

# Shariah Punishments in the Penal Code of Maldives

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## Abstract

Despite Maldivian Constitution prohibiting laws that contravenes Shariah, the inclusion of conflicting punishments and interpretations of offenses within its Penal Code has contributed to a penal impasse, in terms of hudud punishments. This paper conducts an empirical study based on doctrinal research on the level of inclusion of hudud punishments in the current penal code of Maldives as well as conducting a qualitative study through the stakeholders in Maldives. Furthermore, issues are analysed and discussed to prove the effects of including conflicting concepts within the same penal law in terms of Shari'ah punishments. The findings of this paper will show the attitudes among the stakeholders towards the application of hudud punishment in Maldives. Even though the evidence found in this paper is gathered from sources in Maldives, these findings can be utilised by other Islamic countries in addressing issues related to Shari'ah punishments in their respective penal systems.

**Keywords:** Penal Law, Hudud, Qisas, Shari'ah, Maldives

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## I. INTRODUCTION

In the Islamic legal context Shari'ah is referred to as the canon laws ordained and derived from the Qur'an and the Sunnah of the Prophet Muhammad (SAW). Shariah contains all aspects and functionalities of laws and jurisprudence in Islam.<sup>1</sup> Muslims believe that the Holy Qur'an is unchanging and eternal, hence its rulings on legal matters and its authority remains intact and enforceable on any circumstance in accordance with the sunnah of the Prophet (SAW). Throughout the history Muslim jurists have tried different methodologies in deriving rulings from Quran and Sunnah. These methodologies, or in a more refined term the Islamic *corpus juris* or *fiqh*, is accepted by the consensus of the scholars of the Islamic world as valid and having status of legality in its application and enforcement of its rulings. All Muslims are required to follow these rulings in their public and private life.<sup>2</sup> In this sense most Islamic countries have enabled systems to include the rulings of Shari'ah in both public and private laws. Some countries have parallel systems with both the common law and Shari'ah, other countries have opted for only Shari'ah jurisdictions. More recently some Islamic countries have adopted codified Shari'ah penal systems which is a relatively new form of integration of Shari'ah criminal law in to their legal systems.

Maldives being a country with a 100% Sunni Muslim populace with an ardent following in its teachings, decided to include the aspects of Shari'ah and its forms of punishments in to its Penal Code and was at the time claimed to be a country with a codified Shari'ah compliant penal code in the world.

## II. SHARIAH CRIMINAL PUNISHMENTS

There are three main types of punishment approaches in Islam. On the first and second part is the punishments directly derived from the sources of Shari'ah which are predetermined and fixed as mandatory punishments and the judge does not have any discretion over it. These punishments are known as *Hudud* and *Qisas* punishments. On the third part is the type of punishment that the judge is given discretion on its application. These punishments are known as *Ta'zir* punishments.

### 1- Hudud Punishments

Hudud punishments are levied for crimes that are mentioned in the Qur'an and Sunnah of the Prophet (SAW). Hudud offenses are considered as violations against the rights of Allah (SWT). The punishments and its procedure of application is directly mentioned either in the Qur'an or the Sunnah of the Prophet (SAW). In total there are 7 crimes applicable of hudud' punishments; 1. for the theft offense punishment by amputation of hand;

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<sup>1</sup> Abdal-Haqq, 2006, Understanding Islamic Law, From Classical to Contemporary, Altamira Press, p.3-4

<sup>2</sup> Iyad, Zahalka, Sharia in the Modern Era - Muslim Minority Jurisprudence, Cambridge, Cambridge University Press, 2016

2. for fornication or adultery punishment by stoning for the married person or one hundred lashes for unmarried person; 3. for making false allegation of adultery on someone punishment of eighty lashes; 4. for the offense of apostasy punishment of death; 5. for the offense of drinking intoxicants punishment by eighty lashes; 6. for robbery punishment of death/ cutting off limbs on alternating sides or the punishment of exile depending on the seriousness of the offense;<sup>3</sup> and, 7. for rebellion punishment of death.<sup>4</sup>

It has to be noted that there are set criteria that is considered almost virtually next to impossible to prove a case of *hudud*, unless an accused confesses, as it has to be proven without any doubt and only on certainty<sup>5</sup> before the accused is convicted. Even in the event of confession the accused is allowed to retract his confession before or even during the punishment is carried out.

The Prophet (SAW) has spoken on the importance of warding off the punishment of *hudud* on Muslims as much as possible.

“...Ward off the *Hudud* from the Muslims as much as you all can, and if you find a way out for the person, then let them go. For it is better for the authority to err in mercy than to err in punishment...”<sup>6</sup>

## 2- Qisas Punishments

*Qisas* punishments are for offenses where the offender is prescribed to be punished in the same manner he treated the victim; such as in cases of murder and personal injury.<sup>7</sup> One of the main features of *Qisas* punishments is the concept of proportionality in punishment. However, unlike *hudud* punishments, in cases of *qisas* the victim or the heirs of the victim has the right to pardon the offender<sup>8</sup> and opt either for a compensatory arrangement. The compensatory model is also prescribed in Shari'ah. It has to be noted that the importance and the virtuousness of forgiving the offender is mentioned in several verses of the holy Qur'an. However, there is no harm in pursuing justice the victim as it is his sole discretion either to pardon or not to pardon.

## 3- Ta'zir Punishments

*Ta'zir* punishments in Shari'ah are the type of reformatory, disciplinary and deterrent forms of punishments<sup>9</sup> given at the discretion of the judge after determining the merits of the case. Even though considered as crimes punishable under Shari'ah, *Ta'zir* offenses do not carry a fixed punishment from either the Quran nor the Sunnah of the Prophet (SAW). Hence the judge is given the choice in punishing the offender.

*Ta'zir* punishments range from, on a serious note; corporal punishment, death, imprisonment or expulsion of an offender from the land.<sup>10</sup> On a lenient application, these punishments can range from admonitions, reprimand, threat, boycott, public disclosure, fines and seizure of property of the offender. In today's terms alternative forms of punishments such as community service, imposed rehabilitative punishments among others are also categorised under *ta'zir* punishments.

## III. MALDIVIAN PENAL SYSTEM

Since 1961 until 2014, for over half a century, Maldives has been following a penal code that was described as vague and unable to address the issues and crimes of a modern society.<sup>11</sup> For these reasons the government decided to redraft the Penal Code from ground up with two conditions. The first condition was that a new penal code should encompass the principles of Shari'ah. The second condition was that the new penal

<sup>3</sup> I. Doi, A. Rahman. (1984). *Shariah: The Islamic Law*. P.255 UK: A.S Noordeen.

<sup>4</sup> Mohamed Farid. Bin Mohamed Sharif,(2006) The concept of Jihad and Baghy in Islamic Law: with special reference to Ibn Taymiyya, Phd Thesis, University of Edinburgh p.180

<sup>5</sup> Brown, J. (2017). *Stoning and Hand Cutting: Understanding the Hudud and the Sharia in Islam*. Texas: Yaqeen Institute for Islamic Research

<sup>6</sup> Brown, J. (2017). *Stoning and Hand Cutting: Understanding the Hudud and the Sharia in Islam*. Texas: Yaqeen Institute for Islamic Research

<sup>7</sup> Hakeem, F., Haberfeld, M., & Verma, A. (2012). The concept of punishment under sharia. *Policing Muslim Communities, Comparative international context*, 14.

<sup>8</sup> Mohamed, M. (1982). *The concept of Qisas in Islamic Law*.p.77-86, Islamabad: Dr Muhammad Hamidullah Library, IJU

<sup>9</sup> Ibn farhun, tabsirat al-Hukkam as cited by Siddiqui, M. I. (2010 ). *The Penal Law of Islam*. New Delhi: Adam Publishers and Distributors. p137

<sup>10</sup> Hughes, T. P. (1995). *Dictionary of Islam* (illustrated, reprint ed.). New Delhi: Asian Educational Services. P.113

<sup>11</sup> Shakoore, A. A. (2004). *National Criminal Justice Action Plan 2004-2008*. Attorney General's Office. Male': Attorney General's Office.P. 10

code should be in confirmation with international best practice and in line with universal norms and standards.<sup>12</sup> The intent was on to acquiring a modern penal code with rehabilitation as the intrinsic core of any punishment model. Thus going away from the punishment of imprisonment and other forms of detrimental punishments for offenders. A formula for having the convicted brought back to the society as a law abiding citizen within the least amount of time would be the ideal standard sought out by the government.

As a result of the yearning for penal reformation, in 2004 the government of the Maldives assigned the renowned expert in criminal justice Professor Paul Robinson from the University of Pennsylvania, Law School to formulate the initial draft of the Penal Code.<sup>13</sup> After extensive studies and with the recommendation from the stakeholders and the legal fraternity of Maldives he completed the final draft in 2006.

The Penal Code was debated in the parliament for 7 years before it was passed and was made effective in July 2015. It has to be noted that despite the extensive debate over a period of 7 years and of many concerns on its proponents by the public at large, no major amendments were brought to the Penal Code by the parliament when they passed it as a law. The law was initially passed almost without any amendments by the parliament and just as it was presented to the parliament by the government. It has been said that the government at that time did a lot of effort to make sure that all the aspects of the penal code were in fact in line with the Islamic law and the punishments were also derived from the Islamic law for all Shari'ah offenses.

#### **IV. PARTICIPANTS AND MATERIALS**

This study was conducted in Maldives primarily with two main interest groups. The methodology was to utilise a questionnaire with direct questions regarding the aspects of the penal code and the view of the respondent on its conformity with Islamic law.

For the questionnaire part of the study two interest groups were selected. The first group were stakeholders from the judiciary where there was a total of 18 respondents. The participants were 5 judges from different hierarchies of courts of law, 5 criminal defence lawyers who were currently practicing in Maldives and 8 prosecution lawyers from the Prosecutor General's office.

On the second group participants among Islamic Scholars who were licensed to propagate Islam in Maldives participated. In total 10 respondents volunteered in the second part of the study.

Both groups were given options to answer on a pre-prepared questionnaire. The questionnaire was delivered directly to them electronically and their responses were monitored and collected in real-time. The questionnaire was designed in a way that the answering process is simple and easy for the respondents.

#### **V. RESULTS AND DISCUSSIONS**

##### **Shariah Punishments in the Penal Code of Maldives**

Maldivian Penal Code project was given to a professor in Pennsylvania university. The idea was that the professor would use his expertise along with the expert advice from the Maldivian stakeholders to draft a modern penal code that is in line with international standards all the while encompassing the Islamic aspects within the project. However, since the beginning of the formulation of the project, Professor Robinson was against the implementation of a Shari'ah model in the new Penal Code of Maldives. His opposition towards Shari'ah punishments were seen from the very beginning of the project where he claimed the punishment of flogging was offensive to Maldivians and would damage the criminal justice systems moral credibility and bring it in to disrepute.<sup>14</sup> Despite the initial drafters' loathe towards adopting a Shari'ah compliant Penal Code in the Maldives, the Islamic law component somehow was to be made available according to the official conditions by the Attorney General's Office. As a result, it was mentioned that when it came to Shari'ah punishments the drafting process relied on 3 primary sources to consider a form of punishment. The first one was to assert the presence of prior statutes of Maldives regarding that particular Shari'ah punishment and give priority for that clause. If that particular Shari'ah punishment is not mentioned in the previous laws of Maldives then the drafters opted to refer to Shari'ah principles mentioned particularly in the *Shafi* school of jurisprudence. The other source was to consult Maldivian stakeholders in the judiciary and through ordinary Maldivian citizens for that particular Shari'ah punishment. It has to be noted that there was no basis given for the choosing of the above criteria. Nevertheless the drafters mentioned on the issue when these 3 sources conflicted with each other and how they approached to resolve this conflict.

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<sup>12</sup> Shakoora, A. A. (2004). *National Criminal Justice Action Plan 2004-2008*. Attorney General's Office. Male': Attorney General's Office. P. 10

<sup>13</sup> Final Report of The Maldivian Penal Law & Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 1)" P.3

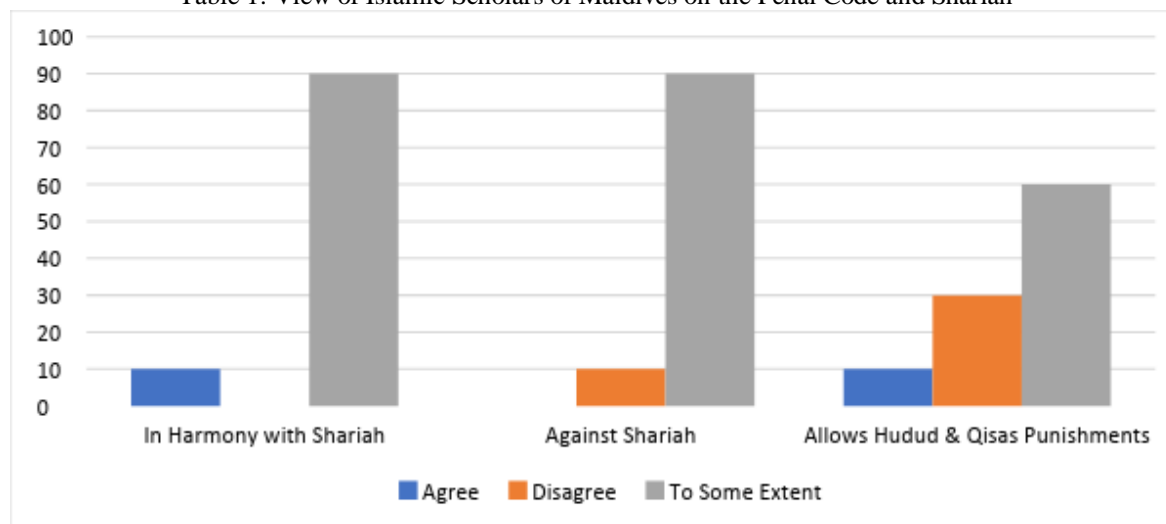
<sup>14</sup> Final Report of The Maldivian Penal Law & Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 1)" P.3

1. In the event if the previous Maldivian statutes conflicted or deviated from Shari'ah punishments, such as in the case where Maldives did not have the punishment of amputation for theft and death sentence for apostate; the drafters opted to reject that particular Shari'ah punishment and adopted the Maldivian law for that offense that was in place at the time.
2. In the event if there is disagreement among Islamic scholars on the interpretation of a particular issue in Shari'ah; the drafters opted to reject the disagreed issue of Shari'ah and adopt norms that 'reflect the views of Maldivian society.'
3. In the event if there is disagreement among Maldivians on a particular issue of Shari'ah such as whether to keep defamation as a civil or a criminal offense; the drafters gave up task of defining the punishment for that particular offense to the parliament.<sup>15</sup>

This shows that the disregard to consider the basics of the Islamic law principles have led to the Penal Code getting finalised without major portions that are considered punishable by Shari'ah to be effectively eliminated from the 'Shari'ah attuned' product. The end result lacked hudud' punishments, qisas punishments in their full virtue and any punishment derived from the authority of the prophet (s.a.w). instead the new Penal Code provided alternative imprisonment punishments for Shari'ah punishment applicable offences.

On this note, the focus of the research focused on to seek data from stakeholders within the society in respect of the compatibility and the level of harmony between the current Penal Code with Shari'ah. The results of the data collected showed in the view of the scholars of the country who participated in the research, that not only the Penal Code is not in harmony with Shari'ah, It is a view held by almost 90% of the scholars that the Penal Code is against Shariah code to some extent.

Table 1: View of Islamic Scholars of Maldives on the Penal Code and Shariah



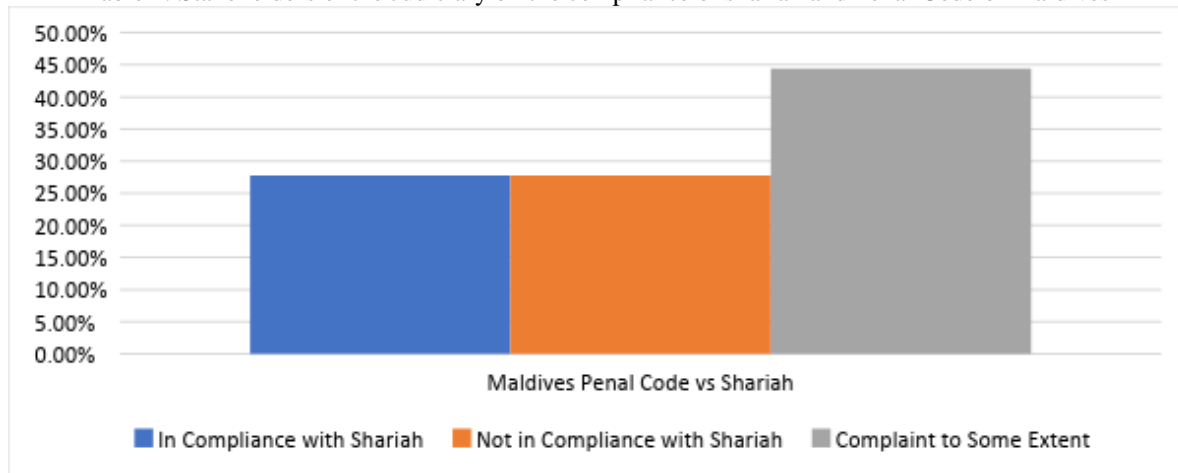
According to the data collected from the questionnaire from Islamic scholars in Maldives, it can be seen that when asked about the harmony in correlation with Shari'ah and the current penal code of Maldives, 90% of the scholars chose that it is in harmony with Shari'ah only to some extent whilst 10% disagrees that the penal code is in harmony with Shari'ah at all.

Also in this manner when asked about if the current penal code of Maldives is against Shari'ah, 90% of the scholars said it is against with Shari'ah to some extent. Only 10% of them said it is not against Shari'ah. The question was more refined and asked regarding the allowance of hudud' and qisas punishments and its availability in the current penal code of Maldives, to this question, 60% of the scholars responded that the current penal code allows hudud' punishments to some extent whilst 30% of the scholars said hudud' and qisas punishments are not allowed as per Shari'ah. Only 10% of scholars agrees that hudud' and qisas punishments are available in the penal code of Maldives in accordance with Shari'ah. This data clearly indicates that among the scholars of the Shari'ah law in Maldives, albeit for just 10% of the respondents, the remaining 90% is not fully convinced that there is a Shari'ah compatible structure made available within the Penal Code of Maldives.

<sup>15</sup> Robinson, Paul H. and Criminal Law Research Group (2006). University of Pennsylvania, "Final Report of The Maldivian Penal Law & Sentencing Codification Project: Text of Draft Code (Volume 1) and Official Commentary (Volume 1)" P.3-4

The research once again tried to acquire a more clearer picture on the compatibility of Shariah and the current Penal Code of Maldives, through asking the same questions which were posed to the Islamic scholars, however, this time questions were asked from the stakeholders of the Maldivian judiciary. The answers from the stakeholders of the judiciary also showed a similar result as only a quarter of them agreed that the current penal code is in fact in compliance with Shari'ah, however the vast remaining majority was of the conviction that the current penal code is either not in compliance with shariah or it is rather compliant only to some extent.

Table 2. Stakeholders of the Judiciary on the compliance of shariah and Penal Code of Maldives



The stakeholders of the judiciary were asked their opinion on the compliance of the current Maldivian penal code with Shari'ah. To this question 44.4% of the respondents said that the penal code is in compliance with Shari'ah only to some extent, whilst 27.8% of them said it is in compliance with Shari'ah, the remaining 27.8% of the respondents said it was not in compliance with Shari'ah at all.

### Hudud and Qisas Punishments in the Penal Code of Maldives

When the parliament passed the Penal Code instead of going through every punishment mentioned in the final draft to see its compatibility with Shari'ah, they chose to include a simple clause that interpreted the word 'punishments' where it was mentioned that in the instances where the punishment is prescribed in the Holy Qur'an then that person should be punished as prescribed by the Penal Code and Qur'an.<sup>16</sup> This ambiguous inclusion led to confusion among the legal fraternity as the possibility of multiple punishments for the same offense, where the offender would be given both *hudud* and the penal punishment became evident. So in order to alleviate the concerns the parliament passed another law with the following amendment.

*“if a person is found guilty, beyond reasonable doubt, under the scope of criminal culpability under Shariah law on a hudud punishable offence mentioned in the ‘Quran’, then the judge should give the hudud’ punishment in accordance with this law.”<sup>17</sup>*

Even though this amendment may make the Penal Code seem reasonably in line with Shari'ah to an average reader, there was a hidden agenda where the obvious omission of the *Sunnah* of the Prophet (SAW) denied the application of many types of *hudud* and *qisas* punishments as they were transmitted from the sunnah of the prophet(SAW). For this reason there was a lot of pressure on the government from different civil society groups and political parties to do more to harmonize the Penal Code with Shari'ah. So heeding to the public outcry the parliament passed a third amendment to the Penal Code. Where the new amendment stated that;

*“if a person is found guilty, beyond reasonable doubt, under the scope of criminal culpability under Shariah law on a hudud punishable offence or Qisas offence mentioned in ‘Shariah’, then the punishment should be the Shariah punishment in accordance with Shariah.”<sup>18</sup>*

This amendment did not make the judiciary or the Prosecutor apply Shari'ah prescribed punishments, but provided them with the discretionary power to choose between Shari'ah prescribed punishments and other punishments. Furthermore, this gave both the judiciary and Prosecutor General the power to discriminate between similar cases.

This time the judiciary found a way to recuse themselves from applying *hudud'* and *qisas* punishments with the assistance from the Prosecutor General who has the sole authority of criminal prosecution in Maldives.

<sup>16</sup> The Penal Code of Maldives 9-2014, 2014, Section 1205

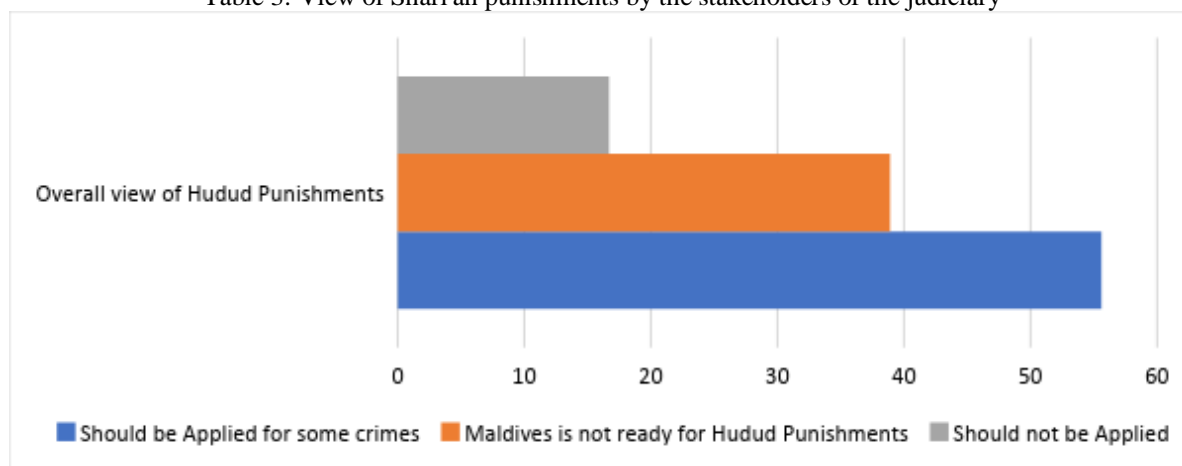
<sup>17</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 article 68

<sup>18</sup> Law of the 3<sup>rd</sup> Amendment to the Penal Code 9/2014, 26/2015 Article 3

The Prosecutor General is given the discretionary authority to choose the type, criteria and the form of punishment for any particular case. Thus if the prosecution charges an accused under a particular offense where the punishment could have potentiality within the scope of *hudud* or *qisas*, by way of asking the court for a specific punishment; the court is compelled to yield the requested form of punishment should the accused is found guilty. In other words, the prosecution has the authority to file a case seeking Shari'ah punishment or the punishment mentioned in the penal code.

The issue of compatibility aside, the research felt the importance of identifying the yearn among the legal fraternity and stakeholders of the judiciary for such an application of shariah punishments through the current penal code. The question was posed to them and their answers revealed that there is clearly contrasting views among the stakeholders in regards to the application of Shariah punishments, though the majority of the stakeholders were in for the application of shariah punishments for 'some' offenses, whilst the next highest percentage was in the view that Maldives was not yet ready for the application of hudud' punishments. Then there was the remaining percentage who were against any form of application of Shariah punishments in the Maldives.

Table 3: View of Shari'ah punishments by the stakeholders of the judiciary



The overall opinion of the stakeholders of the judiciary were asked regarding the implementation of *hudud* and *qisas* punishments in the penal code of Maldives. To this question 55.6% of the respondents answered that *hudud* and *qisas* should be levied for some crimes in Maldives. Whilst 38.9% of the respondents said Maldives is not yet ready of *hudud* and *qisas* punishments, only 16.7% of them said punishments of *hudud* and *qisas* should not be applied in Maldives at all.

The research also collected data from separate instances that were observed under the new penal code in the pretence of Shari'ah or hudud mandate, by the personal preference by the presiding judge ;

### Issue 1

In 2015 A woman was found guilty of committing *Zina* (adultery) by her confession. The judge presiding the case sentenced her to death by stoning.<sup>19</sup> Whilst the case was yet to be appeal by either parties involved in the case; the Supreme Court of Maldives annulled the sentence in the same day of the sentencing. As the decision of the Supreme Court is final; this action by the Supreme Court was unprecedented and had blocked the opportunity for due process guaranteed for both the convicted and the prosecution by the constitution of Maldives.

In its ruling of the annulment of the sentence, the Supreme Court highlighted the fact that the lower court has deviated from the regulatory procedures and that it has acted in a manner in contravention of the judicial procedures.<sup>20</sup> Hence, simply put, the Supreme Court had determined that if the prosecution does not ask for a stoning punishment, the courts do not have the power to deliver a punishment by stoning even if it fits the offense or even if the Penal Code allows for Shari'ah punishments.

The initial attempt of the lower court judge to levy the punishment prescribed under Islamic law was due to the fact that the penal code specifically mentions of the authority and the discretion for the judge to mete the

<sup>19</sup> bbc.com. (2015, October 19). *Maldives annuls death by stoning sentence for woman*. Retrieved from bbc.com: <https://www.bbc.com/news/world-asia-34569071>

<sup>20</sup> Supreme Court Ruling 2015/SC-SJ/12, 2015

sentence ascertained for such an offense under Shari'ah, however under this pretext, if and whenever a judge assumes the discretionary position allowed for him in the application of Shari'ah punishments is automatically nullified by the Supreme Court of Maldives. The question arises if the article allowing for Shari'ah punishments could ever be utilised at any instance, or whether the inclusion of the single absolute article of Shari'ah is just in fact a mere ornament for the purposes of having the penal code consistent with the harmonising aspect of Islamic law, or whether it is included just to appease the public. As at no point in time, the supreme court has allowed for the application of any Shari'ah punishments under the virtue of this very provision in the law.

### **Issue 2**

The Penal Code of Maldives allows for the punishment of flogging for various Shari'ah offenses. However, the Penal Code prohibits the punishment to be carried out unless the final court of appeal decides on the case. In these instances the Prosecutor General refrains from appealing to the higher courts so that the punishment of flogging will not be carried out. This can be interpreted as a deceptive method equipped by the prosecution in order to avoid enforcing Shari'ah punishments in the country. As most cases are tried in the lower level courts and then appealed to the higher courts by the losing party, and in the special events where the law particularly deems the Prosecutor General to appeal all and any cases related to corporal punishments till the last avenue for appeal is exhausted, despite having the case won pro-prosecution at all previous instances.

Any form of corporeal punishment is not allowed to be applied unless the final verdict of the Supreme Court is issued regarding the case. This in a way allows the Prosecutor General to use this provision as a loophole to dodge the potential controversy the government would face, as a whole from the 'human rights' groups and others within the international community, should they refrain from appealing the case until the period of appeal is exhausted. Having the time run out of the appeal period by default allows the convict to avoid having to have the corporeal punishment levied on him as it is not supported by the last court of appeal. However, if the punishment for a particular offense came with another form of punishment such as imprisonment, fines or community service etc, that portion of the punishment will be enforceable from the moment the punishment is issued from the lower court.

It may seem that Maldivian courts issue punishments such as flogging/canning which are derived from and to Shari'ah specific punishments, however the additional 'safety' mechanisms in place within the law, allows the deviate the authorities from enforcing such punishment.

### **Issue 3**

Shari'ah offenses are given extra definitions to suit a particular interpretation to avoid the application of punishment and also redefining the Shari'ah offenses. The drafters of the Penal Code has gone a long way in having the interpretation of all Shari'ah offenses, without leaving the details and aspects to be determined by the presiding judge. In one sense, this approach could be seen very reasonable as it would avoid all doubt and would have the uniformity among all courts of law in the Maldives. However, when the interpretations are closely scrutinised it is visible that the definitions provided by the drafters of the Penal Code does not confirm with the Islamic interpretation of these offenses through any point in the history of Islam.

1. Unlawful sexual intercourse is considered as a crime and is to be given the Shari'ah punishment of 100 lashes. The Penal Code defines 100 lashes as the "*hudud* punishment of *Zina* under Shari'ah".<sup>21</sup> However this is a misleading definition as *Zina* is categorized under Shari'ah as fornication and adultery, where both offenses have different punishments based on different sets of criteria. The word *Zina* is mentioned in the penal code, but the offense does not reflect the punishment nor the offense in Islamic scope.

2. Intoxication is redefined in the Penal Code as to have an intoxicant in the body of the defendant to the degree that his total self-consciousness is lost to the extent that he is not able to cogitate the consequences of his actions.<sup>22</sup> However this interpretation is a deviation from the Sharia's interpretation of intoxication as it does not specify the limit of consumption and it is considered an offense despite the amount consumed or despite its effects on the mental capacity of the offender.

3. Illegal Sexual Offence is defined in the Penal Code as acts of sexual arousal or gratification with someone 'without consent'. However, this definition is in contradiction of Shari'ah as consent not a factor when adultery and fornication are considered as criminal acts.<sup>23</sup> These interpretations are issued to prevent the judges from applying the Shari'ah punishments despite the offense having fulfilled all the criteria's of the Shariah offense.

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<sup>21</sup> The Penal Code of Maldives 9-2014, 2014, Section 411(d)

<sup>22</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 Article 31(d)

<sup>23</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 Article 131(a)

**Issue 4**

The parliament of the Maldives has made several attempts to remove major forms of offenses from the Penal Code. As previously declared offenses in the Penal Code such as incest<sup>24</sup>, bestiality<sup>25</sup>, sexual relations with the same-sex<sup>26</sup> were removed under an amendment brought to the Penal Code. Those offenses that were removed from the penal code were either mentioned in other legislatures that are used as the main prosecution document instead of the penal code. This allowed for the government to avoid having to give imprisonment sentences for these offenses instead. As the criteria for criminal cases when it comes to the punishment aspect is not applicable to be calculated in the same manner, should it has come from a law that is not the penal code itself, as the penal code provides a punishment mechanism and a calculation table on aggravating and mediating factors, if the offense was sent for trial through a different law then these factors were not applicable for the presiding judge. It has to be noted that since implementation of the new Penal Code there has been an increment in the number of *hudud* related crimes such as adultery, fornication, theft, assault<sup>27</sup> and homicide<sup>28</sup>.

**VI. CONCLUDING REMARKS**

The purpose of this study was to find discrepancies in the Penal Code of Maldives in terms of its approach in including Shari'ah punishments and offenses in its mandate. This study found that despite the eagerness of the Maldivian government to include a codified version of Shari'ah in a modern penal code setting, the people who initially drafted, those who assisted the drafting committee, those who were in the parliament during the legislative process as well as the upper echelons of the judiciary and the prosecution services deliberately participated in deviating the criminal justice system mainly away from the *hudud* and *qisas* punishments. These deviations and the differences between the two systems are visible and the stakeholders themselves agree that both the civil punishment system and the shariah code are not fully integrated or are not in compliance with each other in Maldives. The disharmony between Islamic law and civil law in Maldives is the direct result of deliberate attempts at all levels of the government to withdraw as far away as possible from the shariah punishments. Despite the public outcry and the calls from different sectors of Maldives calling the government to have a shariah inclusive penal code, the government at along with the drafters of the penal code did the very opposite. Some may consider the aspects that are in contravention with Islamic law in the Penal Code maybe unlawful according to the constitution of the country, as the constitution specifically asserts that all laws created in Maldives should be in line with Islamic law. The government has attempted to avoid further issues with having the Penal Code contradicting with the Constitution of the country just by including a single provision in the penal code, which mentions that all shariah offenses will be dealt in accordance with Islamic law. However, to this day all attempts to use this provision by different judges were tackled down by the Supreme Court of Maldives.

It has to be said that when it comes to Shari'ah punishments, the Penal Code of Maldives is mired in ambiguity with misleading interpretations of offenses that are deliberately written in a way to block the way of having the criteria of Shari'ah offenses despite similarities among both systems. The real reason why they opted to move away from Shari'ah is not found except on one occasion where the main drafter highlighted his concerns regarding inclusion of flogging as a punishment. No other group responsible for the drafting, legislating, prosecuting or adjudicating has given their reasons. In this paper no efforts have been made to acquire data as such was not within the scope of this study.

This study proves that the attempt at harmonisation between Shari'ah and the Maldivian Penal Code by the government of Maldives was a failure from its inception, legislation and in its application.

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<sup>24</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 Article 44

<sup>25</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 Article 45

<sup>26</sup> Law of the 1<sup>st</sup> amendment to the penal code 9/2014, 2015, 6/2015 Article 49

<sup>27</sup> National Bureau of Statistics, NUMBER OF CRIMINAL CASES FILED BY CATERGORIES, 2013 – 2016, Table 8.22, <http://statisticsmaldives.gov.mv/yearbook/2017/wp-content/uploads/sites/4/2017/07/8.22.pdf>

<sup>28</sup> National Bureau of Statistics, LOGGED CASES OF DEATH , 2011 – 2016, Table 8.11, <http://statisticsmaldives.gov.mv/yearbook/2017/wp-content/uploads/sites/4/2017/06/8.11.pdf>



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