

Capital Punishment in the Lens of the Shari'ah

Abdulrazaq Kilani

Department of Religious and Cultural Studies,
University of Port Harcourt, Port Harcourt.
Abdulrazaq.kilani@uniport.edu.ng

Vol.3, Issue 2 | July 2020

KEYWORDS

Capital, Punishment,
Shari'ah

ABSTRACT

Shari'ah as a legal system of law in Islam is greatly misunderstood by a cross section of the intellectuals due to the prescription of capital punishments in the legal system. The paper provides explanation for capital punishment in the Shari'ah using the absolute sources of Islam (Qur'an and Sunnah) and to explain that the Shari'ah and Islamic system provide for reform, forgiveness and pardon. The paper concludes that the revulsion against the Shari'ah and its prescriptions is misplaced as Islamic system is replete with prescriptions of mercy and pardon for offenders.

Introduction

The history of human civilization reveals that every society has been involved in the quest to establish and maintain order in the society. Law has been identified and used as a veritable means of establishing and maintaining order. Every society exercises control over itself by the use of a number of machineries like taboo, custom, tradition and law. Islam as a complete and divine system has recognized the indispensability of maintaining law and order in its system so as to make it easy for humankind to establish servitude to God without any hindrance. Islam therefore provides for the Shari'ah in a comprehensive form in its system. The critics of the Shari'ah have used the provision of capital punishment in the legal system to deride it and call for the total abolition of Shari'ah as legal systems of countries that use it because they describe the Shari'ah legal system as anachronistic to modern life. What resonates to the critics of Shari'ah when the legal system is mentioned is that of a body of law that sanctions stoning to death and hand chopping. There is no doubt that stoning and hand chopping do feature in the Shari'ah but their actual function can only be understood by examining the overall objectives of the Shari'ah and the place of crimes and

punishments (*Hudud*) in Islamic state engineering. It needs to be stated that these crimes and punishments called *Hudud* constitute a minuscule portion of the Shari'ah. The focus of this paper is to bring into the fore the Islamic position on death penalty as contained in the Shari'ah and why no Muslim nation or individual has tried to abrogate or modernize the provisions in view of the clamor by modernists and human rights advocates.

SHARI'AH: MEANING, SOURCES AND SCOPE

The term *Shari'ah* is from the Arabic word *Shara'* that means a path, to enter, to set out, to enact or to commence. It literally means, the way to a watering place. Technically, it means a divine path or law leading to Allah and it is a divine path set for mankind. The *Shari'ah* connotes a comprehensive sense of justice because it includes all the virtues of good behaviour, good deeds and returning good for evil. The *Shari'ah* is the detailed code of conduct or the Canons comprising ways and modes of worship, standards of morals and life, it is a law that prescribes and judges between right and wrong (Maududi 1973:11). The *Shari'ah* stipulates the law of God and provides guidance for the regulation of life in the best interests of man. The *Shari'ah*

according to al-Faruqi "is the prescriptive figurization of the vision of Islam and the forte of Muslim juristic thought(Faruqi 1986:46). The Shari'ah which is translated as Islamic Law brings into fore the centrality of *Tawhid*, and full belief in the absolute unity of Allah, the One as the source of existence, values and source of Law (Lamido 2000:2). In Islam, no one can ever deny Allah a role in our lives especially when the issue of Shari'ah is discussed as an integral part of holistic Islamic epistemology. In Islam, it is unthinkable to build a shield between our morality and its source, the Divine presence. This is the understanding of Islam on the concept of divine justice as a Muslim who believes in Allah the All-seeing [*Al-Basir*] does not lock himself in a room and turnout the light believing he can sin and escape. The same with one who believes in *Al-Sami'* [the All-Hearing], such a person does not speak things in private, which are prohibited by Allah. In exactly the same way, a Muslim who believes in Allah, the Just cannot stand injustice (Lamido 2000:3). This explains why Islam has not allowed any duality in the lives of Muslims; a duality of this world and the hereafter or a duality between mundane and spirituality.

Shari'ah refers to the sacred laws and ways of life prescribed by Allah. In Qur'an 45:18, Allah says, "Then We have put you on a (legal) way of commandment. So follow you that, and follow not the desires of those who know not". The Qur'an and the Sunnah comprise the Shari'ah. These are considered the most important sources of Islamic law. The Qur'an is the eternal word of Allah which is the primary source of guidance because it is the spoken word of Allah. The Sunnah refers to the words and actions of the Prophet. The Shari'ah deals with ideology and faith (*aqeedah*), behavior and manners (*adab wa akhlaq*), and practical daily matters (*Mua'malat*), crimes and punishments (*Hudud*), International laws and state relations (*Siyar*). The Shari'ah therefore is a comprehensive body of norms covering every aspect of life including international, constitutional, administrative, criminal, civil, family, and religion. The *Fiqh*, or Islamic jurisprudence which is wrongly viewed in some quarters as the Islamic Law refers to the legal rulings of the Muslim scholars derived from the Shari'ah. In other words, the *Fiqh* is the human understanding and interpretation of the rules of the Shari'ah and does not enjoy a divine status in Islamic sciences as the Shari'ah. *Fiqh* is not Shari'ah that is divined but the human interpretation and understanding of the principles of Shari'ah as contained in the Qur'an and Sunnah.

DEBATE ON CAPITAL PUNISHMENT

The debate about the imposition of capital punishment may be as old as the supreme penalty itself. The circumstances of its imposition and administration, as well as the wisdom of its use

altogether, have preoccupied jurists, scholars, philosophers, and theologians for many centuries. The position of every Muslim to the question of death penalty is dictated always by its religious context. Every Muslim considers as authoritative sources of guidance the Qur'an and Hadith and the two primary sources provide explicitly for capital punishment. A philosophical inquiry indicates that failure to demand for capital punishment in the case of murder for example according Kant is immoral. Kant proclaims in his work, *The Metaphysics of Morals* (1965: 102) that:

If an offender has committed murder, he must die. In this case, no possible substitute can satisfy justice. For there is no parallel between death and even the most miserable life, so that there is no equality of crime and retribution unless the perpetrator is judicially put to death.

The advocates including the Muslim scholars have always argued that the death penalty serves the society well as deterrence to others. The death penalty deters as a by-product of an effective process of socialization and it deters through the successful internalization of the societal values which foreclose the contemplation of murder for example in the first place. Goldberg (1979:542) posited in the same vein that:

The death penalty deters primarily by deterring today's child from becoming tomorrow's murderer; it deters-if it does deter-by engendering in today's child a resistance to murder that prevents him from ever even considering murder in the behavioural calculations he makes as an adult.

The debate on death penalty has been transformed, in the last half of the twentieth century, with the injection of a new element, the international law of human rights. Initially addressing the issue implicitly, with the proclamation of the right to life and the prohibition of cruel, inhuman, and degrading treatment or punishment, in articles 3 and 5 respectively of the 1948 Universal Declaration of Human Rights,' the law has steadily and inexorably developed in this area. By the end of the twentieth century, some sixty states had ratified international treaties prohibiting capital punishment, and the issue itself had become one of the pre-eminent debates in such important international forums as the General Assembly of the United Nations and the Rome Conference on the International Criminal Court.

In 1981, the Islamic Council adopted a Universal Islamic Declaration of Rights, which states: "(a) Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall

be exposed to injury or death, except under the authority of the law. The Arab Charter of Human Rights, adopted September 15, 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life in the same manner as the other international instruments. However, three distinct provisions, Articles 10, 11, and 12, recognize the legitimacy of the death penalty in the case of "serious violations of general law," prohibit the death penalty for political crimes, and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth.

THE STATE, THE LAW AND PUNISHMENTS

In order to enable humankind to live in the state in a cohesive and organized way, the state has to maintain certain norms in the form of criminal law which provides for punishments that may be imposed on those persons who transgress its provisions. In any society where there is law, there must be sanction for violators of such law. Punishments are the means used from time immemorial by the society to express its denunciation of the wrongdoing in order ensure welfare of the people and peace in the society. Punishment is designed to perform one of the most basic duties of the state to protect the life, liberty and property of the citizens by reducing the commission of offences. The instrumentality of the law saves the society into becoming a state of anomie. In relation to this, Justice Stewart observes that ' When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve", then there are sown the seeds of anarchy of self-help, vigilant justice and lynch law"(Bari 2010:39).

Capital punishment is the right of the state to take a life as a punishment for a crime. There is daily an increasing advocacy by human rights groups calling for its abolition. According to Amnesty International's 2014 study, 98 countries have abolished capital punishment while another 35 countries are considered 'abolitionist de facto' by virtue of either not applying the death penalty or not carrying out the sentence. There are also seven countries that are using capital punishment in what has been described as extreme cases. In a nutshell, there 140 countries in total which represents two-thirds of all countries in the world that do not apply capital punishment (Jimly Asshiddiqie 2015:6). Capital punishment, which takes a person's life who is found guilty of a capital offence by the courts of law, is considered to serve the main objectives of punishment - deterrence, prevention and retribution (Bari 2010:40). The implication of this is that when a criminal is given a capital punishment, it dissuades not only the offender from repeating the crime but also deters others who have criminal tendencies. It

serves as deterrent because people fear death the most; by putting the offender to death, fear is instilled in the minds of other potential criminals who may be planning to commit the same crime and it also makes the evil-doer as an example and thereby sending strong warning to all that are like minded with him. Sir James Stephen observed that: 'No other punishment deters men so effectually from committing crimes as the punishment of 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 result (Royal Commission 1949-1953: 19).

Raspberry also posited that the opposition to capital punishment 'has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response.' Rasperry (1976: A27):

The application of the death penalty also serves the purpose of incapacitation of the offender permanently as such a criminal is prevented from committing such a heinous crime in the future. There is no gainsaying the fact that in most cases where the loved one of a person has been gruesomely killed that, capital punishment gratifies the feeling of pleasure of the relatives of the victim at the thought that the murderer has been brought to justice by the state thereby preventing the danger of self-help by people.

Bari (2010: 41) submitted:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.... It is indeed unique as the executed person loses 'the right to have rights.

IMPERATIVE OF LAWS, REWARD AND PUNISHMENTS IN ISLAM

Allah's command for Muslim society constitutes a system of duties that are incumbent upon a Muslim of his religious belief and those who violate His command must be punished. In Islamic legal system, law is classified either as a violations of the 'rights of God' (*ḥuqūq Allāh*) or violations of the 'rights of God's servants,' i.e., human beings (*ḥuqūq al-ibād*). The rights of human beings include the right to physical inviolability, the right to dignity, the right to property, the right to family, and the right to religion (Brown 2017:6).

Criminal responsibility in Islamic Jurisprudence is declared to be strictly personal and individual. In Qur'an 45:15, Allah says, "Whosoever does a good deed, it is for himself, and whosoever does evil, it is against (himself). Then to your Lord you will be made to return". Also in Qur'an 6:164, "No person earns any (sin) except against himself (only), and no bearer of burdens shall bear the burden of another" (also Q 35:18, Q 4:123). Islamic legal system divides offences, from the perspective of sanction, into three categories;

- i. *Hadd* offences [*jara'im al-hudud*] are those which attract a fixed and non-negotiable punishment once established. In other words, *hudud* offences and their penalties are fixed, absolute and not commutable. They are understood as especially intended to protect the broader interests of society or the public. These include adultery and fornication, apostasy, drinking, rebellion, slander and highway robbery.
- ii. *Qisas* and *Diyah* offences [*jara'im al - qisas wad-diyah*] are those which are retributive in nature, but which can be substituted by some payment in kind as restitution, or forgiven by the injured party or his heirs. In this category, the sanctions are meant to protect the interests of society or the public but also to respect the victim by protecting the personal and private interests of the victim's family. These include murder, manslaughter and bodily harm.
- iii. The third category *Ta'zeer* offences [*jara'im at-ta'zeer*] refers to everything that is prohibited in the Qur'an or Sunnah but for which a punishment is not prescribed under *Hadd* or *Qisas* and *Diyah*.

There is no doubt that understanding this point and classifications is critical to understanding Islamic Criminal Law. The widely held opinion by critics of Shari'ah is that *al-'Uqūbāt* (Islamic penal law) is "torturing, cruel, degrading or inhumane and that *Qur'ānic* legislation 'leaves no room for flexibility in the evaluation of its injunction. Islamic law provides for the principle of *Ijtihād* which provides contemporary Muslim scholars with a framework for workable solutions to contemporary problems. It is the knowledge of juridical source methodology, the rules for deriving legal rulings and the ways of indicating legal preference. In this respect, a *Faqīh*, (a Muslim jurist), functions not only as legal expert but also as social scientist by his continuous self-renewal through meeting and adjusting to changing circumstances based upon the rulings conducted within the framework of *Ijtihād* (Al-'Alwani, 1991: 129-142). The Criminal Law deals with the protection of public interests and values deemed to be vital for a particular society, even if at times the immediate interest protected is a private interest. *Al-*

'Uqūbāt represents the power of the state to impose punishments on offenders in order to enforce compliance with penal rules (Lateef 2017:11). *Al-'Uqūbāt* in a broad sense is the body of law that defines criminal offences, regulates the apprehension, charging and trial of suspected persons and determines the types of punishments and their mode of execution to the offenders.

THE SHARI'AH AND HUDUD PRESCRIPTIONS

The Qur'an is the epitome of the Shari'ah and the Sunnah (the sayings, deeds and approvals of the Prophet) prescribe the capital punishment for several *hadd* or fixed and unchangeable punishment. *Hudud* is plural of the Arabic word *hadd* crimes in which the mandatory punishment cannot be decreased, altered or remitted by anyone, including the head of the state.' In other words, the *hudud* are crimes that their punishments are specified in the Quran or Sunnah and that they are considered to be violations of the rights of God and of course, some of the *hudud* are also violations of the rights of humans as well. The Quran mentions the "limits of God" several times, warning Muslims of the sin of transgressing them and that they should not even approach them (Quran 2:187, 2:229, 4:14, 58:4, 65:1). *Hudud* crimes are considered as the most serious, heinous and grave crimes under the Islamic Penal Law for which Allah has enacted as deterrent and preventive punishments to deter others who have similar criminal tendencies and prevents the wrongdoer from offending again in the future. These are the offences against public morality termed in Islam as *haqq Allah*- the claim or right of Allah and the Qur'an ordains strict implementation of *hadd* punishment. According to Islamic Law, capital punishment may be imposed for categories of crimes namely intentional murder; spreading mischief in the land (*Fasad fil-ardh*) which include highway robbery and, adultery. In the case of intentional murder, it is punishable by *qisas* in which the offender is subjected to precisely the same treatment as his victim, i.e. the law of equality, 'life for life' and, as such, the objective of this punishment is retributive. According to Asshiddiqie (2015:8):

The idea that the victim's family – those most directly affected by the crime committed – determine the terms of justice is a powerful mechanism to promote forgiveness and reconciliation. Islamic law strongly encourages forgiveness.....Modern criminal law focuses, however, on the state's relationship with the accused. It is the state that exacts punishment for crimes against its citizens; it is also the state – not the individual – that receives any fines (a kind of *diyat*) that are levied. The interests of the victim's family are too often missing in both the theory and practice of modern criminal law.

In the case of 'spreading mischief in the land', it is wide-open to different interpretations, the jurists generally agree to include the following crimes in the expression that affect the community as a whole and destabilize the society:

- i. Treason: it is a crime in which traitors try to plot the overthrowing of the Islamic Government and helps the enemy of the Muslim community. It also includes armed rebellion (*baghy*) which means intentional use of arms to overthrow a legitimate leader.
- ii. Apostasy, renouncing the religion of Islam (*riddah*) and turning against it. *Ar-Riddah* or *Irtidad* is defined as willful rejection of Islam by a Muslim through a statement or an action. Apostasy was the spiritual form of treason as it should be noted that during the time of the Prophet Muhammad, Islam was still a growing religion with few devotees. It was also a time of numerous battles where followers of the Prophet fought those who rejected Islam. Hence, apostasy was seen as a form of treason that endangered the general safety of the Muslim followers, and death was therefore a reasonable punishment in the historical context, as it was in most other societies and religious communities at the time. It is important also to note that, despite the clear nature of the sanction for apostasy or treason, those who repented and returned to Islam could be given a stay of execution. In the modern context, the decision to convert to or from a religion is matter of religious choice, which can be framed as a matter of human rights. Moreover, Islam itself guarantees the freedom to follow whatever religion someone may choose. The Qur'an supports religious pluralism as contained in Qur'an 109, 'For you, your religion, and for them, their religion' (Jimly Asshiddiqie (2015: 6).
- iii. *Hirabah*, 'waging war against God and society' or brigandage, banditry and committing highway robbery. Highway robbery is not merely an offence against the individuals, it is considered by the Qur'an (Surah *al-Maidah* verse 33) as 'waging a war against Allah and His Messenger' and an attempt to spread mischief in the world.
- iv. *Zina*, commission of adultery by a married man or woman (*muhsan*)
- v. Homosexuality and vi. Murder.

However *Hudud* cases with other forms of punishment different from capital punishment include; *Sariqa* (theft), *Shurb al-Khamr* (drinking alcohol) and *Qadhif* (slander or defamation or false accusation of any of these things).

There is no doubt that capital punishment exists in Islamic Law but one can safely say there has been

rarity in its application. A Scottish doctor working in Aleppo in the mid 1700's observed that there were only six public executions in twenty years and theft was rare and when it occurred it was punished by lashing of the feet. Also, a famous British scholar of Arabic in Egypt in the mid 1800's reported that the *hudud* punishment for theft had not been inflicted in recent memory. In the roughly five hundred years that the Ottoman Empire ruled Constantinople, records show that only one instance of stoning for adultery took place (Brown (2017:18).

SANCTITY OF LIFE AND THE OBJECTIVES OF SHARI'AH

Islam considers life of every person as sacred and posited that no one has the right to take another person's life unjustly. It provides that only a lawfully constituted authority is empowered to terminate a life in the process of implementing the injunctions of Allah on earth through the instrumentality of the Shari'ah. In Qur'an 6:151, Allah says, "Take not life, which God has made sacred, except by way of justice and law. Thus does He command you, so that you may learn wisdom". Again the same message was mentioned in Qur'an 17:33, "And kill not your children for fear of poverty". The value of human life to all humankind is espoused in Qur'an 5:32 thus:

....that if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land - it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind.

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

- i. The protection of life (*al-nafs*)
- ii. The protection of religion/faith (*al-din*)
- iii. The protection of offspring, or an individual's lineage (*al-nasab*)
- iv. The protection of property (*al-Maal*)
- v. The protection of an individual's intellect (*al-aql*). [Al-Shatibi, 335-338].

In order to achieve these objectives which are considered five indispensables, Islam has established the imperative of moral education, which emphasizes the importance of cultivating *taqwa* (religious or God consciousness) so that people do

not commit crimes because of the consciousness and understanding that God is always aware of what they do. In the same vein, the basic doctrines of Islam encapsulate that there is life after death accompanied by accountability (*hisab*) and recompense for good or evil deeds. This understanding is the pillar of faith that propels a believer in all his or her dealings on earth. This is the core of Islamic epistemology. Allah says in the Qur'an 5:8:

O you who believe! Stand out firmly for Allah as just witnesses; and let not the enmity and hatred of others make you avoid justice. Be just, that is nearer to Taqwa; and have Taqwa of Allah. Verily, Allah is Well-Acquainted with what you do

The teachings of Islam make it clear that religious or moral piety alone cannot guarantee law and order in any society and hence the Shari'ah prescribes forms of punishment, which constitute the criminal justice systems of Islam. The Shari'ah is also based on the foundational principle that the function of law in Islam, is to 'accrue benefit' for the individual as well as for the common good or public interest (*masalih*) while 'repelling harm' away from the public. Shari'ah laws are simply a means to achieve that goal and not an end in themselves. Many classical scholars of Islam have elaborated on the purpose and function of the Shari'ah in Muslim society. Ibn Qayyim asserts that Islamic juridical methodology has always been based on 'wisdom and people's welfare' and the famous exponent on the objectives and goals of the Shari'ah, Abu Ishaq al-Shatibi explained as follows:

God established Shari'ah in order to advance *masalih*, and there is unanimous agreement on this. It was also agreed that the *masalih* which are taken into consideration are those relating to *kulliyat* [i.e. universal principles, the five 'indispensables' in Islam: protection of an individual's faith, life, intellect, offspring and property] and not those relating to *juz'iyat* ['particular laws' which are merely a means to achieving the universals]... 'repelling harm' means preventing anything that would undermine the indispensables or public interests (*masalih*). Thus, the death penalty was seen as a way of deterring crime and sin in Islam and repelling harm from the *masalih*. (Al-Shatibi, 1997: 221, 335,338].

FORGIVENESS AND PARDON IN THE FRAMEWORK OF THE SHARI'AH

One of the often read criticisms of the Shari'ah is that the legal system is harsh and rigid but a cursory look at the two primary sources of Islam (The Qur'an and

Hadith) where the law is derived, provide opposite of this allegation of harshness and rigidity. Islam provide for unqualified affirmation of the dignity of humankind (Q17:70), the Qur'an further commands, "Keep your duty to your Lord, who created you from a single soul and created its mate of the same [kind] and created from them countless men and women" (Q4:1). In the same vein, the Quran also states that all human beings have been created honourable and in the best of mould (Q 95:4). The Qur'an in many chapters brings into fore the Mercy of God to humankind and encouraging all not to despair of God's mercy (Q 39:53, Q 7:156).

In the Hadith and sayings of the Companions are references to mercy and pardon for offenders. In one popular saying in which scholars like Tirmidhi and Bayhaqi consider the narration as that of Aisha rather than the Prophet said: "do your best to avoid mandatory punishments. If you can find a way out for the accused, let him go. It is better for the ruler to err in granting a pardon than to err in enforcing a punishment [al-Tirmidhi, 1344]. According to Ibn Hajar, there is also another reliable statement of Umar's saying, "For me to err in the *hudud* because of ambiguities is more preferable for me than to carry them out because of ambiguities." (See Shams al-Din al-Sakhawi, 2004), The same Umar has been reported to have suspended the application of *Hudud* for theft in times of famine while the famous Hanafi jurist al-Kasani (d. 1191) wrote, "It is not permissible to carry out the *hudud* without the probability of some benefit" (Brown 2017:18).

In addition, there are other textual evidence that Prophet Muhammad (PBUH) was more concerned on turning away people from sins than punishing the offenders. Anas ibn Malik reports:

I was with the Prophet when a man came and said to him: 'Messenger of God, I have committed an offence carrying a mandatory punishment, so punish me'. The Prophet did not ask him what he committed. Then it was time for prayer. The man offered his prayer with the Prophet. When the Prophet finished the prayer, the man went up to him and said: 'Messenger of God, I have committed an offence carrying a mandatory punishment. Enforce God's ruling on me'. The Prophet said: 'Have you not prayed with us?' The man said: 'Yes'. The Prophet said: 'God has forgiven you your sin' (Bukhari 6823).

In addition, under the Shari'ah, there is a presumption of innocence for *hudud* crimes the Prophet (PBUH) demonstrated flexibility and tends towards spiritual purification of the adherents and ardently wanted them to turn away from sins and follow the path of righteousness. The Prophet was also reported to have said, "Who so ever commits the

sins (*shirk*, stealing and adultery) and is punished for it, then the punishment nullifies the sins for them. And who so ever commits the sins and Allah covers it, then it depends on Allah to pardon them or punish them" (Sahih al-Bukhari, 6784). The Prophet himself clarified many times that it was far better to forgive and resolve *hudud* crimes without his intervention when he said, "Pardon in *hudud* among yourselves, for the legal penalty for any wrongdoing reported to me will imperatively be applied." (Abu Dawud no. 4376, and An-Nasa'i no. 4889. In another Hadith, the Prophet said, "He who has committed [*haad*], let him cover himself with the covering of God, and let him repent to God. For on him who reveals to us his deed in the open, we will enforce the Book of God." (Al-Hakim, Mustadrak, 4:244, 383). Anas ibn Malik was also reported to have said, "I never saw a case involving legal retaliation being referred to the Messenger of Allah, except that he would command pardoning the criminal." (Sunan Abu Dawud, no. 4497)

The Muslim jurists provided a long list of requirements that must be eliminated as ambiguities before the punishment of amputation for theft for example could be carried out and this general understanding among Muslim jurists on the need to eliminate all forms of ambiguities made Rudolph Peters to conclude that, it is "nearly impossible for a thief or fornicator to be sentenced, unless he wishes to do so and confesses" (Rudolph Peters, 2005: 54).

The primary sources of Islam which provides relevant Islamic law provision of crimes that deserve the death penalty but in the same vein put up many barriers to imposing this punishment even for those accused of the most serious *hudud* crimes in order to protect the innocent and those with lesser wrongdoings. The Shari'ah provides for death penalty for armed robbery and gave the judge the right of discretion and may only impose the death penalty when death occurs, whether or not the attempt at the actual dispossession was successful. In case of confessions which is considered as binding proof of guilt of *hudud* offenses, not only may such confessions be withdrawn, but it is required for the *qadi* (a judge of Islamic law) to remind a confessor of this option. In the case of the crime of apostasy, a person is given at least three days to repent to avoid punishment and if a person repents the repentance should be accepted as sincere, without further questioning.

REVULSION TO SHARI'AH PUNISHMENTS

A cursory look at works on Shari'ah by many modernist scholars is the revulsion at flogging, amputation and stoning to death as punishments. The modern humankind only think of incarceration as the normal way of punishing crime, so much so

"that it becomes difficult to conceive of a moment when prisons were not at the core of criminal justice but what needs to be mentioned is that historically, prisons have been the exception, not the rule, for punishment in human history (Brown, 25). Prior to the seventeenth century, when the situation in Europe changed, the main use of prisons globally had been for detaining suspects pending and during trial and not for punishment. Many modern states today face the challenge of maintaining inmates due to the cost implications and security concern due to constant jail break by convicted criminals. In Europe from the Middle Ages through the 1700s, horrendous types of mutilation like amputating hands, fingers, ears, tongues, burning with hot tongs, were standard punishment etc. In fact, Thomas Jefferson recommended cutting a half-inch hole in the nose of women who engaged in sodomy (Langbein 1976: 36). The changes in the form of punishment in Europe did not begin until 18th century when execution and severe corporal punishments made way for various forms of forced labor, imprisonment, and deportation to the colonies. The first modern prison opened near Philadelphia in 1790 and later in Europe where prisons emerged as institutions that combined incarceration and forced labor by those who had committed crimes that would otherwise have been punished by death. It is therefore an unfair assessment for modern lens to be used to appraise development of many centuries and in the same vein condemn religious texts and sanctions using the yardsticks set up by modern minds. What modern humankind wants are custom-built religious dogmas that satisfy their whims and caprices and relegating or total abandonment of Allah's injunctions in their lives. This is where Islamic teachings clearly reject the position of revisionists who clamor for total review or rejection of divine laws on humankind. The outcry against the *Hudud* provision in the Shari'ah as inflicting inhuman injury on people is a cultural fiction as the condition in many prisons in developing societies like Nigeria is worse and more inhuman.

The systematic reduction of the scope of Shari'ah in many Muslim countries today is the effect of colonialism and the globalization of Western values. Many Muslims today due to western education, migration to Europe and America have been culturally conquered and many Muslims are becoming allergic to their own revealed tradition. This is the sad situation today responsible for the tension between Muslims and modernist Muslims on one hand and non-Muslims states and powers on the other.

CONCLUSION

In order to attain peace and harmony in the society, the *Shari'ah* has asked people to seek his personal rights in such a way that the rights of other people are not violated. Islam has strongly forbidden theft, robbery, bribery, murder, cheating, and interest on capital, gambling, lottery, adultery and sodomy against other people. It also prohibits injurious and exploitative economic activities like hoarding, speculation and black marketing. The *Shari'ah* is meant to guide the step of man and establish in him the servitude to only one God. It is in this perspective, one can appreciate why it forbids all that is harmful to man, and allows or ordains all that is useful and beneficial to him. The knowledge of humankind today make them to be arrogant and even compete with the Creator but Islam opines that the sources of human knowledge are too limited to provide him the unalloyed truth and God has spared humankind the risks of trial and error and revealed the *Shari'ah* which is the right and complete code of life for the entire human race. The Shari'ah represents good and justice and abhors cruelty and oppression and the basis of the Shari'ah as encapsulated by Ibn Qayyim "is wisdom and welfare of the people in this world as well as the Hereafter. This welfare lies in complete justice, mercy, welfare and wisdom; anything that brings injustice, harshness, misery and folly has nothing to do with the *Shari'ah*" (cited by Umar Chapra 1980:146). There is no provision of willful imposition on non-Muslims as the toleration of differences of belief and doctrinal commitments is an established Islamic principle (Qur'an 2:256, 10:99). The *Shari'ah* establishes the general conditions that will facilitate the realization of the human mission (*Khilafah*) on earth. The Islamic *Ummah* is to foster the Islamic character and help the individual grow morally and spiritually, allowing him/her to define his/her role and objectives in life within the general framework of the *Shari'ah*. The fundamental principles on which the *Shari'ah* rests is that the laws are not passed in a heated assembly by people who ardently desire the legislation in their interest, against people who ardently oppose it in their own interest. It is not a law based on the work of warring politicians, or by decree of a monarch or emperor or of a military dictator. It is a divine path made by God for humankind to thread for peace and safety of all. The need for good government cannot be over emphasized and the upsurge of crimes in our society today is a reflection of bad governance pushing many people to commit heinous crimes.

References

- Al-Khaṣṣāf, Abū Bakr (1979). *Adab al-Qāḍī*, ed. Farhat Ziadah. Cairo: Maṭba'at al-Jablāwī.
- Al-'Alwani, T. S. (1991). 'Taqlid and ijihād'. *The American Journal of Islamic Social Sciences* 8.1:129-142
- Al-Sakhāwī, Shams al-Dīn (2004). *al-Maqāṣid al-ḥasana*, ed. Muḥammad 'Uthmān al-Khisht. Beirut: Dār al-Kitāb al-'Arabī.
- Asshiddiqie, Jimly (2015). 'Islam, Democracy and the Future of the Death Penalty', SH Adnan Buyung Nasution Papers on Southeast Asian Constitutionalism No 2, 11 August, Centre for Indonesian Law, Islam and Society
- Bari, M. Ershadul (2010). 'Capital Punishment in Islam'. *Journal of Islamic Law Review* Vol. 6 (2010), pp. 39-84.
- Goldberg, Steven (1979). Does Capital Punishment Deter? In Richard A. Wasserstrom (ed). *Today's Moral Problems*. New York: McMillan Publishing Co. Inc.
- Lim, Marvin (2016). 'Human Dignity and Punishment in Judaic and Islamic Law: War and the Death Penalty'. *Southwestern Journal of International Law*, vol.22.
- Oladosu, Jare (2016). 'Saving the Death Penalty'. *Ife Journal of Religions*, vol.12, 2016.
- Maududi, A. (1973). *Towards Understanding Islamic*. Nairobi: The Islamic Foundation.
- al-Faruqi, Ismail Raji (1986). 'Marching to the next Century' *Afkar/Inquiry* London vol. 3, No7, July.
- Brown, Jonathan A. C. (2017). 'Stoning and Hand Cutting: Understanding the Hudud and the Shariah in Islam'. www.yaqeeninstitute.org retrieved 5/8/18.
- Chapra, M. Umar (1980). "The Islamic Welfare state and Its Role in the Economy" in Khurshid Ahmad (ed), *Studies in Islamic Economics*. London: The Islamic Foundation.
- Great Britain, Royal Commission on Capital Punishment, Report (1949-1953).
- Kant, Immanuel (1965). *The Metaphysical Elements of Justice*, translated by John Ladd. Indianapolis: Bobbs-Merrill Educational Publishing.
- Kilani, Abdulrazaq (2001). 'The Shari'ah and the Maintenance of Law and Order'. Daniel I. Ilega [ed] *Studies In World Religions*. Ado Ekiti: Hamaz Global Ventures, 2001, pp. 162-174.
- Langbein, John (1976). 'The Historical Origins of the Sanction of Imprisonment for Serious Crimes'. *Journal of Legal Studies* 5, no. 1.
- Lateef, Abiola Muideen (2017). 'Therapeutic Jurisprudence in Islamic Penal Law In Nigeria, 2000-2015'. PhD Thesis in the Department of Arabic and Islamic Studies, University of Ibadan.

- Peters, Rudolph (2005). *Crime and Punishment in Islamic Law*. Cambridge: Cambridge University Press.
- Rasperry (1976). 'Death Sentence'. *The Washington Post (Washington D.C.)*, 12 March 1976, A 27.
- Sanusi, Lamido Sanusi (2000). *'Islam, Probity and Accountability: A Critical Essay in History, Philosophy and Law'*. (Being text of the N. T. A Channel 10 Annual Ramadan Public Lecture at the Auditorium of the Nigerian Law School, Victoria Island, Lagos. December 3, 2000.
- Zakariyah L. (2010). 'Confession and retraction: the application of Islamic legal Maxims in Safiyyatu and Amina's cases in Northern Nigeria'. *Journal of Muslim Minority Affairs*, 30.2: 251-263.

Biographical Note

ABDULRAZAQ OLUBUSUYI KILANI is a Professor of Islamic Studies at the Department of Religious and Cultural Studies, University of Port Harcourt and a former Head of the Department (2003-2006). He holds a Ph.D in Religious Studies specializing in Islamic Studies from University of Port Harcourt in 1999. He is Fellow, US Summer Institute (SUSI), University of California, Santa Barbara 2008.

