editorial Recommendations** 
   * + - 1. It is affirmed by the Human Rights Committee that the right to life is the “supreme right from which no derogation is permitted,”[[70]](#footnote-70) that the right “should not be interpreted narrowly,”[[71]](#footnote-71) “no one shall be arbitrarily deprived of his life,”[[72]](#footnote-72) and where the death penalty is applied it should only be administered following the observance of minimum standards.[[73]](#footnote-73) These include due process of law and fair trial guarantees,[[74]](#footnote-74) and that no execution method should constitute torture or cruel, inhuman or degrading treatment or punishment.[[75]](#footnote-75)
         2. These are guiding thresholds for the interpretation of the right to life when considering the General Comment No. 36, Section IV: Imposition of the death penalty, and how it can be adopted to remove the use of the punishment as an application of enlightened Islamic theological reasoning.
         3. Section IV, Paragraphs 38-40, consider the interpretation of the application of the death penalty for the “most serious crimes.”
         4. The theological reasoning for the renunciation of the death penalty within Islam was provided in **Part II** above.
         5. Below are recommendations for amendments to the General Comment No. 36.
   1. ***Apostasy (Ridda)***
2. It is submitted that the *hudud* offence of *ridda* constitutes different aspects of “political apostasy” which are grounded in hermeneutical observations concerning the apostate person who is leaving Islam for the military/militia benefit of its enemies.
3. There is not a unanimously acceptable *hudud* punishment for “religious apostasy.”
4. Neither political apostasy nor religious apostasy is a crime in international law.
5. Freedom of religion is protected under ICCPR article 18 and the General Comment No. 22 states that article 18 “does not permit any limitations whatsoever on the freedom of thought and conscience or to have or adopt a religion or belief of one’s choice.”[[76]](#footnote-76) The Special Rapporteur on the Freedom of Religion or Belief affirmed the “absolute protections covering the right to have, adopt or change one’s religion or belief (or have any beliefs at all) under international human rights law.”[[77]](#footnote-77)
6. The criminalisation of apostasy in this context and if found guilty, the imposition of a death penalty, is a clear violation of the freedom of religion and the right to life under international law.
7. It is submitted that due to the theological clarity required on the varying aspects of “apostasy” that it is necessary to strengthen the categorisation to make it clear that the death penalty for “any form of apostasy” is a violation of the right to life.
8. It is therefore recommended that the words “any form of” be inserted so the General Comment No. 36, paragraph 40, reads: “any form of apostasy…”

* 1. ***Blasphemy (sabb)***
     + - 1. The death penalty for blasphemy is based upon questionable jurisprudential grounds due to the variance and ambiguity in the source-texts of Islamic law.[[78]](#footnote-78)
         2. The *Qur’an* does not explicitly stipulate the death penalty for the act of blasphemy except in the case of those who wage war against Allah or the Prophet, where blasphemy is interpreted within a wider definition to include causing corruption or disorder in the land.[[79]](#footnote-79)
         3. Consequently, some Islamic jurists equate blasphemy with apostasy. This interpretation ties the offence to the punishment of death. However, there is a more nuanced understanding of apostasy in Islamic law which entails military hostility against the Muslim polity rather than mere disbelief.[[80]](#footnote-80)
         4. The creation of the crime of blasphemy within many Islamic theocratic states is not a *hadd* or *qesas* crime, it is purely *ta’zir* and therefore there is a political choice of whether or not to categorise such an offence as one that deserves the death penalty.
         5. It is therefore recommended that the word “blasphemy” be inserted so the General Comment No. 36, paragraph 40, reads: “(any form of) apostasy, blasphemy…”
  2. ***Sexual Immorality (Zina)***

1. The *hudud* offence of *zina* (sexual immorality) requires strict evidentiary standards creating an exorbitantly high burden for the prosecutor to meet. It includes the burden of proving the hermeneutical and exegetical aspects of the four confessions from the accused,[[81]](#footnote-81) and for the theological classification of the character of the four witnesses to the purported crime.[[82]](#footnote-82)
2. The acceptance of ambiguities within the Islamic criminal justice system should be implemented to waive the *hadd* for *zina* offences.
3. It is argued that the *Hadith* literature has supplied high evidentiary standards to demonstrate that fair trials within *shari’a law* affirms the elevation of the inherent quality of mercy and beneficence*.*
4. The theological motivation is to align the criminal justice context with mercy and not retribution, and thus a fair trial is one that will side with mercy.
5. Sexual immorality is not a crime in international law and trials which administer the death penalty for sexual immorality are in conflict with not only ICCPR article 6, but also with the article 7 prohibition on inhuman punishment, and the due process and fair trials provisions with the ICCPR article 14.[[83]](#footnote-83)
6. It is therefore recommended that the words “sexual immortality” be inserted so the General Comment No. 36, paragraph 40, reads: “including adultery, sexual immorality…”

***d. Drug Offences***

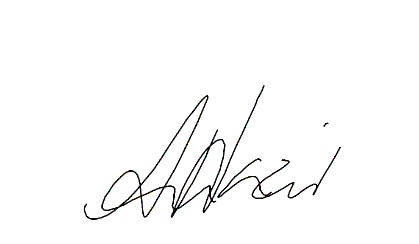
1. There has been a significant use of the death penalty for drug offences in many Islamic countries.[[84]](#footnote-84)
2. It is well accepted within UN human rights bodies that drug offences do not constitute the “most serious crimes” for the restriction of the scope of the punishment in ICCPR Article 6(2).
3. The UN Human Rights Committee concluded that drug trafficking was an offence that “cannot be characterized as the most serious.”[[85]](#footnote-85) This view has been supported by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,[[86]](#footnote-86) and the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[[87]](#footnote-87)
4. As the death penalty for drug crimes is a *ta’zir* punishment, it is submitted that this issue be identified in General Comment No. 36, paragraph 39. The text should include a specific recognition that drug offences can be held to be committed within secular positive law contexts and also in Islamic theological contexts.
5. There should be a recognition that the death penalty for drug offences is not mandated within the *Qu’ran* and *Hadith*, but that it is legitimised through questionable theo-political frameworks.
6. The death penalty for drug offences is therefore politically motivated as a crime control model that is ineffective and not a religious punitive mandate provided within the *shari’a*.
7. It is therefore recommended that the theological foundation for drug offences be nullified by inserting “secular and religious” so paragraph 39 reads: “drug offences for secular and religious crimes…”
8. ***No Crime or Punishment without (International) Law***
9. It is submitted that there is an overarching international jurisprudential reason for the above amendment proposals to General Comment No. 36. These are derived from the procedural law principles found in the legal maxims of: *nulla crimen sine lege[[88]](#footnote-88)* (no crime without law) and *nulla poena sine lege* (no punishment without law).[[89]](#footnote-89)
10. The ICCPR article 15 states, “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”
11. It is submitted that neither apostasy, sexual immorality, blasphemy, nor drug offences, are crimes punishable with the death penalty in international law. The application of the punishment for those offences would not only be a violation of the right to life under ICCPR article 6, but also a violation of ICCPR article 15’s prohibition against guilt without international law.
12. **Conclusion: The Valuable Contribution of Islam to the Right to Life**
13. The religion of Islam has made many significant contributions to enhance the central tenets of modern civilisation, and thus modern life, and consequently the right to life.
14. It is well known that across the Islamic world and within many secular countries there are Islamic libraries which hold valuable collections which contribute to the studies of history, philosophy, mathematics, and science and medicine. These have both direct and indirect relevance for the fostering of a flourishing life and the preservation of the right to life.
15. Islam demonstrates rich benevolence to the world in many areas, including advances in medical science and mathematics. This social change for the improvement of the quality of life in the world should be extended to include a benevolence which aims to change the harsh and cruel law of Islamic capital judicial systems.
16. Consistent with this is the evolution of the theological interpretation which protects life rather than uses the criminal justice process to take it away. Islamic communities will significantly benefit from criminal justice policies that promote the flourishing of life and not from punishment that brutalises society, such as the death penalty.
17. No capital judicial system in any jurisdiction can guarantee fair trials and the immunity of arbitrary application. Hence the important *shari’a* principle of ambiguities to prevent the application of the *hudud* should be applied. The presence of ambiguities reveals that innocent Muslims may be executed and it cannot therefore be guaranteed that Muslims will receive a fair trial in capital cases.
18. It is of utmost theological significance to clarify what constitutes acceptable faith within Islam.
19. It is argued that it is an acceptable application of faith to *believe* that in theory *shari’a law* provides for the possibility of the death penalty, but that in *practice* it is for the discretion of the state; perhaps as a principle of *proprio motu*.[[90]](#footnote-90) If that discretion is informed by the understanding that no capital judicial process can always be fair, that it will have arbitrary attributes, that it is understood that the implementation of executions are cruel, and that society is brutalised by the death penalty, then it is an acceptable application of Islamic faith to conclude that the death penalty is incompatible with the foundational pillars of belief for promoting peace, love, mercy and benevolence.
20. It is a commendable application of faith for Muslims to promote the abolition of the death penalty as a demonstration of peace, love, mercy and benevolence to the world.
21. The abolition of the death penalty would signal a very significant step in the promotion of human dignity and the right to life of people within Islamic countries.
22. There is a growing understanding with the UN human rights bodies “that the death penalty [is] incompatible with Islam.”[[91]](#footnote-91) Hence, the General Comment No. 36 should be amended to reflect this understanding as a manifestation of acceptable faith in the religion, but also as a principle of international law.

**Respectfully submitted by:**



**Professor Jon Yorke**

Professor of Human Rights and Director of the BCU Centre for Human Rights



**Miss Amna Nazir**PhD Candidate and UN Policy Officer of the BCU Centre for Human Rights

**Appendix**

**Selected verses (*ayah*) of the *Qur’an* and *Hadith*.**

**The Possibility of the Death Penalty**

**Sura Al-Isra, ayah 33**

وَلَا تَقْتُلُوا النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ ۗ وَمَنْ قُتِلَ مَظْلُومًا فَقَدْ جَعَلْنَا لِوَلِيِّهِ سُلْطَانًا فَلَا يُسْرِفْ في الْقَتْلِ ۖ إِنَّهُ كَانَ مَنْصُورًا {٣٣}

(Translation: *Sahih International*)

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].

**Non-Mandatory Death Penalty in Hiraba Crimes**

**Sura Ma’idah, ayah 33**

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ۚ ذَٰلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا ۖ وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيمٌ {٣٣}

(Translation: *Sahih International*)

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

**No Death Penalty for Zina crimes of Unmarried People**

**Surah Nur, ayah 2**

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ ۖ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۖ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ {٢}

(Translation: *Sahih International*)

The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.

**No Compulsion in Islam**

**Surah al-Baqara, ayah 256**

لَا إِكْرَاهَ فِي الدِّينِ ۖ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ ۚ فَمَنْ يَكْفُرْ بِالطَّاغُوتِ وَيُؤْمِنْ بِاللَّهِ فَقَدِ اسْتَمْسَكَ بِالْعُرْوَةِ الْوُثْقَىٰ لَا انْفِصَامَ لَهَا ۗ وَاللَّهُ سَمِيعٌ عَلِيمٌ {٢٥٦}

(Translation: *Sahih International*)

There shall be no compulsion in [acceptance of] the religion. The right course has become clear from the wrong. So whoever disbelieves in Taghut and believes in Allah has grasped the most trustworthy handhold with no break in it. And Allah is Hearing and Knowing.

**Compensation (Qisas) for Murder**

**Surah Al-Baqarah, ayah 178.**

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى ۖ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنْثَىٰ بِالْأُنْثَىٰ ۚ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۗ ذَٰلِكَ تَخْفِيفٌ مِنْ رَبِّكُمْ وَرَحْمَةٌ ۗ فَمَنِ اعْتَدَىٰ بَعْدَ ذَٰلِكَ فَلَهُ عَذَابٌ أَلِيمٌ {١٧٨}

(Translation: *Sahih International*)

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.

**Surah Ma’idah, ayah 45**

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ ۚ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ ۚ وَمَنْ لَمْ يَحْكُمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ {٤٥}

(Translation: *Sahih International*)

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.

**Surah Nisa, ayah 92**

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً ۚ وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ إِلَّا أَنْ يَصَّدَّقُوا ۚ فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ ۖ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَىٰ أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ ۖ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ ۗ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا {٩٢}

(Translation: *Sahih International*)

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.

**Repentance and the Forgiving and Merciful Nature of Allah**

**Surah Ma’idah, ayah 34**

إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ ۖ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ {٣٤}

(Translation: *Sahih International*)

Except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.

**Repentance and Alternative Punishments for *Zina***

**Surah Nisa, ayah 15-16**

وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ ۖ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّىٰ يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا {١٥}

(Translation: *Sahih International*)

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.

وَاللَّذَانِ يَأْتِيَانِهَا مِنْكُمْ فَآذُوهُمَا ۖ فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا ۗ إِنَّ اللَّهَ كَانَ تَوَّابًا رَحِيمًا {١٦}

(Translation: *Sahih International*)

And the two who commit it among you, dishonor them both. But if they repent and correct themselves, leave them alone. Indeed, Allah is ever Accepting of repentance and Merciful.

**The death penalty for *zina* (adultery)**

حَدَّثَنَا سَعِيدُ بْنُ عُفَيْرٍ، قَالَ حَدَّثَنِي اللَّيْثُ، حَدَّثَنِي عَبْدُ الرَّحْمَنِ بْنُ خَالِدٍ، عَنِ ابْنِ شِهَابٍ، عَنِ ابْنِ الْمُسَيَّبِ، وَأَبِي، سَلَمَةَ أَنَّ أَبَا هُرَيْرَةَ، قَالَ أَتَى رَسُولَ اللَّهِ صلى الله عليه وسلم رَجُلٌ مِنَ النَّاسِ وَهْوَ فِي الْمَسْجِدِ فَنَادَاهُ يَا رَسُولَ اللَّهِ إِنِّي زَنَيْتُ‏.‏ يُرِيدُ نَفْسَهُ، فَأَعْرَضَ عَنْهُ النَّبِيُّ صلى الله عليه وسلم فَتَنَحَّى لِشِقِّ وَجْهِهِ الَّذِي أَعْرَضَ قِبَلَهُ فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي زَنَيْتُ‏.‏ فَأَعْرَضَ عَنْهُ، فَجَاءَ لِشِقِّ وَجْهِ النَّبِيِّ صلى الله عليه وسلم الَّذِي أَعْرَضَ عَنْهُ، فَلَمَّا شَهِدَ عَلَى نَفْسِهِ أَرْبَعَ شَهَادَاتٍ دَعَاهُ النَّبِيُّ صلى الله عليه وسلم فَقَالَ ‏"‏ أَبِكَ جُنُونٌ ‏"‏‏.‏ قَالَ لاَ يَا رَسُولَ اللَّهِ‏.‏ فَقَالَ ‏"‏ أَحْصَنْتَ ‏"‏‏.‏ قَالَ نَعَمْ يَا رَسُولَ اللَّهِ‏.‏ قَالَ ‏"‏ اذْهَبُوا فَارْجُمُوهُ ‏"‏‏.‏ قَالَ ابْنُ شِهَابٍ أَخْبَرَنِي مَنْ، سَمِعَ جَابِرًا، قَالَ فَكُنْتُ فِيمَنْ رَجَمَهُ، فَرَجَمْنَاهُ بِالْمُصَلَّى، فَلَمَّا أَذْلَقَتْهُ الْحِجَارَةُ جَمَزَ حَتَّى أَدْرَكْنَاهُ بِالْحَرَّةِ فَرَجَمْنَاهُ‏.‏

Narrated by Abu Hurayra (Allah be pleased with him):  
A man from amongst the people came to the Messenger of Allah (Allah bless him & give him peace) while he (the Messenger of Allah) was sitting in the Masjid, and addressed him, saying: O Messenger of Allah! I have committed illegal sexual intercourse. The Messenger of Allah (Allah bless him & give him peace) turned his face away from him. The man came to that side to which the Messenger of Allah (Allah bless him & give him peace) had turned his face, and said: O Messenger of Allah! I have committed illegal intercourse. The Messenger of Allah (Allah bless him & give him peace) turned his face to the other side, and the man came to that side. When he confessed four times, the Messenger of Allah (Allah bless him & give him peace) called him and said: Are you insane? He said: No, O Messenger of Allah! The Messenger of Allah (Allah bless him & give him peace) said: Are you married? He said: Yes, O Messenger of Allah! The Messenger of Allah (Allah bless him & give him peace) said (to the people): Take him away and stone him to death.   
***(Sahih al-Bukhari, Volume 8, Book 82, Hadith 814)***

The above incident shows the importance of trying to avert a legal punishment as much as possible. The man came and confessed to the prophet that he had committed unlawful sexual intercourse, yet the prophet ignored him, in order that he may change his mind.

حَدَّثَنِي عَبْدُ اللَّهِ بْنُ مُحَمَّدٍ الْجُعْفِيُّ، حَدَّثَنَا وَهْبُ بْنُ جَرِيرٍ، حَدَّثَنَا أَبِي قَالَ، سَمِعْتُ يَعْلَى بْنَ حَكِيمٍ، عَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ ـ رضى الله عنهما ـ قَالَ لَمَّا أَتَى مَاعِزُ بْنُ مَالِكٍ النَّبِيَّ صلى الله عليه وسلم قَالَ لَهُ ‏"‏ لَعَلَّكَ قَبَّلْتَ أَوْ غَمَزْتَ أَوْ نَظَرْتَ ‏"‏‏.‏ قَالَ لاَ يَا رَسُولَ اللَّهِ‏.‏ قَالَ ‏"‏ أَنِكْتَهَا ‏"‏‏.‏ لاَ يَكْنِي‏.‏ قَالَ فَعِنْدَ ذَلِكَ أَمَرَ بِرَجْمِهِ‏.‏

Narrated by Ibn 'Abbas (Allah be pleased with him):   
When Ma'iz bin Malik came to the Prophet (in order to confess), the Prophet said to him, "Probably you have only kissed (the lady), or touched, or looked at her?" He said, "No, O Allah's Apostle!" 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).  
**(*Sahih al-Bukhari, Volume 8, Book 82, Hadith 813*)  
See also:  
(*Sahih Muslim, Book 17, Hadith 4202*)  
(*Abu Dawud, Book 40, Hadith 76*)  
(*Miskhat ul masabih, Volume 2, Hadith 3403*)**

وَحَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ، حَدَّثَنَا عَبْدُ اللَّهِ بْنُ نُمَيْرٍ، ح وَحَدَّثَنَا مُحَمَّدُ بْنُ عَبْدِ، اللَّهِ بْنِ نُمَيْرٍ - وَتَقَارَبَا فِي لَفْظِ الْحَدِيثِ - حَدَّثَنَا أَبِي، حَدَّثَنَا بَشِيرُ بْنُ الْمُهَاجِرِ، حَدَّثَنَا عَبْدُ اللَّهِ بْنُ بُرَيْدَةَ، عَنْ أَبِيهِ، أَنَّ مَاعِزَ بْنَ مَالِكٍ الأَسْلَمِيَّ، أَتَى رَسُولَ اللَّهِ صلى الله عليه وسلم فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي قَدْ ظَلَمْتُ نَفْسِي وَزَنَيْتُ وَإِنِّي أُرِيدُ أَنْ تُطَهِّرَنِي ‏.‏ فَرَدَّهُ فَلَمَّا كَانَ مِنَ الْغَدِ أَتَاهُ فَقَالَ يَا رَسُولَ اللَّهِ إِنِّي قَدْ زَنَيْتُ ‏.‏ فَرَدَّهُ الثَّانِيَةَ فَأَرْسَلَ رَسُولُ اللَّهِ صلى الله عليه وسلم إِلَى قَوْمِهِ فَقَالَ ‏"‏ أَتَعْلَمُونَ بِعَقْلِهِ بَأْسًا تُنْكِرُونَ مِنْهُ شَيْئًا ‏"‏ ‏.‏ فَقَالُوا مَا نَعْلَمُهُ إِلاَّ وَفِيَّ الْعَقْلِ مِنْ صَالِحِينَا فِيمَا نُرَى فَأَتَاهُ الثَّالِثَةَ فَأَرْسَلَ إِلَيْهِمْ أَيْضًا فَسَأَلَ عَنْهُ فَأَخْبَرُوهُ أَنَّهُ لاَ بَأْسَ بِهِ وَلاَ بِعَقْلِهِ فَلَمَّا كَانَ الرَّابِعَةَ حَفَرَ لَهُ حُفْرَةً ثُمَّ أَمَرَ بِهِ فَرُجِمَ ‏.‏ قَالَ فَجَاءَتِ الْغَامِدِيَّةُ فَقَالَتْ يَا رَسُولَ اللَّهِ إِنِّي قَدْ زَنَيْتُ فَطَهِّرْنِي ‏.‏ وَإِنَّهُ رَدَّهَا فَلَمَّا كَانَ الْغَدُ قَالَتْ يَا رَسُولَ اللَّهِ لِمَ تَرُدُّنِي لَعَلَّكَ أَنْ تَرُدَّنِي كَمَا رَدَدْتَ مَاعِزًا فَوَاللَّهِ إِنِّي لَحُبْلَى ‏.‏ قَالَ ‏"‏ إِمَّا لاَ فَاذْهَبِي حَتَّى تَلِدِي ‏"‏ ‏.‏ فَلَمَّا وَلَدَتْ أَتَتْهُ بِالصَّبِيِّ فِي خِرْقَةٍ قَالَتْ هَذَا قَدْ وَلَدْتُهُ ‏.‏ قَالَ ‏"‏ اذْهَبِي فَأَرْضِعِيهِ حَتَّى تَفْطِمِيهِ ‏"‏ ‏.‏ فَلَمَّا فَطَمَتْهُ أَتَتْهُ بِالصَّبِيِّ فِي يَدِهِ كِسْرَةُ خُبْزٍ فَقَالَتْ هَذَا يَا نَبِيَّ اللَّهِ قَدْ فَطَمْتُهُ وَقَدْ أَكَلَ الطَّعَامَ ‏.‏ فَدَفَعَ الصَّبِيَّ إِلَى رَجُلٍ مِنَ الْمُسْلِمِينَ ثُمَّ أَمَرَ بِهَا فَحُفِرَ لَهَا إِلَى صَدْرِهَا وَأَمَرَ النَّاسَ فَرَجَمُوهَا فَيُقْبِلُ خَالِدُ بْنُ الْوَلِيدِ بِحَجَرٍ فَرَمَى رَأْسَهَا فَتَنَضَّحَ الدَّمُ عَلَى وَجْهِ خَالِدٍ فَسَبَّهَا فَسَمِعَ نَبِيُّ اللَّهِ صلى الله عليه وسلم سَبَّهُ إِيَّاهَا فَقَالَ ‏"‏ مَهْلاً يَا خَالِدُ فَوَالَّذِي نَفْسِي بِيَدِهِ لَقَدْ تَابَتْ تَوْبَةً لَوْ تَابَهَا صَاحِبُ مَكْسٍ لَغُفِرَ لَهُ ‏"‏ ‏.‏ ثُمَّ أَمَرَ بِهَا فَصَلَّى عَلَيْهَا وَدُفِنَتْ ‏.‏

'Abdullah b. Buraida reported on the authority of his father that Ma'iz b. Malik al-Aslami came to Allah's Messenger (may peace be upon him) 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 (may peace be upon him) 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. He (the narrator) said: There came to him (the Holy Prophet) a woman from Ghamid and said: Allah's Messenger, I have committed adultery, so purify me. He (the Holy Prophet) turned her away. On the following day she said: Allah's Messenger, Why do you turn me away? Perhaps, you turn me away as you turned away Ma'iz. By Allah, I have become pregnant. He said: Well, if you insist upon it, then go away until you give birth to (the child). When she was delivered she came with the child (wrapped) in a rag and said: Here is the child whom I have given birth to. He said: Go away and suckle him until you wean him. When she had weaned him, she came to him (the Holy Prophet) with the child who was holding a piece of bread in his hand. She said: Allah's Apostle, here is he as I have weaned him and he eats food. He (the Holy Prophet) entrusted the child to one of the Muslims and then pronounced punishment. And she was put in a ditch up to her chest and he commanded people and they stoned her. Khalid b Walid came forward with a stone which he flung at her head and there spurted blood on the face of Khalid and so he abused her. Allah's Apostle (may peace be upon him) heard his (Khalid's) curse that he had hurried upon her. Thereupon he (the Holy Prophet) said: Khalid, be gentle. By Him in Whose Hand is my life, she has made such a repentance that even if a wrongful tax-collector were to repent, he would have been forgiven. Then giving command regarding her, he prayed over her and she was buried. **(*Sahih Muslim, Book 17, Hadith 4206*)  
See also:  
(*Abu Dawud, Book 40, Hadith 92*)   
(*Miskhat ul masabih, Volume 2, Hadith 3405*)**

حَدَّثَنَا أَحْمَدُ بْنُ إِسْحَاقَ الأَهْوَازِيُّ، حَدَّثَنَا أَبُو أَحْمَدَ، حَدَّثَنَا بَشِيرُ بْنُ الْمُهَاجِرِ، حَدَّثَنِي عَبْدُ اللَّهِ بْنُ بُرَيْدَةَ، عَنْ أَبِيهِ، قَالَ كُنَّا أَصْحَابَ رَسُولِ اللَّهِ نَتَحَدَّثُ أَنَّ الْغَامِدِيَّةَ وَمَاعِزَ بْنَ مَالِكٍ لَوْ رَجَعَا بَعْدَ اعْتِرَافِهِمَا أَوْ قَالَ لَوْ لَمْ يَرْجِعَا بَعْدَ اعْتِرَافِهِمَا لَمْ يَطْلُبْهُمَا وَإِنَّمَا رَجَمَهُمَا عِنْدَ الرَّابِعَةِ ‏.‏

Narrated Buraydah ibn al-Hasib: We, the Companions of the Apostle of Allah (peace be upon him), used to talk mutually: Would that al-Ghamidiyyah and Ma'iz ibn Malik had withdrawn after their confession; or he said: Had they not withdrawn after their confession, he would not have pursued them (for punishment). He had them stoned after the fourth (confession).  
**(*Abu Dawud, Hadith 4434*)**

This famous incident of Ma’iz ibn Malik also gives the same message, in that the Imam should try his best to avoid the legal punishment. This is the reason why it is recommended to say to the one who confesses committing fornication that you may only have touched, you may only have kissed, are you sure you had sex, think again properly of what you are saying and think of the consequences of your confession, and other such things.

This (trying to avert a legal punishment) has been explicitly mentioned in one Hadith.

حَدَّثَنَا عَبْدُ الرَّحْمَنِ بْنُ الأَسْوَدِ أَبُو عَمْرٍو الْبَصْرِيُّ، حَدَّثَنَا مُحَمَّدُ بْنُ رَبِيعَةَ، حَدَّثَنَا يَزِيدُ بْنُ زِيَادٍ الدِّمَشْقِيُّ، عَنِ الزُّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، قَالَتْ قَالَ رَسُولُ اللَّهِ صلى الله عليه وسلم ‏ "‏ ادْرَءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ مَخْرَجٌ فَخَلُّوا سَبِيلَهُ فَإِنَّ الإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ ‏"‏ ‏.‏

Aisha (Allah be pleased with her) narrates that the Messenger of Allah (Allah bless him & give him peace) said: Keep the Muslims away from punishments as much as possible. If there is any way out for an offender to escape punishment, acquit him. It is better for a judge to make an error in acquittal than in conviction.   
**(*Sunan Tirmidhi, Hadith 1424*)**

Due to the forgoing, the Fuqaha (jurists) have laid down (based on the guidelines of the Quran and Sunnah) certain strict rules and conditions in order for a punishment to be established or enforced. The following are certain rules and conditions for the punishment of committing adultery to be enforced, as mentioned in the books of Hanafi jurisprudence:

**1)** It is actual vaginal sexual intercourse (and not anal or oral intercourse) that takes place between a man and a woman.

**2)** The man and woman involved in this unlawful sexual intercourse are not married; neither is the woman a slave-girl of the man.

**3)** It is proven by four people testifying that they clearly observed the couple engaged in unlawful sexual intercourse without any doubt or ambiguity. They are able to say that they saw their private parts meet like the Kohl needle entering the Kohl bottle. The judge would ask them all the various details concerning the time and location of the incident, and who were the people involved and other such matters, in order to remove any doubt.

**4)** If the four witnesses take back their testimony before the actual punishment is enforced, then the punishment will be abandoned, and they (witnesses) will be punished for the crime of false accusation.

**5)** The witnesses are not allowed to delay their testimony from the time of the incident to the time of testifying. If they delayed testifying in the courts, the punishment will not be enforced, unless they were very distant from the Imam hence the delay was due to them travelling to the Imam.

**6)** The punishment of adultery is also proven if the perpetrator him/herself confesses to be guilty of the crime. He/she must be sane, mature (baligh) and must confess four separate times in four separate sessions that the crime was committed. The Imam will try to wave away the punishment as much as possible by saying to the confessor that you may have only touched or kissed and other such statements. The Imam will also inquire about the various details of the incident, and when the confessor explains everything without leaving any doubt or ambiguity, the punishment will be enforced.

**7)** If the confessor takes back his words before the punishment is enforced or during the punishment, he/she will be released and set free.

(See: al-Ikhtiyar li ta’lil al-Mukhtar, 2/311-316 & other major Hanafi Fiqh references)

1. Professor of Human Rights and Director of the Centre for Human Rights, School of Law, Birmingham City University, 4 Cardigan Street, Birmingham, UK, B4 7BD. Email: [jon.yorke@bcu.ac.uk](mailto:jon.yorke@bcu.ac.uk) We acknowledge the research assistance of Miss Hana Aziz. [↑](#footnote-ref-1)
2. UN Policy Officer, Centre for Human Rights, School of Law, Birmingham City University, 4 Cardigan Street, Birmingham, UK, B4 7BD. Email: [amna.nazir@bcu.ac.uk](mailto:amna.nazir@bcu.ac.uk). [↑](#footnote-ref-2)
3. For example, the work of Ibn Sina, known as Avicenna in the West, who contributed significantly to the fields of medicine and philosophy. His most famous works are The Book of Healing, a philosophical and scientific encyclopedia, and The Canon of Medicine, a medical encyclopedia. See Salim T. S. Al-Hassani, *1001 Inventions: The Enduring Legacy of Muslim Civilization* (3rd edn, National Geographic 2012). [↑](#footnote-ref-3)
4. M. Cherif Bassiouni, ‘Death as a Punishment in the Shari’a, in, *The Death Penalty: Condemned*, International Commission of Jurists, September, 2000, p. 66. [↑](#footnote-ref-4)
5. William A. Schabas, ‘Islam and the Death Penalty,’ 9 Wm. & Mary Bill Rts. J. 223 (2000), p. 231. [↑](#footnote-ref-5)
6. Bassiouni (n 4) 67. [↑](#footnote-ref-6)
7. For more information on the *Madhahib*, see Bassiouni (n 4) 66-73. [↑](#footnote-ref-7)
8. See Abdul Qadir Oudeh, *Criminal Law of Islam*, (S. Zakir Aijaz tr, Kitab Bhavan 1999); Muhammad Abu Zahrah, *al-Jarima wa al-Uquba fi al-Fiqh al-Islami* (Cairo: Dār al-Fikr al-Arabi, n.d). [↑](#footnote-ref-8)
9. ibid. [↑](#footnote-ref-9)
10. See Qur’an, 2:187. [↑](#footnote-ref-10)
11. Jonathan Brown, “Taʿzīr,” Oxford Encyclopedia of Islam and Law (Oxford University Press, forthcoming). [↑](#footnote-ref-11)
12. Jonathan Brown, *Stoning and Hand Cutting: Understanding the Hudud and the Shariah in Islam* (Yaqeen Institute for Islamic Research 2017) 5. [↑](#footnote-ref-12)
13. *Baghi* is classified as a *hadd* according to the Maliki school only, see Wael B Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge University Press 2009) 318. [↑](#footnote-ref-13)
14. Anwarullah, *The Criminal Law of Islam* (Kitab Bhavan 2006) 46-49. See also Abdul Qadir Oudeh, *Criminal Law of Islam,* (S. Zakir Aijaz tr, Kitab Bhavan 1999); Burhan al-Din al-Marghinani, *The Hedaya* (Charles Hamilton tr, 1791). [↑](#footnote-ref-14)
15. See M. Cherif Bassiouni, ‘Quesas Crimes’ in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982) 203-209. [↑](#footnote-ref-15)
16. Qur’an 2:178. [↑](#footnote-ref-16)
17. Muhyī al-Dīn Yaḥyā ibn Sharaf al-Nawawī, *Rawḍat al-Ṭālibīn* (‘Ādil ‘Abd al-Mawjūd & ‘Alī Mu’awwaḍ eds., n.d) vol VII, 305-07; Muḥammad b. Yūsuf Mawāq, *Al-Tāj wal-Iklīl fī Sharḥ Mukhtaṣar Khalil* (n.d) vol VI, 290-91; see Hallaq (n 13) 312. [↑](#footnote-ref-17)
18. Punishment of lashing is mentioned in the Qur’an 24:2. [↑](#footnote-ref-18)
19. ‘Abd Allāh Maḥmūd b. Mawdūd Mūṣilī, *al-Ikhtiyār li Ta’līl al-Mukhtār* (Cairo: Muṣṭafā Bābī al- Ḥalabī 1951) vol IV, 89-90; Alī ibn Muhammad ibn Habīb al-Māwardī, *al-Hāwi al-Kabīr* (Ādil ‘Abd al-Mawjūd & ‘Alī Mu’awwaḍ eds., Beirut: Dār al-Kutub al-Ilmiyya 1994) vol XIII, 227. [↑](#footnote-ref-19)
20. See Qur’an 4:15; *Sahih Muslim*, *hadith* 4206; *Sahih Bukhari*, *hadith* 6825. [↑](#footnote-ref-20)
21. Ibn Naqīb Misrī, *‘Umdat al-Sālik* (N.H.M. Keller ed. and trans., Sunna Books, 1991) 635-38; Muhammad b. Ahmed Ibn Rushd (Al Hafid), *The Distinguished Jurist’s Primer* (I. Khan Nyazee tr, Garnet Publishing 1994–96) II, 556-60. [↑](#footnote-ref-21)
22. Muḥammad Shams al-Dīn b. Shihāb al- Dīn Ramlī, *Nihāyat al-Muhtāj ilā Sharh al-Minhāj* (Cairo: Muṣṭafā Bābī al- Ḥalabī, 1357/1938; repr. Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1939) vol VIII, 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, 1992-92) vol IV, 290. [↑](#footnote-ref-22)
23. *Sunan of Abū Dāwūd: kitāb al-ḥudūd, bāb rajm Māʿiz b. Mālik, bāb fī rajm al-yahūdiyayn*; Mūṣilī, *al-Ikhtiyār*, vol II, 312-13. [↑](#footnote-ref-23)
24. See *al-Fatāwā al-Hindiyya*, compiled by al-Shaykh al-Niẓām et al., 6 vols. (repr.; Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1400/1980) vol III, 450; Ibn Qudāma, *al-Mughnī* (Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.) vol XIII, 84; Ibn Qudama, *Kāfī,* volIV, 338-40; Muḥammad b. al- Ḥasan Shaykh al-Ṭā’ifaṬūsī, *al-Khilāf fī al-Fiqh* (Tehran: Maṭb’at Rangīn, 1377H) volII, 612-13. See generally, Ma'amoun M. Salama, ‘General Principles of Criminal Evidence in Islamic Jurisprudence’ in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982) 115-119. [↑](#footnote-ref-24)
25. Abū Isḥāq Ibrāhīm Ibn ‘Abd al-Rafī, *Mu’īn al-Ḥukkām ‘alā al-Qaḍāyā wal-Aḥkām* (Muḥammad b. Qāsim b. ‘Abbād, 2 vols., Beirut: Dār al-Gharb al-Islāmī, 1989) volII, 647-49. [↑](#footnote-ref-25)
26. Hallaq (n 13) 350-51. [↑](#footnote-ref-26)
27. Hallaq (n 13) 351; Mohamed S. El-Awa, *Punishment in Islamic Law* (American Trust Publications 1993) 125-126. [↑](#footnote-ref-27)
28. Alī Ḥaydar, *Durar al-Ḥukkām: Sharh Majallat al-Aḥkām* (Fahmi al-Husayni ed., Dār al-Kutub al-‘Ilmiyyah, n.d.) vol. I, p. 70; Ibn Ḥajar al-Asqalānī, *Fath al-Bāri Sharh Sahih al-Bukhārī* (Muhibddin al-Khatiib ed., Dār al-Marifah n.d) vol. VIII, p. 476; Ahmad Ibn Shaykh al-Zarqa, *Sharh al-Qawaa’id al-Fiqhiyyah* (4th edn, Dār al-Qalam, 1996/1417) p. 401. [↑](#footnote-ref-28)
29. Ma'amoun M. Salama, ‘General Principles of Criminal Evidence in Islamic Jurisprudence’ in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982)119-121. [↑](#footnote-ref-29)
30. *Sahih Muslim, hadith* 4206; *Sahih Bukhari, hadith* 6825. 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. [↑](#footnote-ref-30)
31. This is according to the Hanafi and Shafi *madhabs*. See Hallaq (n 13) 314; Jamila Hussain, *Islamic Law and Society: An Introduction* p.137; Judith E Tucker, *Women, Family, and Gender in Islamic Law*, 186-87. [↑](#footnote-ref-31)
32. Māwardī, *Hāwi*,XIII, 227. [↑](#footnote-ref-32)
33. Brown, note 12, at 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) vol II, 145. [↑](#footnote-ref-33)
34. Ibid citing Sulaymān al-Bujayramī, *Ḥāshiyat al-Bujayrimī ʿalā al-Minhāj* (Cairo: Maṭbaʿat Muḥammad Shāhīn, 1380/1960) 345; Mullā ʿAlī al-Qāri’, *Sharḥ Musnad Abī Ḥanīfa* (Khalīl Muḥyī al-Dīn al-Mīs ed., Beirut: Dār al-Kutub al-ʿIlmiyya, n.d.) 487; Muḥyī al-Dīn al-Nawawī, *al-Majmūʿ* (Muḥammad Najīb al-Muṭīʿī ed., Jedda: Maktabat al-Irshād, n.d.) vol V, 211. [↑](#footnote-ref-34)
35. Brown (n 12) 10. [↑](#footnote-ref-35)
36. *Sunan Tirmidhi, hadith* 1424 [↑](#footnote-ref-36)
37. See Intisar Rabb, ‘Islamic Legal Maxims as Substantive Canons of Construction: Ḥudud-Avoidance in Cases of Doubt’ (2010) 17 Islamic Law and Society 63-125; Jamal al-Din al-Zayla'ī, *Nasb al-Rāyah li-Ahadith al-Hidāyah* (2nd edn, Beirut: Al-Maktab al-Islāmī, 1393H) vol II, 33; Māwardī, *Hāwi*, XIII, 210, 241. [↑](#footnote-ref-37)
38. See e.g. Qur’an 2:256. [↑](#footnote-ref-38)
39. Muḥammad bin Faraj al-Qurṭubī Ibn al-Ṭallāʿ, *Aqḍiyat Rasūl Allāh* (often known as *al-Aḥkām*), (Fāris Fatḥī Ibrāhīm ed., Cairo: Dār Ibn al-Haytham, 2006) 24. [↑](#footnote-ref-39)
40. Taha Jabir Alalwani, *Apostasy in Islam* (International Institute of Islamic Thought 2011) 97-116. [↑](#footnote-ref-40)
41. Jonathan Brown, *The Issue of Apostasy in Islam* (Yaqeen Institute for Islamic Research 2017) 12. [↑](#footnote-ref-41)
42. Kamāl al- Dīn Ibn al-Humām, *Sharḥ Fatḥ al-Qadīr,* (repr.; Beirut: Dār al-Fikr 1991) vol VI, 972. [↑](#footnote-ref-42)
43. Muḥammad b. Aḥmad Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, 30 vols. (Beirut: Dār al-Maʿrifa, n.d.) vol X, 110. [↑](#footnote-ref-43)
44. Ibn Taymīyyah, *Al-Sarim al-Maslul* (Muhayy al-Din 'Abd al-Hamid ed., Beirut: Dār al-Kitāb, 1398/1978) 318; Ibn Qudāma, *Mughnī* (Cairo, n.d.) vol VIII, 126; Abd al-Wahhab al-Sha'rani, *Al-Mizan* (Cairo: Marba'ah al-Husayniyyah, 1329H) vol II, 134; Sulayman ibn Khalaf ibn Sa’d al-Baji, *Al-Muntaqa Sharh al-Muwatta* (Cairo, n.d) vol V, 282. [↑](#footnote-ref-44)
45. Mohamed S. El-Awa, *Punishment in Islamic Law* (American Trust Publications 1993) 55. [↑](#footnote-ref-45)
46. Micheal Mumisa, *Sharia Law and the Death Penalty* (Penal Reform International 2015) 24. [↑](#footnote-ref-46)
47. Qur’an 5:33. [↑](#footnote-ref-47)
48. Mohamed S. El-Awa, *Punishment in Islamic Law* (American Trust Publications 1993) 9-13; Micheal Mumisa, *Sharia Law and the Death Penalty* (Penal Reform International 2015) 24-25. [↑](#footnote-ref-48)
49. Qur’an 17:33, “...we have given his heir the authority (demand Qisas, law of equality in punishment or to forgive...)”. [↑](#footnote-ref-49)
50. See, Qur’an2:178,” O you who have believed, prescribed for you is legal retribution for those murdered…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.” [↑](#footnote-ref-50)
51. Qur’an 5:45. [↑](#footnote-ref-51)
52. Qur’an 2:178; 5:45. [↑](#footnote-ref-52)
53. See e.g., Qur’an 5:34; 3:159; see also, Muhammad Moheiddin Awad, *Bada’il al-Jaza’at al-Jina’ia fil Mojtama’ al Islami* (The Substitute Criminal Penalties in Islamic Societies) (1411 A.H., 1991 A.D.), cited in Bassiouni (n 4) 81. [↑](#footnote-ref-53)
54. See generally Ghaouti Benmelha, ‘Ta’azir Crimes’ in M. Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1982) 211-226. [↑](#footnote-ref-54)
55. Bassiouni (n 4) 82. [↑](#footnote-ref-55)
56. ibid. [↑](#footnote-ref-56)
57. Lizzie Dearden, ‘Man Who Filmed Woman Being Publicly Beheaded in Mecca Reportedly Arrested in Saudi Arabia’ (*The Independent*, Monday 19 January 2015) <http://www.independent.co.uk/news/world/middle-east/man-who-filmed-woman-being-publicly-beheaded-in-mecca-reportedly-arrested-in-saudi-arabia-9988062.html>. [↑](#footnote-ref-57)
58. See Qur’an 5:34 (*hirabah*); 5:38-39 (*sariqa*); 24:2-6 (*qadhf* and *zina*). [↑](#footnote-ref-58)
59. Mohammad Hashim Kamali, ‘Punishment in Islamic Law: A Critique of the Hudud Bill of Kentalan, Malaysia’ 13(3) Arab Law Quarterly (1998) 221. For the different juristic views on repentance, see ibid 222-224. [↑](#footnote-ref-59)
60. See Bassiouni (n 4) 82-83 [↑](#footnote-ref-60)
61. ibid 83. [↑](#footnote-ref-61)
62. al-Sarakhsī, *al-Mabsūṭ*, vol IX, 141; Yusuf al-Qaradawi, *Shari'ah al-Islam Salihah li'l Tatbiq fi Kulli Zaman wa Makaan* (Cairo: Dār al-Sahwah 1393H) 35. [↑](#footnote-ref-62)
63. Muhammad al-Ghazali, *Min Huna Na'lam* (Cairo 1948) p. 5. Also discussed by Hamid Enayat, *Modern Islamic Political Thought* (The Macmillan Press 1989). [↑](#footnote-ref-63)
64. Muṣṭafā Aḥmad Zarqā, *al-Madkhal al-Fiqhī al-'Āmm*, 2 vols. (Damascus: Dār al-Fikr, 1387/1968). [↑](#footnote-ref-64)
65. al-Qaradawi (n 62). [↑](#footnote-ref-65)
66. Tariq Ramadan, ‘An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World’ (*Tariq Ramadan*, 5 April 2005) <https://tariqramadan.com/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/>. [↑](#footnote-ref-66)
67. al-Zarqa (n 64). [↑](#footnote-ref-67)
68. Ramadan (n 66). [↑](#footnote-ref-68)
69. Brown (n 12) at 28 citing Shaltūt, *Fatāwā*, 45; Jumʿa, *al-Bayān*, 71; Bin Bayyah, *Tanbīh*, 83-84. [↑](#footnote-ref-69)
70. General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, (Document presented without formal editing, adopted on First Reading, 120th Session), para. 2. (Hereinafter, “General Comment”). [↑](#footnote-ref-70)
71. General Comment, para 3. [↑](#footnote-ref-71)
72. General Comment, para. 4. [↑](#footnote-ref-72)
73. General Comment, para. 5. For the minimum standards, see, Safeguards guaranteeing protection of the rights of those facing the death penalty, ECOSOC resolution 1984/50, 25 May 1984 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx> [↑](#footnote-ref-73)
74. General Comment, para 8. Noting ICCPR article 16, and see also, ICCPR article 14. [↑](#footnote-ref-74)
75. General Comment, para. 8. Noting ICCPR article 7. [↑](#footnote-ref-75)
76. General Comment No. 22 on the Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1/Add.4, 30 July 1993, para 3. [↑](#footnote-ref-76)
77. Report of the Special Rapporteur on the freedom of religion or belief, A/HRC/34/50, para. 39. [↑](#footnote-ref-77)
78. For a detailed analysis of blasphemy in Islam, see Siraj Khan, ‘Blasphemy Against the Prophet’ in Coeli Fitzpatrick & Adam Hani Walker (eds), *Muhammad in History, Thought, and Culture* (ABC-CLIO 2014) 59-68. [↑](#footnote-ref-78)
79. See section iii (Qur’an 5:33). [↑](#footnote-ref-79)
80. See Khan (n.77). [↑](#footnote-ref-80)
81. For example, see, for a woman confessing four times to sexual immorality, *Sahih Muslim*, Book 17, *Hadith* 4206. For an example of a man confessing four times to sexual immorality, see *Sahih al-Bakhari*, Volume 8. [↑](#footnote-ref-81)
82. See notes 18-23. [↑](#footnote-ref-82)
83. ICCPR Article 14, “…everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…” Following the observations in this submission, the question arises as to if an Islamic court attempts to impose a death penalty, whether it can be accepted to have applied a competent and enlightened reading of *sharia law*? We do not think this is theologically possible. Thus in imposing a death sentence the Islamic court would have provided adjudication that is incompatible with *shari’a law* and the promotion of love, peace, mercy and benevolence. [↑](#footnote-ref-83)
84. See, Patrick Gallahue and Rick Lines, The Death Penalty for Drug Offences: Global Overview 2015: The Extreme Fringe of Global Drug Policy, Harm Reduction International, October 2015, https://www.hri.global/files/2015/10/07/DeathPenaltyDrugs\_Report\_2015.pdf [↑](#footnote-ref-84)
85. Concluding observations: Sudan. Concluding Observations of the Human Rights Committee (29 August 2007) UN Doc. CCPR/C/SDN/CO/3, para 19. [↑](#footnote-ref-85)
86. Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council (29 January 2007) UN Doc. A/HRC/4/20, paras 51–52. [↑](#footnote-ref-86)
87. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak to the UN Human Rights Council (14 January 2009) UN Doc. A/HRC/10/44, para 66. [↑](#footnote-ref-87)
88. *Nulla crimen sine lege*, means, “no crime without law” Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/nullum\_crimen\_sine\_lege [↑](#footnote-ref-88)
89. *Nulla poena sine lege*, means, “no punishment without law” ibid. [↑](#footnote-ref-89)
90. For the context of *proprio motu* in the ICCPR article 6(4) see, Organizational and other matters, including the adoption of the report of the pre-session working group on individual communications, Draft Comment No. 36, Article 6: Right to Life, Draft prepared by Yuval Shany and Nigel Rodley, Rapporteurs, CCPR/C/GC/R.36, 1 April 2015, p. 4, para. 12. [↑](#footnote-ref-90)
91. See HRC A/HRC/30/21, para 38, page. 10. [↑](#footnote-ref-91)