

**THE APPLICATION OF AL-UQUBAT (ISLAMIC CRIMINAL LAW)
IN CONTEMPORARY NIGERIAN SOCIETY:
CURRENT ISSUES AND THE WAY OUT**

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ABSTRACT

The application of the Islamic criminal law in Nigeria with particular reference to the Northern Nigeria has a long and rich history. Contrary to the popular view usually expressed in many circles, it did not start with the re-introduction of the Islamic criminal law in 1999 by the then Zamfara State Governor. The existing literature on the classical application of the penal code in Northern Nigeria, as in many Muslim countries shows that there are a lot of current issues arising from a serious misinterpretation of these Islamic penal codes. This misinterpretation is due to the failure of Muslim scholars over the years to question the application of the Islamic penal law system in many Muslim countries, including Nigeria in line with the maqasid al-shari'ah or the ultimate objectives of the Islamic law. This review will therefore employ the maqasid al-shari'ah in order to examine some issues relating to constitutional and fundamental human rights of individuals and the Islamic Penal Law as it is currently operational in the Muslim world. Using these maqasid al-shari'ah schemes, the study finally calls for a re-interpretation of the criminal laws and legal system as implemented in Muslim countries.

Keywords: Al-uqubat, application, Islam, Northern Nigeria, Law

INTRODUCTION

The term Shari'ah "literally means a path that leads to where water is fetched." Quadri (2000) explains that there is a connection between this literal definition and the technical meaning of Shari'ah because Shari'ah is in reality the divine path to success in this world as well as the path designed by Allah for humans to attain eternal salvation in the hereafter. Muslims who have accepted the Shari'ah as the pathway to their worldly and eternal success must their follow it in its totality. They must bury their dead according to the Shari'ah, they must marry according to to it, they must divorce according to it, and distribute their inheritance according to it and they must demand for their affairs to be adjudicated according to it (Quadri, 1995).

It is for this reason that the Shari'ah has always been part of the life of Muslims and wherever, one finds Muslims, one will also finds the application of Shari'ah in one form or another. As far back as the thirteen century for instance, it is on record that Muslims had been living their lives in line with the Shari'ah in Kanem-Borno.

Mai idris Aloma who ruled between 1570 and 1602 was reported to have reformed the administrative structure of his government to allow for the setting up of the dispensation of the Islamic legal system. Similarly in Kano, Islam had been with the people as far back as the thirteen century and Muhammad Rumfa also restructured his political administration to replace all pagan institutions with Shari'ah compliant ones. (Kani, 1405 A.H: 18-19). As pointed out by Quadri above (11-13), the application of the Shari'ah was not restricted to the Northern part of Nigeria alone. In fact, some Muslim rulers who established Shari'ah courts in their palaces, included Oba Momodu Lamuye of Iwo, Oba Aliyu Oyewole, the seventh Akirun of Ikirun and Oba Abibu Lagunju of Ede. All these rulers, being Muslims, not only ensure the application of the Shari'ah in their domains but also supported Islamic scholarship to the extent of appointing Shari'ah judges as their scribes (Abdullah, 1998).

All the above happened before the popular Sokoto Caliphate which is in reality a Sultanate as Sheikh Usman Dan Fodio did not consider the empire to be independent of the Ottoman Caliphate. It is therefore because of the entrenchment of the Shari'ah Law in Nigeria, especially in the North that the British government conceded to set up its administration in accordance with the principles of the Shari'ah (Ikime, 1977). However this concession was later granted partially as the Shari'ah was placed under the Native Law and Custom Ordinance and thereby restricted in its application. Islamic penal codes such as amputation and crucifixion were regarded as either mutilation or too harsh. The denial of two people of different religions, the right to inherit each by the Islamic penal code was also considered repugnant to natural justice, equity and good conscience and incompatible with a written law. Consequently, the Muslims in the North opposed this apparent interference with the application of the Shari'ah and this led to many protests and riots (Kumo, 1988). For instance, in the case of one Mary T. Baike who was disallowed to inherit her dead Muslim father by the Shari'ah court because she had converted to Christianity, the Supreme Court overturned the judgment on the grounds that it was based on a law that was repugnant to natural justice, equity and good conscience (Ajetumobi, 1988).

The above British policy of interference in the application of the Shari'ah took a new dimension in the South. The same government that was seeking to regulate the application of the Shari'ah in the North however discouraged its existence in the South. Even the application of the civil and family aspects of the Shari'ah was not conceded to the Southern Muslims. Consequently this British double standard policy of the British was also protested by Muslims in the South though in different ways. They demanded the establishment of the Shari'ah courts to adjudicate on the Islamic family Law if only to stop what they term as separating Muslim couples "like dogs" (Anderson, 1978).

It is therefore the above perception of the Muslims in Nigeria of the place of the Shari'ah in their lives which culminated in the re-introduction of the Islamic Penal code in 1999 by the Zamfara state governor, Ahmed Sani Yerima. As a result of this, the major current issues hovering around the application of the Shari'ah in

Nigeria and many other Muslim countries today revolve round the application of the Islamic penal codes known as Al-Uqubat and how they affect fundamental human rights. To address this as we intend to do in this paper, we will need to explain the maqasid schemes in Islam. The Islamic Law according to many Muslim scholars revolves round a scheme of benefits and harms (masalihah and mafasid) aimed at protecting five ultimate objectives (al-darurah al-Khamsah). These objectives are religion, life, intellect, offspring and property. What accrues in terms of benefits or ward off in terms of harms (for example, supplying food among the needy to benefit the hungry and healing the sick to ward off diseases) is however predicated on both real and potential benefits and harms and not merely on material gains and profits. Hence al-Ghazali, the great Shafi'i scholar argues that the considered juristic benefits or harms as the case maybe must be those intended by the Lawgiver and not those designed by human beings. He therefore differentiated between the ultimate objectives and purposes set by Allah, the Lawgiver and those decided on the basis of human whims and caprices.

Any imaginary benefit which is prohibited by the Islamic Law for example is mulghat or null and void and must be discarded. So also is the case of any benefit that does not originate from the maqasid scheme either in its restricted or unrestricted form (maslahah al-mursalah). Such benefits according to al-Ghazali would be unaccepted because it does not qualify as a darurah or necessity that meets any of the above five ultimate objectives on the essential level. It is also not a definitive benefit whose realization is certain and its benefit is not universal or meets the needs of a community. (Al-Ghazali 1322 AH: 284-286 and 296). Based on this maqasid schemes, it is therefore argued that the application of Islamic Criminal Law should be based on the above fundamental goal of accruing benefits and warding off evils.

AL-UQUBAT AND ITS CLASSIFICATION IN ISLAMIC LAW

Al-Uqubat refers to divine punishments prescribed by Allah, the law-giver for those offenses that are considered the violation of the divine rights or haqq Allah. Hence, the first classification of these divine punishments are also known as Hudud (fixed punishments prescribed in the Qur'an and Sunnah), the plural of Hadd (El Awa, 1985). Thus, the punishments called Al-Uqubat includes fixed and prescribed limits (the literary meaning of Hudud) set by Allah which nobody can alter either by making them lighter or heavier. Similarly, these punishments cannot be waived or pardoned by anybody whether the head of state, governor or even the victim (s) of the crime that carries the punishment once the case is before the judge. The reason for this is the fact that all these punishments that fall under the category of Hudud despite being categorized as the rights of Allah are in reality for the benefits of the people and in the interest of the public. The punishments are not imposed because of the violation of religious duties such as neglect of the five daily compulsory prayer and obligatory fasting in the month of Ramadan (Doi, 1984).

The Hudud are generally recognized as six or more by most Muslim scholars.

They include the punishments for armed robbery, apostasy; unlawful sexual Intercourse, false accusation, drinking and theft but which we will show in this paper is merely five. The second classification of punishments under the Shari'ah is Al-Qisas (Retaliation) which is punishment for homicides and injuries. Lastly, we have Al-Ta'zir (Judicial discretionary punishment) which refers to all punishments that are determined by judges (Peters, 2003 and El Awa, 1985). The next section will now discuss each of this classification one by one. This will be followed by a discussion of these punishments and their implications for the protection of fundamental human rights contained in various global and regional declarations. While doing this, the paper will critically question the application of the application of Islamic penal law system in Nigeria using the maqasid al-shari'ah Schemes guided by legal maxims that ensure that the accruing of benefits and warding off of harms.

We will restrict ourselves to three of these maxims in this paper. The first is the maxim: *al-asl fi al-ashya al-Ibahah ma lam yarid dalil al-tahrim* or *al-asl fi al-ashya al-Ibahah hatta yadulla al-dalil ala al-tahrim* which means that the original rulings on things is their permissibility as long as there is no evidence that proves their prohibition. This entails the permissibility of accruing all benefits and warding off all harms unless there is evidence in the two absolute frame works of Islam (The Qur'an and Sunnah) that prohibits accruing such benefits and warding off such harms. The remaining two related legal maxims are: *al-darar yuzal* which means that harm should be alleviated and *dar' al-mafasid awla min jalbi al- masalih* which means warding off harm has precedence over accruing benefits. On the basis of these two legal maxims, al-Suyuti emphasize that warding off any intended harms is of higher priority (Al-Suyuti Jalal al-Din 'Abd al-Rahman, 2004).

THE FIRST CLASSIFICATION OF THE AL-HUDUD

The Al-Hirabah: This refers to the fixed punishments in the Shari'ah known as Hudud. Al-Hirabah, the first of the Hudud has been defined by Kasani in 'Uda al-Tashri' al-Jinai al-Islami as "waiting by the way (or highway) to steal travelers' property by force and by this means obstructing traveling on this road" (El Awa, 1985). It does not however mean that if someone robs with force, murders, or harm another person, or a group of people in a place in the town, city or village, outside the highway, it will not be Al-Hirabah. It only means that the acts of depriving people of their property or wealth through the use of force, whether accompanied by killing or injuring them in the process or not, must have taken place in circumstances where it is difficult for the victims to receive help and assistance. This is the view of majority of Muslim scholars (Doi, 1984 and El Awa, 1985). The intention to commit robbery with force by lying in wait for wayfarers on the highway, prowling houses in the night and harassing passersby fully armed is sufficient for conviction of the crime even if the culprit is not successful and the punishments are four (Q5: 33-34).

The Punishments: The first punishment, death penalty is prescribed for the culprit who commits murder in the process of armed robbery but is caught before carting away the stolen property. The second punishment is crucifixion and this is prescribed for the culprit if both life and property have been taken. The third punishment, amputation of the hand and foot in alternative sides is prescribed for the culprit who kills, robs and mutilates or inflicts additional hardship such as rapes on the victim(s). The last punishment is banishment which applies to armed robbery that consists of mere hold-up without further aggravation like killing or actual. There is agreement among scholars that the offender remains banished until he or she shows evidence of improved conduct and unlikelihood to engage in the criminal act again. This principle is therefore comparable to the modern day parole system (Doi, 1984 and El Awa, 1985).

The Al-Zina: The second of the Al-Uqubat to be discussed here is Al-Zina which implies any unlawful sexual intercourse between two people. If someone has sex outside marriage, whether he or she is married or not, it is called Zina in Islamic Law. Al-Zina therefore refers to both fornication and adultery. The Hanafi School of Islamic defines Al-Zina as "Sexual intercourse between a man and a woman without legal right or without the semblance of legal right known as al-milk or shubhat al-milk. This shows that the main element of Al-Zina is unlawful sexual intercourse or sexual intercourse between a man and a woman that is not legally married or has a contract that looks like a legal marriage. Hence any sexual intercourse between people who are not married whether the marriage is valid or not, is illegal. In addition, any unlawful intercourse between a man and a woman which does not include sexual intercourse is not considered Al-Zina (Q17: 32) that attracts fixed punishments. They are rather under the category of crimes that attract discretionary punishments (Doi, 1984 and El Awa, 1985).

According to the verse above, the Islamic law in respect of Al-Zina is guided by morality. Al-Zina is seriously condemned in Islam because it is amoral transgression that opens the way to untold social problems, vices and diseases. In fact, the prohibition of Al-Zina in Islam represents a moral mechanism to regulate all sexual acts and relationship. Islam, while not frowning at the sexual instincts has regulated sexual acts and relationship in order to protect personal health, marital sanctity, public morality, societal peace and social placement and legitimacy of children among others. The desire to limit sexual transgression in the society is informed by the need to safeguard both the individuals and the society from the evils of sexual corruption and anarchy. This is why Islam not only prohibits adultery as it is done in some modern penal systems but also fornication. The emergence of such ailments and crises like AIDS, killing of unwanted children, murdered of unfaithful sexual partners and legal tussles over the fatherhood and legitimacy of children born out of wedlock are some of the evils caused by the prevailing sexual freedom that permits all forms of sexual relationships and orientations.

The Punishments: The punishments for the offence of Al-Zina are two based on the marital status of the offenders. This is because the existence or non existence of marriage plays a very important role on a person's ability to maintain sexual control. The married person who possesses Ihsan (ability to have sexual relationship with his or her spouse) when guilty of unlawful sexual intercourse is regarded as a Muhsan (married) offender and has committed adultery. The unmarried person who engages in unlawful sexual intercourse is regarded as a ghair muhsan (unmarried) offender and has committed fornication (El Awa, 1985). These punishments for the crime of Al-Zina are contained in two different passages of the Qur'an (Q4: 15-16 and 24:2).

The first two verses indicate that the punishments for an adulterous woman and man were imprisonment in her family's house until she died or until such a time when another revelation would prescribe a new punishment for these women and caning respectively. Then the last verse was revealed and it prescribes a hundred lashes for both the male and female culprits of Al-Zina. According to the views of most Muslim scholars, the initial punishments contained in chapter 4 of the Qur'an became abrogated following the revelation of verse two in chapter 24. This view of the majority is supported by a tradition of the Prophet where the Prophet on receiving the last revelation declared as follows:

Take from me, accept from me. Undoubtedly Allah (H) now has shown a path for them (adulterers). For unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death (Doi, 1984).

THE QUR'AN AND SUNNAH CONNECTIONS

The above tradition is the clearest evidence that the punishments for Al-Zina are contained in not only the Qur'an but also the Sunnah. Though there are reports that the above mentioned stoning to death of an adulterer and adulteress was also revealed in the Qur'an and according to majority of Muslim scholars, the Qur'anic text was later abrogated while its verdict remains applicable, the point as clarified in the above tradition is that stoning to death as a punishment for an adulterer and adulteress was never prescribed by the Qur'an at all. It was actually not only prescribed by the Prophet in the Sunnah while explaining the revelation of the verse of caning (24: 2), it was also implemented by him at least on four occasions. The Prophet ordered the punishment to be carried in three different cases where the culprits were Muslim men and women. Though it is true that on only one occasion, the punishment was carried out on a male and female member of the Jewish community, it is however not true that the Prophet initially used the Jewish law because there was not yet any revelation concerning the punishment for Al-Zina in Islamic Law.

The above tradition shows that the Prophet upheld stoning to death even after the revelation of Qur'an 24:2 (El Awa, 1985). We are therefore of the view that al-rajm is part of the fixed punishments whose implementation is however restricted if not totally un-implementable by damage control because while the Prophet upheld stoning to death even after the revelation of Qur'an 24:2, the application was based

on very stringent conditions which indicate that the Law Giver is not interested in the imposition of the punishments except in rare cases. The stipulation of the evidence of four matured male witnesses of high moral probity and good reputation before a person can be convicted for the offenses of unlawful sexual relations makes it almost impossible to punish any offender. Added to this is the requirement that their evidence must prove that they are on the spot eyewitnesses of the alleged crimes rather than relying on mere circumstantial evidence.

This explains the reason why witnesses have not been able to prove the offenses of unlawful sexual relations beyond all reasonable doubts throughout, perhaps, the entire history of Islam. Apart from the cases of confession, on the basis of which the Prophet upheld the above fixed punishments, almost all other cases in Islamic history were all based on circumstantial evidence. Unfortunately, the accused are usually not allowed to have access to adequate opportunities to defend themselves. For instance, a woman accused of adultery or fornication on the basis of pregnancy outside marriage, who claim that the child is either the result of sexual intercourse that took place during her sleep and without her knowledge, the consequence of sperm that accidentally enters her vagina without penetration or fathered by a former husband for as long as seven years after the end of the marriage, according to the Maliki school should be set free (Peters, 2003)

Similarly, women should not be convicted for adultery as it is done in Northern Nigeria presently because they have once contracted a valid marriage but which has ended. The once married person in reality no longer possess Ihsan (ability to have sexual relationship with his or her spouse) since the marriage has ended either as a result of divorce or death of her spouse. So if and when a previously married woman is found guilty of unlawful sexual intercourse, it is injustice to still regard her as a Muhsanah (married woman who has the ability to have sexual relationship with her spouse) as it is done presently. Since she has reverted back to the status of unmarried person who engages in unlawful sexual intercourse, she should therefore be regarded as a ghair muhsanah (unmarried) offender who has committed fornication if and when she is guilty of unlawful sexual intercourse. This leniency in the application of the above punishments is in line with Prophetic specific commandment that the divinely fixed punishments must be waived whenever there is any element of doubt (Doi, 1984).

The Al-Sariqah: Al-Sariqah is another punishment of Hudud which means illegal acquisition of property or wealth. It violates the limits set by Allah on the acquisition of property. For instance Allah says "Do not devour the property and wealth of one another through false and illegal means (2:188). It also means stealing with criminal intention and an act of theft which occurs when property owned by another person is taken away secretly and with criminal intentions. In short, Al-Sariqah refers to the act of taking someone else's property by theft or stealth. The divine law on Al-Sariqah (Qur'an5: 38) was revealed by Allah, the law-giver and it became one of

those offenses that are considered the violation of the divine rights or haqq Allah (El Awa, 1985). The Islamic law on Al-Sariqah is therefore a means of protecting this right of the general members of the society. Hence the offence of Al-Sariqah has been committed only when the property stolen is taken out of the possession of its real owners, illegally and secretly and with criminal intentions.

Secondly, the property must be movable, valuable and must have been kept in its usual custody. This second point which has been used to exclude misappropriation and stealing of public funds to our minds is no longer tenable. This is because while in the past, public officers usually have personal control over the custody of public funds, hence the impossibility of meeting this condition when they stole public funds, this is no longer the case. Today, with the modern banking system and the regulation of having different signatories to public and corporate accounts, no one individual is keeping the custody of public funds and therefore such funds are in their "safe custody" or hirs as prescribed by Islam.

So public officers guilty of stealing public funds should also be punished accordingly with amputations of their hands. Thirdly, the property must have reached a minimum amount of monetary worth known as Al-nisab in Islamic Law. The Al-nisab is generally regarded as three dirhams or a quarter of dinar. Fourthly, the person who has committed Al-Sariqah must be sane and matured. Lastly, the person must not be hungry or under any compulsion when committing the crime (Doi, 1984). According to majority of Muslim scholars, the punishment of amputation (Q5: 38 and the Sunnah, where the Prophet ordered the amputation of a female thief's hand in line with the divine instruction), in the case of a thief cannot be imposed unless the property is worth the minimum value of one quarte of gold or 3 pieces of silver. It is only the Hanafi and Zaydi Schools that raise the value to ten pieces of silver. The Zahiri School represented by Ibn Hazm in his book, al-Muhalla however is of the view that there is no fixed Al-nisab in Islamic Law based on the Sunnah (El Awa, 1985).

The interpretation of the value of Al-nisab according to the Zahiri Zahiri School expounded by Ibn Hazm appears closest to of the Qur'an and the Sunnah because of the fluctuations in the prices of commodities. Thus, the value of the prices of commodities and the minimum Al-nisab for the infliction of the punishment of amputation may vary from one society to another. This is because all punishments prescribed by Allah are mainly to protect the lives and rights of the society. To achieve this therefore, the changing circumstances in the society such as the value of money, the rate of poverty and the amount considered negligible under these giving circumstances will enhance the fulfillment of not only Al-nisab but also the condition that the thief must not have stolen because of hunger.

Views of Muslim Scholars: In the same vein, the view of the majority of Muslim scholars that the hand of the offender should be cut from the wrist is supported by the practices of the Prophet and his followers as well as the generally acceptable

usage of the word hand in Arabic. With respect to the question on how many times the hands of a thief should be cut, most Muslim scholars opine that if there is a second offense of Al-Sariqah by an already amputated thief, the thief's left foot should be cut. If there is a third theft, then the left hand of the serial offender should be cut while the right foot would be cut for the fourth theft. This is the view of the Maliki, Shafi'i and Hanbali Schools. Only the Hanafi School differs by arguing that there is no cutting of any limb of a serial offender. Rather the offender would be given discretionary punishments.

The above view of the Hanafi School appears to be the most correct because it is nearest to the maqasid al-shari'ah. This is also supported by the practice of Ibn Abbas and 'Ata'. 'Ata' insisted that there is no further amputation after the first one because "the silence of the Law Giver on this is because of His mercy and not because of forgetfulness. If Allah had wanted anything else to be cut, he would have mentioned it." Just as this interpretation is supported by a well-known rule that "every crime for which there is no fixed punishment, its perpetrator is liable to discretionary punishment" (El Awa, 1985). The next punishment that we will discuss here is Al-Qadhf which has been defined as an unproved allegation that an individual has committed Zina (Q24: 4-5). According to the majority of Muslim scholars, in order to consider such allegation as Al-Qadhf and therefore punishable, the offender must be a sane adult Muslim and must have made the allegation very clearly. The expression used in making the allegation of Al-Qadhf must clearly mention that the person so-accused has committed zina. Except for the Maliki School which opines that an insinuated accusation, where the accuser uses a word which means among other things, illegal sexual intercourse is an offence if the accused understands it to imply that he or she is accused of Zina, all others scholars hold that there can be no fixed punishment for the culprit of Al-Qadhf unless the expression that is used is unambiguous.

Punishment for Al-qadhf: Since the Islamic Law always insists on clarity in all matters, especially, on the question of crimes and their punishment, it is preferable to insist on clarity of the allegation. The punishment for Al-Qadhf according to Qur'an chapter 24 is eighty lashes as well as rejection of the future testimony of the accuser. Even if it is an indirect clear accusation, the punishment will be implemented. For instance, a person denying the paternity of another person is considered to have made a clear accusation of Zina against either or both of the parents whose child paternity has been denied (Doi, 1984 and El Awa, 1985).

In addition, the Muslim jurists differ on the fate of those who repent from their crime of Al-Qadhf. All the Muslim scholars are unanimous that the repentance of an offender does not affect the execution of the punishment of canning. Again, they all agree that the repentance does affect the verdict that the offender is an evil doer. According to majority of the scholars, the verse also means that the future testimony of the repentant offender can be accepted after the repentance. This is also

preferable to the Hanafi's opinion that repentance does not affect the fact that the future testimony of the offender is to be rejected as it is in line with the need to reform the offender already discussed before (El Awa, 1985).

According to Qur'an 24: 6-7, if the husband accuses his wife of committing the crime of Zina, then the accuser must corroborate the accusation by swearing four times to the veracity of the accusation. This is followed by a fifth oath of invoking the curse of Allah on himself. The accused spouse can however avert the punishment of Al-Qadhf from herself by also swearing four times on the perfidy of the spouse. This is also followed by a fifth oath of invoking the curse of Allah on herself if the accuser is telling the truth. The Islamic law has chosen this approach in the case of a husband and wife to pave the way to a divorce where either party is convinced on the unfaithfulness of his or her spouse. This is because of the strict condition of producing four witnesses to support the allegation of Zina. Since as stated before in our discussion on the punishment of Zina, in most cases it will be difficult or impossible to get four on the spot witnesses to the crime of Zina, Islam relaxes the rule for a married couple so as not to condemn either spouse to a life of misery with an unfaithful partner. So once the couple takes the oath, their marriage stands automatically divorced (Doi, 1984).

Punishment for Shurb Al-Khamr

The last of the fixed punishments in the opinions of these authors is the punishment for Shurb Al-Khamr or taking "any intoxicant that puts a curtain on one's intellect" or "juice or drug that intoxicates or destroys the intellect." Shurb al-Khamr extends to the taking of hashish, opium, marijuana, cocaine etc because it leads to the commission of crimes. For instance someone who is not bold enough to commit rape will be able to execute the act under the influence of alcohol. Hence the commission of many crimes are made easy for people after they have emboldened themselves with hot and intoxicating drinks. Though it is in the nature of Shurb al-Khamr to both benefit and harm human beings but because its harm far outweighs its benefits, it is forbidden in Islam (Q5:91) This is confirmed by the Prophet who refers to liquor as "the mother of all vices," "the embodiment of all sins" and "wine and faith cannot remain in the heart of a person at the same time." Thus prohibition of Shurb al-Khamr has given Muslims a degree of temperance or sobriety unknown among the followers of other religions (Doi,1984). Yet though Shurb al-Khamr is seriously condemned in Islam because of its evil effects and opening of the way to untold social problems, vices and diseases, its prohibition took a gradual process. The first revelation on Shurb al-Khamr (Q2:219) teaches a very important philosophy in the psychology of reformation.

Rather than the prohibition of Shurb al-Khamr outrightly, the divine wisdom merely teaches that Shurb al-Khamr is bittersweet and contains both benefits and vices to human beings and the society and hence shunning it in order to protect personal health, intellectual sagacity, public orderliness, societal peace and social unity is better. Later the divine revelation restricted its intake by prohibiting daily

compulsory prayers for those intoxicated from (Q4:43). Accordingly, many people abandoned it completely so as not to invalidate their prayers. But by the time the final prohibition was revealed in the fourth or fifth year of Hijrah (Q5:91), virtually everybody had been gradually weaned away from Shurb al-Khamr. Hence, it has been confirmed by historians that on the occasion of the last revelation on Shurb al-Khamr, people went to their houses and started pouring away their barrels of liquor.

The fixed punishment for the crime of Shurb al-Khamr is based on analogy drawn from the preceding punishment al-Qadhf by the companions of the Prophet because whosoever drinks is most liable to slander and defame people's character hence the punishment for al-Qadhf as mentioned in the Qur'an was fixed for Shurb al-Khamr and on this basis, the Maliki, the Hanafi and the Hanbali Schools agree that the fixed punishment for drinking of intoxicants is eighty lashes. However the Shafi'i disagrees, saying that the fixed punishment is forty lashes only. The Muslim scholars also differ on using circumstantial evidence to convict a person for the crime of Shurb al-Khamr. According to majority of the scholars, the punishment will not be given based on the smelling of the mouth of the accused even if it reeking with alcohol.

Imam Malik however disagrees, maintaining that if the mouth of the accused smells of alcohol, then it is evidence that the accused has drunk it and should be punished accordingly (Doi, 1984). This punishment confirms the important role of logic and philosophy in Islamic Law to determine the ultimate objectives of commandments, prohibitions and allowances etc. The last fixed punishment according to most classical scholars is Al-Riddah which refers to the rejection of Islam in its totality or any divine fundamental principle of the religion prescribed by Allah, the law-giver and His Prophet. Hence the rejection of the belief in any article of faith, the obligatory ritual practices or imitating non-Muslims in their religious practices amount to apostasy in Islam. Similarly, the act of running away from the battle field is regarded as apostasy. According to all classical Muslim scholars, the punishment for Al-Riddah is prescribed by the Prophet when he said "whosoever changes his religion (from Islam to anything else), bring an end to his life."

In doing so, the Muslim scholars explain that the apostate will be given time to reconsider his apostasy but if he or she is adamant, then the punishment is death. While they differ on the length of time to be given the apostate to reconsider, they are unanimous on killing the person if he fails to revert back to Islam. In cases where a person apostatize under duress, while his heart remains imbued with the Islamic belief, the scholars argue that the person will not be charged with apostasy based on the case of 'Ammar ibn Yasir for which a passage of the Qur'an was revealed (Q16:106). We however argue here that the Islamic ruling on apostasy by classical Muslim scholars is a gross violation of a very important teaching of Islam in the Qur'an and Sunnah. This is the doctrine of freedom of worship which has been declared a fundamental objective of the Islamic Law by many commandments in the Qur'an (2:256, 22:39-40, 60:9 and 88:22-24). It is highly significant that in all the

aforesaid passage, there is categorical statements on the freedom of worship and in fact monasteries, churches and synagogues just like mosques are all regarded as sacred places for which Allah has appointed some people to prevent their destruction and desecration (22:39-40). The last passage also indicates that in cases of apostasy, the punishment does not reside in the Prophet but Allah. This perhaps informed Ezzati in his conclusion that Jihaad in Islam is a measure that guarantees room for more than one religion to exist (Ezzati, 1979:6 and 28).

OTHER RELIGIONS AND ISLAM

Accommodation of other religions in Islam was amply demonstrated by the Prophet Muhammad (SAW). This prophetic accommodation of non-Muslims, especially Christians could be seen in his support for the Roman Christians in their conflict with Persia in the early days of Islam in Arabia. This was followed by the Prophet's reception and hospitality to the Christian delegation from Najran whom he received in his mosque (Haykal, 1976: 481-482). The Prophet demonstrated similar respect and accommodation for the Jews. For instance, when the Jews of Khaybar murdered a Muslim but the murderer could not be identified, the Prophet personally paid out a hundred camels to the family of the deceased as compensation. No wonder D.D. Macdonald in the Encyclopaedia of Islam despite his support of the age-long thesis of the sword regarding the spread of Islam, agrees that the "idea of spreading Islam by force was not present in the mind of the Prophet" (Cited in Uthman, 2001: 111-117).

HUMAN RIGHTS AND CONSTITUTIONAL ISSUES

It is interesting that today the advocacy for the freedom of religion of non Muslims appears to be "the most thrilling issue of constitutional law which hovers around the Islamic penal laws and law of apostasy in particular. The criminalization of apostasy from Islam or denial of Muslims their liberty to apostate from Islam, creating cases of husbands "said to 'pretend' to be Muslims in order to get out of a marriage with their non-Muslim wives and thereby leaving their spouses in the lurch" and the courts' granting the children's custody to the 'pretending' Muslim converts (Jen-T' Chiang, 2007) and other violations of non Muslim personal liberties such as their rights to non Muslim rites of a deceased after they have apostatized from Islam are prevailing human rights and constitutional issues in the application of Al-Uqubat and which we will now address before discussing the remaining two classifications of Al-Uqubat.

To address these conflicting standpoints on the above human rights and constitutional issues, we will attempt to examine how the maqasid (ultimate objectives) of the Al-Uqubat can be used to reform the application of Islamic Criminal Law today with the three legal maxims mentioned in the introduction of this paper, that revolve round the permissibility of accruing all benefits and warding

off all harms unless there is evidence in the two absolute frame works of Islam that prohibits accruing such benefits and warding off such harms, to resolve the "overdose of misconceptions about Islam" hovering around the issues of apostasy and freedom of religion. For instance these legal maxims oppose the classical view that freedom of worship or religion does not entail the freedom of a Muslim to convert to other religions as claimed by scholars like Ahmad (61-81).

To these Muslim scholars who hold this view, they believe that while Islam grants a person the freedom of religion, such a freedom is not extended to granting those people who are born Muslims or have accepted Islam as a religion, the right to leave and abandon Islam. They support this oxymoronic view with the fact that in Islam no human has absolute freedom which belongs to Allah alone (Jen-T' Chiang, 2007). The above perception of apostasy as a hadd punishment or fixed punishable crime by the death penalty in Islamic Law is a total violation of the Islamic concept of faith. Faith in Islam though innate to a person, as a person is born a Muslim according to Islamic teachings, is not the birth right of any person. Hence a person even though born a Muslim may at any time cease to profess Islam and a Muslim just as non Muslims who have 'reverted' (Since according to Islamic teachings, they were originally born Muslims) to Islam, can at any time return to their former religions.

Islam teaches that a true Muslim believes in and loves Allah so much that all his actions and activities are carried out for the sole aim of pleasing Allah alone which is Jih?d in Islam (Qutb, 1978). By implication, a person remains a Muslim in the truest sense of the word as long as all his actions and activities are done to win the pleasure of Allah. When a person's actions and activities cease to be done for the sole aim of pleasing Allah, the person in reality ceases to be a Muslim. It is in this context that Islam teaches that there is no compulsion in faith (2:208, 217 and 256, 10:99-100 and 88:22-24).

PUNISHMENT FOR APOSTASY

It is very clear that in the second and last passages above, the punishment for apostasy resides in Allah who has chosen to punish people who apostatize after they die on the Day of Judgment (2:217). Allah also specifically warns the Prophet from enforcing Islam on people or punishing the apostates since their punishment is with Allah (88:21-26). This perhaps informed Prophet's attitudes to apostates. Contrary to the popular tradition that says "whosoever changes his religion, kill him" as contained in Sahih al-Bukh?ri, the Prophet did not kill any single apostate. He only sanctioned the killing of only those apostates who committed felony and sedition in the Muslim community and this is the correct meaning of the above reported tradition in Sahih al-Bukhari which also contains other traditions that explain the meaning of the popular tradition. One of such traditions is in fact reported by virtually all the six authentic collectors of traditions but the narration in Sahih al-Bukhari is cited and translated by us as follows:

The blood of a Muslim who believes that there is no God except Allah and that I am His apostle cannot be shed except in three cases: a life for a life (retaliation for murder), a married person who commits illegal sexual intercourse (adultery) and the one who forsakes his religion and foments dissension among the Muslim community (Khan, 1986). In short there is no such thing as a fixed punishment for apostasy. Rather it is only apostates who also commit felony and treachery that the above punishment in the popular tradition of the Prophet refers to. This puts the above punishment under the crime of Al-Hirabah as discussed before because "fomenting dissension among the Muslim community" (Khan, 1986) is subsumed under the term "waging war against Allah and His Prophet" as the crime of Al-Hirabah is described in the Qur'an itself.

THE SECOND CLASSIFICATION OF AL-UQUBAT : AL- TA`ZIR

This contains only one punishment, Al-Qisas which means retaliation that is taken by a victim or his or her male heirs, agnates or relatives to avenge a crime done to the victim. It is only in the absence of male agnates, that a daughter or sister of the victim can be the avengers (Peters, 2003: 2). The law of retaliation in cases of murder has been prescribed to ensure the protection of the sacredness of human life. Human life is so sacred in Islam that Qatl (killing) one life is equal to killing the whole of humanity (Q5: 32). In fact, a person has no right to kill himself or herself in Islam (Q81: 8-9, 6: 140, 6: 15 and 4: 29). According majority of Muslim scholars, the punishment of intentional killing or injury is retaliation by death in the case of homicide or inflicting the same injury in the case of injury, hurt or torts. This view is based on the Qur'an chapter (2: 178-179) above.

A murderer or injurer can however be prosecuted, sentenced and punished only if the victim or his or her avengers demand retaliation. Thus, the law of Al-Qisas in Islam allows the victims or the avengers of the crime of murder or torts to forgive the offenders and in that case, demand compensation or the payment of full diyah (blood money or price). In addition, the pardoned offenders are to be given a hundred strokes of the cane and imprisonment for a year. Manslaughter or unintentional injury also requires the payment of full or complete diyah. Similarly, the rule applies to the loss of hearing, loss of mental balance, breaking of backbone, impairing of testicles and damage of the penis glands. The same applies to an offender who is a minor or mad. However the payment of diyah will only come from the minor's property if it does not exceed one third. The loss of bosoms of a woman, eyes, hands, legs or nostrils requires the payment of a full diyah. The loss of only one of any of these requires the payment of half of diyah.

The loss of the one eye of a one eyed person requires the payment of a full diyah. In all cases of Al-Qisas in Islamic law, the death penalty cannot be imposed on an innocent person regardless of relationship with the offender. A woman shall be killed for killing a man just as a man shall be killed for killing a woman. In the same vein, the diyah is a fixed amount and is not a function of people's status or

rank. It is not to be adjusted because of extraneous considerations of social status, gender, religion and wealth of the victim or offender. The full diyah for the killing of a free Muslim man is one hundred camels for people who have camels, one thousand dinars in gold for people who possess gold or twelve thousand pieces of dirham for people with silver (Doi, 1984: 234-236).

THE LAST CLASSIFICATION OF THE AL-UQUBAT

Al-Ta'zir, the use of judicial discretion in awarding punishments is the divine allowance given to the judge to use his discretion to award the measures and forms of punishments on crimes where no punishments have been prescribed by Allah, the law-giver. It has been defined as a disciplinary punishment for a crime for which neither no specific fixed punishment is prescribed nor any form of expiation by Allah (Doi, 1984: 226). There are basically ten types of Al-Ta'zir punishments and penalties for different crimes. They are admonition or al-wa'z generally, al-Tawbikh (Reprimand), threat or al-Tahdid, boycott or al-Hajr, disclosure or al-Tashhir, fines and seizure of property (al-Gharamah wal Musadarah), imprisonment (al-Habs), flogging or al-Jald, exile or al-Nafl and Al-Ta'zir as an additional punishment to fixed punishments. Though instead of al-Nafl, El-Awa (1985: 96-109) mentions death penalty but that is in fact a major Al-Uqubat punishment as already discussed.

The general structure of the Islamic Criminal Law in most Muslim countries are today based on Al-Ta'zir as many Muslim countries are coming to terms with the need to re-interpret classical interpretations of the Islamic Criminal codes with the exception of a few countries including Nigeria. Hence punishment usually takes the form of imprisonment, fines and light canning in most penal codes of contemporary Muslim countries. For instance, while Malaysia today follows the classical interpretation of listing apostasy as a punishable offence, it does not uphold the classical punishment of death penalty but punishes apostasy by denial of certain constitutional rights, like change of name and inheritance.

HUMAN AND WOMEN'S RIGHTS AND THE APPLICATION OF AL-UQUBAT IN NIGERIA

Today virtually all countries of the world, including Muslim countries including Nigeria have committed themselves to human rights declarations such as the Universal Declaration of Human rights of 1948, the International Covenant on Civil and Political Rights of 1966, the Convention for the Elimination of all Forms of Discrimination against Women of 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984, the Convention on the Rights of the Child of 1989 and the African Charter of Human and Peoples' Rights (ACHPR) of the African Union and of the Commonwealth. Many of the punishments and penalties for Al-Uqubat are regarded as torturing or cruel, degrading and inhuman and outlawed by virtually all the above conventions which stipulate that nobody shall be subjected to torture or any inhuman or degrading punishments.

CAPITAL PUNISHMENT AND AL-UQUBAT

The implementation of capital punishment in itself in the Al-Uqubat is an example used by human rights' activists to gauge Islamic Law compliance with human rights' declarations. For instance, after the re-introduction of the Islamic Criminal Law in Northern Nigeria, assignation of the death penalty to such offences as deliberate adultery, homicide, and armed robbery as well as amputation and retaliation to stealing and tort respectively is regarded as violating the fundamental human rights of citizens. Using Zamfara Penal Code as a case in point, Peters (2003: 38) has argued the above punishments are forms of torture, inhumane treatment and degrading punishment. Muslim scholars however object to the qualification of the Al-Uqubat as torturing or cruel, degrading and inhumane.

While acknowledging the harshness of the Al-Uqubat, they argue that the Islamic Law has put in place some measures and restrictions that serve as "damage control" against the abuse of such punishments. There is no doubt, as we have already explained while discussing the various punishments in Islam that strict adherence to these measures will make the application of the Al-Uqubat extremely difficult if not totally impossible. What remains to be seen which many Muslim scholars have failed to address or address in its totality is the seriousness and rampancy of judicial misdemeanor, irregularity, anomaly, discrepancy and violation of Islamic norms and values in applying the capital punishment in Muslim societies. We have many instances of these judicial violations of Islamic norms and values which occurred in Nigeria. For instance, Bariya Magazu was sentenced to flogging for having sexual relations outside marriage, and that sentence was carried out though she claimed that she had been raped. Another woman, Amina Lawal Kurami, was also convicted for adultery and sentenced to death though she was divorced. A Shari'ah court in Katsina state ruled on March 22 2002 that she could breastfeed her baby for eight months before she would be executed.

Her sentence was later overturned on appeal. On September 15 2004, another woman, 26-year-old Daso Adamu, was handed the death sentence by a Shari'ah court in Ningi area of Bauchi state. Though Adamu admitted to having sex with a 35-year-old man 12 times, the man was acquitted for want of evidence. Hajara Ibrahim, a 29-year-old woman, was also sentenced on October 5 2004 by a shari'ah court in the Tafawa Balewa area of Bauchi state, after having confessed to having sex with 35-year-old Dauda Sani and becoming pregnant but the court however set her alleged partner free and consequently acquitted him due to lack of four witnesses (Uthman, 2009: 169-170, 2007: 60-70 and 2006: 117-145). Following the above judicial ineptitude of some judicial officers, even if capital punishment will not be abolished, we argue that there is a need for a total re-orientation and training of judges and other operators of our legal systems.

While Islam allows judges to use their discretion based on the evidence before them, a general principle in Islamic Law discussed in this paper is waiving mandatory

sentences in all cases when there is the slightest doubt and this principle must have informed the lack of prosecution of people for sexual relations outside marriage on the basis of mere circumstantial evidence during the life time of the Prophet. Not even a single case was prosecuted by the Prophet based on apprehension by four witnesses. Hence while death penalty may not be abolished based on the objectives and benefits of the law of retaliation in Islam, the conditions surrounding its imposition on offenders as well as the training and education of law officers must be reviewed as already being advocated (Faruqi, 2001 and Mah, March 2000: 62).

GENDER INEQUALITY IN ISLAMIC LAW

Again, the issue of gender equality has become prominent in all human rights discourses today. In this respect, most human rights activists have described the Islamic Law in Nigeria as violating this principle in respect of Muslim women. Human rights advocates, feminists and feminist jurists point to the right of men to physically correct their wives as evidence of this inequality in Islamic Criminal law. On this note, a contemporary Muslim jurist has argued, citing different evidence from the Qur'an and sunnah that what is allowed in the real sense in Islam is symbolic beating. He therefore concludes that all kinds of cruelty and beatings apart from the symbolic mentioned in the Qur'an is forbidden going by the spirit of Islamic Law in averting harm (Ansari, 2010). We therefore are of the opinion that, as he suggested, there should be a criminal case against such men who commit torts against their wives as done in Malaysia today. The rejection of a man's capability to rape his wife because of the implied consent given at the time of marriage is also regarded as a violation of the equality of husbands and wives under the Islamic Law.

As argued by Ansari (2010), since one of the Islamic legal maxims (discussed in this paper) does not allow taking benefits at the cost of injury (in this case, the wife's health), Islam does not allow a man to forcefully have sex with his wife. We are therefore arguing that this legal maxim allows the Islamic courts to punish men for the offence of "rape" because such an act amounts to giving precedence to benefits above preventing harm when hurting women is categorically prohibited in Islam (Q4: 19). The most criticized example of gender inequality in the application of the Islamic Criminal Law is the use of pregnancy as evidence of both pre and extra marital sex where a woman is single or no loner married and this has also been addressed and found contrary to the spirit of the Islamic Criminal law in this paper.

CONCLUSION

While Muslim scholars have attempted to respond to the human rights and gender objections raised against the implementation of the Al-Uqubat as being done in Malaysia today, it is very clear that the provisions of protecting the essential and fundamental objectives in many cases only exist in name and are not enforced in practice.

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