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ISLAMIC LAW AND THE MOVEMENT FOR THE ABOLITION OF DEATH PENALTY: A COMPARATIVE PERSPECTIVE

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Abstract

The adverse effects of the 2nd World War led to the international call for the universalisation of democracy and respect for human rights. Human rights and civil society groups singled out death penalty as cruel and inhuman practise which the member states of the United Nations were still practicing. There has been a political global trend rather than social, religious and economic that calls for the abolition of the death penalty. This drive has been inconsiderate of the different diversities that are prevalent within the individual states most especially the Muslim World that it could not be implemented without trespassing on Islamic law. There is need for mutual cooperation between the retentionists and abolitionists countries in their areas of convergence and respect for each other's beliefs in their areas of divergence. This paper therefore analyses the international move to have the world free of death penalty in relation to the teachings of Islam.

1.0 Introduction:

The irreversible effect of the death penalty makes it like no other punishment². Once it is imposed the person's life can never be restored³. It is for this reason that there is wide discontentment for its continued existence in many countries of the world mainly from the civil society and human rights groups, criminologists, and political parties both within and often outside the country applying the death penalty⁴.

After the Second World War, the United Nations General Assembly adopted resolution 217 A (III) of December 1948 to ratify the Universal Declaration of human rights (UDHR) to be part of the United Nations international instruments⁵. Article 3 of the UDHR provides for the Universal right to life whereas Article 6 of the same

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² Neumayer Eric (2008) Death Penalty: the political foundations of the global trend toward abolition. Human rights review. 9 (2). Pp. 241-268. ISSN 1874-6303. Available at <http://eprints.lse.ac.uk/2600/> page 2 Accessed on 18/6/2019.

³ Ibid

⁴ Ibid

⁵ Micheal Mumisa, -Shariah and the Death Penalty: Would the abolition of death penalty be unfaithful to the message of Islam?| University of Cambridge, Penal Law Reform 2015. Pg 20 Available at Penalreform.org Accessed on 17/6/2019.

provides for the universal right to freedom from torture, inhuman and degrading treatment or punishment⁶. The above provisions became the corner stone for which the abolitionists to call for other member states to desist from applying death penalty⁷. The Universal Declaration of Human Rights was later reinforced by the International Covenant on Civil and Political Rights (ICCPR) which was adopted by the United Nations General Assembly by resolution 2200A (XXI) on 16 December 1966 and came in force from the 23 March 1976 in accordance with Article 49 of the Covenant⁸. The Covenant commits its member states to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and fair trial⁹. Article 6 of the International Convention on Civil and Political Rights calls for all member states to restrict the imposition of the death penalty to the *most serious crimes* in accordance with applicable law at the time of the commission of the crime and pursuant to a final judgment rendered by a competent court. This provision was a positive step towards the abolition of the death penalty as member states were urged as a first step to limit the imposition of the death penalty to the most serious crimes. These crimes vary from one country to another as in countries such as Uganda, murder is a very serious crime¹⁰ in relation to countries like Philippines, China, Singapore and Malaysia where drug trafficking is a very serious crime that would attract a death sentence¹¹.

Other international conventions that made a milestone in as far as abolition of the death penalty is concerned included; the second optional protocol to the International Convention on Civil and Political Rights adopted by the United Nations General Assembly in 1989. Article 1 of the Protocol prohibits the implementation of the death penalty within all the member states. The second Protocol to the American Convention on Human Rights, adopted by the General Assembly of the Organization of American States in 1990 abolished the death penalty and the Protocols No. 6 and No. 13 to the European Convention on Human Rights, adopted by the Council of Europe in 1983 and 2002, respectively also abolished the imposition of the death penalty¹². However, of these international treaties, the Protocol No. 13 to the

⁶ Cataclysm and World Response in Drafting and Adoption: The Universal Declaration of Human Rights. Available at udhr.org Accessed on 17th/6/2019.

⁷ Ibid

⁸ Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights*, Oxford University Press, 1985.

⁹ Articles 1-6 of the International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

¹⁰ See: Section 189 of the Penal Code Act Cap. 120 Laws of Uganda.

¹¹ Eric Neumayer, *Death Penalty: The Political Foundation of the Global Trend Towards abolition*. Human rights review., 9 (2). Pp 241-268. ISSN 1874-6306. Available at <https://eprints.lse.ac.uk/6200/> Accessed on 10/7/2019.

¹² Ibid

European Convention on Human Rights is the only one that demands abolition of the death penalty for all crimes, whereas the others allow parties to retain the penalty in time of war¹³.

We should however note that the Muslim countries had criticized the 1948 Universal Declaration of Human Rights for its failure to take into account the cultural and religious context of non western countries¹⁴. In response to the Universal Declaration of Human Rights, the member states of the Organisation of Islamic Cooperation (OIC) on 5th August 1990 adopted the Cairo Declaration on Human Rights in Islam (CDHRI)¹⁵. The Declaration among others forbids discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. It goes on to proclaim the sanctity of life, and declares the preservation of human life to be a duty prescribed by the Shariah¹⁶.

The CDHRI was adopted as a living document of human rights guidelines prescribed for all member states of the OIC in response to the Universal Declaration of Human Rights which the OIC member states termed as a secular understanding of the Judeo-Christian tradition which could not be implemented by Muslims without trespassing Islamic law¹⁷.

The purpose of this paper is to examine the Islamic perspective on the death penalty in view of the abolitionist approach at the international arena.

2.0 The Legal Framework of the Death Penalty under International Law

International Law refers to the body of rules established by custom or treaty and recognized by nations as binding in their relations within one another¹⁸. The international bill of rights positively impacted on the move to abolish the death penalty in the following manner;

Article 3 of the Declaration guarantees a universal right to life, whereas Article 5 of the Declaration guarantees the universal right to freedom from torture, cruel, inhuman or degrading treatment or punishment. The aforementioned provisions, formed the basis for which civil society groups and abolitionists states to call for the abolition of

¹³ See: Article 2 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty.

¹⁴ National Review Online, Human Rights and Human Wrongs, David G.Littman, January 19, 2003 accessed on 17/6/2019.

¹⁵ Brems, E (2001). –Islamic Declarations of Human Rights||. Human rights: universality and diversity: Volume 66 of International Studies in human rights. Martinus Nijhoff Publishers. Pp.241-84 ISBN 90-411-1618-4.

¹⁶ Article 2 of the Cairo Declaration on Human Rights in Islam

¹⁷ Ibid

¹⁸ Bentham Jeremy (1789), An Introduction to the Principles of Morals and Legislation, London: T.Payne, pg. 6

death penalty¹⁹. Article 6 of the International Covenant on Civil and Political Rights provides for the inherent right to life of every human being and that in countries where death penalty has not been abolished, it may be only imposed for the most serious crimes and after following the due process of the law.

The 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights was adopted by United Nations General Assembly on December 29 with fifty nine votes in favour, twenty six votes against and thirty four countries abstaining²⁰. Article 1 of the protocol provides for the abolition of death within the member state countries. During the voting time, almost all Arab states voted against the protocol²¹. However, as of September 2018, the second optional protocol has 86 state parties of which Angola had signed but did not ratify the protocol²².

On 20th December 2012, the United Nations General Assembly passed Resolution 67/176, Moratorium on the Use of the Death Penalty. Article 4 of the resolution calls upon all states to progressively restrict the use of the death penalty and not to impose capital punishment for offences committed by persons below 18 years of age²³. It also calls on reducing number of offences for which death penalty may be imposed; to establish a moratorium on executions with a view to abolishing the death penalty. Article 5 there from calls upon states which have already abolished the death penalty not to reintroduce it and encourage them to share their experiences in this regard. This move has been successful to a large extent as Countries that have abolished the death penalty both within the law and practice have reached 142 including countries like South Africa, United Kingdom, Sweden among others compared to 56 countries who are still retaining the same including Afghanistan, Bahrain, Saudi Arabia, Somalia among others²⁴.

3.0 The Road to Abolish Death Penalty on the African Continent:

Africa is the second largest continent with 54 fully recognized sovereign states²⁵. The international wave for the abolition of the death penalty has been most positively

¹⁹ Eric Neumayar, Death penalty: The Political Foundations of the global trend towards abolition, *Human Rights Review*, 9 (2). Pp. 241-268. ISSN 1874-6303 page 11 Available at <https://eprints.lse.ac.uk/6200/> Accessed on 9/7/2019.

²⁰ William A. Schabas, -Islam and the Death Penalty| *William & Mary Bill of Rights Journal* Vol. 9 Issue 1 Article 13 page. 228.

²¹ *Ibid*

²² United Nations, Treaty Series Vol. 1642 pp. 414 Reg No. 14668.

²³ General Assembly of the United Nations Resolutions A/RES67/176. Available at <https://www.un.org/resolutions>. Accessed on 7/9/2018.

²⁴ Abolitionist and Retentionist Countries. Available at <https://www.Penaltyinfo.org>. Accessed on 7/7/2019

²⁵ FIQH, -Triggers for Abolition of the Death Penalty in Africa: Southern Africa Experience| October 2017 pp. 5

received by most of the African states²⁶. Currently in Africa, more than 80% of countries have abolished the death penalty including South Africa, Burundi, Rwanda, Ivory Coast among others. Only 10 of the African countries have executed within the past decade²⁷.

According to Amnesty International, at least 1,032 people were put to death worldwide in 2016²⁸. The majority of these executions took place in just three countries: Iran, Pakistan and Saudi Arabia²⁹. In the whole of Africa, at least 64 people were executed in Botswana, Egypt, Nigeria, Somalia, South Sudan and Sudan³⁰. This really shows the positive strides Africa has achieved in as far as abolition of death penalty is concerned.

In order to work towards abolition of the death penalty across the continent, below are some of the continental conventions and resolutions that have registered a milestone in that line;

The African Charter on Human and People's Rights adopted in Nairobi on June 27, 1981³¹. Article 4 of the Charter recognizes the inviolability of human life and it prohibits the arbitrary deprivation of right to life. This was a positive stride in fast tracking the abolition of death penalty in Africa.

The African Commission on Human and Peoples' Rights Resolution 42 of Kigali Rwanda in 1999³². The resolution calls on to State Parties to limit the imposition of the death penalty only to the most serious crimes; and to consider establishing a moratorium on executions; and consider the possibility of abolishing the death penalty. At the time of passing this resolution there was only 19 African countries that had at the time de facto or de jure abolished the death penalty³³. As of today 80% of the African states have abolished the death penalty which is a great achievement for the abolitionists³⁴.

The African Commission on Human and Peoples' Rights Resolution 136 (2008)³⁵. This resolution calls on State Parties to observe a moratorium on executions —with a

²⁶ Ibid

²⁷ These countries are; Botswana, Chad, Egypt, Equatorial Guinea, Gambia, Libya, Nigeria, Somalia, Sudan and South Sudan. See: Death Penalty World Wide Data base, [http:// www.deathpenaltyworldwide.org/search.cfm](http://www.deathpenaltyworldwide.org/search.cfm)

²⁸ Death Sentence and Execution 2016, Amnesty International.

²⁹ Ibid

³⁰ Ibid

³¹ The African Charter on Human and Peoples Rights. Available at <https://www.humanrights/se/Africa/pdf>. Accessed on 9/7/2019.

³² Human Rights Library-ACHPR/Res.42(XXVI)99. Available at hrlibrary.umn.edu>Africa.rec47. Accessed on 7/9/2019

³³ ibid

³⁴ Ibid

³⁵ The African Commission on Human and Peoples' Rights, at its 44th meeting on the 10th to 24th November 2008 in Abuja Nigeria. Available at <http://www.achpr.org>sessions>136>. Accessed on 7/9/2019.

view to abolishing the death penalty³⁶ and to ratify Second Optional Protocol to the ICCPR and lastly the African Commission on Human and Peoples' Rights General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015). This general comment offers interpretation and application of the right to life under Article 4 of the African Charter, which includes provisions on the abolition of the death penalty.

The abolition of the death penalty on the African Continent has been achieved by employing the following mechanisms;

1. Legislative Amendment;

African states have engaged in intensive amendments of the existing legislation in a bid to abolish the death penalty³⁶. They include countries like Burundi (2008), Côte d'Ivoire (2000), Djibouti (1995), Gabon (2010), Guinea-Bissau (1993), Rwanda (2007), Senegal (2004) and Togo (2009) and Madagascar (2014)³⁷.

2. Constitution reform

African states have managed to abolish death penalty through adoption of new constitutions. This has been effectively done by countries such as; Republic of Congo (2015), Mauritius (1995), Namibia (1990), Seychelles (1993), São Tomé and Príncipe (1990), Namibia (1990), Mozambique (1990) and Angola (1971)³⁸.

3. Constitution Petitions;

Courts of law have been used to challenge the constitutionality of the death penalty within the African Continent. The land mark decision of the South African Constitutional Court in *State vs. Mukwanyane* was the first to outlaw the constitutionality of death penalty³⁹. In Malawi, the case of *Kafantayeni and others v. The Attorney General of Malawi*⁴⁰ struck down the mandatory death penalty for murder in 2007 on the basis that it violated the right to life and amounted to inhuman punishment. In Kenya, the case *Mutiso v. Republic*⁴¹ successfully challenged the death penalty punishment much as it is still available in the Kenyan statute books. In Uganda, the case of *Attorney General vs. Suzan Kigula & 417 Others*⁴² of which the mandatory death sentence for particular crimes under the Ugandan Penal Code was outlawed.

³⁶ Fiqh, –Triggers for the Abolition of the Death Penalty in Africa: A South African Experience| October 2017 pg 23

³⁷ Ibid

³⁸ Ibid

³⁹ *State vs. Mukwanyane* (1995) ZACC 3.

⁴⁰ Constitutional case No. 12 of 2005.

⁴¹ Criminal Appeal No. 17 of 2008.

⁴² Constitutional Civil Appeal No. 3 of 2006.

4.0 Arguments for and Against the Death Penalty

Deterrence; Those in favour of the death penalty argue that by imposing the death penalty, it would deter the commission of crime by the would be offenders⁴³. This argument is also held by *Sir James Stephens* where he said in support of the death penalty that: „*No other punishment deters men so effectually from committing crimes as punishment for death.....The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some results*“⁴⁴. On the other side abolitionists argue that this is not conclusive in fact in United States Supreme Court case of *William Henry Furman vs. State of Georgia*⁴⁵ where the US supreme court held that the imposition of the death penalty violates the 8th and 14th amendments to the US constitution, different studies were referred to indicating instances where countries that employ capital punishments but still having higher instances of homicides as opposed to the abolitionist⁴⁶.

Retribution; The supporters of death penalty hasten to add that the family members of the dead are more contented if the killer is also made to pay for his crime by causing his death⁴⁷. That in fact Allah supports this argument where He said;

“.....*There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing.(Quran 2:178-9)*
(emphasis added)

Prevention; This is also known as –Theory of disablement| as it aims at preventing the crime by disabling the criminal⁴⁸. That by killing the killer it permanently incapacitates him from killing other people in the future. To the abolitionist they argue that this purpose can be served even when the killer is given a custodial sentence.

To the Moslem countries, the imposition of the death penalty is a divine right specifically provided for within the holly Quran and its abolition will result into a total violation of the Islamic teachings⁴⁹. Abolitionists states argue that only small part of Islamic criminal law is being regulated by the Quran and Sunah under the

⁴³ Micheal Mumisa, –Sharia Law and Death Penalty: would the Abolition of death penalty be un faithful to the message of Islam?| University of Cambridge, Penal Reform Commission, 2015 Available at www.penalreform.org pp. 13 Accessed on 28/6/2019

⁴⁴ Great Britain, Royal Commission on Capital Punishment, Report (1949-1953) Pg. 19

⁴⁵ 408 U.S. 238

⁴⁶ Ahiraf Ali, Abolition of Death Penalty in Pakistan, Available at https://www.academia.edu/Abolitionofdeath_penalty_in_Pakistan/pdf. Accessed on 10/7/2019.

⁴⁷ Ibid

⁴⁸ M.Ssekaana, –Criminal Procedure and Practise in Uganda| Law Africa Publishing (U) Ltd, 1st Edition 2010 pg. 349.

⁴⁹ William A. Schabas, –Islam and the Death Penalty| William & Mary Bill of Rights Journal Vol.9 Issue 1 Article 13 page 11.

heads of Qisas, and Hudood and in fact Muslim countries hide under this religious pretext to keep on imposing the death penalty even in instances where Islamic Law does not provide for it⁵⁰.

5.0 Islamic Teachings on Death Penalty.

Islamic criminal law being a universal law revolves around the following five fundamental points which are; (1) protection of religion; (2) protection of life; (3) protection of sanctity of family; (4) protection of property and (5) protection of reason/or intellect⁵¹.

The purpose of punishment in Islam is to deter the commission of crimes and ensure social justice and the well being of the people⁵². On this Allah says;

Whoever works evil, will be requited accordingly [4:123]

The above verse maintains that those who transgress within the society, they should be made to equally suffer for their wrong doings by way of punishment.

In Islam the human life is so sacred and inviolable to the extent that however kills a human soul is considered to have extinct the whole human race and whoever saves a human soul is considered to have saved the whole human race. Allah says;

*“That if any one slew [killed] a person, Unless it be for murder, Or for spreading mischief [creating disorder] in the land, **It would be as if he (slew) the whole people; And if anyone saved a life, It would be as if he saved the lives of all mankind.**” [5:32]*

The prophet also affirmed the inviolability of human blood during his sermon in his farewell pilgrimage. The prophet (PBUH) said;

“O People! Your blood, property and honour is made completely forbidden upon one another. The respect for these things is such as it is the respect of this (Day of Pilgrimage), and the respect of the month of Dhul Hajjah , and the respect of this city (Mecca). Beware, let it not happen after me that you begin to take each others lives and be in the category of unbelievers”⁵³.

Therefore, for Islam to prescribe the death penalty for intentional killings, it is in such away acknowledging the inviolability of human blood.

5.1 Crimes Punishable with Death Penalty under Islamic Law:

There are three categories of crimes under Islamic Law and they are;

⁵⁰ Ibid

⁵¹ Abu Hamid al-Ghazali, al-Mustasfa min _Ilm al-Usul, Vol. 2 p66

⁵² M. Ershadul Bari, –Capital Punishments in Islam || Journal of Islamic Law Review Vol. 6 (2010) page 2.

⁵³ Sahih al-Bukhari note, 23 at pg. 39.

(1) Qisas and Diyat (Crimes of retaliation and Blood Money) (2) Hudud Crimes _Claims against God' (Mandatory) (3) Ta'zir crimes _Claims of the state/Society' (Discretionary)

5.1.2 Qisas Crime (Murder)

Qisas (retaliation or retribution) crimes follow the principle of an _eye for an eye'. These crimes aim at seeking justice by way of its equivalence. They are administered under strict conditions to fit with the sanctity of human life in Islam, and involve the following offences against the person:

- (1) *Intentional or premeditated murder (first-degree)*; (2) *Quasi-intentional murder (second-degree)*; (3) *Unintentional murder (manslaughter)*; (4) *Intentional injury (battery)*; and (5) *Semi-intentional/unintentional injury*.

In Islam therefore the punishment for intentional/premeditated murder is death. On this the Quran says;

“Believers, just retribution is prescribed for you in cases of killing: a free man for a free man, a slave for a slave, and a female for a female. If something [of his guilt] is remitted to a person by his brother, this shall be pursued with fairness, and restitution to his fellow-man shall be made in a goodly manner. This is an alleviation from your Lord, and an act of His grace. He who transgresses thereafter shall face grievous suffering”.

There is life for you, men of understanding, in this law of just retribution, so that you may remain God-fearing. (Quran 2:178-9) (emphasis added)

Under the conventional law, punishments are prescribed to achieve objectives such as; retribution, rehabilitation, reformation, and deterrence⁵⁴. In case of premeditated death, the Uganda Law prescribes the death penalty also in form of retribution. Section 189 of the Penal Code Act Cap. 120 provides that any person convicted of murder shall suffer death.

Important to note, much as Islam provides for a death sentence to a person convicted of murder, it provides for other safe guards upon which the death penalty can be waived as a mode of Qisas;

1. Islam allows the family of the deceased to forgive the killer either for free or in return of financial compensation known as _diyat' as an alternative to the infliction of the death penalty to the killer. This practise has been encouraged mostly in Moslem countries such as Saudi Arabia, Pakistan and Yemen⁵⁵. On this the Allah says;

“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

⁵⁴ M.Ssekaana, -Criminal Procedure and Practice in Uganda| Law Africa Publishing (U) Ltd, 1st Edition 2010 page 352.

⁵⁵ M. Ershadul Bari, -Capital Punishments in Islam|| Journal of Islamic Law Review Vol. 6 2010 pg. 49

legal retribution. But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers”. (Quran 5:45) (emphasis added)

The prophet (PBUH) also guides Muslims that forgiveness of the aggressor is the better option. The prophet said:

*“Whoever forgives the retaliation from the killer, would enter in to paradise. No man would remit from any injury inflicted upon him, but Allah would elevate his position and forgives his sins”*⁵⁶.

There are however different views of Moslem Scholars on whether after the victim’s family forgiving the killer, the payment of blood money by the killer should be mandatory or not?.

Imam Abu-Hanifah and Malik Ibn Anas maintain that once the victim’s family has waived the imposition of the Qisas penalty, the victim’s family has an option to chose on whether to request for blood money or not⁵⁷. The spirit behind their reasoning is that by the deceased family going a head to forgive the killer and then maintain the demand for payment of blood money, it would be an implication that they have not forgiven the killer. Imam Shafie and Hanmbal are of the view that once the family of the deceased waives the imposition of the death penalty, the killer must compulsorily pay blood money⁵⁸.

However, all that said, the provision for the forgiveness of the killer is not available within the Ugandan penal system so is at the international arena which makes Islam a class of its own.

There are however criticisms raised by the western countries that the act of forgiveness is discriminatory in nature because different offenders would be treated differently upon conviction over the same crime⁵⁹. However, for one to claim to have been discriminated against, the discrimination should be based on colour, sex, religion, race, descent, place of birth, language and birth place⁶⁰. Therefore one cannot claim to have been discriminated against in case the family of the deceased forgives the killer and he or she is not forgiven because it does not arise as of right⁶¹.

Islam also provide for other instances that can lead to the waiver of the death penalty. They are;

⁵⁶ Muhammad Ibn Yazid Ibn Majah, Sunan Ibn Majah, Kitab AL-Diyat, (Ihya al-Thurath-cArabi n.d) Vol. 2 pg.877

⁵⁷ Badiriyah Abdul Munie’ m Hasuuna, –Jaraimu al Qatl Amda wa Shibuhu Amda Wal Qatl Jaraimu Al hudud fi Sharieyat Wal Qaanuni || page 48.

⁵⁸ Ibid

⁵⁹ M.Ershadul Bari, –Capital Punishments in Islam || Journal of Islamic Law Review Vol. 6 2010 page. 49

⁶⁰ See: Article 21 (3) of the Constitution of Republic of Uganda 1995 (as amended)

⁶¹ Ibid

(a) Where a father kills his son/daughter;

Islam takes a son or daughter as one half of his/her own father. Therefore where the father kills his son/daughter he cannot be killed under Shariah law.

“In the hadith narrated by Jaabir Ibn Abdallah he narrates that a man said, “O Messenger of Allah, I have wealth and children, and my father wants to take all my wealth and leave nothing. The prophet Peace Be Upon Him said. “You and your wealth belong to your father” [Ibn Majah no. 2292]

In another tradition narrated by Suraqah bin Malik bin [Ju’shum]:

“That the holly prophet judged that the son is to suffer retaliation for killing his father, but the father is not to suffer retaliation for killing his son” [Jami”at- Tirimidhi 1399]

(b) A freeman killing a slave;

During the pre and post Islamic Arabia people were free to own slaves until it has been recently abolished internationally in 1927⁶². In line with the circumstances of that time, a slave was not considered to be equal to a freeman and as such a freeman would not be killed for killing a slave while a slave would be killed for killing a freeman. On this Allah said;

*“Believers, just retribution is prescribed for you in cases of killing: **a free man for a free man, a slave for a slave**, and a female for a female.....” [2:278]*

(c) A Muslim killing a non Muslim;

The prophet said;

“No Muslim will be killed in Qisas of an idolater” (Darmi: No.2356)

However there are different opinions on the legality of this position. For imam Abu Hanifah a Muslim should be killed in case of pre-meditated death against the killing of a non Muslim⁶³. Abu Hanifa base his position which I also concur with on the Quranic verse where Allah says:

“Believers, just retribution is prescribed for you in cases of killing: a free man for a free man and slave for a slave....” [Quran 2:278]

5.1.3 Hudud Crimes ‘Claims against God’

⁶² Slavery Convention, Signed at Geneva on 25 September 1926. Available on <http://www.ohchr.org>Slavery/pdf>. Accessed on 5/7/2019.

⁶³ Ibid

—Hudud || is an Arabic word its singular is „*hadd*” meaning ‘limit’⁶⁴. Hudud are crimes whose punishments are already fixed within the Quran and Sunah⁶⁵. They are crimes against Allah and where it is established that they have been committed the judge is only bound to prescribe the said punishment against the offender. Of the six hudud crimes three of them carry the death penalty upon conviction of the offender⁶⁶. They are;

1. Zina– adultery (2) Riddah– apostasy and (3) Hirabah– ‘waging war against God and society’ or brigandage/banditry

5.1.3.1 Apostasy

This refers to the conscious abandonment of Islam by a Muslim in word or through deed⁶⁷. It includes the act of converting to another religion, by a person who was born in a Muslim family or who had previously accepted Islam⁶⁸.

Allah says;

Make ye no excuses: ye have rejected the faith after ye had accepted it: if we pardon some of you, we will punish others amongst you for that they are in sin. [Quran 9:66]

The prophet said that;

*The blood of a Muslim who confesses that none has the right to be worshiped but Allah and I am his apostle, cannot be shed except in three cases: In Qisas for murder, a married woman who commits illegal sexual intercourse and **the one who converts from Islam (apostle) and leaves the Muslims**⁶⁹.*

Under the Ugandan law, there is no crime which is described as apostasy however there is the offence of Insulting religion and disturbing religious assemblies contrary to Sections 118 and 119 of the Penal Code Act respectively both of which they are minor offences. This because conventional laws appreciate what is referred to as freedom of worship and freedom to belong to any religious denomination envisioned under Article 29 of the Constitution. Islam was the first to appreciate the freedom of one to belong to a particular religion. Allah says in **Quran 2:256** that;

“There is no compulsion in religion”

⁶⁴ Micheal Mumisa, –Shariah law and the death penalty: would abolition of the death penalty be unfaithful to the message of Islam || Penal Reform International . Available at: <http://www.penalreform.org>. Accessed on 7/7/2019.

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Peters & De Vries (1976), Apostasy in Islam, Die Welt des Islam vol. 17 pg. 12

⁶⁸ Ibid

⁶⁹ Sahih al-Bukhari 9:83:17

It is for the above reason that Islam cannot compel a person to convert to Islam but when an individual out of his own will converts to Islam, he/she cannot thereafter denounce Islam.

However, according to shafi and Malik school of law where an apostate denounce that other religion or faith (recant) and expresses his regret or repents the punishment should then be waived⁷⁰. On this note, Article 126 of the 1991 Sudanese Penal Code Act provides for death penalty for any person found guilty of apostasy⁷¹. However, the section goes on to state that where the apostate repents and recants his apostasy before the execution of the death penalty, the death penalty should be withdrawn⁷². In Sudan, the famous case Meriam Yahya Ibrahim a 27 year old woman was convicted on 11 May 2014 on account of apostasy and zina under the 1991 Sudanese Penal Code⁷³.

5.1.3.2 Adultery

According to Sharia law the crime of adultery (zina), includes both adultery (sexual relations between individuals, at least one of whom is married) and fornication (sexual relations between unmarried individuals)⁷⁴. The Quran requires four male eye witnesses or four confessions on four separate occasions by the defendant in open court to sustain a zina conviction⁷⁵. Married persons who commit zina are punished by stoning to death and unmarried persons by one hundred lashes.⁷⁶

However, under the Ugandan law, section 154 of the Penal Code Act provides for the crime of adultery in following terms. The law says; *„any man who has sexual intercourse with any married woman not being his wife commits adultery and is liable to imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred shillings; and, in addition, the court shall order any such man on first conviction to pay the aggrieved party compensation of six hundred shillings, and on a subsequent conviction compensation not exceeding twelve hundred shillings as may be so ordered“*.

The above section clearly makes adultery a misdemeanor for which a lesser punishment is laid. This is a true indication that the conventional laws disregard the crime of adultery much as it causes disastrous effects to families the most

⁷⁰ Elizabeth Preiffer, –The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria| William & Mary Journal of women and the law, Vol 11 Issue 3 Article 9 page. 511

⁷¹ Sudanese Criminal Act 1991

⁷² Ibid

⁷³ International Federation for Human Rights Sudan: Death Penalty pronounced in apostasy case, 20/ May/2014. Available at <https://www.refworld.org/docid/5391b73e22.html> Accessed 7/7/2019.

⁷⁴ Prof. Anwarullah, –The Criminal Law of Islam|| KItab Bhavan Publishers, 1st Edition 2006 pg.125

⁷⁵ See: Quran 24:2.

⁷⁶ ibid

fundamental units of this World. Adultery leads to confusion of lineage, child abuse, family breakups, and spread of diseases among other.

However, Islam has laid certain conditions that make the impositions of the death penalty very difficult. In fact certain Moslem scholars are of the opinion that the evidential requirement of Zina makes the implementation of its punishment very difficult⁷⁷. They are;

There should be four eye witnesses who should testify that they saw the act being committed at the same time⁷⁸. If the act is to be proved by way of confession, then the confession must be repeated in four clear and unambiguous words. The accused can any time withdraw his confession at anytime of which the death penalty would be withdrawn⁷⁹. In addition the witnesses in the case of Zina must be Muslim, male of high moral standing with the society and of legal capacity⁸⁰. Where one wrongfully accuses his fellow Muslim of zina, then he/she would be liable for another had known as Qazf and would be stripped eighty lashes for that⁸¹.

Imam Malik maintains as an exception for the provisions of four witnesses that Zina can be proved by circumstantial evidence in case of unmarried woman becoming pregnant⁸². In Saudi Arabia for instance who are followers of Imam Ahmad Ibn Hanmbal, thy raise several defenses for this claim⁸³. First, a woman who was married before can claim that the pregnancy is for his former husband under the 'sleeping fetus' doctrine that the pregnancy can last from four to seven years⁸⁴; second the woman can claim that there was no penetration which is requirement for Zina; thirdly the woman can claim to have been coerced into the sexual intercourse⁸⁵; fourthly a woman can claim that she engaged into the sexual act under a mistaken belief for example believing that they underwent through a valid marriage ceremony whereas not and lastly the woman can claim that the sexual intercourse took place while she was a sleep⁸⁶. The last two defenses cannot be disproved except for the woman's claim.

⁷⁷ Elizabeth Preiffer, –The Death Penalty in the Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria| William & Marry Journal of Women and the law Vol. 11 Issue 3 Article 9 page. 510

⁷⁸ Quran 4:15-16

⁷⁹ Prof. Anwarullah, –The Criminal Law of Islam|| Kitab Bhavan Publishers 1st Edition 2006 pg. 161

⁸⁰ Ibid

⁸¹ See: Quran 24:4

⁸² Ibid

⁸³ Elizabeth Preiffer, –The Death Penalty in the Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria| William & Marry Journal of Women and the Law Vol. 11 Issue 3 Article 9 page. 511

⁸⁴ Ibid

⁸⁵ Prof. Anwarullah, –The criminal Law of Islam|| Kitab Bhavan Publishers 1st Edition 2006 page 161

⁸⁶ The tradition of the prophet that the pen is lifted for three categories of people and one of the instance is a sleeping person until he/she wakes up. [Abu Dawud 4403]

Surely the evidential burden makes it next to impossible to prove the offense for Zina and as such the infliction of the death penalty under the head of Zina is most unlikely to occur.

5.2.1.3 Harabah (Dacoity and Highway robbery)

Harabah literally means to quarrel, to fight and in technical terms it means to take a way property from a person openly by using or threatening to use force⁸⁷. Harabah includes highway robbery, bloodshed, high treason, decoity among others⁸⁸. According to Imam Abu Hanifah for a person to commit harbah must be armed with something that can be used as a weapon arm or such a thing which is used as arm stick, stone, piece of wood etc. however according to Imam Malik and Shafi, harbah can be committed with personal capabilities of using force irrespective that the offender is armed or not⁸⁹.

Highway robbery is punishable by death, crucifixion, amputation and, banishment.⁹⁰ This offense interferes with commerce and creates fear among travelers.⁹¹ The Quran states:

*This is the recompense of those who fight against God and His Messenger, and hasten about the earth, to do corruption there: they shall be slaughtered, or crucified, or their hands and feet shall alternately be struck off, or they shall be banished from the land.*⁹²

This offence is also provided for within the Ugandan law specifically under section 285 of the Penal Code Act. The section provides that; „any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery.⁹³ The punishment for aggravated robbery is death⁹⁴”.

However, under Islamic law, there is an unanimous opinion of the jurists that if the offenders of harbah repent before their arrest by state, the ‘_hadd’ shall not be implemented on them however they would be liable for restoration of property back

⁸⁷ Prof. Anwarullah, –The Criminal Law of Islam || Kitab Bhavan Publisher 1st Edition 2006 page195.

⁸⁸ Ibid

⁸⁹ Ibn Qudaamah, al-Mughni, Vol. 10, page 262-64

⁹⁰ M. Siddiqi, the Penal Law of Islam 52 (1979), note 80, pg. 141.

⁹¹ Ibid, pg. 140

⁹² Quran: 33: 34.

⁹³ Section 285 of the Penal Code Act Cap 120

⁹⁴ See: Section 286 (2) of the Penal Code Act Cap. 120.

to the owner and shall be liable for qisas where they committed murder or hurt⁹⁵. In countries such as Saudi Arabia the offenders would also be liable under ta'zir⁹⁶. The Quran relates to the punishment of the offenders of harabah:

“Except if those who repent before they fall onto your power; in that case, know that Allah is oft-forgiving, most merciful” [5:34]

Basing on the above verse, where the offenders repent after being arrested, the *hadd* shall be implemented if their offence is proved by the testimony of two adult, sane and credible witnesses other than the victims⁹⁷.

Surely Islam is a most forgiving religion and the death penalty can be implemented during extreme circumstances.

For the third category of offences which is Ta'zir, (offences against the state) these are crimes whose punishments have not been fixed by the Holy Quran and the Sunnah of the prophet (PBUH)⁹⁸. The punishments for these crimes are left on the discretion of the judge/ruler to fix in accordance with the prevailing circumstances much as the ruler would be free to prescribe death punishment for the aggressor if circumstances so demand⁹⁹.

5.2.2 Procedure before conviction of death penalty in Islam:

Islam emphasizes that before the imposition of the death penalty, the due process should be followed. These conditions make the convictions of the hudud and qisas crimes very difficult to the extent that Islamic states end up convicting the accused persons on the basis of Ta'zir¹⁰⁰. Allah again says:

Do not kill a soul which Allah has made sacred except through the due process of law.[Surat al An'am 6:151]

The following are some of trial procedures before sentencing the accused to death penalty;

1. The prosecution must prove its case beyond reasonable doubt. Islam considers it preferable to error in granting a pardon, than to error in inflicting punishment. On this the Prophet (PBUH) said:

“Avoid applying legal punishment upon the Muslims if you are capable. If the criminal has a way out, then leave him to his way. Verily it is better for the leader to make a mistake forgiving the

⁹⁵ Prof. Anwarullah, –The Criminal Law of Islam || Kitab Bhavan Publishers, 1st Edition 2006 page 197

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Prof. Anwarullah, –The Criminal Law of Islam || Kitab Bhavan Publishers 1st Edition 2006 page 212.

⁹⁹ Ibid .

¹⁰⁰ Prof. Anwarullah, –The Criminal Law of Islam || Kitab Bhavan Publishers, 1st Edition 2006 page 36

criminal than it is for him to make a mistake punishing the innocent” Sunan al-Tirmidhi 1424.

Therefore, for any offence that cannot be proved beyond a reasonable doubt, the court should find in favour of the defendant.

2. Circumstantial evidence cannot be admitted in hudud offenses¹⁰¹. Because of the gravity of the punishment associated with hudud punishment being death penalty, Islam requires that the evidence must be direct and conclusive¹⁰². However Imam Malik of the Maliki school of law makes an exception for Zina in case of an un married woman becoming pregnant¹⁰³.
3. In the same line, Sharia law also requires that a minimum of two witnesses that are morally upright, sane male and Muslims who must testify that they saw the offence take place for other hudud offences other than Zina. Allah says:

“.....and bring to witness from among your men.....” [2:282]

For conventional law even one witness is enough much as the court is required to take extra caution when convicting on the evidence of a single identifying witness. The case of *Abdallah Nabulere and 2 others vs. Uganda*¹⁰⁴ where the court noted that where the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused, there is need for a special caution as a witness can be more convincing but mistaken.

4. Sharia law also has a strict requirement that a person cannot be accused of an offence if they are under the age of criminal responsibility known as bulugh. The prophet Peace be Upon Him said:

“The pen is lifted (prevented from writing the sins) of three groups (of people) that is, they will not be responsible for their actions: the insane until they become sane, those who are sleeping until they wake up, and the young until they reach puberty.” [Recorded in Abu Dawud 4403 and Ibn Majah 2041]

This is in line with the Constitution of the Republic of Uganda as the age of maturity is 18 years and a child would be criminally culpable upon retaining the said age¹⁰⁵.

¹⁰¹ Elizabeth Peifer, –The Death Penalty in Traditional Islamic Law and as interpreted in Saudi Arabia and Nigeria | William & Mary Journal of the Women and Law Volume 11 Issue 3 Article 9 page.55

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ Criminal Appeal No. 9 of 1978.

¹⁰⁵ See: Article 257 of the Constitution 1995 (as amended)

There are no formal procedures that were laid by the holy Quran or the traditions of the prophet [PBUH] on how the trial process should be however they have been developed by Muslim scholars within the different Muslim countries.

In Pakistan Article 2 of the Constitution of Pakistan provides that Islam shall be the state religion of Pakistan. Parliament of Pakistan is not allowed to pass any law that is repugnant to the teaching of the holy Quran and the traditions of the prophet¹⁰⁶. This means that Pakistan is an Islamic state governed on the very teachings of Islam¹⁰⁷. In Pakistan, a death penalty convict is a condemned prisoner¹⁰⁸. A convict becomes a condemned prisoner after an additional district session judge condemns him to suffer death. This sentence must however be confirmed by the High Court of Pakistan for it to be executed¹⁰⁹. Therefore a prisoner has a right to appeal to High court as of matter of law to vary or confirm his sentence. Where the High Court upholds the death sentence, the session judge will issue the execution warrant which bears the execution date. The convict has an automatic right to appeal to the Supreme Court of Pakistan¹¹⁰. If the Supreme Court does not issue an order for stay of execution before the date provided for in the execution warrant, the prisoner will only be left to send an appeal for mercy to the president of Pakistan who has the powers to pardon under Article 45 of the Pakistan constitution. If the prisoner's appeal before the president fails, he/she will have to be executed on the set date provided for within the execution warrant.

In Saudi Arabia, Article 1 of the Constitution of the Kingdom of Saudi Arabia provides that Islam is the state religion of the Arabic Republic of Saudi Arabia with Quran and the Sunnah of the prophet [PBUH] with Riyadh as its capital city. Article 38 of the Constitution of Saudi Arabia also maintains that there shall be no crime or penalty except in line with shariah. In Saudi Arabia it is the High Court of Saudi Arabia (kubra court) that has jurisdiction to try the case that would result into the imposition of death penalty¹¹¹. The High court in the death penalty case sits with three judges who investigate, examines witnesses and issue its verdict¹¹². The accused once convicted has a right to appeal to court of Appeal (cassation court) who sits with five judges once the sentence is confirmed, the file is sent to the Supreme Judicial

¹⁰⁶ Ibid

¹⁰⁷ See: Article 1 of the Constitution of the Republic of Pakistan [as modified on the 28/February/2012]

¹⁰⁸ Ashraf Ali, -Abolition of Death Penalty in Pakistan|| Available at https://www.academia.edu/Abolition_of_death_penalty_in_Pakistan/pdf. Accessed on 7/8/2019 page 11

¹⁰⁹ Ibid

¹¹⁰ Ibid

¹¹¹ Elizabeth Preiffer, -The Death Penalty in Traditional Islamic Law and as interpreted in Saudi Arabia and Nigeria|| William & Mary Journal of Women and the Law. Vol. 11 Issue 3 Article 9 page. 521

¹¹² Ibid

Council that also reviews the prisoner's case¹¹³. If the sentence is confirmed the file is sent to the King of Saudi Arabia who has the review. Where the king confirms the conviction, the prisoner will have to be executed.

5.2.3 Execution of Death Penalty in Islam.

Under Islamic law, execution of a death penalty should be public in order to enhance its alleged effect of general deterrence¹¹⁴. This is derived from the hadith of Maiz who had confessed that he had committed adultery and the prophet ordered that he should be taken to Baqi' garqad (the grave yard of Medina) an open place for him to be stoned from there¹¹⁵. According to Imam Abu Hanifah and one view of Imam Ahmad in case of premeditated murder, the convict shall be beheaded with a sword or another similar weapon¹¹⁶. According to Imam Malik and Imam Shafi if possible the convict shall be killed in the same way as the victim was killed.

For the case adultery the punishment should be executed in an open place where the prisoner is made to stand into the hole half way of his body and then stoned up to his/her death.

In conclusion therefore by following the tenets of Islam, the implementation of death penalty is very difficult to realise to the extent that one can say there is almost no death penalty in Islam through the waivers and evidential safe guards provided and required under the law respectively.

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¹¹³ Ibid

¹¹⁴ William A Schabas, –Islam and Death Penalty|| Willian & Mary Bill of Rights Journal (2000) Available at

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¹¹⁶ Prof. Anwarullah, –The Criminal Law of Islam|| 1st Edition 2006 page 90.

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