

A Comparative Study of Intentional Homicide (*al-qatl al- 'amd*) in *Shari'ah* and the Modern Human Rights Concept of Right to Life for Murderers

M Ighsaan Taliep
mitaliep@ipsa-edu.org

Abstract

This study sets forth the classical positions on the question of *al-qatl al- 'amd* (intentional homicide), its definition, its scope and the application of the relevant punishment. The extent of compatibility, if any, with the modern human rights concept of right to life for murderers will also be explored. The latter concept is considered alongside the relevant provision of the Bill of Rights contained in the South African Constitution, including relevant case law for consideration to be applied in a modern context. This article advocates the idea that what is suitable for a specific country will be a function of its history, unique culture, and socio-political and legal conventions based on historical experiences and development. It also sets forth what is currently exercised in certain contexts, and whether the concept of *al-qatl al- 'amd* would imperil the interests of the community. This study also tracks the ways in which leniency and avenues for repentance, recompense and forgiveness (*al- 'afwu*) are navigated around social expediencies including Islamic notions of justice and fairness and what is appropriate in a modern context.

Keywords: Intentional homicide, *Shari'ah*, punishment, jurisprudence, murderers

1. Introduction

1.1 Intentional Homicide (*al-qatl al-‘amd*)

The prevailing present-day position pertaining to intentional homicide in South Africa, and as informed by the right to life provision in the Bill of Rights, is that there is some form of restitution to compensate for the racist, abhorrent apartheid-era measures of brutal suppression of the majority for staging a sustained uprisings against the last remaining colonial project on the African continent:

South Africa [during apartheid] had the 3rd highest judicial execution rate in the world. Between 1980 and July 1989, 1,109 people have been hanged in South Africa. At the end of July 1989, a total of 283 prisoners were being held on death row at Pretoria Central Prison. 272 of these prisoners were black and 11 were white. According to the Minister of Justice, Kobie Coetsee, death row [was] 43,5% overcrowded. In March 1988, 53 people were on death row for politically related crimes. (Simpson & Vogelmann, 2009)

Scholars from the various schools of Islamic jurisprudence provide numerous definitions for *al-qatl al-‘amd*. Notwithstanding the diversity in choice of phrasing, the concept is fairly straightforward. A formula in the Ḥanafī tradition reads:

The deliberate killing of a person through the use of a weapon, like a sword or a knife, or something which achieves the same outcome as a weapon in decapitating body parts, like a sharp-edged wooden implement, or rock, or fire, or striking a vital organ with a metal pin” (Al-Kāsānī, n.d. p.233).

Shāfi‘ī and Ḥanbali jurists include the following elements in their definition of *al-qatl al-‘amd*:

An intentional act of aggression targeted at a person the expected outcome whereof would ordinarily be death; either with a lethal weapon, or a heavy object like a block of wood; directly or indirectly like piercing a vital organ with a metal pin, or a non-vital organ like a thigh which eventually leads to death due to poisonous infection (Ibn Qudāmah, n.d. p.322).

The Māliki school refers to similar elements (Ibn Rushd, 1997). Based on these definitions of *al-qatl al-'amd* there is a basic consensus that it comprises three elements: first, that the murder victim must have been a living human being; second, that the homicide ensued as a result of the murderer's conduct; and third, that the murderer had the intention to take life (Auda, 1992). The aforementioned definitions compare closely to definitions for murder as articulated in contemporary secular legal literature. However, the latter definitions generally ascribe to higher degree of succinctness. Some legal academicians in South Africa proceed simply; murder consists of the unlawful and intentional killing of another person (Burchell & Milton, 2003). Consequently, the essential elements for murder are classified as follows: first, the killing must be unlawful, second, that a killing took place, third, that the murder was committed against a person, and fourth, that it was intentional. The consonance between the two sets of essential elements is clear, yet the South African legal definition conveys greater accuracy through the inclusion of the term "unlawful". This thereby automatically excludes killing in self-defence from the ambit of intentional homicide or murder. The latter definition also effectively includes every form of killing and consequently dispenses with the requirement of establishing causation. In the definitions of the *fuqahā* (sing. *faqīh*, jurist) the emphasis placed on a living human being highlights the distinction between the killing of a living human being, and an unborn child. In Islamic jurisprudence, an unborn foetus is not regarded as a complete living human being, therefore unlawful aggression against an unborn foetus is not deemed as *al-qatl al-'amd* (Al-tasrī', 1992: p.14). The relevant punishment for aggression against an unborn foetus differs and is beyond the scope of this paper.

2. Literature Review

There is a considerable number of studies that dealt with intentional homicide, the death penalty, human rights law, and the global impact of the death penalty. The majority of these studies concentrate on the global abolition of the death penalty which will be surveyed in this section.

Smit (2004) investigates the death penalty in Africa by addressing three important issues. First, to what extent is the death penalty in Africa really a problem that needs to be taken seriously? Second, what

limitations exist on the death penalty in Africa? Third, what can be done to make the death penalty more strictly enforced in Africa? The article also explores the possibility that the abolition of the death penalty will be motivated by article 4 of the African Charter on Human and Peoples' Rights and its associated provisions. It is proposed that strengthening national criminal justice systems, advancing procedural challenges, encouraging open discussion about alternatives to the death penalty, and challenging mandatory death sentences will strengthen restrictions on the death penalty in Africa. The article comes to the conclusion that the best way to eventually abolish the death penalty in Africa is through constructive criminal justice reform as opposed to moralistic condemnation (Smith, 2004:p.1).

Since the end of 1988, an impressive number of countries have abolished the death penalty. The denial of the fundamental human rights to life and freedom from torture, cruelty, and inhuman punishment has been recognized by a "new dynamic," and international human rights treaties and institutions that uphold the abolishment of the death penalty as a global objective have grown (Hood& Hoyle,2009 :p.1-9). Hood & Hoyle (2009) focuses on the political forces that played a significant role in creating the new dynamic, such as the liberation of nations from colonial and totalitarian oppression, the emergence of democratic constitutions, and the development of political institutions in Europe dedicated to the advancement of human rights. When abolition has not yet been formally achieved through legislation, this study discusses how and to what extent the death penalty has been restrained. Finally, it look at the chances of the death penalty being reduced even further and eventually abolished in those nations that still practice it. There is a growing consensus among these countries that the death penalty, if used at all, must be administered with extreme caution and thorough protections in place for the accused to prevent torture and wrongful conviction. Thereafter, it is only a short step from there to the complete abolition of the death penalty worldwide.

The debate around the call to stop the death penalty appears to have incorporated an old and ongoing discussion between religion and international law that asks whether both are allies or enemies. There were two sides to the argument that were opposed to one another. The

first promotes “secular bloc” (Azeez & Saliu, 2017: p.1), represented by the westernized international human rights system, and the second are the opposing ideological force, represented by the Islamic Law system. The question of whether the respective stances of the international human rights system, a secular law, and that of Islamic Law on the abolition of the death penalty are incompatible is therefore intriguing. This is especially important because any time the rejection of the call is mentioned, there is almost always an accusation made against Islam as a religion. In order to fully understand the different position maintained by Islamic Law on the call for the abolition of the death penalty and why it takes that side, this paper examines the various areas of divergence between the two opposing systems. Thus, the study also presents the overall ideal position that should be objectively taken into account from the points of view of the two opposing sides whenever there is a dialogue on the subject (Azeez & Saliu, 2017).

Samudro (2020) intends to examine in depth the legal review of capital punishment in Indonesia from the standpoint of Islamic law. This study is expected to contribute ideas to the literature in the field of Islamic law as well as input for observers and law enforcers in determining policies related to the death penalty law. To achieve the goal, this research was carried out by observing events or facts deemed relevant to the research, as well as collecting primary and secondary data using a juridical-normative approach and qualitative analysis methods. According to a study on this topic, capital punishment (*qisas*) reflects justice and balance with the perpetrator's actions against the victim, or the imposition of this punishment is in accordance with the principles of Islamic criminal law, and the soul applies benefit to the level of social life. Islamic law has guaranteed, protected, and safeguarded the benefit of mankind through Islamic criminal law (*fiqh al-jināyāt, at-tashri' ul jināi*) by establishing a number of rules, either in the form of orders or prohibitions.

One of the most prevalent penalties in history is the death penalty, which was once thought to be a useful tool in the fight against crime. The establishment of regimes by international organizations like the United Nations on the justification that there has been no violation of the right to life is seen as a violation of the humanistic approach,

which is viewed as being violated by the death penalty. As part of its adherence to the Universal Declaration of Human Rights, the United Nations calls for the abolition of the death penalty or the imposition of a moratorium on it in Resolution 62/149 (UDHR). Despite the states' adoption of the UDHR and recognition of the right to life as a fundamental human right enshrined in their constitutions, there are domestic pressures that could lead them to lift the moratorium on the death penalty. There are two ways to look at this dichotomy: on the one hand, adopting a moratorium on the death penalty is thought to be humane, but on the other, it puts a strain on a state's counterterrorism system by necessitating immediate action against the terrorists. A qualitative and descriptive study was carried out by the researcher. In order to derive conclusions about the impact of the moratorium on the death penalty in the context of terrorism specifically in Pakistan, both primary and secondary data have been used. The study comes to the conclusion that imposing the death penalty as a punishment to deter crime and violence and lifting the moratorium on its use have not been effective because there are numerous other factors that are equally important in lowering violence (Noor & Ajmal, 2022).

The present study primarily focuses on the concept of *al-qatl al-'amd*, application and punishment of intentional homicide in *Shari'ah* and the modern human rights concept of right to life for murderers

3. Discussion

3.1 Sanctity of life in Islam

Intentional homicide or murder has always been the subject of severest censure in human societies throughout the ages. Similarly, in Islam, it is viewed as the most heinous of crimes and is unvaryingly condemned in the Qur'an and the Sunnah (Prophetic tradition). In one place the Qur'an confirms the severe abhorrence with which murder is characterised in the revealed law of the Israelites:

We ordained for the Children of Israel that if anyone slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole people (Qur'an. 5:32).

Related verses provide guidance in the event of intentional homicide:

Nor take life, which Allah has made sacred, except for just cause. And if anyone is slain wrongfully, we have given his heir authority (to demand retaliation or to forgive). But let him not exceed bounds in the matter of taking life; for he is helped (by the Law). (Qur'ān. 17:33).

Elsewhere the Qur'ān also states:

Those who invoke not, with Allah, any other god, nor slay such life as Allah has made sacred, except for just cause, nor commit fornication; and any that does this meets punishment. (Qur'ān. 25:68).

The aforementioned texts in no uncertain terms establish the sanctity of life in accordance with the worldview of Islam. As a set of laws of divine origin, the *Shari'ah* emphasises the fact that the murderer who destroys life invokes upon himself the curse of Allah and His eternal chastisement in the Hereafter, in addition to punishment in this world:

And one who kills a believer intentionally, his recompense is Hell, to abide therein (forever): and the wrath and the curse of Allah are upon him, and a dreadful chastisement is prepared for him. (Qur'ān. 4:93).

The two verses in the preceding paragraph contain an exceptional phrase which has substantial bearing on the principle of the sanctity of life in Islam. The words, "except for just cause" introduce a legal dimension to the absolute sanctity of life, indicating that circumstances may arise where the taking of life is justified. Jurists identify three scenarios in which this may occur: First, is killing in lieu of an established right, or *qisas* (just retaliation) to the *waliy al-dam* (nearest of kin) upon the order of the court. The second instance is, is the taking of life in execution of a court order by a judge in accordance with *Shari'ah*. The third instance of just cause arises when killing occurs under the operation of the right to self-defence (Kamali, 2007). These circumstances where taking a life is considered to be justified demonstrate a significant distinction in comparison to the modern human rights principle of right to life as enshrined in the South African Constitution, to which the discussion will return later.

3.2 Punishment for *Al-qatl al-‘amd* in accordance with *Shari‘ah*

The punishment for *al-qatl al-‘amd* is established in the *Qur‘ān* and the Sunnah. The normal format in classical *fiqh* (jurisprudence) when introducing the subject is to state it in relatively broad terms. In this manner, the punishment for *al-qatl al-‘amd* is *qīṣaṣ*. It is a common outlook that this may afford *qīṣaṣ* a preferred status. This outlook may be explained by the reference to *qīṣaṣ as al-‘uqūbah al-asliyyah*. (the original punishment). The typical discourse of *fiqh* would thereafter proceed to explain that *qīṣaṣ* may be substituted by *diyāh* (blood money), which in this case would be referred to as *al-‘uqūbah al-badaliyyah* (substitute punishment). According to Mālikiyyah *fiqh*, substitution is valid only after mutual agreement (Al-Zuhayli, 1989). A noteworthy development in this regard, in some contemporary works, is the shift in placing *diyāh* in a hierarchical sequence to an approach which deems the two options, at least, of equal weight (Al-Awa, 1998). In many modern contexts, with the ever-increasing emphasis on human rights, the possibility of substituting *diyāh* as an alternative to *qīṣaṣ* may be a positive approach. In fact, the above is arguably a more accurate reflection of the relevant provisions in the *Shari‘ah* sources. This is especially true when considering the numerous references to *diyāh*, or even *‘afwu* (pardon), both of which are encouraged for the *waliy al-dam* as the preferred options for punishment (Audah, 1992). Examples of these aspects, and others, will be illustrated in further detail in the following discussion of the relevant source texts. First, it is important to note the Qur’anic references which establish the basis for this *fiqh* in the *Shari‘ah*:

O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if remission is made to one by his (aggrieved) brother, then grant any reasonable demand, and compensate him with handsome gratitude. This is alleviation from your Lord and a mercy from Him, but anyone who becomes aggressive after that shall bring upon himself a painful chastisement. (*Qur‘an*. 2:178).

Another verse shows the uniformity of the law of *qīṣaṣ* and *diyāh* in previous revealed systems:

We ordained therein for them: 'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.' But if anyone remits the retaliation by way of charity, it is an act of atonement for him. (Qur'an. 5:45).

The latter reference to '*afwu* instead of *qisas* engenders a powerful moral and spiritual attitude which is nuanced in the former verse in the description as "...alleviation from your Lord and a mercy from Him". In this instance, '*afwu* has been interpreted as occurring either with or without compensation. This point will be discussed in more detail later in this paper.

It is not surprising that the Companions of Muhammad ﷺ transmitted for the sake of posterity the magnanimous spirit which they observed directly from the Prophet. Anas bin Mālik, who was a servant in the Prophet's household, narrates, "No case came before the Prophet wherein he did not advise granting '*afwu* (forgiveness)" (Abu Dāwūd, n.d. p.83). In yet another (Prophetic tradition), it is recorded, "Any person whose deceased was slain has the choice of two things, either to take *diyyah* or to retaliate (Muslim, n.d. p.86)". A *hadith* dealing with the punishments for homicide reinforces the theory that the various options to be exercised by the heirs of the deceased are of equal value:

Whoever had been afflicted by murder or injury has the option to select one of three [punishments for the perpetrator], and if he opts for a fourth then apprehend him: retaliation, remission, or blood money. [Thus] anyone, who, after exercising any of the options still commits excess, shall enter Hellfire for eternity. (Al-Tabrizī, 1977).

Notwithstanding the emphasis often placed on *qisas* by jurists, they generally acknowledge the positions of '*afwu* and *diyyah* based on their textual explicitness, as demonstrated in the *hadith* above. To this end, (Audah, 1992) states:

The jurists have reached *ijmā'* (consensus) on the permissibility to remit, and that remission is preferred to execution. The authority indicating to such permissibility emanates from the Qur'an, the Sunnah and the *ijmā'*.

The founding jurists of the four major schools of *fiqh* have some measure of debate around the classification of *‘afwu*. According to the *Shāfi’i* and *Ḥanbali* views, *‘afwu* may occur with or without compensation. *‘afwu* with compensation, i.e., the option of *diyyah*, is the first classification. The next is *‘afwu* without compensation, or a full pardon. Imām Mālik classified the payment of *diyyah* as a form of settlement, instead of *‘afwu*. In the Mālikī view, payment of *diyyah* may only be determined by an agreement with the offender (Audah, 1992). The basis for the first opinion proceeds from the principle that the right to exercise one of the three options for punishment belongs to the heirs of the deceased. The difference in classifications may appear to be academic.

The survival instincts of humans will hardly allow any offender to reject an offer to pay *diyyah* in favour of *qīṣaṣ*. This seemingly obvious dilemma may, however, become complex if the economic situation of the offender is insufficient to pay *diyyah*. In the view of all the jurists, the responsibility to pay *diyyah* in cases of *al-qatl al-‘amd* falls squarely on the perpetrator (Al-Zuhayli, 1989). Moreover, unless the government assumes the responsibility in cases where the offender has insufficient resources to pay *diyyah*, the law would be patently disadvantageous to the poor – most certainly an untenable situation by any standard, but especially the standard of justice in the *Shari‘ah*.

Imāms Mālik and Ḥanīfah hold the view that the State should impose *ta‘zir* (discretionary punishment) in cases of *‘afwu* without compensation. The other two jurists, Shāfi’i and Ḥanbal, however, deem the offender to be free from punishment if the heirs of the deceased elect to exercise the option of *‘afwu* (Audah, 1992).

A brief look at the socio-cultural climate that prevailed at the time when the regulatory framework governing the punishment for the *al-qatl al-‘amd* was revealed is helpful for gaining a deeper understanding of the reasoning behind these decisions. The prevailing Arab socio-cultural milieu at the time the Qur’ān was first revealed was one of oppression, tyranny, and injustice. It was common for revenge and counter-revenge attacks, especially attacks in retaliation for murder, to continue unabatedly over extended periods of time. Also, tribal prejudices often ran very deep. Accordingly, if one tribe regarded itself superior to another, and someone from the latter tribe killed say, a female

from the former, the female's death would be avenged by killing a male from the latter tribe because, according to the former, their females are superior to those of the other. Similarly, if a slave of the self-declared superior tribe was killed, they would kill as vengeance a free person from the inferior tribe, and so on (Anwarullah, 1997). In this context, when Qur'ān states:

“The free for the free, the slave for the slave, and the female for the female” (*Qur'ān* 2:178)

This verse illustrates the falsehood of prior practices rather than to narrow the scope of them (Tomuschat, 2010). Thus, the *a priori* intention of the relevant provisions related to punishments for murder, was to establish equality in the value of human life. This notion of equality, or at least equivalence, coincides accurately with the literal meaning of the term *qisas*.

The development of the legislative process in Islam at the time sought to radically adjust the existing forms of excessive revenge for murder through the application of *qisas*. These adjustments wisely retained some accommodation for the natural human desire for revenge but did not fail to direct the nascent faith community to far more meritorious responses than succumbing simply to the nether levels of human instinct. They were conditioned to gain appreciation for the worldview of Islam, which incorporates the option of forgiveness with or without compensation, as mentioned earlier, which is preferred.

3.3 Classification of *al-qatl al-'amd* in *Shari'ah*

The exceptional approach to punishment for *al-qatl al-'amd* in the *Shari'ah* classifies murder as either a crime or a misdemeanour. Burchell and Milton provide a useful understanding of the concept of crime:

The word 'crime' comes from the Latin word '*crimen*' meaning 'accusation'. In this sense, it was used in early English law to distinguish legal proceeding involving a claim for damages for harm done (an 'action') from a charge that a person had committed a punishable wrong ('crime') (Burchell & Milton, 2000).

A further definition for ‘tort’ in the Merriam Webster online dictionary (n.d.) reads: “A wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction.”

In *fiqh* parlance, crime and torts are generally referred to as *ḥuqūq-Allah* (truths of Allah) and-*’ibād* (truths of people), respectively. The former denotes those laws which seek to protect the interest of society or the public by imposing punishment for its violation, whereas the latter refers to the laws which protect the interest of the private individual which may be redressed in the form of compensation.

In an attempt to classify intentional homicide, the three options mentioned previously are considered here individually. If the heirs of the deceased elect to demand *qīṣaṣ*, the majority of jurists have maintained that it becomes the right of the heirs to execute the murderer themselves (El-Awa, 1998). The support for this position is most commonly drawn from the verse, “ ... and if anyone is slain wrongfully, we have given his heir authority.” (Qur’ān 2: 17:33). The authority given to the heirs in this instance is the right to kill the perpetrator. Another view, which is more common among contemporary scholars, is that the heirs have the right to demand execution, but only the state is authorised to carry out the killing. Considering the majority view, the notions of crime and punishment give way to the perpetuation of the former practice of revenge outside of the law. The minority view, which enjoys support from many contemporary scholars, allows for a clear classification of *al-qatl al-’amd* as a criminal offence (El-Awa, 1998). Should the heirs elect to receive justice in the form of *diyyah*, the notion of compensation in lieu of a civil wrong clearly favours the classification of *al-qatl al-’amd* as a tort. This dimension is further bolstered when considering that many scholars have also allowed the possibility of settlement on a suitable amount of remuneration, which can be agreed upon independent of the *diyyah*. This arrangement is termed a settlement and may occur out of court.

Finally, the heirs of the victim may, with equal authority grant *’afwu* without any compensation. To reiterate, the *Shari’ah* deems this option as one of exceptional virtue through which society may aspire to the higher values and purposes of clemency and mercy. Therefore, in this case it can be concluded that *al-qatl al-’amd* neither fits in the category

of crime nor tort as perceived from a Western legal perspective. It seems to straddle both sides thereby ascribing to it a kind of 'dual nature' (El-Awa, 1998). Enquiry on this matter highlights the complexity and peril of drawing over-simplified comparisons between the death penalty in Western legal systems and in the *Shari'ah*.

3.4 Concept of Right to Life

In contrast to various other rights stated in the Constitution of South Africa, its articulation of the right under discussion in this paper says very simply, "Everyone has the right to life." Added to its observation that the rights to life and dignity are "the most important of all rights and that it is the 'ultimate limitation of state power' (Constitution of the Republic of South Africa, 1996).

The Constitutional Court of South Africa has also rendered the punishment of the death penalty as exceedingly difficult to allow, precisely because of the textually unqualified expression of s.11 and s.10 (Currie, 2001).

When the racist system of apartheid was dismantled, it was not long after the installation of the interim Constitution of 1993 that a landmark judgement in *S vs. Makwanyane*, and another similar ruling in 1995 in case (3) SA 391 CC, the death penalty, in accordance with the then s.277 1(a) of the Criminal Procedure Act 51 of 1977, was declared in conflict with the provisions of the Constitution of the Republic of South Africa Act. 200 of 1993, and therefore unconstitutional. The main thrust employed by the counsel for the defendant was the rights to life and dignity (Constitution of the Republic of South Africa, 1996).

When determining the constitutionality of the death penalty, the court in the above case deemed itself to be guided by international law and conventions. The court also had the foremost responsibility of accurately interpreting the South African Constitution. Of particular note is the court's reference to the position of the United Nations Human Rights Committee (UNHRC), which regards the death penalty as cruel and inhumane (Currie, 2001). Although the attempt by the Attorney General to justify what is inhumane and degrading treatment in the abovementioned case is admirable, ultimately the outlook on what

is considered inhumane is dependent on the perceptions of society; the death sentence in extreme cases of murder would not be deemed repugnant by many members of South African society. In any case, the court expectedly attributed preponderance to the provisions in the Constitution (De Waal, 2001).

The court also asserted that the socio-political context in South Africa at the time, when the multi-party negotiating process crafted the interim constitution before it was officially adopted by Parliament, is a further bulwark as an interpretive guide and framework. This is particularly pertinent since, at the time of constitutional negotiations in the newly democratic South Africa, it could not be resolved whether the death penalty should be sanctioned by the Bill of Rights as a possible sentence for murder and other crimes. Constitutional Court Judge Langa emphasized the intent behind the unqualified terms, particularly regarding the right to life. In his view, the emphasis on the right to and respect for life was informed by the experiences of violence, suppression and indignity still so fresh in the psyche of South Africans. A human rights culture of respect for human life and its inherent dignity, as reflected in the Bill of Rights, had to be cultivated, and the State had to take a leading role. The protection afforded by the Constitution was made applicable to everyone. The death penalty was not only viewed, by consensus of the full bench of Constitutional Court judges, as a violation of the right to life, and a severe slight to human dignity, but also as gratuitous given the availability of the alternative sentence of long-term imprisonment. There was similar consensus in refutation of the proposition that the death sentence wields a margin of effectiveness as a deterrent greater than long term imprisonment.

The Court determined all pre-Constitutional legislation pertaining to the death sentence to be invalid, and that the State is forbidden to execute any person forthwith.

A concerted effort has been put forward in the arguments against the findings of the Constitutional Court in favour of the death penalty from an Islamic perspective. The objective in this paper has been to vindicate the death penalty as punishment for a variety of crimes in the *Shari'ah*. It is the view of this paper that the death penalty be restricted to one element of the punishment for *al-qatl al-'amd* in Islam (Vahed, 2003). One of the specific claims by the Constitutional Court that this

paper set out to refute is the marginal effectiveness of the death penalty as a deterrent compared to long term prison sentences. Statistics, naturally, form an important facet in assailing the claim contained in the judgement. Whilst certain references to the crime rates in some of the neighbouring countries in Southern Africa were adduced in support of his position, these may be negligible and could easily be refuted by the extensive statistics from countries like the United States, for example, which would demonstrate the lack of deterrence of the death penalty in the states which allow this punishment, in comparison to states where it is banned. In fact, a 2009 survey by the New York Times found that states without the death penalty have lower homicide rates than states with the death penalty (Murder Rate of Death Penalty States Compared to Non-Death Penalty States, n.d.).

The most persuasive aspect of Vahed's (2003) presentation is his reliance on the case study of Saudi Arabia to help demonstrate the deterrent effect of the death penalty, and the consequent low rates of violent crime in that country. He drew comparisons between the period pre-1929 and thereafter when fixed punishments and laws were introduced. He states that prior to 1929 anarchy prevailed in Saudi Arabia, compared to the law and order of today. Statistics may not be available for the period before 1929, however, "statistics between 1966 and 1975 show that the crime rate decreased from 32 per thousand of the population to 18 per thousand." (Vahed, 2003).

It is worth mentioning that the statistics of Saudi Arabia's low crime rates are often repeated by visitors to the country who personally experience a sense of security and a crime-free environment during their stay there. If the low crime rate can successfully be singled out to be attributed to the effectiveness of the death penalty as a deterrent in Saudi Arabia, then certainly the differences between this country and others where homicide and other violent crime is more of a problem make comparisons on this basis appear somewhat facile. It would be necessary, for instance to compare South African society with societies who are more similarly placed in terms of other statistics. Before isolating a certain aspect such as the death penalty as the reason for the low crime rate in Saudi Arabia, analysis based on in-depth sociological research would be advisable.

Against the backdrop of the 1948 Universal Declaration of Human Rights proclamation of the ‘right to life’ and the prohibition of inhumane and cruel treatment and punishment (Schabas, 2000), it is understandable that South Africa would choose to enshrine the inderogable principle of ‘right to life’ at the centre of its post-apartheid constitutional dispensation, given its history of brutal repression of the indigenous people over centuries of colonialism. It is instructive, though, that on the African continent, in 2002, only two countries, South Africa and Mauritius, were prepared to support the United Nations resolution for the abolition of the death penalty (Van Zyl, 2004). Therefore, this paper proposes that the provisions in the *Shari‘ah* related to the punishment for *al-qatl al-‘amd* (intentional homicide) may better serve the ends of justice on the African continent and in South Africa, in particular. As will be shown, the right to life in the *Shari‘ah* is inviolable, except for a just cause established under the operation of the law (*Al-Qurān* 6:151; 17:33; 25:68). However, the *Shari‘ah* empowers the heirs of the deceased to exercise their prerogative to either exact *qisās* (just retribution), or grant pardon, with, or without *diyāh* (compensation), whilst promoting a distinct bias toward the latter.

4. Conclusion

This paper has demonstrated that it appears implausible that the punishment for intentional homicide in Islam seeks to fulfil the function of deterrence. Primary to the support of this assertion is the inability to clearly classify *al-qatl al-‘amd* as a crime to start with. Moreover, the clearly preponderant attitude of promoting *qisās* in favour of *diyāh*, or *afwu*, without any compensation further militates against this proposition.

In its unique construction of the punishment for *al-qatl al-‘amd* the *Shari‘ah* has clearly endeavoured to retain the element of retribution which, from the outset, needed first to achieve the objective of reining in the rampant excesses of limitless revenge attacks in the *Jabiliyya* (pre-Islamic Arabia). As soon as the society realised the essential principle of the inherent value of all life, they were more likely to heed the call of the *Shari‘ah* to partake in the liberating and empowering potential of forgiveness – whether with or without compensation. Given the bias against *qisās*, on the one hand, and the complete flexibility of choice afforded to the heir of the deceased, the striking feature of the

punishment for *al-qatl al-'amd* that remains is its lack of insistence on any particular form, except a bias toward forgiveness.

The attitude with which one should approach the comparison of intentional homicide in accordance with the two systems ought to mirror the same flexibility. Clearly the fundamental principle of right to life, as provided in the Constitution of South Africa, barring an amendment to narrow the scope of the wording of the said provision, does not permit, as expressly stated by the Court, the death penalty. Of course, the right to life is one of the entrenched clauses in the Bill of Rights, and its scope in the application of, and during the phases, in the transition to democracy in South Africa, permeates and serves as the basis for the entire legal edifice of the country. The right to life provision in the Constitution must also have as one of its primary objectives the right to not receive the death penalty, and to restrict all forms of abuse of power by the State towards its citizens. Moreover, the State also has the positive responsibility, herein, to protect the life of all its citizens from life-threatening attacks.

Given the perennial debate between the advocates of the death penalty and the abolitionists of this punishment, and in light of the restricted scope of this paper, the only plausible conclusion to draw is that there is no clear answer. What should not be accommodated is the coercion by the United Nations of some of its member countries to abolish the death penalty. Nevertheless, the resolution which was passed by the UN General Assembly calling for a moratorium on the death penalty was couched in ostensibly innocuous terms, to "progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed" (General Assembly of the United Nations: 62nd Plenary, GA 10678.n.d.). The right to determine the suitability and acceptability of capital punishment should be guaranteed to the sovereign authorities in various countries.

What is suitable for a specific country will be a function of its history, its unique culture, its socio-political and legal conventions based on historical experience and development, which may not necessarily be shared by another. In fact, different people will have varied responses to issues even within the same country. It the contention of this paper that when considering *al-qatl al-'amd*, the approach of the *Shari'ah* of affording the *waliy al-dam* the right to choose any one of the three options for punishment

accommodates the diversity of human emotions and opinions on the issue. It is unlikely that an option so exercised would imperil the interest of the community, for example in the case of a particularly grotesque murder. As members of society the heirs of victims are likely to be influenced by the same factors affecting the rest of that society.

Finally, if an heir should opt for forgiveness, and the State believes that in such a case the public interest is not served, the State may exercise its own discretion, under the operation of *al-siyāsah al-shar‘iyyah* (policies of Islamic government) with due consideration for the rule of law, and in accordance with the *Māliki* school to apply *a ta‘zir* (discretionary punishment).

BIBLIOGRAPHY

- Abu Dāwūd M. (n.d.). *Sunan Abī Dāwūd*. Al-Maktabah al-shāmilah: <http://www.waqfeya.net/shamela>.
- Al-Kāsānī A(n.d.). *Badā‘ al-ṣana‘a fī tartīb al-sharā‘i*. Beirut: Dār al-kutub al-‘ilmiyyah.
- Al-Zuhayli W (1989). *Al-Fiqh al-islāmī wa adillatuhu*. Damascus: Dār al-fikr.
- Al-Tabrīzī, A. (1077). *Mishkāt al-maṣābī*. Beirut: Al-maktab al-Islāmī.
- Anwarullah, H., (1997). *The criminal law of Islam*. Kuala Lumpur: A.S. Noordien.
- ‘Audah A.(1992). *Al-tasrī‘ al-jinā‘i al-Islāmī muqāraranan bi al-qānūn*. Beirut: Mu’assasah al risālah (11th Ed.)
- Azeez, Y. A., & Saliu, A. (2017). The call for abolition of death Penalty: Islamic law versus international human rights law. *Advanced Science Letters*, 23(9), 9195-9202.
- Burchell, J. Milton, J. (2000). *Principles of criminal law*. Lansdowne. Juta & Co. Ltd.
- El-Awa, M. S. (1998). *Punishment in Islamic law indianapolis*. American Trust Publications.
- Hood, R., & Hoyle, C. (2009). Abolishing the death penalty worldwide: The impact of a “new dynamic”. *Crime and Justice*, 38(1), 1-63.
- Ibn Qudāmah, M.(n.d.). *Al-Mughnī*. Beirut: Dār al-kutub al-‘ilmiyyah.

- Ibn Rushd, M. (1997). *Bidāyah al-mujtahid wa nihāyah*. Cairo: Dār al-kutub al-Islāmiyyah.
- Kamali, M H. (2007). *Rights to life, security, privacy and ownership in Islam*, (5): Pre-publication draft, MCL Module on Fundamental Rights in Islam, IPSA.
- Muslim M: Al-maktabah al- shāmilah: <http://www.waqfeya.net/shamela>.
- Noor, S., & Ajmal, A. (2022). United Nations resolution for moratorium on death penalty and its implications on counter terrorism. *Cogent Social Sciences*, 8 (1).
- Samudro, K. B. (2020). Juridical review of the death penalty in Indonesia in Islamic law perspective. *Law Development Journal*, 2(1), 37-50.
- Smit, D. V. Z. (2004). The death penalty in Africa. *African Human Rights Law Journal*, 4 (1), 1-16.
- Tomuschat, C. (2010). Human rights and international humanitarian law. *European Journal of International Law*, 21(1), 15-23.
- Vahed, M A. (2003). *Crime and punishment: A comparative analysis between Islamic law (Shari'ah) and Western law*. Durban: Al-Noor Publishers, (pp.147-9).

Internet Sources

- Merriam-Webster (n.d.). *Merriam-Webster.com dictionary*. <http://merriam-webster.com/dictionary/tort>. (Accessed 12 October 2008)
- <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates>. (Accessed 10 May 2009)
- <http://www.csvr.org.za/wits/articles/artdpg1.htm>, (Accessed 10 May 2009)
- <http://www.un.org/News/Press/docs/2007/ga10678.doc.ht>, (Accessed 10 May 2009)

Case law

S v Makwanyane and Another 1995(3) SA 391

Legislation

Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

M Ighsaan Taliep is one of the founding members of the International Peace College South Africa who has contributed to the improvement of the institution since 1995. M Ighsaan has completed his BA (Hons) in Islamic Law with the Islamic University of Medina 1995, went on to complete his B.Com (Law) with UWC in 1995 and completed the Master of Comparative Law (MCL) with the International Islamic University of Malaysia in 2009. M Ighsaan is the President of The United Ulema Council of South Africa, which is a coordinating body of Ulema of South Africa. He was also the the second Deputy President of the Muslim Judicial Council from 2005 to 2011.