THE CONTINUING DEBATE ON THE DEATH PENALTY: AN EXPOSITION OF INTERNATIONAL INSTRUMENT, MALAYSIAN AND THE SHARĪ'AH PERSPECTIVES

Shamrahayu A. Aziz*

ABSTRACT

The debate on the death penalty seems endless. Some see the death penalty as a form of human rights violation, while others consider it as a means to preserve and protect the rights of others. This article provides an exposition of the death penalty from the international, Malaysian and Shari'ah perspectives. In doing this, a brief philosophy of human rights is given. Many international legal instruments, provisions of the Malaysian Federal Constitution and other relevant statutes, court decisions and the Qur'anic provisions and *Sunnah* are used to enrich the discussion. The study finds that the international instruments do not forbid nor encourage the death penalty. Thus, the experience of each country may contribute to the status of this capital punishment; some countries are still retaining it, while some others have repealed the punishment. Be that as it may, the Islamic legal position on the punishment remains unchanged but its application may be varied to suit different times and situations.

Keywords: death penalty, international, Malaysia, Islamic law

* Associate Professor of Law, Ahmad Ibrahim Faculty of Laws, International Islamic University Malaysia. She can be reached at srahayu@iium.edu.my. The idea in this article was presented in Justice Society Maldives Public Lecture Series, at MCHE (College) Auditorium, Male, Maldives, on 11th Dec 2010. The author would like to acknowledge her research assistant, Dr. Abdulfatai O. Sambo for his assistance in the completion of this article

DEBAT BERTERUSAN MENGENAI HUKUMAN MATI: PENJELASAN DARIPADA PERSPEKTIF ANTARABANGSA, MALAYSIA DAN SHARI'AH

ABSTRAK

Debat tentang hukuman mati tiada kesudahannya. Ada yang memandang hukuman mati sebagai salah satu bentuk pelanggaran hak kemanusiaan, manakala yang lain menganggapnya sebagai satu cara untuk memelihara dan melindungi hak orang lain. Makalah ini memberi penjelasan tentang hukuman mati daripada perspektif antarabangsa, Malaysia dan Shari'ah. Dalam membuat demikian, falsafah ringkas hak kemanusiaan diberi. Diskusi diperkayakan dengan menggunakan beberapa instrumen perundangan antarabangsa, peruntukan Perlembagaan Malaysia dan statut lain yang relevan, penghakiman dan mahkamah peruntukan Al Qur'an dan Sunnah. Kajian mendapati bahawa instrumen antarabangsa tidak menghalang atau menggalakkan hukuman mati. Dengan itu, pengalaman setiap negeri boleh menyumbang kepada status hukuman mati ini; setengah negeri masih mengekalkannya, manakala yang lain telahpun memansuhkan hukuman tersebut. Walaupun sedemikian, kedudukan dalam undang-undang Islam kekal tidak berubah tetapi pemakaiannya mungkin boleh diubah mengikut kesesuaian masa dan situasi.

Kata kunci: hukuman mati, antarabangsa, Malaysia, undang-undang Islam

INTRODUCTION

One of the most controversial discourses in today's world of criminal justice is the position of the 'death penalty' as a form of punishment. Countries of the world are not unanimous on its position. Amnesty International's recent figure shows that the trend towards restriction of the death penalty continues.[1] As of December 31st 2013, it was reported that 98 countries have abolished death penalty for all crimes; 7 countries

[1] Amnesty International, *Facts and Figures on the Death Penalty* (as of 8 August 2007), accessed November 19, 2012http://web.amnesty.org/pages/deathpenalty-facts-eng and http://www.amnesty.org/en/library/info/ACT50/002/2007 accessed December 2, 2012.

abolished the death penalty for ordinary crimes.[2] Meanwhile, 35 countries abolished the capital sentence in practice, while 58 countries still retain the sentence.[3] At the moment, there are no reliable statistics on the number of death penalties that have been carried out. Amnesty International however reported that: at least 1,591 people in 2006 were executed in 25 countries. Also, at least 3,861 people were sentenced to death in 55 countries in the same year. The report further shows that 91 percent of the executions in 2006 occurred in USA, China, Iraq, Iran, Sudan, and Pakistan. Although the exact figure of those sentenced to death in the world is not easy to access, it is estimated by the human rights group that 19,185 and 24,646 awaited death execution by the end of year 2006.[4]

While some countries retain the death penalty for heinous crimes like murder, rape, armed robbery, some other countries have long lists of offences which carry the death penalty. Offences that usually carry death penalties in some countries are blasphemy, adultery, corruption, apostasy, acts incompatible with chastity, economic offences, expressing oneself, holding an opinion, homosexual acts, matters of sexual orientation, manifesting one's religion or beliefs, prostitution, organisation of prostitution, participation in protests, premarital sex, singing songs inciting men to go to war, sodomy, speculation, acts of treason, espionage or "crimes against the State", writing slogans against a country's leader and drug-related offences.[5] Some of these penalties carry the mandatory sentence. For instance, in Malaysia, drug trafficking carries the mandatory death sentence.[6] In many countries, children and pregnant women are not sentenced to death. However, Amnesty International reports that some countries executed persons below the age of 18, for instance, China, Congo (Democratic Republic), Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, USA and Yemen (the minimum age for execution is now 18).[7] Although the way and manner of execution is

---

2 Accessed April 3, 2014. http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries.

3 Ibid.

4 Amnesty International, *Facts and Figures on the Death Penalty*.

5 Phillip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/4/20, (2007) para 40.

6 Section 39B Dangerous Drugs Act 1952.

7 Accessed October 1, 2014.http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries .

carried out differs considerably from one country to another, the common one seems to be hanging and shooting by firing squad.

Against the above backdrop, it can be said that the death penalty is always at the center stage in the human rights debate. It is a controversial issue because there is no unanimous position on the use of this capital punishment in the penal systems of most countries in the world. The reason for the disagreement is mainly due to different understanding and views on the philosophy or the concept of human rights. Ironically, some look at the death penalty as part of the preservation of human rights ideals, while others look at it as a form of violation of human rights. The difficulty in resolving this controversy lies in the possibility or the impossibility to strike a balance between these two arguments.

This article therefore makes an analytical exposition of international, Malaysian and Islamic perspectives on the yet unresolved debate concerning the death penalty. The study begins with the basic arguments for and against the death penalty. It briefly discusses the philosophy of human rights, and further analyses the international, Malaysian and Islamic perspectives on the death penalty.

ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

Arguments for Death Penalty

James Fitzjames Stephen, amongst the proponents of death penalty, argues that, "there is nothing that it is worthwhile to protect at the cost of human life, except human life itself, or the existence of government and society".[8] Thus, he agrees with those who promote the death penalty because they consider it as a mechanism to protect human rights. If one's right is violated by another, he (the owner of the right) must be protected. The perpetrator has to suffer for the violation of the fundamental rights of another human being; hence, the death penalty sentence. In this situation, the proponents of the death penalty pay due regard to the rights of the victim. People in this group invoke the religious argument to justify the execution. Since Islam allows the death penalty, some Muslims therefore, support the execution on the ground of belief in cardinal principles of the religion.

Despite that, this group does not overlook the rights of the

[8] Leon Radzinowicz & Roger G. Hood, *A History of English Criminal Law and Its Administration from 1750: Grappling for Control,* (Steven & Sons, Vol. IV, 1968), 339.

perpetrator - punishing the criminal with capital punishment or death penalty does not mean that the criminal's or the perpetrator's rights are violated. In the event of criminal prosecution (for the violation of human rights), the dignity and the rights of the suspect or accused person are protected by criminal law, criminal procedure law and evidence law. These laws, at all times, will take care of the rights of the suspect or accused person. Thus, if all laws are just and properly applied, the possibility of the court to mistakenly convict and punish a person for the death penalty can be avoided.

This group also argues that by putting a criminal to death, it will deter others from committing the crime. Once put to death, naturally the criminal will not be able to commit the crime anymore. Hence, the society is a better place without him. In addition, on the ground of the 'deterrent' effect of such punishment, the execution of the death penalty will be a strong warning to others as the punishment will deter others from committing the same act (or violate the rights of others) for which the criminal had been punished for.

Arguments against Death Penalty

Movements to abolish the death penalty became obvious after World War II with the wave of freedom and human rights.[9] The then European Union Commissioner for External Relations, Chris Patten, while addressing the First World Congress against Death Penalty 2001 at Strasbourg said:

> The inhuman, unnecessary and irreversible character of capital punishment, no matter how cruel the crime committed by the offender…That stand is rooted in our belief in the inherent dignity of all human beings and the inviolability of human persons…it is impossible to reduce the risk to zero applying the penalty in error. [10]

Thus, those who oppose the execution of the death penalty argue

[9] Roger Hood and Hoyle Carolyn, *The Death Penalty: A Worldwide Perspective*, (Oxford University Press, 4th Edition, 2008), 18.

[10] His Excellency's speech was delivered by Angel Viñas, Director for Multilateral Relations and Human Rights at DG Relex, European Commission, accessed June 26, 2014 t http://europa.eu/rapid/press-release_SPEECH-01-300_en.htm ;William A. Schabas, *The Abolition of the Death Penalty in International Law,*(Cambridge, 3rd Edition 2001).

that it is a violation of human rights. In particular, it is a violation of the criminal's rights.[11] According to this view, nobody, including the state (even through legal means or through a court decision) is allowed to take another person's life. It is cruel, unusual and inhuman. According to this group, one's life can only be taken away by God. If death is caused by the state, the state is acting as inhuman and as cruel as the criminal himself.

Furthermore, they argue that, the court may commit a mistake in the prosecution and conviction process. The court might send an innocent person to death. If this were to happen, it will bring more harm than good to the society at large. If a person is killed (in the execution of ab death sentence) no other remedy may be offered. This must be avoided and should not happen.

If the court has mistakenly penalised an innocent person, the deterrent effect of the execution (as argued by the proponents of the death penalty) will be a mere illusion. The real criminal is still free at large. Furthermore, the argument to set the execution as a form of strong warning to others may not be genuine as certain crimes punishable with death (such as drug trafficking) are still being committed.

In the Western penology argument, some label the criminals as sick persons. They commit the crime (in this case, violate other's rights) due to their 'sick' character.[12] They should not be inhumanly punished for their action. The state, the victim, or the victim's family should not be cruel to them. They should be given another chance to continue to live; perhaps, they will turn a new leaf. Although the opponents of the death penalty acknowledge the rights of the victim, they give more emphasis on the rights of the criminal.

Analysis of Both Views

From the above discussion, it can be summarised that two major arguments supporting the retention and execution of the death penalty are: the retributive factor and the deterrence factor. A retributive argument for the death penalty for homicide originated from the notion of 'an eye for an eye, a tooth for a tooth.'The concept shows how the people are opposed to

11 Roger Hood & Hoyle Carolyn, The *Death Penalty*, 7.

12 See for instance discussion in Seymour L. Halleck, . *Psychiatry and the Dilemmas of Crime, A Study of Causes, Punishment and Treatment*, (London: University of California, 2007).

grievous offences and demand the accused's moral satisfaction.

The other argument is deterrence. It appeals to the society to deter heinous crimes and to put in place measures for such deterrence. The issue is whether death penalty has unique deterrence more than other forms of punishment such as life imprisonment. Criminologists claim that states have no sufficient evidence to show that the death penalty actually has more deterrent effects than other forms of punishment like life imprisonment. They objected to the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.[13]

Many arguments against the death penalty have been based on religious, ethical, pragmatic, and moral grounds.[14] The major one seems to be that human institutions, including its criminal justice system, are fallible. There is the possibility of human error knowing-fully well that death, once carried out, is irreversible. The criminal justice sectors commit mistakes sometimes in many countries. Later evidences showed that the persons sentenced to death are either innocent of the charges against them or does not deserve to die based on the evidence before the court.

Having considered this brief background to the arguments – pro and against – (on) the death penalty, before we can heartily appreciate the facts, it is relevant for us to think and evaluate the concept and the philosophy of human rights in Islam and the West, which is submitted as the basis of the debate on the death penalty.

BRIEF PHILOSOPHY OF HUMAN RIGHTS

The philosophy behind all theories of human rights (Islamic or other

---

[13] Roger Hood, *The Death Penalty – A Worldwide Perspective*. (Oxford: Clarendon Press, 3rd ed, 2002), 230; Janet BL Chan and Deborah Oxley, "The deterrent effect of capital punishment: A review of the research evidence." in *NSW Bureau of Crimes Statistics and Research*, *Crime and Justice Bulletin*, No 84, (October 2004), 1.

[14] American Civil Liberties Union, Death Penalty 101,accessed December 2, 2014 http://www.aclu.org/capital/facts/10602res20070409.html; NSW Council for Civil Liberties, 2005. The Death Penalty in Australia and Overseas, Background Paper (by Michael Walton), at paras 59–70 accessed December 2,2014 http://www.nswccl.org.au/issues/death_penalty/resources.php); Pontifical Council for Justice and Peace, 2004. The Compendium of the Social Doctrine of the Church, (St Pauls Publications, para 405.

theories) is for the protection of human dignity. There is no disagreement on this. No one is allowed to encroach into another person's rights as the dignity of men is the most important aspect in human life and human development. Although Islam and the West have some similar views on the general theory and objective of human rights, their emphasis and approach are dissimilar. Therefore, (due to the difference in emphasis and approach) certain kind of human rights (though agreeable by both) are built upon two different concepts.

Islam has divine basis for human rights. Being divine in nature, certain fundamental concepts on human dignity are nonnegotiable, and are considered immutable. The Western theory of human rights on the other hand, evolves with the evolution of human thoughts. It changes according to time and the need of the people.

From another perspective, the Islamic concept of human rights, while it acknowledges the individual rights, emphasises on the obligations of individuals. In addition, as it is always put at the center stage, the Islamic theory puts the rights of the public at a better place than the rights of individuals. The Islamic system in general, and Islamic concept of human rights in particular accentuate on the public rights, rather than individual rights. If there is any conflict between the rights of individuals and the rights of the public, the latter's rights shall precede. In materialising this theory, the *Shari'ah* places five basic values of human necessities (religion, life, property, honour and dignity and lineage) as the foundation on the scope and limitation of human rights. Muslims' faith (*al-din*), human life including health (*al-nafs*), intellect and mind (*al-'aql*), dignity and lineage (*al-nasab*) and property (*al-mal*) are the major interests protected in Islam. Islamic law protects each of the five interests by enjoining, and recommending, acts that will promote the interest, and prohibiting, and discouraging, acts that will harm, and jeopardise, the interest. For example, Islamic law enjoins the five daily obligatory prayers (*salat*) and recommends supererogatory prayers (*nawāfil*) because *salat* increases a Muslim's faith in Allah (s.w.t.), and prohibits neglecting the obligatory *salat* because such act decreases a Muslim's faith in Allah (s.w.t.). Nevertheless, this does not mean that Islam ignores individual rights. This is true as Islam pays high regards to the dignity of men. It is the very theory of Islamic human rights that no one can be deprived of their rights without due process. For instance, the evidential requirements in criminal convictions for corporal offences are much higher than the applicable standard of proof in the common

law system.[15]

The Western concept of human rights on the other hand, emphasises on the rights of individuals. Personal liberty and personal rights are the two core aspects of the Western theory of human rights.[16] One's private sphere is immutable. What more if it involves the life of a human being.

DEATH PENALTY DEBATE FROM THE INTERNATIONAL LAW PERSPECTIVE

International law does not absolutely prohibit states from imposing death penalty.[17] While some states signed treaties not to, under any circumstance, impose the death penalty, some agreed not to carry out the penalty while some are not parties to any treaty in relation to the death penalty.[18] A number of states also retain the penalty and affirm their constitutionality and effectiveness.[19] International law seems to put some restraints on states that still retain the death penalty in terms of the offences that may impute the penalty, on whom it may be imposed and the procedure for its imposition. The past six decades have witnessed trends towards the restriction on the death penalty.[20]

It should however be stated that some states are parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) adopted in 1989 which aims at abolishing the death penalty. As of 22 November, 2012, there were 75 states parties to the Second Optional Protocol. Article 1 of the Protocol provides that: "1) No one within the jurisdiction of a state party to the present

---

15 Yusuf al-Qaradawi. *Islam: An Introduction*, trans. Syed Bashir Ahmad Kashmiri, (Kuala Lumpur: Islamic Book Trust, 2010); Mohammad Hashim Kamali. *The Dignity of Man: The Islamic Perspective*, (Kuala Lumpur: Ilmiah Publishers, Malaysia, 1999); Sheikh Shawkat Hussain.. *Islam and Human Rights*, (Kuala Lumpur: Muslim Youth Movement of Malaysia, 1991).

16 Alison Dundes Renteln, "The Concept of Human Rights" *Anthropos* 83, (1988): 343 – 364.

17 William A. Schabas, *The Abolition of the Death Penalty.*

18 Accessed October 1,2014.http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries

19 *Ibid.*

20 Roger Hood, "The Enigma of the 'Most Serious' Offences", *Center for Human Rights and Global Justice Working Paper*, *Extrajudicial Executions Series*, No 9, (2006):4–5, accessed December 2, 2013http://www.nyuhr.org/docs/WPS_NYU_CHRGJ_Hood.pdf.

Protocol shall be executed; 2) Each state party shall take all necessary measures to abolish the death penalty within its jurisdiction." However, state parties may reserve the right to apply the death penalty in certain conditions such as in the period of war and some other most serious crimes of a military nature committed during wartime upon conviction. This Protocol places much emphasis on the right to life.

It is pertinent however to consider whether the right to life guaranteed under international law outlaws the death penalty. Many international legal instruments and national constitutions guarantee the right to life.[21] It forms part of customary international law. The right entails not to deprive a person arbitrarily of his life. For instance, the Universal Declaration of Human Rights (UDHR) in Article 3 provides that 'Everyone has the right to life', while the ICCPR in Article 6(1) provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." However, this right is not an absolute one. In other words, a person may be lawfully deprived of his rights in certain circumstances. Also, Article 3 of the Declaration of Responsibility and Human Duties provides for the right to life and human security. This Convention was adopted in 2002 by High-Level Group under the auspices of Valencia City and UNESCO initiated and organised by the Valencia Third Millennium Foundation. The States are enjoined to protect and respect the right to life of everybody as this is their primary duty. Necessary measures are required to be taken to prevent deprivation of life by States and its officials.

It is submitted that although there are restrictions on the imposition of the death penalty, it is not yet outlawed. This is the position under customary international law. This position aims at safeguarding and guaranting the protection of the rights of those who await the death penalty. It is adopted by the United Nations Economic and Social Council (ECOSOC), The Safeguards were adopted in resolution 1984/50 of 25 May 1984, and is often referred in resolutions of the former UN Human Rights Commission (the UN's Commission on Human Rights was abolished on 16 June 2006 and the Human Rights Council was established in its place by the General Assembly in its

[21] Sarah Joseph, S.J. Schultz and Castan Melissa, 2004.*The International Covenant on Civil and Political Rights,* Oxford University Press, 2nd ed., 154–193; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge:Cambridge University Press,2002), 283–295.

resolution 60/251 of 15 March 2006.), the UN General Assembly, and other international bodies. Thus, ICCPR binds all states as to its standards on death penalty, whether or not they are parties to the Convention.[22]

One way international law restricts the death penalty is by restricting the imposition to most serious crimes. Undoubtedly, homicide falls under this category.[23] However, the debate with respect to other forms of crimes such as human and drug trafficking offences, economic and financial crimes or corruption offences, and armed robbery still continues.[24] For instance, in the Indonesian Constitutional Court, the issue whether drug trafficking offences are among the 'most serious crimes' became a central question in the case brought by three of the Bali nine.[25]

One other issue which generates controversy under international law is whether mandatory death sentences violate the right to life. This point is stressed by the Human Rights Committee in many cases under the First Optional Protocol to the ICCPR. While Courts in some States seem to hold this view, some States still contend that the mandatory death penalties do not violate any national laws and that it is consistent with international obligations. For instance, the Singapore Court of Appeal in *Nguyen Tuong Van v Public Prosecutor* still adhered to mandatory death penalty.[26]

Despite the permissibility of the death penalty under international customary law though with some restrictions on its imposition, some have argued that death penalty cannot but in all circumstances be

---

22 UN Commission on Human Rights resolution 2005/59, paras 4(a) and (b), and 3(b).

23 E/2000/3, para 79 and CHR resolution 2005/59, para 7(f).

24 Andrew Byrnes, "The Right to Life, Death and Human Rights Law: An International and Australian Perspective," *UNSW Faculty of Law Research Series* 66 (2007) accessed December 27, 2012 http://ssrn.com/abstract=1366566.

25 Andrew Byrnes,"Drug Offences, the Death Penalty, and Indonesia's Human Rights Obligations in the case of the Bali 9: Opinion submitted to the Constitutional Court of the Republic of Indonesia." *UNSW Faculty Law Research Series 44*, accessed December 27, 2012http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997178 and http://law.bepress.com/unswwps/flrps/art44/; McDonald QC, C., "Don't Bury Us Before We're Dead." (paper delivered at the Criminal Lawyers Association of the Northern Territory Eleventh Biennial Conference on Remote Justice, Bali, Indonesia, 5 July,2012).

26 [2004] SGCA 47, [2005] 1 SLR 103 (upholding the judgment of the High Court of Singapore in [2004] SGHC 54, [2004] 2 SLR 328).

arbitrary deprivation of life. As a result, it is argued that imposing the death penalty is an unlawful act. The argument was based on the fact that death penalty does not have effective deterrence.[27] Although this argument seems convincing, arguing that the death penalty does not deter people who have yet to commit the act is very difficult to justify. There is no sufficient scientific proof of this which takes into account the social, economic, ethnic, cultural and political factors of all nations. There can be no generalisation based on studies conducted in some States (West) in the world. So, depriving a person of his life in accordance with the law, especially in heinous crimes cannot by any standard be said to be arbitrary. Also, to argue that the mandatory death penalty is arbitrary is very unconvincing. This is because allowing for the court's discretion in this kind of penalty especially for heinous crimes may create room for arbitrariness and judicial mischief. A judge may be favourably disposed to the plea of a party not to impose death penalty but refuse another of similar circumstance. This will then be nothing but jungle justice.

In the same vein, the argument that the death penalty is cruel, inhuman and degrading treatment has also been put forward. It is submitted that the ICCPR does not view the death penalty as amounting to cruel, inhuman or degrading treatment. However, prolonged delay on death row while waiting for execution may be inhuman, cruel and degrading. The Human Rights Committee opines that some types of execution may be cruel and degrading. Some national courts such as the South African Constitutional Court in *State v Makwanyane*[28] was of the view that imposition of the death penalty is cruel, inhuman and degrading treatment.

It is pertinent to mention the extra-territorial effects of human rights obligations affecting the death penalty. It is submitted that by virtue of the ICCPR and some human rights instruments, a state that extradites a person to a country where an accused may likely be imposed with the death penalty seems to violate the ICCPR. Again, a state that has abolished the death penalty in its statutes does not have the right to extradite a person to a jurisdiction where the person may likely receive the death penalty upon conviction. This view was adopted by the Human Rights Committee in a case brought against Canada by the US requesting the extradition of a person to the US.[29]

---

27 Roger Hood and Hoyle Carolyn, *The Death Penalty*.

28 Andrew Byrnes, "Drug Offences".

29 *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D/829/1998,

MALAYSIAN LEGAL POSITION ON THE DEATH PENALTY

Legal Provisions on Death Penalty

Since the debate on the death penalty has been made global, Malaysia is not excluded from the ongoing debate. Malaysia retains the death punishment for various offences, including punishment for murder (Section 302 Penal Code), treason (Sections 121 and 121A Penal Code), drugs trafficking (Section 39B Dangerous Drugs Act 1952 (Revised 1980)) and firearms related offences (Section 3, 3A and 7 Firearms (Increased Penalties) Act 1971.[30]

Punishment for murder in Malaysia is mandatory death. Section 302 of the Penal Code has an explicit provision on this. This section provides for punishment for murder stating that: "Whoever commits murder shall be punished with death." The Malaysian penal law does not give the victim's family the options – whether to ask for payment of *diyyah* (compensation) or to forgive the offender as found under the Islamic law. Once found guilty, the convicted person will face the death sentence unless his application for royal clemency is approved. It is a general practice in Malaysia that the Royal Highnesses have the power to pardon any offence committed and punished within the jurisdiction. The power to pardon is exercisable by the Pardons Board under the Article 42 of the Malaysian Federal Constitution.

Another mandatory death sentence is found for the offence of intent to cause death, hurt or imprisonment the Yang di-Pertuan Agong, Ruler or the Yang di-Pertua Negeri under section 121A of the Penal Code. In addition to the death sentence, anyone found guilty under the section shall also be liable to fine. This section contains offences

at para at 10.4 (2003).

[30] Prior to the legislation of Security Offences (Special Measures) Act 2012 (SOSMA) death penalty was also found under Section 57 of the Internal Security Act 1960 (ISA). The ISA was repealed by SOSMA Section 32(1). Section 57 of the Internal Security Act 1960 provided for mandatory death sentence for the offence of having possession and control of firearm or ammunition in security area. It contains offences relating to firearms, ammunition and explosives: "(1) Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control— (a) any firearm without lawful authority therefore; or (b) any ammunition or explosive without lawful authority therefore, shall be guilty of an offence and shall, on conviction, be punished with death." The offence under section 57 of the Internal Security Act is a strict liability offence. The accused shall have to prove that the possession or the control of the firearm or the ammunition is under a lawful excuse.

against the person of the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri. It provides: "Whoever compasses, imagines, invents, devises or intends the death of or hurt to or imprisonment or restraint of the Yang di-Pertuan Agong or any of the Rulers or Yang di-Pertua Negeri, their heirs or successors, shall be punished with death and shall also be liable to fine".

Sections 3 and 3A of the Firearms (Increased Penalties) Act also provide mandatory death for the offence of discharging or for being an accomplice in discharging firearms. Section 3 provides for the penalty for discharging a firearm in the commission of a scheduled offence. It states: "Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby, be punished with death." Section 3A contains the penalty for accomplices in case of discharge of firearms, where it explicitly provides: "Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge."

Trafficking in drugs into Malaysia is also punishable with mandatory death. This is provided for under section 39B of the Dangerous Drugs Act 1952. Section 39B provides: "(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia *(a)* traffic in a dangerous drug; *(b)* offer to traffic in a dangerous drug; or *(c)* do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug." Subsection (2) provides that: "any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death."

Death sentence for the offence of trafficking in firearms under section 7 of the Firearms (Increased Penalties) Act is not mandatory because courts is given the choice, depending on the facts and proof in the case, to impose life imprisonment and whipping sentence. Section 39B provides for mandatory death sentence for trafficking in dangerous drug.

Death penalty under section 121 of the Penal Code is a non-mandatory sentence. This offence of waging or attempting to wage war or abetting the waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri is punishable with death or life imprisonment and if one is not punished with death, he may also be liable to a fine.

Death Penalty and the Courts

The Malaysian courts, while interpreting the right to life under Article 5 of the Malaysian Federal Constitution rule that death penalty is constitutional, provided that it is recognised by the law. That is, "save in accordance with law" under Article 5(1), death penalty is constitutional. This is based on Article 5(1) of the Federal Constitution which states "No person shall be deprived of his life or personal liberty, save in accordance with law." So, as long as the proper procedure of prosecution and conviction are adhered to, the penalty is valid. Thus, in *The AG, Malaysia v Chow Thiam Guan*,[31] it was held that: "under Article 5(1) of the Federal Constitution, the law is that if Parliament deems it necessary that the death *penalty should be mandatory* it is not within the province of the court to adjudicate upon the wisdom of such a law. The law may be harsh but the role of the court is only to administer the law as it stands." Also, in *Public Prosecutor v Lau Kee Hoo*,[32] it was held that a person may be deprived of his life so long it is in accordance with the law. Similarly, the Federal Court in *Public Prosecutor v Lau Kee Hoo*,[33] had to decide on the issue : "Whether or not the mandatory death sentence provided under section 57(1) of the Internal Security Act, 1960, is ultra vires and violates Articles 5(1), 8(1) and 121(1) of the Federal Constitution." It held:

> (1) it is clear from article 5(1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional (4) Capital punishment is not unconstitutional *per se*. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made; (7) there is nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may be to some extent diminished if it is not.

31 [1983] 1 MLJ 51 at 52.

32 [1983] 1 MLJ 157.

33 [1983] 1 MLJ 157.

Also, in *Public Prosecutor v Yee Kim Seng*,[34] the High Court held (Ajaib Singh J) that : "Article 5(1) is not infringed because the accused is not going to be deprived of his life or personal liberty except in accordance with law. And the law in this case, is the ISA which is a perfectly valid law passed by Parliament." This can be compared with a Pakistani decision in *Mohd. Riaz v Federal Government of Pakistan and Gul Hassan*[35], where it was decided that mandatory death sentence in murder case is invalid. This is because in Islam, there is the option (if agreeable by the victim's family) i.e. to pay *diyyah*.

It is relevant to quote a decision of a well-known former Lord President of Malaysia, Suffian LP. He wrote in his written judgment, in *Public Prosecutor v Lau Kee Hoo*[36]:

> Thus it will be seen that the Constitution itself envisages the possibility of Parliament providing for the death penalty, so it is not necessarily unconstitutional....Nor does our constitution contain any provision prohibiting 'torture or inhuman or degrading punishment' while it may be regarded as cruel in certain other countries, public opinion here is not quite ready to follow suit as far as certain grave offences are concerned, though it might do so in future; and that if the fathers of our constitution had desired to abolish it they would have said so in the clearest of language.

This judgment indicates the readiness of the Malaysian judiciary to apply the death penalty despite the arguments against the penalty in other countries. Although there is clear legal and judicial recognition of the death penalty in Malaysia, the argument against death penalty is not something unfamiliar. The Malaysian Bar, on some occasions has been very vocal on the call to abolish the death penalty. To the contrary, there are also arguments advanced by some other groups to request the government to consider punishing human traffickers with the death sentence. On a different issue, some have suggested the imposition of the death sentence on one guilty of rape, especially where the victim is a child. This call is made due to the serious nature of the offence. These debates assume that there is no unanimous view on the position of the death penalty in Malaysia although the law and judicial stand on the subject are crystal clear.

---

34 [1983] 1 MLJ 252.

35 PLD 1980 FSCI, 9

36 [1983] 1 MLJ 252, at 159.

DEATH PENALTY UNDER THE SHARĪ'AH

As earlier stated, Islam recognises the death penalty. There are three kinds of death penalty in Islam – death penalty as a form of *hadd* penalty, a *qisas* (retaliation) and finally *ta'zir* (discretionary) punishment. In a *hadith*, it is reported that, "the killing of a Muslim is not permissible except in three cases: when he kills another person, when he commits adultery after he has been married and when he becomes apostate".[37]

It must be mentioned at the outset that the word *hudud* in general refers to the limitations set by the law. In this respect, there are specific injunctions (on the offence and the punishment). Some define *hudud* as offences that have clear injunction(s) (on the offences and the punishments) in the Qur'an. Some others define *hudud* as offences that have their punishments clearly prescribed either by the Qur'an or the *Sunnah*.

Death Penalty in *Hudud*

According to the majority view of Muslim jurists, there are thoffences under *hudud* classification that are punishable with death. They are namely adultery, apostasy and brigandry (*hirabah*). With respect to adultery, In relation to the crime of adultery, the punishment provided for the crime committed by the married adulterers is stoning to death. The punishment is provided for in the hadith of the Prophet s.a.w:

It has been related on the authority of Abu Hurairah who said, "A man came to the Prophet when he was in the mosques and said, "Oh Prophet! I have committed Zina." The Prophet turned his face from him but he repeated his statement four times by coming in-front of the Prophet. When he completed four times testimony against himself. Prophet said to him, "Are you insane?". He answered in the negative. The Prophet "Are you married?". He answered in positive. The Prophet said, "You might have kissed her" He answered to have made intercourse with her. The Prophet said, "Do you know Zina." He answered in positive. At last the Prophet ordered to stone him to death and he was stoned to death[38]. Again, with respect to apostasy, the principal *hadith* on apostasy provides to the effect: "Whoever

---

[37] Sunan Abu Dawud, trans Ahmad Hasan ., (New Delhi: Kitab Bhavan) , Vol. II, 332.

[38] Muhammad Ibn Ali Al-Shawkani, *Nail al Awtar*, Vol.VII (Beirut: Muassasat al-Tarikh al Arabi,n.d),111-113.

changes his religion, kill him"[39]. Also, with respect to *hirabah, Surah Al-Maidah* (5): 33 – 34 says: "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; Except for those who repent before they fall into your power: in that case, know that Allah is Oft-forgiving, Most Merciful."

It is submitted that in all these three offences, there are stringent requirements of evidence for conviction. In adultery for instance, conviction can be made through unqualified *iqrar* (confession) or *shahadah* (oral testimony by eye witnesses). The *iqrar* has to be made various times (depending on the applicable school of thought) not at once. One who makes the confession must fulfill certain requirements in making a valid and binding confession. The duty of the court is to ensure that the accused person, not only possesses the criteria to make the plea, but also understands the nature and the consequence of the guilty plea. Therefore, it has been a practice in Shari'ah criminal procedure that the court shall request the prosecutor to present the summary of facts and evidence against the accused person. This is because there is no specific procedure found in legal provisions regarding the presentation of summary of facts and evidence. The gist of this procedure is to assist the judge to substantiate his decision to record the guilty plea and subsequently to convict and punish the accused person. Following the presentation, the accused person shall be asked whether he agrees to the facts and the evidence that the prosecution relies on. The guilty plea shall only be recorded by the court if the accused admits them (facts and evidences). If the accused denies (either the facts or evidence), the court shall not record the plea, instead it will conduct a full trial. Apart from being an unqualified, the plea may be retracted at any time, even during the execution of the death sentence.

If the case is established by way of *shahadah*, the *shahid* (witness) must possess the *'adalah* (just) character – not only at the time he delivers the testimony in court (*al-ada'*) but also at the time he perceived the evidence (*al-tahammul*). There must be four eye-witnesses who have seen the commission of the crime of adultery as clear as they see the

[39] Abu Dawud, 1990, Reprint 1997. *Sunan Abu Dawud*, trans Ahmad Hasan ., (New Delhi: Kitab Bhavan) , Vol. 3, Book of Battles, 657; Al-Bukhari, 1419H/1999, Sahih al-Bukhari, Riyadh: Dar al Salam li-al-Nashr wa-al-Tawzi', 1193; Al-Shawkani, M. M., Nayl al-Awtar, (Beirut: Mu'assasat al-Tarikh al-'Arabi, n.d.), Vol. 7, 216.

sun. *Iqrar* and *shahadah* are two kinds of Shariʿah evidential procedure that can be the basis of conviction justifying death penalty. They bind the court in the sense that the court cannot ignore or reject the evidence if all the requirements are satisfied.

In the case of apostasy, the accused is given the opportunity to repent. The period of repentance may be extended beyond 3 days (although 3 days is generally understood as the time frame for repentance). Some Muslims even subscribe to the view that the repentance period may be extended throughout life time. The conviction process for apostasy must be done in court of law giving emphasis to the required standard of proof.

In the case of *hirabah,* death punishment may be imposed if the accused person refuses to repent and be remorseful. Death penalty can only be imposed on the *muharib* only if he caused death in the commission of *hirabah* and he refuses to repent and be remorseful. If no death is caused in the commission, death penalty is not prescribed for the offence. If the offender repents and is remorseful for what he has done before he is brought to the authority, death penalty is not to be imposed on him. This is based on verses in *Surah Al-Maidah* (5): 33 – 34 which states that: "The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter; Except for those who repent before they fall into your power: in that case, know that Allah is Oft-forgiving, Most Merciful."

Since these 3 offences are categorised as *hudud*, the jurists are unanimous that the burden of proof in *hudud* cases is *yaqin* (beyond any shadow of doubt). The *hudud* punishment shall only be imposed if the evidence is crystal clear (in the form of *yaqin*) and the punishment shall be avoided if there is (even) a slightest doubt (*idra' al-hudud bi alshubhah*).

Death Penalty in *Qisas*

Regarding the offence of *qisas*, death penalty is to be executed as a form of retaliation. In the case of causing the death of another, the victim's family has the right to retaliation. Muslim jurists are of the view that *qisas* and *diyyah* are the punishments that have been prescribed by Shariʿah. It is meant to protect the rights of individuals, whereby Islam acknowledges the sacredness of the blood of human beings. *Qisas*

and *diyyah* offences are crimes that have been prescribed in detail by Shari'ah as contained in the Qur'an and *Sunnah*. The punishment therefore, cannot be remitted or altered by anyone else – not even the state, except by the victim or his legal heirs. In this respect, the case of *Qisas* is unique in the sense that the victim's family is given the option to insist upon execution of death penalty, to accept the *diyyah* as monetary recompense, or to forgive the offender. The options leave the room for people to be compassionate and profess forgiveness. The Qur'an says that settlement is encouraged and most preferred in such situations.

From the evidential perspective, the burden of proof is on the prosecution under the general principle: evidence is for the claimant and oath is for the defendant (*al-bayyinah 'ala al-mudda'i wa al-yamin 'ala man ankara*). This is the general rule which is also applicable in other cases. According to some views, the standard of proof in *qisas* cases is of beyond any reasonable doubt (*zan qarib min al-yaqin*), as it is not one of *hudud* offences. This can be achieved through circumstantial evidence (apart from *iqrar* and *shahadah* as discussed above). Nonetheless, one may argue that since the offence and the punishments are prescribed by the Shari'ah sources, it is a form of the limitation that Allah (s.w.t.) has prescribed. If this approach is taken, the standard of proof must also reach the standard of *yaqin* that is beyond any shadow of doubt. The relevant verses on the subject of *qisas* punishments for the offence of murder are given below. For the offence of causing hurt, the legal authorities are:

> 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 any one remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers. [40]

> The prohibited month for the prohibited month,- and so for all things prohibited,- there is the law of equality. If then any one transgresses the prohibition against you, Transgress ye likewise against him. But fear Allah, and know that Allah is with those who restrain themselves.[41]

> And if ye do catch them out, catch them out no worse than they catch

[40] *Surah al-Maidah* (5): 45

[41] *Surah al-Baqarah* (2):194

> you out: But if ye show patience, that is indeed the best (course) for those who are patient.[42]

With respect to the offence of intentional murder, the following verses provide:

> 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 *qisas* or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law).[43]

> 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 any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, this is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty.[44]

Also, if death is caused by a mistake, the applicable law is given in *Surah* al-Nisa' (4), verse 92 to the effect that:

> Never should a believer kill a believer; but (If it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (Is enough). If he belonged to a people with whom ye have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom.

Death Penalty in *Ta'zir*

Regarding *ta'zir* or discretionary punishment, the principle is almost clear on the basis of the power of the state authority in *al-Nisa'*(4): 59 quoted above. The state authority is bestowed with a wide discretionary power to create offences and punishments relevant, expedient and necessary for the country. According to the majority Muslim Jurists

42 *Surah al-Nahl* (16): 126

43 *Surah al-Isra'* (17): 33

44 *Surah al-Baqarah* (2):178

(considered as the most acceptable view), the state authority can even create offences punishable with death penalty if it is considered necessary for the interest of the society. Some minority jurists, however, disagree with this view. They argue that the man-made offences should not be punished with more serious punishment than the prescribed offences by the Quran or *Sunnah*. Thus no death penalty shall be prescribed for *ta'zir* offences.

Since *ta'zir* offences are not the same as *hudud* offences, the evidential requirement may be lesser than the standard of proof required in *hudud*. Some Muslim jurists suggest that the standard of *zan qarib min al-yaqin* (beyond reasonable doubt) is sufficient for conviction and sentencing. Nonetheless, some others argue that when a punishment for an offence is severe, the required evidence and standard of proof must be very stringent. Though one may argue that it can be to the degree of *zan al-ghalib* or *zan qarib min al-yaqin* (presumption that is closer to certainty), the state authority or the state law of evidence may put a higher standard of proof that is *yaqin*, as there is no specific injunction of Shari'ah on the degree of proof. It is a matter of *ijtihad* (independent juristic legal extrapolation).

It is submitted from the Shari'ah perspective stated above that although Islam recognises and provides explicit provisions on death penalty, this punishment is not something encouraged. This has been made clear in various verses of the Qur'an, some of which have been quoted above. In *qisas* cases, men are encouraged to be compassionate and to forgive the offender. In *hirabah*, the suspect or accused is encouraged to repent and be remorseful. In these cases, death penalty is the last resort. It should not be the prime choice. Similar approach had been taken by the Prophet (s.a.w.) in adultery cases. In a case known as *Maiz's Case*, the Prophet (s.a.w.) refused to impose the death penalty on Maiz's first confession for adultery. The Prophet did not punish him immediately when he confessed. He was punished after his fourth confession. During the execution of the death sentence through stoning, the companions told the Prophet that Maiz retracted his confession. The Prophet responded to the companions that Maiz should have been brought to him for he might have retracted his confession. This case has been used as an authority that the Islamic legal system does not promote the death penalty and one is always allowed to make his confession as the basis of any conviction. In another case, the *al-Ghamidiyyah's Case,* a woman companion who came to the Prophet and confessed to committing adultery. The Prophet asked her to go back and repent. When she came for the second time, and again, while

telling the Prophet that she was pregnant (from the adultery committed) confessed the same to the Prophet. The Prophet asked her to go back and her case shall be decided later. When she delivered the baby, the woman appeared before the Prophet again. The Prophet informed her that he would not impose the punishment until she completed nursing the baby and until there is someone who will take care of her child. The woman was sentenced to death when an Ansari companion offered the responsibility to take care of the child.

Therefore, although the court cannot remit the death sentence in *hudud* offences, the evidential requirement to arrive at such a sentence is inflexible. There is no compromise in the method and standard of proof. The courts thus, must (at all times), be vigilant on the required burden and standard of proof in the case. This does not mean that the evidential requirements in other cases (than *hudud*) can be compromised. Their standard of proof should meet certain standards as it involves the life or death of a human being. Being a system that respects the rights of individuals, the Shari'ah system at all times, will take care of the rights of every man. Accepting the widest definition of *hudud* mentioned earlier (since the offence and punishment are clearly spelt out by the Qur'an) the required standard of proof must be very stringent. All *hudud* offences must be avoided if there is doubt (*shubhah*).

CONCLUSION

Many countries in the world have abolished provisions on, and the execution of, death penalty. It is also a fact that some countries which retain death penalty in their laws are not active in executing the sentence. Nevertheless, it is also a fact that there are countries in the world that still perceive the relevancy of death penalty as a form of deterrence. The diverse experiences of different countries often determine the status of this capital sentence. More so, international law does not absolutely prohibit the imposition of the death penalty although there are restrictions on its imposition. This also largely depends on treaties signed by each country.

No one should deny the fact that the Shari'ah allows the imposition and the execution of the death penalty. This fact does not appear in vacuum as every severe punishment in Islamic law is accompanied by stringent procedural and evidential requirements. Furthermore, Islamic law does not put the death penalty as the first priority in the list of possible punishments. As much as possible, Islamic law encourages

repentance and forgiveness. Furthermore, although Islamic law allows the execution of the death penalty, it should not be imposed if there is a slightest doubt on the guilt of the accused person. The court must be convinced that the case against the accused person has been proved beyond any shadow of doubt and no innocent person shall be put to death.

Thus, all members of any particular society are expected to adhere to certain rules of conduct acceptable to the community. In breach of the acceptable conduct, most systems provide sanctions. The penalty sanctions depend on the wishes of the society which then decides on the kind of penal sanctions to be adopted and applied. Therefore, in Malaysia, the death penalty is not unconstitutional. The Constitution envisages situations that can warrant justifiable termination of life. Due process of law (including the evidential process – the standard and burden of proof) needs to be followed strictly in this regard.