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ADULTERY LAWS IN ISLAM AND STONING IN THE MODERN WORLD

Souha Korbatiéh*

Abstract: This article looks at the legal basis within Islamic scholarship for imposing stoning for the crime of adultery. Traditionally it has been accepted that, based on Qur'an, hadith and examples from the Rightly Guided Caliphs, stoning is the Islamic punishment for married adulterers. However, upon closer inspection it appears these sources may not be as solid as once believed. While the *jumhoor* (majority) opinion for stoning remains, there are notable scholars, traditional and modern, who discount, question and even reject these arguments. Despite the *jumhoor*, the severity of the punishment is greatly tempered by the high evidentiary standards that act as its safeguard. These safeguards are briefly discussed.

The second part of this article looks at stoning in the modern world, which has occurred as a by-product of the rising phenomenon of *sharia* application in modern Muslim countries. The challenge for these countries is how to apply *sharia* punishments such as stoning, while maintaining *sharia*'s aims of equality, social justice and morality.

Solutions for existing and emerging Muslim states regarding the application of punishments are made and practical suggestions for a way forward. This article essentially argues Muslim scholars and jurists must reassess the legitimacy of imposing *sharia* punishments such as stoning and reach meaningful conclusions about the future of capital punishment in the Muslim world.

Keywords: *adultery, capital punishment, Muslim states, sharia, stoning*

INTRODUCTION

Islamic law, or *sharia*, is often represented as harsh, regressive and discriminatory. This view is primarily expressed when dealing with Islamic penal codes. The significance of *sharia* in Islam cannot be understated. It has been described as 'the epitome of Islamic thought...the

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core and kernel of Islam',¹ with its primary objective to enjoin good and prevent evil.² It is considered the divine and eternal law,³ regulating every facet of life/human activity.⁴ Without this 'temporal application,' Islam is seen as incomplete from a Muslim perspective.⁵

There are three categories of crime in Islam. First, *hudud*,⁶ which are crimes or violations against God,⁷ and by extension, the public interest; hence, are the worst crimes a Muslim may commit. Second, crimes against people fall under *qisas* (equality, retaliation)⁸ or *diyya* (pecuniary compensation), which are mainly offences of blood, such as homicide and assault.⁹ *Ta'azir* (discretionary punishments) are the third category, consisting of offences in line with social change and not specified in the sources.¹⁰ This article will focus on the *hadd* (singular of *hudud*) crime of adultery (*zina*) and its punishment of stoning (*rajm*).

The question of *sharia* and particularly *hudud* application is highly pertinent in the modern world for two reasons. First, it is necessary to create a penal system implementing *sharia* and reflective of its principles that is not applied to the detriment of its citizens and community. Second, in seeking to provide justice and equity, as intended by the divine Rule Maker, modern Muslim governments must realistically assess and accept the less than Islamic circumstances under which they operate that inevitably create a shortfall in the application of *sharia*-based criminal laws.

The primary goal and justification of punishment is to provide general and specific deterrence,¹¹ hence the need for public punishment.¹² In fulfilment of general deterrence, the Islamic state has the responsibility to ensure an economic, educational and social system that

¹ Schacht, as cited in Mamman Lawan, Ibrahim N. Sada and Shaheen Sardar Ali, *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual* (UK: UK Centre of Legal Education, 2011), 9, https://www.heacademy.ac.uk/system/files/introduction_to_islamic_criminal_justice.pdf.

² Cliff Roberson and Dilip K. Das, *An Introduction to Comparative Legal Models of Criminal Justice* (Boca Raton, FL: CRC Press, 2008). See Qur'an 3:110. Qur'anic translations are from Abdalhaqq Bewley and Aisha Abdurrahman Bewley, *The Noble Qur'an: A New Rendering of its Meaning in English* (Norfolk, UK: Bookwork, 2005).

³ Gaafer Mohamed Abd-Elrahim, *The Concept of Punishment in Islamic Law in Relation to Contemporary Legal Trends* (Yellow Springs, Ohio: Union for Experimenting Colleges and Universities, 1987), <https://search-proquest-com.ezproxy.csu.edu.au/docview/303533027?accountid=10344>.

⁴ Jonathan Brown, *Stoning and Hand Cutting – Understanding the Hudud and the Sharia in Islam* (Irving, TX: Yaqeen Institute, 2017) <https://www.yaqeeninstitute.org/publications/stoning-and-hand-cutting-understanding-the-hudud-and-the-shariah-in-islam/>; Schacht, as cited in Roberson and Das, *An Introduction to Comparative Legal Models of Criminal Justice*.

⁵ al'Awwa, as cited in Richard Vogler, *A World View of Criminal Justice* (Aldershot, England: Ashgate, 2005), 120.

⁶ See for example Qur'an 2:229: "These are Allah's limits, so do not overstep them."

⁷ Bassiouni, as cited in Tarek Badawy, "Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses," *Arab Law Quarterly* 23, no. 3 (2009), <http://www.jstor.org.ezproxy.csu.edu.au/stable/pdf/40604746.pdf>.

⁸ Brown, *Stoning and Hand Cutting*.

⁹ Vogler, *A World View of Criminal Justice*.

¹⁰ Sarakhsi, Sirbini, as cited in Mohammad Salim El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis, USA: American Trusts Publications, 1982); M. Cherif Bassiouni, ed., *The Islamic Criminal Justice System* (New York: Oceana Publications, Inc, 1982).

¹¹ Ibn al-Qayyim, as cited in El-Awa, *Punishment in Islamic Law*.

¹² Siddiqi, as cited in Matthew Lippman, Sean McConville and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (Connecticut: Greenwood Press Inc., 1988).

adequately provides for citizens while strengthening personal spirituality and instilling respect and dignity to all people.¹³ More specifically, it is the government's responsibility to ensure favourable conditions for crime do not exist, so for example adultery is forbidden only after marriage is made legal and simple,¹⁴ and modest dress and conduct, and prohibitions on mixed gatherings, collectively act to discourage adultery and sexual misconduct.¹⁵

Further, *hudud*, as the most serious of crimes, are those that impact morality as well as public safety and order, the fundamental interests in society,¹⁶ such as family, property and societal stability, and the offender's salvation.¹⁷ They are intended to preserve the peace, security and stability of society.¹⁸ In fact, it is due to the significant position of family under *sharia* and its preservation that the punishment for adultery is so extreme. *Hudud* crimes are significant, because in the Islamic ethical construct they 'spell death and destruction to society'.¹⁹ Put together, *hudud* penalties deter crime to maintain a moral public sphere. Finally, *hudud* punishments, while severe, are exceedingly difficult to prove and inflicted as a last resort.

The punishment for the crime of adultery (*zina*)²⁰ is the most severe of all punishments under *sharia*. Its sanction aims to legally protect the most basic and important structure in society – the family.²¹ If committed by an unmarried person, the punishment is 100 lashes, and according to the majority of jurists, for a married person the punishment is stoning (*rajm*) to death. Stoning the married adulterer is clearly supported by all four major schools of Islam, and while not in Qur'an, the punishment was enforced by the Prophet (pbuh²²) since the early days of the establishment of *sharia* against Muslims and Jews,²³ and followed ever since. There are, however, significant minority opinions that question or deny the punishment of stoning based on sources that argue the crime warrants 100 lashes only, applicable to everyone equally.²⁴

The methodology of this article is primarily a systematic review of literature relating to the theories and ethics of capital punishment of adultery and its evidentiary requirements. This article reviews and analyses scholarly and source-based opinion, mainly the Qur'an and

¹³ Abdurrahman Raden Aji Haqqi, "Criminal Punishment and Pursuit Justice in Islamic Law," *International Journal of Technical Research and Applications* 15 (2015), <http://www.ijtra.com/special-issue-view/criminal-punishment-and-pursuit-justice-in-islamic-law.pdf>.

¹⁴ Bassiouni, *The Islamic Criminal Justice System*.

¹⁵ Siddiqi, as cited in Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure*.

¹⁶ Bassiouni, *The Islamic Criminal Justice System*.

¹⁷ Robert Postawko, "Towards an Islamic Critique of Capital Punishment," *Journal of Islamic and Near Eastern Law* 1 (2002).

¹⁸ Bassiouni, *The Islamic Criminal Justice System*.

¹⁹ Postawko, "Towards an Islamic Critique of Capital Punishment," 16.

²⁰ Qur'an 24:2: "A woman and a man who commit fornication: flog both of them with one hundred lashes."

²¹ Agnieszka Minda and Joanna Nowak, "Sharia Criminal Law – Structure and Influence throughout History," *Studenckie Zeszyty Naukowe* 18, no. 27 (2015).

²² When Muslims mention the name of any of the prophets of God, they conclude by supplicating prayers upon them in the form of 'peace be upon him' (pbuh). This acronym will not be repeated each time a prophet's name is written in this article. However, it is implied.

²³ Sahih al-Bukhari, Vol. 8, Book 82, Hadith 805, <https://sunnah.com/bukhari/86>.

²⁴ Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia," *Arab Law Quarterly* 13, no. 3 (1998), <http://www.jstor.org.ezproxy.csu.edu.au/stable/pdf/3382008.pdf>.

*hadith*²⁵ commentaries, and assesses and critically analyses the current political climate of modern states that retain or are seeking to implement capital punishment in modern states. The relevant data is organised within a theoretical framework representing the sections of this article. Arguments for stoning will be looked at first followed by counter arguments. Finally, implementation of sharia punishments will be examined.

ARGUMENTS FOR STONING

According to Siddiqi,²⁶ adultery is punished severely for two reasons. First, the negative outcomes from adultery, which are seen as undermining marriage and leading to family conflict, jealousy, divorce, illegitimate births and the spread of disease; and, second because early marriage is encouraged by state support and the allowance of polygamy, which are both seen as making adultery unnecessary.²⁷ Stoning is thus seen as an indication of the legal, moral and social interests of society, yet juxtaposed to these interests, the nearly impossible standards to prove the offence implies that punishment is mainly a deterrent,²⁸ which are further tempered by the offence of slander or requirement for four witnesses.²⁹

As Muslim civilisation meticulously documented judicial decisions, the Ottoman Empire is known to only once have ordered stoning to death of an adulterer in its 500-year history.³⁰ Some argue no one in Islamic history has been punished for adultery as a result of the oral testimony of four witnesses and rare punishments occurred by confession.³¹ In fact, unlawful sexual intercourse was almost never punished in Islamic history at *hudud* level “due to [the] impossibly high evidentiary bar,” but was punished under *ta'azir* by fines and lashings.³²

Despite how traditional Muslim societies may have practically treated adultery, the *jumhur* (majority of jurists) believe married adulterers receive stoning. There are a number of arguments for this stance, including Qur'anic and *hadith* evidence. The reports based on Qur'anic evidence are that a verse was revealed stating, “the old married man and woman who commit adultery, stone them to death as a deterrence from Allah, and Allah is Most Powerful,

²⁵ *Hadith* and *sunnah* are sayings and actions of Prophet Muhammad, including his words, actions and tacit approvals.

²⁶ As cited in Matthew Lippman, “Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law,” *Boston College International and Comparative Law Review* 12, no. 29 (1989), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1374&context=iclr>.

²⁷ Siddiqi, as cited in Lippman, “Islamic Criminal Law and Procedure.”

²⁸ Postawko, “Towards an Islamic Critique of Capital Punishment.”

²⁹ Lippman, “Islamic Criminal Law and Procedure.”

³⁰ Heyd, as cited in Sadakat Kadri, *Forced to Kill: The Mandatory Death Penalty and its Incompatibility with Fair Trial Standards* (London, UK: International Bar Association, 2016), <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Other%20publications/Forced%20to%20Kill%20-%20The%20Mandatory%20Death%20Penalty%20and%20its%20Incompatibility%20with%20Fair%20Trial%20Standards.pdf>; Fariba Zarinebaf, *Crime and Punishment in Istanbul 1700-1800* (Berkeley: University of California Press, 2010).

³¹ Badawy, “Towards a Contemporary View of Islamic Criminal Procedures”; Bassiouni, *The Islamic Criminal Justice System*.

³² Brown, *Stoning and Hand Cutting*, 3.

Most Wise.”³³ There is no number for this verse because it was apparently revealed and later abrogated, according to many scholars including al-Tabari, but interestingly its ruling remained.³⁴

Further and more significantly to evidence the veracity of the punishment, the penalty of stoning continued during the rule of the Rightly Guided Caliphs after the death of the Prophet.³⁵ Caliph Ali sentenced an adulterer to both punishments: flogging in accordance with Qur’anic provisions and stoning in accordance with Prophetic tradition.³⁶ Further, Caliph Umar in a sermon stated,

I am afraid that after a long time has passed, people may say, ‘We don’t find the verses of the Rajam...in the Holy Book,’ and...they may go astray...I confirm that the penalty of Rajam be inflicted on him who commits illegal sexual intercourse if he is already married...Allah’s Apostle (pbuh) carried out the penalty of Rajam, and so did we after him.³⁷

Umar’s acknowledgement of the stoning punishment not being in the Qur’an is interesting and presents an issue. It begs the question as to how and why a verse would be used if abrogated. Perhaps he felt, even in abrogation, the offence of adultery was serious and needed to be dealt with definitively, particularly as the Empire had expanded rapidly under his rule and heinous crimes that threatened the moral fibre of the still new Muslim world were necessary to address with swift, harsh punishment. Under such circumstances, it may be viewed he was implementing a *ta’azir* punishment that reflected the punishment of the day. Alternatively, he may have felt, even though abrogated, it would be more appropriate to use the punishment God initially prescribed rather than creating one from human reason that may cause dispute and friction among Muslims. However, the rationale for abrogation meant the rule was no longer fit for application, so applying such a verse is inherently problematic. In fact, Brown argues Umar’s fear of people abandoning the punishment of stoning does not actually state there was a verse with that ruling.³⁸ This is a matter for jurists to consider and rule upon to guide modern Muslim communities who may be unnecessarily holding onto a discretionary punishment.

There are also many *ahadith*³⁹ evidencing stoning. A *hadith* in Muslim on the authority of Abu Huraira states a man whose son committed adultery with his employer’s wife was prescribed by the Prophet 100 lashes and one year exile for the son, and if the woman confessed

³³ Al-Tabari, as cited in Azman bin Mohd Noor, “Stoning for Adultery in Christianity and Islam and its Implementation in Contemporary Muslim Societies,” *Intellectual Discourse* 18, no. 1 (2010), <http://ezproxy.csu.edu.au/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=51886194&site=ehost-live.>; Ismail Ibn Kathir, *Tafsir Ibn Kathir*, trans. Safiur-Rahman Al-Mubarakpuri (Riyadh: Darussalam, 2000).

³⁴ Al-Asqalani, as cited in Bassam Zawadi, *The Quranic Verse on Stoning*, n.d, https://www.call-to-monotheism.com/the_quranic_verse_on_stoning.; Al-Bukhari, as cited in Noor, “Stoning for Adultery in Christianity and Islam”; El-Awa, *Punishment in Islamic Law*; Sahih Muslim, vol. IIIA, Ch. 4, no. 1691.

³⁵ Kamali, “Punishment in Islamic Law.”

³⁶ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

³⁷ Bukhari, vol. 8, book 82, no. 816.

³⁸ Brown, *Stoning and Hand Cutting*.

³⁹ Plural of *hadith*.

she was to be stoned.⁴⁰ In another *hadith*, on the authority of Ubadah Ibn As-Samit, the Prophet said,

Take from me. Verily Allah has ordained a way from them...in the case of married (persons) there is (a punishment) for one hundred lashes and then stoning (to death). And in case of unmarried persons (the punishment) is one hundred lashes and exile for one year.⁴¹

There are other reports in Sahih Muslim and other authors of the *sunan*, such as Abu Dawud, Ibn Majah, al-Nasai, al-Tirmidhi, and Bayhaqi and Ahmad in his *Musnad*,⁴² that the Prophet received Qur'anic revelation then told his companions a new piece of legislation had been revealed to him: a married person shall be given 100 lashes and then stoned; an unmarried person shall be given 100 lashes and banishment for one year. Based on this *hadith*, jurists agree on stoning for a married offender,⁴³ while they disagree regarding flogging a married offender and banishment of an unmarried offender.⁴⁴ In fact, *hadith* scholars have stated stoning did not take place before the revelation of the Qur'anic verse that ordained flogging, rather stoning was practised after its revelation,⁴⁵ hence superseding the Qur'anic punishment. This is also the *ijma* (consensus) of the *ummah*.⁴⁶

Further evidence is based on four cases of stoning reported during the Prophet's time. Two were Jews and the Prophet ordered stoning by following Old Testament as he normally did when applying laws to Jews. However, in three cases (including the famous cases of Maez and Ghamidiyyah, and the wife of Makhdom Al-Aseef), they confessed to adultery and were sentenced to stoning,⁴⁷ when there was no reason to apply Jewish law since all were Muslim.⁴⁸ The final argument for proponents of stoning is that this penalty was part of the Old Testament, retained in the New Testament and reaffirmed by Islam.⁴⁹ The similarity to Jewish law only supports the strength of the claim it is correct as both laws are divinely revealed.⁵⁰

ARGUMENTS AGAINST STONING

The issue is, while there are seemingly clear *hadith* advocating stoning for married adulterers, Qur'an 24:2 does not distinguish between married and unmarried persons. Traditionally, only Kharijites adhered to the literal text of the Qur'an and did not stone offenders, yet El-Awa notes recent jurists of other schools have argued against stoning for adultery based on the same Qur'anic verse.⁵¹ Most jurists, however, state in this case *sunnah*

⁴⁰ Book 17, no. 4209.

⁴¹ Sahih Muslim, vol. IIIA, ch. 3, no. 1690; Noor, "Stoning for Adultery in Christianity and Islam."

⁴² As cited in Noor, "Stoning for Adultery in Christianity and Islam."

⁴³ Noor, "Stoning for Adultery in Christianity and Islam."

⁴⁴ *Muhalla*, Shu'rani, as cited in El-Awa, *Punishment in Islamic Law*.

⁴⁵ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁴⁶ Ibn 'Ashur, as cited in Noor, "Stoning for Adultery in Christianity and Islam."

⁴⁷ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁴⁸ Noor, "Stoning for Adultery in Christianity and Islam."

⁴⁹ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁵⁰ El-Awa, *Punishment in Islamic Law*.

⁵¹ As cited in Postawko, "Towards an Islamic Critique of Capital Punishment."

supersedes or explains more fully the Qur'anic law,⁵² as mentioned above. These conflicts indicate a literal reading does not necessarily establish a *hadd* offence.⁵³ This is problematic as normally to reach the level of being *haram* (sinful), there must be clear textual evidence, or to evidence such a severe punishment it should be proven by decisive evidence via the Qur'an or *hadith mutawatir*.⁵⁴

Accordingly, a small number of scholars argue against the *jumhur*, mostly Kahirjites and Mu'tazilites who believe the penalty for adultery, irrespective of marital status, is 100 lashes.⁵⁵ This is based on a number of arguments. The Qur'anic evidence in 24:2 prescribes 100 lashes for adultery and makes no distinction between married and unmarried offenders.⁵⁶ If meant for implementation, then punishment of such severity would have been mentioned specifically in the Qur'an.⁵⁷

Further, the assertion by those who support stoning based on the abrogated verse in the Qur'an is believed by some scholars to be uncertain, not proven beyond doubt, and it is further argued this verse does not fit the literary style of the Qur'an.⁵⁸ Further, the narration by Said ibn al-Musayyib, who states he heard Umar in a sermon say the stoning verse was in the Qur'an but later abrogated, has been rejected by some scholars, who state Al-Musayyib was only two years old when Umar was killed and Umar's statement implies the Qur'an was altered, which would be classified as an act of disbelief.⁵⁹

While this counter-argument to abrogation appears quite solid, the reality is pre-modern scholars accept there was a verse in the Qur'an about stoning adulterers that was removed as ordered by God, yet its ruling maintained.⁶⁰ The Shafi'i/Ashari hadith scholar Al-Bayhaqi (d.1066) stated he knew of no disagreement on the possibility of a verse of the Qur'an being removed in entirety while its ruling remained.⁶¹ Al-Ghumari (d.1993), a leading traditionalist scholar of the modern age, disagreed, saying this was irrational and adding all reports describing it as having occurred are narrated by too few transmissions (*ahad*⁶²) to match the certainty of Qur'anic verses.⁶³

Another Qur'anic argument states, since the Qur'an (4:25) has the offence of adultery by a slave-wife (50 lashes) as half that of the free woman (100 lashes), it is argued only flogging

⁵² Postawko, "Towards an Islamic Critique of Capital Punishment."

⁵³ Ibid.

⁵⁴ A *mutawattir hadith* is one that is reported by such a large number of people that they cannot be expected to collectively agree upon a lie. Abu Zahrah, as cited in Kamali, "Punishment in Islamic Law."

⁵⁵ Noor, "Stoning for Adultery in Christianity and Islam."

⁵⁶ Kamali, "Punishment in Islamic Law"; Noor, "Stoning for Adultery in Christianity and Islam."

⁵⁷ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁵⁸ Al-Alusi, as cited in Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁵⁹ Ahmed Mansour, Mawjiz Linafi Hukum al-Rajam [A Summary of Negating the Rule of Stoning], Ahl-alquran.com, November 15, 2007, accessed December 6, 2017, http://www.ahl-alquran.com/arabic/show_fatwa.php?main_id=376.

⁶⁰ Brown, *Stoning and Hand Cutting*.

⁶¹ Ibid.

⁶² *Ahad* refers to a *hadith* narrated by only one narrator. In *hadith* terminology, it refers to a *hadith* not fulfilling all the conditions necessary to be deemed *mutawatir*.

⁶³ Brown, *Stoning and Hand Cutting*.

can be halved and not stoning, so flogging is the Qur'anic punishment in all cases of adultery.⁶⁴ The majority respond by saying this is an incorrect interpretation of the Qur'an and cannot be used to regulate the penalty for a convicted fornicator, married or unmarried.⁶⁵

Further, the assumption is the *hadith* of stoning took place before the revelation of Qur'an 24:2, which prescribes flogging.⁶⁶ The eminent scholars Sarkhasi (d.1096) and Zailai state stoning was practised before the revelation of 24:2 because the *hadith* has the Prophet state, "Take from me!" and if it had been after the divine revelation he would have said "Take from Allah!"⁶⁷ Thus, 24:2 nullified stoning as the punishment for adultery per the previously revealed religions.⁶⁸ There is a further claim that no punishments were carried out after the revelation of 24:2, meaning flogging abrogated stoning.⁶⁹ Many scholars respond to this claim stating this argument has no basis as it is unlikely the punishment would have been abrogated without the knowledge of the companions (such as Umar and Ali who continued enforcing the punishment), otherwise every law in Islam could be claimed as abrogated.⁷⁰

In fact, the famous *hadith* of Maez and Ghamidiyyah,⁷¹ who confessed to adultery and were stoned, is rejected by some scholars, stating the small number of reporters of this *hadith* do not suffice to supersede a Qur'anic injunction.⁷² In fact, Abu Hanifa refused to accept this report on the basis it was *ahad*, and even the *hadith*'s successive reporting by multiple numbers do not invalidate a Qur'anic decree according to Imam Shafi'i and some Zahiri school scholars.⁷³ However, other scholars argue the stoning of Maez and Ghamidiyya was witnessed by a large number of companions to reach the level of *mutawatir*, and is related in all authentic *hadith* books with details of the chain from different companions who were present, and these chains support each other leaving no room for fraud and doubt.⁷⁴

The stoning of Maez and Ghamidiyyah has some further apparent inconsistencies. There is doubt by a companion whether their stoning was before or after the revelation of the specific verses in Surah Nur,⁷⁵ which means the punishment collapses on the rule that doubt invalidates the *hudud*.⁷⁶ The conflict over this report means current jurists and scholars need to reassess and determine its validity and strength as the consequences are serious particularly in the modern age where more people have been killed for adultery in the last century than in many, if not all, preceding periods of Islamic history.

⁶⁴ Al-Zayla'i, Abu Zahrah, Mansur, Kamali, as cited in Noor, "Stoning for Adultery in Christianity and Islam."

⁶⁵ Noor, "Stoning for Adultery in Christianity and Islam."

⁶⁶ Abd-Elrahim, *The Concept of Punishment in Islamic Law*; Kamali, "Punishment in Islamic Law"; Noor, "Stoning for Adultery in Christianity and Islam."

⁶⁷ As cited in Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁶⁸ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁶⁹ Noor, "Stoning for Adultery in Christianity and Islam."

⁷⁰ El-Awa, *Punishment in Islamic Law*.

⁷¹ Bukhari, vol. 8, book 82, no. 814; Muslim, vol. IIIA, no. 1695.

⁷² Al-Ghazali, Al-Amedi, Showkani, as cited in Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁷³ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

⁷⁴ Noor, "Stoning for Adultery in Christianity and Islam."

⁷⁵ Qur'an 24:2.

⁷⁶ Abu Zahrah, as cited in Kamali, "Punishment in Islamic Law."

Another *hadith* is reported by Bukhari and al-Shaibani, a second-generation scholar, who asked companion Abdullah bin Abi Awf whether stoning was before the revelation of 24:2 or after, and he responded he did not know.⁷⁷ Hence, this *hadith* is not persuasive as Ibn Abi Awf was unsure of the circumstances, and it is further diminished in value as *hadith* scholars say the *ahadith* of stoning came after revelation of Sura Nur and hence abrogated it, as mentioned above, which is also why Umar and other companions acted on the *hadith* ruling of stoning.⁷⁸

Outside of the Qur'an and *hadith*, some argue the Prophet took the stoning punishment from the Jews, as there is no revelation in the Qur'an confirming it, and applied the same punishment towards guilty Muslims,⁷⁹ implying there is no textual basis for the punishment.

Some modern jurists have considered the issue of stoning and developed their own thoughts based on the sources. Twentieth century jurists Mahmoud Shaltut (d.1963) and Mustafa Al-Zarqa (d.1999) do not favour the penalty of stoning, and Shaltut, a scholar and former president of Azhar University, says stoning can be considered a *ta'azir* punishment at a judge's discretion, rather than a *hadd* punishment prescribed by scripture.⁸⁰ Al-Zarqa agreed, stating stoning was enforced as a *ta'azir* punishment applied by the Prophet to "curb the rampant immorality and corruption of the time of ignorance".⁸¹ Abu Zahrah (d.1974), another leading 20th century scholar, doubted reports the Prophet punished by stoning as it was too cruel a punishment.⁸² Abu Zahrah concluded evidence for stoning was doubtful and therefore preferable not to apply.⁸³

Mohamed S. El-Awa,⁸⁴ a modern commentator and interpreter of Islamic and modern law, in looking at both sides of the argument, believes stoning is prescribed by *sunnah* not the Qur'an, yet agrees *hudud* punishments should only apply in a just society, one that does not necessarily exist today. In fact, many Muslim countries have *hudud* laws, but evidence suggests they are not serious about implementing it, and Muslim governments have often yielded to pressures and found means to avoid implementation of *hudud*, often on technical juristic grounds.⁸⁵

The arguments for and against stoning are very persuasive. There is clearly scholarly debate among traditional and current scholars. The question over an abrogated Qur'anic verse, *ahadith* that have strong arguments both ways, the fact of a severe punishment having no clear textual evidence, and the *hadith* of Umar apparently related by a two-year-old, collectively serve to

⁷⁷ Al-Asqalani, as cited in Abd-Elrahim, *The Concept of Punishment in Islamic Law*; I. Al-Otaibi, "Abu Zahra: Stoning is Jewish!," *Forum Ahl al-Hadeeth*, July 20, 2018, <http://www.ahlalhddeeth.com/vb/showthread.php?t=64354>; El-Awa, *Punishment in Islamic Law*; Sahih Bukhari, vol. 8, book, 82, no. 804; Sahih Muslim, vol. IIIA, ch. 6, no. 1702.

⁷⁸ Abu Zahrah, as cited in Kamali, "Punishment in Islamic Law"; Mughni, as cited in El-Awa, *Punishment in Islamic Law*.

⁷⁹ El-Awa, *Punishment in Islamic Law*.

⁸⁰ Mansour, as cited in Abd-Elrahim, *The Concept of Punishment in Islamic Law*; Mansour, as cited in Kamali, "Punishment in Islamic Law."

⁸¹ As cited in Kamali, "Punishment in Islamic Law," 228.

⁸² Brown, *Stoning and Hand Cutting*.

⁸³ Mansur, as cited in Kamali, "Punishment in Islamic Law."

⁸⁴ As cited in Badawy, "Towards a Contemporary View of Islamic Criminal Procedures."

⁸⁵ Noor, "Stoning for Adultery in Christianity and Islam."

create sufficiently strong doubt. However, the strongest argument in favour of stoning is Umar and Ali, who would have unlikely imposed their punishments without precedence and surety. The possibility of their using the punishment as a form of *ta'azir* likewise serves to place doubt and beg for revisions by scholars of Islam.

Another aspect to assess in seeking ways to limit capital punishment under *sharia* is the concept of repentance. This has been closely assessed by the scholar Kamali based on the interpretation of *hudud* and its use in the Qur'an. The word '*hudud*' in the Qur'an represents limits, not punishment.⁸⁶

Kamali further states, where the Qur'an specifies a punishment for an offence, there are provisions for repentance, forgiveness and reformation, and this should be facilitated at least on a selective basis by positive incentives.⁸⁷ Hence, Kamali argues the Qur'an leaves room for reformation and repentance in all *hudud* offences and denial of this overrules the clear text. This is an interesting argument that scholars should consider when formulating penal codes.

Scholars give three views on repentance.⁸⁸ First, it suspends punishment if done prior to completion of the *hudud* offence. For example, because *hiraba*⁸⁹ (highway robbery), the most serious of crimes, allows repentance, this should be available for lesser crimes, including adultery.⁹⁰ When the Prophet was told Maez ran away while being stoned, he said, "Did you not leave him alone to repent so that Allah would have granted him a pardon?"⁹¹

A second repentance view is that it has no bearing on *hudud* except for *hiraba* due to the clear text, as references to theft and adultery concern repentance after imposition of punishment.

The third view holds that punishment purifies from criminality and so does repentance, so if a person repents they will not be punished provided they do not demand punishment.⁹² The Prophet often tried to persuade individuals confessing to a *hadd* offence, particularly adultery, to retract their confession. Consequently, Kamali argues Qur'anic injunctions regarding reformation and repentance should be combined with fixed penalties.⁹³ These arguments give a basis for repentance to be formally instituted into the elements of penal laws and for modern judiciary and legislators to give it greater emphasis.

EVIDENTIARY REQUIREMENTS

Regardless of adultery's definition as a capital crime, there is inherent difficulty in proving adultery due to the high evidentiary requirements. The concept of the Islamic state avoiding

⁸⁶ Kamali, "Punishment in Islamic Law."

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Qur'an 5:34.

⁹⁰ Kadri, *Forced to Kill*; Kamali, "Punishment in Islamic Law."

⁹¹ Ibn Qudamah; Abu Zahrah, as cited in Kamali, "Punishment in Islamic Law."

⁹² Al-Jawziyyah; Al-Muniriyyah, as cited in Kamali, "Punishment in Islamic Law."

⁹³ Kamali, "Punishment in Islamic Law."

hudud punishment wherever it can⁹⁴ is a feature of Islamic law that seeks to compensate for the application of strict *hudud* rules.⁹⁵ Only evidence with a high degree of reliability is acceptable for adultery, as this limits conviction and punishment to cases where there is certainty of a defendant's guilt.⁹⁶

Adultery requires the oral witness testimony of four adults, male Muslims who are reliable and have seen at the same time the act of sexual intercourse taking place.⁹⁷ Hence, the act of adultery must effectively be public,⁹⁸ witnessed by four people without invading their privacy.⁹⁹ Baderin cites the Islamic scholar Shalabi, who comments that the proof makes the punishment applicable only to those who commit adultery without any concern for public morality "and in a manner that is almost impossible and intolerable in any civilized society."¹⁰⁰ Adultery's standard of proof certainly constitutes a crime under many Western laws of public indecency¹⁰¹ or offensive behaviour, both of which are criminal acts in many modern jurisdictions including Australia.

Confession is the alternative proof for a crime under *sharia* and is the most practical and effective method of proof for adultery.¹⁰² As a major form of evidence, it must be given in open court as many times as the number of witnesses to prove guilt.¹⁰³ Confessions must not be a result of pressure, coercion, abuse or encouragement by the judge.¹⁰⁴ A unique feature of *sharia*, unlike any other legal system, is that a confession may be retracted any time prior to sentence execution, which halts any punishment.¹⁰⁵ In fact, the ruler and judge must suggest the accused abandon their confession,¹⁰⁶ as the Prophet did in the famous hadith of Maez. Again, *sharia* implements procedures to avoid *hudud* penalties.

Circumstantial evidence is termed 'suspicion' and generally not an acceptable method of proof under *sharia*.¹⁰⁷ Shafi'is, Hanafis and most Hanbalis reject presumptions in *hudud* only

⁹⁴ The underlying maxim when prosecuting *sharia* crimes is the hadith:
Avoid condemning the Muslim to *hudud* whenever you can, and when you can find a way out for the Muslim then release him for it. If the imam (ruler) errs it is better that he errs in favour of innocence (pardon) than in favour of guilt (punishment) (At-Tirmidhi, no. 1424, as cited in Bassiouni, *The Islamic Criminal Justice System*, 26).

⁹⁵ Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure*.

⁹⁶ Ibid.

⁹⁷ *Hadith* state the witness needs to testify they saw the penis enter the vagina 'like an eyeliner applicator entering its container' (Sunan Abu Dawud, *Kitab al-hudud, bab rajm Maiz b. Malik, bab rajm al-yahudiyyayn*, as cited in Brown, *Stoning and Hand Cutting*), or to testify if a hypothetical thread were to be passed between the two bodies its passage would be impeded (ie. sexual penetration) (Bassiouni, *The Islamic Criminal Justice System*).

⁹⁸ Lawan, Sada and Ali, *An Introduction to Islamic Criminal Justice*.

⁹⁹ Quraishi, as cited in Badawy, "Towards a Contemporary View of Islamic Criminal Procedures."

¹⁰⁰ Baderin, as cited in Lawan, Sada and Ali, *An Introduction to Islamic Criminal Justice*, 75.

¹⁰¹ Coulson, as cited in El-Awa, *Punishment in Islamic Law*.

¹⁰² Sanad, as cited in Roberson and Das, *An Introduction to Comparative Legal Models of Criminal Justice*.

¹⁰³ Salama, as cited in Lippman, "Islamic Criminal Law and Procedure."

¹⁰⁴ Lippman, as cited in Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria," *William & Mary Journal of Women and the Law* 11, no. 3 (2005), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1132&context=wmjowl>.

¹⁰⁵ Bassiouni, *The Islamic Criminal Justice System*; Peiffer, "The Death Penalty in Traditional Islamic Law."

¹⁰⁶ 'Awdah, as cited in Bassiouni, *The Islamic Criminal Justice System*.

¹⁰⁷ Coulson, as cited in Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure*.

allowing witnesses and confession, as evidence to convict an accused of a *hadd* offence in Islam, must generally be direct not circumstantial.¹⁰⁸ Consequently, the majority of jurists do not consider pregnancy or childbirth as proof of adultery, but the Maliki school allows pregnancy as proof of adultery and presumption of guilt if it is outside the *iddah* (waiting period after divorce or death of a husband); however, they give five years as a maximum gestation period to be pregnant from the husband.¹⁰⁹ The differences among the *fiqh* schools are significant, as was highlighted in the 2003 Nigerian case of Amina Lawal who became pregnant while unmarried. After appealing to the Nigerian Supreme Court of the State Appeal, the sentence was overturned based on the five-year gestation rule and other procedural inconsistencies.¹¹⁰ While this decision shows the flexibility of Islamic rulings, it also highlights the issues faced in the modern Muslim world, and the necessity for review and scholarly debate on the issue of capital punishment.

The restrictions regarding evidentiary rules for adultery are almost an “insurmountable barrier to any conviction.”¹¹¹ Rather, God’s warning is indicated in the severity of punishment, while the difficulty in proof indicates the punishments are mainly used as a threat.¹¹² The punishment’s severity is a constant reminder of adultery’s heinous quality and damaging effects on society, no matter how much society may accept, ignore or decriminalise the act. Adultery in Islam is not a personal act of immorality, but a societal breach of duty.

CHALLENGES OF IMPLEMENTING STONING IN THE MODERN WORLD

Implementing adultery laws in Islam has always been problematic and jurists have tried hard to contain the crime and its punishment, and the strict evidentiary requirements have maintained and justified this. While it was implemented in the past and has a place in *sharia*, there have always been limitations. The challenge is two-fold – should adultery be punished in the modern age, and if so should stoning be used as the punishment? The issues involved with incorporating stoning provisions into modern legal systems is part of the larger issues involved with incorporating *sharia* as a whole. The next part of this article looks at challenges and solutions of Muslim states seeking to accommodate *sharia* provisions.

Many modern scholars have commented on the application of adultery laws in modern society. El-Awa believes the current application of the *sharia* penal code creates “nonsense,” as modern Muslim societies have not effectively understood the Islamic way of life and are not adopting *sharia* properly, particularly in regard to adultery laws.¹¹³ Punishing adultery under circumstances where everything in the community invites and encourages unlawful sexual relationships,¹¹⁴ and “the individual is surrounded by an endless series of temptations might

¹⁰⁸ Peters, as cited in Peiffer, “The Death Penalty in Traditional Islamic Law.”

¹⁰⁹ Brown, *Stoning and Hand Cutting*; Lawan, Sada and Ali, *An Introduction to Islamic Criminal Justice*.

¹¹⁰ Sam Amadi, *Religion and Secular Constitution: Human Rights and the Challenge of Sharia*, 2003, http://www.artsrn.ualberta.ca/amcdouga/MEAS200/group_presentations/amina_lawal_amadi-group4.pdf.

¹¹¹ Roberson and Das, *An Introduction to Comparative Legal Models of Criminal Justice*, 153.

¹¹² El-Awa, *Punishment in Islamic Law*.

¹¹³ Ibid.

¹¹⁴ Ibid; Mawdudi, as cited in El-Awa, *Punishment in Islamic Law*.

amount to oppression and injustice”.¹¹⁵ Marriage is meant to be easy, without difficult economic and social constraints, with no traces of temptation outside, and virtue, piety and remembrance of God are kept fresh in people’s minds and hearts, not a society where “sexual excitement is rampant, where nude pictures, obscene books, and vulgar songs, have become common recreation.”¹¹⁶ Al-Qaradawi likewise has mentioned the exorbitant cost of marriage and temptations on the individual have changed the environment and created many temptations.¹¹⁷

Islam and *sharia*’s contemporary political appeal with modern Muslim states lies in its identification with social justice and reform.¹¹⁸ This is the impetus for struggling and socially deprived Muslim nations seeking *sharia*’s implementation. However, the issue is how to practically implement *sharia* and capital punishment in view of the current state of Muslim populations and their distance from Islamic ideals, and the many secular provisions currently within many of their laws.

Al-Zarqa suggests substituting *hudud* with temporary measures and alternative punishments until conditions are ripe for the proper sanctions.¹¹⁹ Scholars have affirmed, while it is essential Muslims believe *sharia* is the ideal law and *hudud* are valid in theory, their actual implementation comes at the state’s discretion.¹²⁰ This approach is arguably the most appropriate that can be taken among current Muslim nations. Scholars can develop rules, penal and otherwise, based on *sharia* that reflect the present condition of an individual state as it works towards the full implementation of *sharia*. Even the Rightly Guided Caliphs and the Prophet’s life evidence looking at political and economic conditions and deciding whether to enforce *hudud*, such as times when the *hudud* of stealing was not enforced,¹²¹ and Umar famously suspended *hudud* during a year of famine because its enforcement under such circumstances would be unjust.¹²² The goal of *sharia* is justice, and if that cannot be achieved, suspensions and alterations become manifestly significant. This can be done under primary sources of *sharia*, such as *hadith* regarding *hudud* suspension, and under secondary sources of law, such as *darura* and *maslaha mursala*.

A practical and appropriate solution for the current Muslim world has been made by academic and philosopher Tariq Ramadan (b.1962), who suggested a moratorium on Islamic criminal punishment.¹²³ This call had Western critics of Islam claim he called for too little, and conservative Muslim scholars say he was transgressing God’s commands.¹²⁴ Ramadan further

¹¹⁵ Kamali, “Punishment in Islamic Law,” 229.

¹¹⁶ Maududi as cited in Kamali, “Punishment in Islamic Law,” 229.

¹¹⁷ As cited in Kamali, “Punishment in Islamic Law.”

¹¹⁸ Lippman, McConville and Yerushalmi, *Islamic Criminal Law and Procedure*.

¹¹⁹ As cited in Kamali, “Punishment in Islamic Law.”

¹²⁰ Shaltut, as cited in Brown, *Stoning and Hand Cutting*.

¹²¹ Sunan Abu Dawud, as cited in Brown, *Stoning and Hand Cutting*.

¹²² Al-Sarakhsi, Al-Qaradawi, as cited in Kamali, “Punishment in Islamic Law.”

¹²³ As cited in William Fisher, “Tariq Ramadan’s proposal,” *Jordan Times*, April 25, 2005, <https://www.me-forum.org/campus-watch/articles/2005/tariq-ramadan-s-proposal>.; as cited in Mashood A. Baderin, *International Human Rights and Islamic Law* (UK: Oxford Scholarship Online, 2005), <http://www.oxford-scholarship.com/view/10.1093/acprof:oso/9780199285402.001.0001/acprof-9780199285402>.

¹²⁴ Brown, *Stoning and Hand Cutting*.

stated the Muslim world needs to reconcile its message of “justice, equality and pluralism rather than to be obsessed with its most repressive and violent aspects because of frustration with...Western domination.”¹²⁵ Since Islamic scholars disagree on the interpretations and authenticity of texts referring to these practices, and the prerequisites and socio-political contexts necessary to implement them, debating the issues and stopping the practices is essential.¹²⁶ Such debate is necessary and disagreements among scholars and jurists should be used to halt the harshest punishments, based on the doctrine of ambiguity. Stay of execution is a sensible solution until Muslim states can develop penal codes administered with justice and equity, and fulfilling the *maqasid*.

Additional arguments by scholars to fully suspend *sharia* laws and provide a moratorium on capital punishment based on the doctrine of necessity have been made.¹²⁷ Capital punishment demands a high level of responsibility that without safeguards often impacts “vulnerable individuals and minorities.”¹²⁸ In fact, today *sharia* is used by oppressive regimes to attack the poor, women and political opponents where basic human rights and procedural rights are abused and increasing, which is a total denial of justice.¹²⁹ Mir-Hosseini agrees, stating adultery laws particularly impact female and gender equality, and where Islamic penal laws have been revived, the accused have overwhelmingly been women.¹³⁰ This is certainly a strong argument to impose a moratorium until social issues are adequately addressed.

An alternative solution has been suggested by Kamali,¹³¹ who uses the *hadith* on suspending *hudud* in doubtful situations to apply to modern society. He argues, if doubt invalidates *hudud* to completely absolve an offender of all charges or lessen the prescribed punishment to a *ta'azir*, then the temptation to sin, secularity of society and absence of the context and conditions for enforcement of *hudud*, all serve to bring about a doubtful situation that encompasses the general meaning of the *hadith*. Hence, applying the ruling of that *hadith* would reduce *hudud* to *ta'azir*, giving greater scope for courts and governments to set suitable sanctions to fulfil *sharia*, deterrence and reformation.¹³² This is a very sensible approach. It means one can focus on upholding the eternal message of the Qur'an and Islam, such as morality, justice, equality, freedom, humanitarian and compassionate values in society.¹³³ Islam is not a stagnant religion; rather, it is universal and adaptable. To assume literalism in *sharia* denies the *maqasid* and objectives of *sharia*, as well as the wisdom of Islam exemplified in the Qur'an and Prophet's life.¹³⁴ Kamali suggests current Islamic penal policy should use effective deterrence schemes in balance with care and compassion to nurture reformation and

¹²⁵ As cited in Fisher, “Tariq Ramadan’s proposal.”

¹²⁶ Ramadan, as cited in Fisher, “Tariq Ramadan’s proposal.”

¹²⁷ Rohe, as cited in Kadri, *Forced to Kill*.

¹²⁸ Kadri, *Forced to Kill*, 21.

¹²⁹ Ramadan, as cited in Fisher, “Tariq Ramadan’s proposal.”

¹³⁰ Ziba Mir-Hosseini, “Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts,” *SUR International Journal on Human Rights* 15 (2011), <http://lastradainternational.org/Isidocs/islamic.pdf>.

¹³¹ Kamali, “Punishment in Islamic Law.”

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

rehabilitation of offenders. He likewise argues for the temporary suspension of punishment due to uncertainty and doubt.¹³⁵ He suggests the use of *ta'azir* to fulfil the objectives of a *sharia*-oriented policy for justice and good governance, and dealing with criminality in ways that are in the best interests (*maslaha mursala*) of the community in line with Qur'anic vision, basic objectives and philosophy of punishment.¹³⁶

What is lacking in the modern Muslim world is an effort to analyse and refine *sharia* law and practice, and adapt it to a contemporary framework, keeping faith to the past while setting foundations for the future.¹³⁷ Islam does not change in concept and spirit, but the power of the *ummah* to develop and change its laws, customs and practices is inherent,¹³⁸ and this is the basis scholars can use to re-establish *sharia*'s relevance and justice. The flexibility of Islamic criminal law has been ignored and the perceived rigidity of past traditionalist doctrines are used, which is contrary to the spirit of Islamic law as well as past application within the *ummah*. Islamic criminal laws fit Muslim societies better than any other laws, being consistent with their belief in God, and are practical for all times and places given the ability of *sharia* to update and reflect change under its principles.¹³⁹ To believe Islam is static denies its timelessness and universality, and to believe true Islam is only how it was applied in medieval times makes *sharia* somewhat irrelevant or necessary for reinterpretation.¹⁴⁰ Islam does not need reinterpretation; rather, its application needs reconsideration because the principles of Islamic justice offer ample support for the evolution of *sharia* application to the needs of contemporary times.¹⁴¹

Furthermore, secondary sources of *sharia* should promote *maslaha mursala*, and this, in line with the *maqasid*, can go a long way to reassessing mandatory capital punishment laws.¹⁴² In fact, Islamic history evidences *sharia* constantly reinterpreting as it merged secular laws with surrounding customary laws.¹⁴³ This flexibility is still the case and is the advantage that should be used by modern scholars in reinterpreting and shedding new light on *sharia* law. This can be managed in keeping with *sharia* objectives. For example, the Ottoman Empire followed the Hanafi school of law, which was more flexible to local customs and imperial edicts than other schools.¹⁴⁴ Using this methodology, modern scholars could choose the most appropriate school of law that will allow flexibility and appropriate implementation of *sharia* in any given state. However, scholars must be careful not to fall into the trap of eradicating crimes and punishments clearly established by the sources on the basis that a perfect Islamic society has not or cannot be achieved, as this changes and rejects revealed law. It is a fine balance scholars must rule upon for the benefit of the *ummah*.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Bassiouni, *The Islamic Criminal Justice System*.

¹³⁸ Ibid.

¹³⁹ Abd-Elrahim, *The Concept of Punishment in Islamic Law*.

¹⁴⁰ Bassiouni, *The Islamic Criminal Justice System*.

¹⁴¹ Ibid.

¹⁴² Kadri, *Forced to Kill*.

¹⁴³ Benton, as cited in Zarinebaf, *Crime and Punishment in Istanbul*.

¹⁴⁴ Zarinebaf, *Crime and Punishment in Istanbul*.

Muslims must be true to their religion while acknowledging the reality of the world they live in. *Sharia* is like a jigsaw puzzle where missing pieces have obscured the whole picture. Without all the pieces to ensure a Muslim government is fulfilling its obligations, and making Islamic life a reality by fulfilling the objectives of *sharia* and *maqasid*, and maintaining the strictest forms of deterrence for crimes, then the correlating obligations by citizens will be compromised and the strictest forms of punishment should not be imposed. Under these circumstances, the aims of *sharia* and its penal code should be looked at first before imposing particularly severe punishments upon citizens who are being denied Islamic rights.

CONCLUSION

The purpose of this article was to assess the arguments for capital punishment, specifically for the crime of adultery and the limitations based on its imposition. Having looked at the arguments and counter-arguments for stoning, it is apparent the debate is unlikely to be resolved any time soon. Every argument based on the sources has a counter-argument likewise based on the sources or lack thereof. While the fluidity of sources may make it difficult to come to consensus, it also allows for a valid new *ijtihad*,¹⁴⁵

The Islamic resurgence since the mid-20th century has continued to increase as more Muslim states seek to implement classical forms of *sharia*-based laws and punishments. This is a crucial issue as people are potentially being wrongfully executed based on current understandings of stoning and other capital punishment laws.

The answers to today's problems of implementing *sharia* and capital punishments in the modern world are contained well within Islamic legal discourse and tradition. Illustrious past predecessors, such as Caliph Umar and the Prophet, suspended *hudud*, displaying compassion and flexibility that appear little used in modern times. The desire to avoid *hudud* has been manifest throughout Islamic history, but appears absent in many modern states in their zeal to establish their Islamic identity.

It is up to jurists and scholars of Islam to reassess these issues in light of today's world and allow reconsideration of traditional decrees and interpretations. There is a need to merge traditional Islamic penal principles with the wisdom of *fiqh* schools, to synthesise and extrapolate laws, and compare and contrast them using *ijtihad* to produce the most appropriate principles for application in the modern world. It may be on the basis of modern *ijtihad* that strict *hadd* penalties such as stoning can be set aside or temporarily halted without compromising *sharia*. Combining practical knowledge of modern communities, their political motivations and the international space these states occupy and are moving towards, means modern scholars can stay abreast with change and development to make such alterations and compromises in line with divine principles for the benefit of the *ummah*.

¹⁴⁵ *Ijtihad* is a legal term referring to independent reasoning or a jurist's exertion to find a legal solution to a problem.

While scholars play a significant role in *sharia* development, Muslim governments have no less duty. They must fulfil their responsibilities to maintain a fully functioning Islamic society with a legal and social system that can confidently provide justice and equity, the cornerstone of *sharia*. Ensuring *maqasid* are protected and all members have access to the basic necessities of life is part of this duty. Only after these rights are met can a state impose obligations on its citizens. In absence of this, the imposition of a fully-fledged Islamic penal system breaches the standards it seeks to uphold.

It is possible to turn the Islamic criminal discourse into a practical reality. Traditional scholars and jurists used *sharia*'s flexibility to create laws reflective of their time and space. Likewise, the issues that arise in the 21st century and beyond are capable of being dealt with under the rich and complex array of *sharia* rules developed to manage and reform within Islamic boundaries. This is a tall order, but is urgently needed today. If *sharia* is not up to the task, then Islam has failed to be a religion for all times and places.

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