

THE APPLICATION OF AL-UQUBAT IN THE CONTEMPORARY SOCIETY: A RE-EXAMINATION USING THE *MAQASID AL-SHARI'AH* BASED SCHEMES

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This paper focuses on the complexity of the implementation of the Islamic criminal law with particular reference to the feminist view that the Islamic law is “the cornerstone of the system of male privilege set up in Islam” and that the preservation of this system of Islamic law in most Muslim countries signals the existence of anti-human rights practices that uphold not only oppression and domination of women but also of non-Muslims and even ordinary Muslims. Nevertheless, there still appears to be a serious misinterpretation of the Islamic penal code. 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 (the ultimate objectives of the Islamic law). This paper will ground itself upon maqasid al-shari’ah in order to differentiate between the authentic scope and application of the Islamic criminal law and what is currently operational in the Muslim world.

INTRODUCTION

The term *Al-Uqubat* which is the plural of *al-Uqubah* covers both crimes and torts. It means punishments and penalties for crimes and offences recognized by the Islamic law. In short, *Al-Uqubat* refers to divine punishments prescribed by Allah (s.w.t.), the law-giver for those offenses that are considered the violation of the divine rights or *haqq* Allah. Hence these divine punishments are also known as *Hudud* (fixed punishments prescribed in the Qur’an and *Sunnah*), the plural of *Hadd*, though not all punishments in Islamic criminal law fall under this designation.¹ Thus, the punishments called *Al-Uqubat* includes fixed and prescribed limits (the literary meaning of *Hudud*) set by Allah (s.w.t.) which nobody can alter either by making

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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 benefit 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 prayers and obligatory fasting in the month of Ramadan.²

There are basically three classifications of *Al-Uqubat*. Firstly, the above punishments called *Hudud* which 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 argue in this paper are merely five. The second classification is *Al-Qisas* (Retaliation) which is punishment for homicides and injuries. Lastly, we have *Al-Ta'zir* (Judicial discretionary punishment) which refers to all discretionary punishments that are determined by judges.³

We will now discuss each of this classification one by one in the next section, starting from the *Hudud* and show that the punishments that constitute *Hudud* are actually five in number. This will be followed by an analytical comparison of these punishments with modern penal codes that reflect the protection of fundamental human rights contained in various global and regional declarations. Finally, the paper will show how the failure of Muslim scholars over the years to question the application of the application of Islamic penal law system in many Muslim countries, including Nigeria is opposed to some of the *maqasid al-shari'ah* or the ultimate objectives and purposes of the Islamic law and proffer a better application of Islamic penal codes based on these objectives.

THE CLASSICAL UNDERSTANDING OF AL-UQUBAT

The first of the *Al-Uqubat* crimes is *Al-Hirabah* which 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".⁴ *Al-Hirabah*, therefore implies an armed action that is taken by an individual or a group of

bandits to attack and rob their victim (s), especially travelers on the highway or outskirts of the town or city. It does not however mean if someone robs with force, murders, or harms 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. *Al-Hirabah* in short remains the same whether it occurs in the desert, city or in the wilderness where people have no access to help or are prevented from getting or crying for help. This is the view of majority of Muslim scholars and the position of the *Malikis*, *Shafi'is*, *Zahiris*, *Zaydis*, *Imamis* and a section of the *Hanbalis*. Only the *Hanafis* and a section of the *Hanbalis* hold the view what is termed armed robbery according to Islamic Law can only be committed on the highway.⁵

It is for the above reason, that other terms used for the crime of armed robbery in Islamic Law are *Al-Sariqah al-Kubrah* (the Great Theft) and *Qat' al-Tariq* (Highway Robbery). Hence these two terms are used interchangeably with *Al-Hirabah* by classical Muslim jurists. 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.⁶ Since the crime violates the ultimate objectives of the divine law to protect both life and property, it has been described in the Qur'an as both waging war against Allah (s.w.t.) and His Prophet (s.a.w.) as well spreading mischief on earth.⁷ According to the passage, the punishments for *Al-Hirabah* are four, namely killing, crucifixion, cutting off their hands and feet on alternate sides (the right hand and the left foot or vice versa) and banishment.

Most Muslim jurists hold that 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 method of carrying out the death penalty according to these scholars is the sword. Any other method is unaccepted because of the existing consensus by these scholars. The second punishment is crucifixion and this is prescribed for the culprit if both life and

property have been taken. There are three differing views among the jurists on the method of carrying out this punishment. The first is that the criminal should first be crucified alive before being killed with a javelin. The second view is that the criminal should first be killed and his body should then be crucified and left for three days as warning and deterrent to others. The last view is that crucifixion alone is what has been prescribed and should not be combined with another punishment whether before or after. Hence once the offender becomes guilty of murder and robbery, he or she should be crucified alive and left to die on the crucifix before being taken down and buried.⁸

The last punishment is banishment which shows that the gravity of the crimes committed by an offender is taken into consideration in prescribing punishment. According to majority of Muslim scholars, the punishment of armed robbery that consists of mere hold-up without aggravation like killing or actual theft is banishment of the offender.⁹ There are however three juristic views on the punishment of banishment. The *Hanafi* School interprets banishment to mean imprisonment, the *Maliki* School holds that it also means imprisonment but in another country while the *Shafi'i* and *Hanbali* Schools opine that it implies pursuing of the criminal from country to country if he escapes. They all however agree that the offender remains banished until he or she gives evidence of improved conduct and unlikelihood to engage in the criminal act again. This principle is comparable to the modern day parole system.¹⁰ In this context, it is therefore very clear that where armed robbers have not killed anybody, there is no need imposing the death penalty, whether by execution or crucifixion. There is also no need for amputation. This view is based on the Qur'an chapter, 2 *ayah* 179 which shows vividly that the harshness of the Islamic law on the punishment of the crime of armed robbery is to protect both life and the human body by serving as deterrent to anyone who also desires life or other parts of the body.

The second of the *Al-Uqubat* to be discussed is *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. *zina* therefore refers to both fornication and adultery. The *Hanafi* School of Islamic defines *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*."¹¹

This shows that the main element of *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 *zina* as Islam has prescribed.¹² (Q17: 32). Other forms of unlawful intercourse do not fall under crimes that attract fixed punishments. They are rather under the category of crimes that attract discretionary punishments.

According to the verse above, the Islamic law in respect of *zina* is guided by morality. *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 scale of moral evaluation 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 modern penal systems but also fornication and all that leads to it. 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.

According to majority of Muslim scholars, the offence of *zina* has been divided into two categories 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.¹³

The importance in this categorization lies in the punishments for *zina* in Islamic Law. The punishments for the crime of *zina* are contained in two different passages of the Qur'an.¹⁴ The above 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 *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 (s.a.w.) where the Prophet on receiving the last revelation declared as follows:

*Take from me, accept from me. Undoubtedly, He has as now 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.*¹⁵

The above tradition is the clearest evidence that the punishments for *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 though 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 (s.a.w.) in the *Sunnah* while explaining the revelation of the verse of canning, it was also implemented by him at least on four occasions. The Prophet (s.a.w.) 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 (s.a.w.) initially used the Jewish law because there was not yet any revelation concerning the punishment for *zina* in Islamic Law. The above tradition shows that the Prophet (s.a.w.) upheld stoning to death even after the revelation of Qur'an chapter 24 *ayah 2*.¹⁶

Based on the Qur'an and *Sunnah*, Muslim scholars agree that the punishments for *zina* are two, namely caning for fornication and stoning to death for adultery. However not all of them are in agreement on the additional punishment of banishment for fornication and caning for adultery. This agreement occurs because when the Prophet (s.a.w.) ordered caning for fornication, he did not include banishment except on one occasion due to public interest. Neither did he include caning on all the occasions he ordered stoning to death for adultery. The method of carrying out these punishments according to these scholars is the use of the wildest possible publicity to deter other potential offenders. The punishment of *al-rajm* or the stoning to death penalty by stoning is a subject of controversy in modern society, even among Muslim scholars. As stated above, many Muslim scholars today deny that *rajm* is the punishment to be carried out on a male and female offender of *zina* in Islamic Law because there is no text in its support in the Qur'an and because of their above opinion of most of them that the Prophet (s.a.w.) used *al-rajm* initially when there was not yet any revelation concerning the punishment for *zina* in Islamic Law. However their view is contradicted by the fact that the Prophet (s.a.w.) upheld stoning to death even after the revelation of the Qur'an. We are of the opinion that rather than disowning *al-rajm*, what Muslim scholars can do in this respect is damage control because while the Prophet (s.a.w.) upheld stoning to death even after the revelation of Qur'an (Chapter 24, ayah 2), the application was based on very stringent conditions which indicate that the Law Giver is not merely interested in the imposition of all punishments in the Islamic Criminal Law.

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 (s.a.w.) 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.¹⁷

Similarly, women should not be convicted for adultery 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 in all the Schools of Islamic Law. 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.¹⁸

The Punishment of *Al-Sariqah* is another *Al-Uqubat*. *Al-Sariqah*, implies an illegal means of acquiring property or wealth. It violates the limits set by Allah (s.w.t.) on the acquisition of property. For instance Allah says “Do not devour the property and wealth of one another through false and illegal means (4:29). 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* was revealed by Allah (s.w.t.), the law-giver and it became one of those offenses that are considered the violation of the divine rights or *haqq* Allah.¹⁹

In addition, there are many traditions in the *Sunnah* that dwell on the gravity of *Al-Sariqah* by equating it to the crime of *zina*. This shows while *Al-Sariqah* is a theft of property, *zina* is a theft of dignity and the two form parts of the five essential items protected by the Islamic Law.

Thus, the crime of *Al-Sariqah* is so called and is included among the crimes that carry fixed and prescribed punishment in Islam because Islam guarantees individual ownership of property. It teaches that individuals are encouraged to work and own wealth. 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. This is why *Al-Sariqah* is governed by the following conditions in Islamic law, before a person can be guilty of the crime of *Al-Sariqah*. Firstly, as stated above, the property stolen must have been taken out of the possession of its real owner, illegally and secretly and with criminal intentions. Secondly, the property must be movable, valuable and must have been kept in its usual. 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 quate of a 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.²⁰

The nature of *Al-Sariqah* in Islamic criminal law and the conditions governing the declaration of an accused person as guilty of the offence indicate that the conviction of someone for the offence of *Al-Sariqah* like other offences in the Islamic penal code is very difficult if the application of Islamic law in contemporary society strictly abides by these conditions. The Islamic punishment for *Al-Sariqah* as prescribed in the Qur'an is amputation or cutting off the hands of a convicted thief. As reported in the *Sunnah*, the Prophet (s.a.w.) ordered the amputation of a female thief's hand in line with the divine instruction. He also prohibited any mediation in the execution of the punishment, confirming the fixed nature of the punishment and its categorization as one of the *Hudud*. However since this punishment cannot be carried out unless the above conditions are fulfilled, then it is almost impossible to implement. According to

majority of Muslim scholars, the punishment of amputation, in the case of a thief cannot be imposed unless the property is worth the minimum value of one *quatre* 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: 4).²¹ The interpretation of the value of *Al-nisab* according to the School that is the *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 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 (s.w.t.) 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 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.

In the same vein, according to most Muslim scholars, the right hand of a first offender should be cut from the wrist. In this respect, it is only the *Maliki* School that holds that the hand of an offender of the crime of *Al-Sariqah* should be cut from the wrist elbow. However as far as the place of cutting is concerned, 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 (s.a.w.) and his followers as well as the generally acceptable usage of the word hand in Arabic. This is also the case 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* and spirit of Islamic

law which as we have argued earlier is basically to reform criminals. 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 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”.²²

The next punishment that we will discuss here is *Al-Qadhf* which implies an action or expression that is made to allege a person of committing the act of illegal sexual intercourse. *Al-Qadhf* has been defined as an unproved allegation that an individual has committed *zina* based on two verses of the Qur’an.²³ 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, all other scholars hold that there can be no fixed punishment for the culprit of *Al-Qadhf* unless the expression that is used is unambiguous. While the *Maliki* School 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*, it is clear this is not correct. 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. Accordingly, the view of the majority of Muslim scholars is preferable here. The punishment for *Al-Qadhf* is accordance to Qur’an chapter 24 was executed by the Prophet (s.a.w.) on some companions who were used by the hypocrites in spreading slander against Aisha. They were Hassan ibn Thabit, Mistah ibn Athatha and Himna ibn Jahsh. It is for the above reason, that the punishment of *Al-Qadhf* is eighty lashes as well as rejection of the future testimony of the accuser according to the view of the majority where there is no ambiguity in the expression 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.²⁴

In addition, the Muslim jurists differ on the meaning of the last part of the second verse in the above chapter relating to 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. However, the *Hanafi* School disagrees and opines that repentance does not affect the fact that the future testimony of the offender is to be rejected. The above verses are followed by two other verses that prescribe the punishment for the crime of *Al-Qadhf* committed by a person against his or her spouse. According to chapter 24, *ayah* 6-7 of the Qur'an, if either spouse accuses each other 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 (s.w.t.) on himself or herself for telling a lie. The accused spouse can however avert the punishment of *Al-Qadhf* himself or 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 (s.w.t.) on himself or 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 *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 them to a life of misery with an unfaithful partner. So once the couple takes the oath, their marriage stands automatically divorced.²⁵

The last of the fixed punishments in the opinions of these authors is *Shurb al-Khamr* which refers to any juice or drug that intoxicates or destroys the intellect. It therefore includes the drinking of intoxicants or the taking of any intoxicating drug or alcohol. It embraces the drinking of any fermented juice, grape, barley, dates,

honey or taking of hashish, opium, marijuana, cocaine etc. Drinking any intoxicating wine or liquor is a punishable crime in Islam because of the attendant harms and vices that it leads to. For instance someone who is not bold enough to commit rape will be able to execute the act under the influence of alcohol. This is why Islam has prohibited *Shurb al-Khamr* despite some of its benefits and usefulness as contained in the Qur'an.²⁶ Though it both benefits and harms human beings but because its harm far outweighs its benefits, it is forbidden in Islam. However, the Islamic law in respect of *Shurb al-Khamr* is guided by the principle of gradualism. After accepting Islam, the Arabs sought to know the Islamic Law in respect of *Shurb al-Khamr* and the first quoted verse was revealed. In fact, the verse teaches a very important philosophy in the psychology of reformation. Rather than the prohibition of *Shurb al-Khamr* outrightly in Islam, the divine wisdom merely points the attention of the Arabs to the nature of *Shurb al-Khamr*. The verse teaches that *Shurb al-Khamr* represents bittersweets. It contains both benefits and vices to human beings and the society, the verse informs and while not prohibiting *Shurb al-Khamr* the verse points to the wisdom of shunning it in order to protect personal health, intellectual sagacity, public orderliness, societal peace and social unity among others by asserting that its evils outweigh its benefits. Later the divine revelation prohibited *Shurb al-Khamr* partially by conditioning it to retention of senses in prayers.²⁷ Accordingly, by the time the final prohibition was revealed in the fourth or fifth year of *Hijrah*, virtually everybody had been gradually weaned away from *Shurb al-Khamr* hence, 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 neither contained directly in the passages of the Qur'an or in *Sunnah* but is rather based on analogy drawn from the above preceding punishment of *al-Qadhf* by the companions of the Prophet (s.a.w.) 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 is 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.²⁸

The last fixed punishment according to most classical scholars is *Al-Riddah* which means apostasy or the rejection of the religion of Islam in favour of any other religion or rejection of any divine fundamental principle of the religion prescribed by Allah (s.w.t.), the law-giver and His Prophet either through an action or by way of mouth. 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 in defence of Islam is regarded as apostasy. According to all classical Muslim scholars, the punishment for *Al-Riddah* is prescribed by the Prophet (s.a.w.) 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.²⁹

We however argue here that the Islamic ruling on apostasy by classical Muslim scholars grossly violates 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 Muslim scholars. In fact, Islam commands Muslims to establish an Islamic society that transcends the politics of multicultural and religious consociation and tolerance because of this principle. By so doing, Islam upholds a society built on justice, unity and accommodation that are in consonance with the Islamic declaration of one God and one human race and destiny irrespective

of differences in religious and cultural ideologies and belief.³⁰ In such a society, benevolence and reward are measured by performance and not the mundane stratifications of colour, race, religion and lineage. A careful reading of Islamic teachings will therefore show that this classical interpretation of apostasy that denies the doctrine of freedom of worship is not supported by the abundance of classical texts in Islam.³¹ These texts are predicated on many commandments as stated in various Qur'anic passages.³² It is highly significant that in the all the last passage above, there are 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 (s.w.t.) has appointed some people to prevent their destruction and desecration.³³ The last passage also indicates that in cases of apostasy, the punishment does not reside in the Prophet but Allah (s.w.t.). This perhaps informed Ezzati in his conclusion that *Jihâd* in Islam is a measure that guarantees room for more than one religion to exist (Ezzati, 1979: 6 and 28).³⁴

This Accommodation of other religions in Islam was amply demonstrated by the Prophet Muhammad (s.a.w.) on many occasions. 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.³⁵ The Prophet (s.a.w.) 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 (s.a.w.) personally paid out a hundred camels to the family of the deceased as compensation. No wonder D.D. Macdonald in *the Encyclopedia 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".³⁶ In addition, the above military *Jihâd* in Islam, implied by D.D. Macdonald above and which is war and other violent resistance to oppression, persecution and social injustice which has made many people to conclude that *Jihâd* essentially means 'holy war' is guided by many principles to ensure that it does not become a means of spreading Islam by force. One of such guiding principles is the commandment to "wage war against

those who fight you”³⁷ Furthermore, non-combatants, women, children, the old and monks are not to be attacked as commanded by the Prophet (s.a.w.). Just as pastures, trees, crops, wells and fruits are not to be destroyed nor prisoners of war and animals to be slaughtered or tortured.³⁸

We will therefore show shortly in the final section of this paper where the correct interpretation of what is perceived as the punishment of apostasy can be located in Islamic Criminal Law. But before that, we will discuss the remaining two classifications of *Al-Uqubat*.

The second classification of *Al-Uqubat* is of *Al-Qisas* which implies an action that is taken by a victim or his heirs, agnates or relatives to avenge a crime done to the victim. If someone murders, hurts or harms another person, he or she must pay equitably for the killing or injury. *Al-Qisas* therefore refers to the divine law of equality or equitable retaliation of the horrible act of homicide, manslaughter or torts prescribed by Allah (s.w.t.), the law-giver in favour of the victim or his agnatic relatives. The Islamic law of retaliation was revealed by Allah (s.w.t.) to militate the horrors of vengeance practiced for many centuries in most cultures including that of the Arabs. Among the Arabs, when a person was killed, members of his tribe would in turn avenge the murder by killing any innocent person belonging to the clan or tribe of the murderer. At times, the ensuing blood feuds used to claim the lives of hundreds of innocent people for the life of one person. To put a stop to this mayhem, Islam prescribes a strict equitable retaliation and while doing so, makes a clear provision for mercy and forgiveness.³⁹

According to the second verse above, 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.⁴⁰ In fact, the taking of life in general without a just cause or in pursuit of justice is a heinous offence. It is forbidden even to kill animals for fun or sports. In addition, even killing the life of a child or mere embryo through abortion or the use of other contraceptive methods is prohibited except where the life of either the mother or the child itself is in danger. So also, a person has no right to kill himself or herself in Islam (Q81: 8-9, 6: 140, 6: 15 and 4: 29). According to majority of Muslim scholars, the punishment of intentional killing

or injury is *Al-Qisas*, 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. The *Maliki* School however holds that only the adult, male, agnatic relatives of a deceased can avenge the crime of murder. It is only in the absence of male agnates, that a daughter or sister of the victim can be the avengers.⁴¹

The above view of Muslim scholars shows that a murderer or injurer can only be prosecuted, sentenced and punished if the victim or his or her avengers demand retaliation. Thus, the concept 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 *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*. Killing or injury caused by a mad person also requires the payment of *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. 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 must not exceed that of the victim because of extraneous considerations of social status, gender, religion and wealth of the 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.⁴²

The last classification of the *Al-Uqubat* is *Al-Ta'zir* which implies the use of judicial discretion by a judge in awarding punishments on

crimes outside the limits set by Allah (s.w.t.). In short, *Al-Ta'zir* refers to 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 (s.w.t.), the law-giver for those offenses against public peace and tranquility. Thus, the punishments called *Al-Ta'zir* has been defined as “a disciplinary punishment for a crime for which no specific fixed punishment is prescribed nor any form of expiation by Allah which nobody can alter either by making them lighter or heavier.” In Islamic law, there are basically ten classifications of *Al-Ta'zir* punishments and penalties for different crimes. Firstly, there is admonition or *al-wa'z* which is generally prescribed for first offenders in mild cases. Apart from this classification, there is also *al-Tawbikh* (Reprimand) which is punishment for repeated offenders in mild cases. Thirdly, there is threat or *al-Tahdid*. This is followed by boycott or *al-Hajr*. Fifthly, there is public disgrace and disclosure or *al-Tashhir*. This is followed by fines and seizure of property (*al-Gharamah wal Musadarah*). There is also imprisonment (*al-Habs*). This is followed by flogging or *al-Jald*. Nintly, there is exile or *al-Nafl*. Lastly, we have *Al-Ta'zir* as an additional punishment to fixed punishments. Though instead of *al-Nafl*, El-Awa at pp. 96-109, mentions death penalty but that is in fact a major *Al-Uqubat* punishment as already discussed.⁴³

The only thing that must still be noted before ending this section is that 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.

Not surprisingly in Malaysia today, it is interesting that the advocacy for the freedom of religion of non Muslims appears to be “the most thrilling issue of constitutional law which hovers around Malaysia being an “Islamic State”.⁴⁴ According to the Malaysian

Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS) which was established for the purpose of promoting religious and social understanding and harmony, there is prevalence of violation of personal liberties of Malaysian non Muslims. The MCCBCHS has particularly referred to statutory provisions that criminalize apostasy from Islam and deny non Muslims the liberty to apostate from Islam. The MCCBCHS has equally voiced out concern on the disturbing cases of husbands “said to ‘pretend’ to be Muslims in order to get out of a marriage and thereby leaving their spouses in the lurch” and the courts’ granting the children’s custody to the ‘pretending’ Muslim converts. These and other perceived violations of non Muslim personal liberties such as their rights to non Muslim rites of a deceased after they have apostatized from Islam are believed to be unconstitutional by the MCCBCHS according to Jen-T’ Chiang above.⁴⁵ It is for these reasons that we now end this paper with an analysis of some salient human rights issues involved in the application of *Al-Uqubat* based on the ultimate objectives schemes of the Islamic Law.

HUMAN RIGHTS OBLIGATION AND APPLICATION OF AL-UQUBAT

Today, virtually all countries of the world, including Muslim countries have committed themselves to one form of human rights declaration or another. Thus, they are expected to guarantee basic human rights in various international contexts. These declarations include the standard for human rights contained in the Universal Declaration of Human rights in 1948, which has given birth to the International Covenant on Civil and Political Rights in 1966, the Convention for the Elimination of all Forms of Discrimination against Women in 1979, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in 1984, the Convention on the Rights of the Child in 1989, all within the global context set by the United Nations and the African Charter of Human and Peoples’ Rights (ACHPR) of the African Union and of the Commonwealth. All these conventions are relevant to the implementation of the *Al-Uqubat* today. Many of the punishments and penalties for all crimes known as and called *Hudud* are regarded as torturing or cruel, degrading and inhuman and outlawed by virtually all the above conventions which lay down that nobody shall be subjected to torture or any inhuman or

degrading punishments and direct all countries to ensure that such acts are not enforced as punishments. Therefore aside from the issue of apostasy already discussed above, the implementation of capital punishment in itself is another example that is used by human rights' activists to gauge Islamic Law compliance with human rights' declarations. For instance, Malaysia which assigns the death penalty to such offences as deliberate homicide, kidnapping, trafficking in dangerous drugs and possession of firearms is regarded as violating the fundamental human rights of its citizens by abolitionists. The abolitionists who call for abolishing the implementation of capital punishment in Malaysia argue for the abolition of the death penalty because of the freedom to life as enshrined in the Malaysian federal constitution, the 2005 resolution 59 of the UN Commission on Human Rights, Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and findings of the Amnesty International reports that show that long-time imprisonment is a more effective deterrent of crimes than the death penalty. However, Malaysian Muslims, like many other Muslims all over the world, have generally opposed the abolition of death penalty because of *al-Qisâs* or the Law of retaliation in the second classification of Islamic Criminal Law punishments discussed before. This position is in line with the views of Muslim scholars who uphold the classical interpretation and opine that the Islamic Law of *al-Qisâs* is still relevant as it is to punish deliberate homicide with what is equal to the life that a culprit has taken whether directly or indirectly like the case of drug trafficking.⁴⁶

To address these conflicting standpoints, we will attempt to x-ray the *maqasid* (ultimate objectives) approach in the Islamic Laws to show how these ultimate objectives can be used to reform the application of Islamic Criminal Law today. The Islamic Law according to many Muslim scholars revolves round a scheme of benefits and harms (*masalihah* and *mafasid*). These scholars postulate that the Islamic Law is aimed at protecting five ultimate objectives. These objectives are religion, life, intellect, offspring and property. In short, the *maqasid* is designed so that worldly and religious, physical and spiritual and mundane and celestial enjoyments are acquired by humanity. 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. This scheme is therefore guided by the underlying rationale, goal and intention as well the subsequent effects and impacts on humans, non humans, the environment and the global community.

There are many Islamic maxims that guide the *maqasid* scheme in Islam but we will just examine three 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. Another 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, Muslim scholars like al-Suyuti emphasize that if the intended benefits and harms are contending, then warding off the intended harms is of higher priority as the Lawgiver is more preoccupied with what He has forbidden than with He has commanded.⁴⁷

Furthermore, in the *maqasid* scheme, the intended benefits and harms are those established by the Islamic law in accordance with the above listed five ultimate objectives. 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 (s.w.t.), the Lawgiver and not 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 (*maslaha al-mursalah*), such benefit 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. This is also the views of scholars like Imam al-Shatibi who pioneered the field of *maqasid* scheme as an independent field of Islamic Law. As matter of fact, the *maqasid* scheme requires that the ultimate fundamental objectives, values and ethical considerations of the Islamic Law must never be neglected in human actions especially those directed at development and progress. However, Muslim scholars like al-Shatibi disagree on which of these five necessary and essential values (al-*darurah al-Khamsah*) or five ultimate fundamental objectives have the highest priority or precedence. Is it religion and in this case Islam that has priority over life or is it life that has priority over religion? Nonetheless, Islamic scholars are unanimous that all the above ultimate fundamental objectives originate from the Islamic absolute reference frameworks, and therefore qualify as *darurat* or necessities on the essential level and are all definitive benefits whose realization are certain and whose benefits are universal or meet the needs of the entire global community.⁴⁸

Based on this unanimity of Islamic scholars, it is correct to argue that the application of Islamic Criminal Law should be based on the above five essential and fundamental objective like the preservation of life, religion and human dignity. Furthermore, if these *maqasid* are appropriated together with the three legal maxims mentioned above, 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, alleviating harms and assigning the warding off of harm, precedence over accruing benefits, then this “overdose of misconceptions about Islam” hovering around the human rights issues discussed in this paper such as apostasy from Islam being deemed as not only a sinful act by a Muslim but also punishable with death or any other denial of the constitutional rights of a person will be removed. For instance the Malay general opposition to a Muslim Malay converting to other religions as upheld by the classical view that freedom of worship or religion does not entail the freedom of a Muslim to convert to other religions will no longer subsist as a western notion that flows from the secular perception of religion as a private

or personal affair while advocating the absolute freedom of human beings.⁴⁹ To Muslims who hold this view, they believe that while Islam grants a person the freedom of religion, such a freedom to them 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 (s.w.t.) alone. It is this perception that informed the Allied coordinating Committee of Islamic NGOS (ACCIN) the initial massive objections to the initiative of the MCCBCHS toward the formation of the interfaith Committee of Malaysia (IFC) and its agenda for not taking “into consideration the sensitivities of the Muslims especially in the light of the fact there are few reported cases of ‘apostasy’ among the Malays”.⁵⁰

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 being 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 hence *Jihad* in Islam (Qutb, 1978: 93).⁵¹ 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 (s.w.t.). When a person’s actions and activities cease to be done for the sole aim of pleasing Allah (s.w.t.), the person in reality ceases to be a Muslim. It is in this context that Islam teaches that there is no compulsion in faith.

It is very clear that in the second and last passages above, the punishment for apostasy resides in Allah (s.w.t.) who has chosen to punish people who apostatize after they die on the Day of Judgment. Allah (s.w.t.) also specifically warns the Prophet (s.a.w.) from enforcing Islam on people or punishing the apostates since their punishment is with Allah (s.w.t.). This perhaps informed Prophet’s

attitudes to apostates. Contrary to the popular tradition that says “whosoever changes his religion, kill him” and what the tradition in *Sahih al-Bukhâri* purports, the Prophet (s.a.w.) did not kill any single apostate. He only sanctioned the killing of only those apostates who commit felony and sedition in the Muslim community and this is the correct meaning of the above reported tradition in *Sahih al-Bukhâri* 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-Bukhâri* is cited and translated by me 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.*⁵²

Muslim scholars however object to the qualification of the *Hudud* as torturing or cruel, degrading and inhuman. While acknowledging the harshness of the *Hudud*, 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 *Hudud* 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 (Kamali, 1998: 203-234).⁵³ We have many instances of these judicial violations of Islamic norms and values which occurred in Nigeria. 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. She was originally sentenced to 180 lashes as punishment for fornication and calumny against her alleged rapist but after much plea and according to the presiding Judge, he reduced the amount of her flogging on humanitarian grounds. In fact, she was so lucky to have gotten ‘a mere sentence of flogging. Another woman, Safiya Husseini, 35, who got the sentence of death by stoning, was not so lucky. But for the

objections of human rightists around the country which must have assisted the *shari'ah* court of appeal's Judge in Sokoto City who acquitted her because the alleged offense occurred before the implementation of the criminal aspects of the *Shar'ah*. The third 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 also 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.⁵⁴

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 and for many centuries after the life time of the Prophet (s.a.w.). Not even a single case was prosecuted by the Prophet (s.a.w.) 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.⁵⁵

Again, according to the constitutions of virtually all countries of the world today, all persons are equal before the law. This principle has become prominent in all human rights discourses today. In this respect, most human rights activists have described the Islamic Law

as violating this principle both in respect of religion and gender. In case of religion, the non application of Islamic penal codes to non-Muslims is viewed by human rights activists as a violation of the principle of equality before the law. The most prominent form of religious discrimination which non-Muslims certainly protest is the denial of Muslims the right to change their religion through the stipulation of death penalty for apostasy and this has been discussed above. What remains is the case of gender. Human rights advocates, feminists and feminist jurists point to the acceptance of men physically correcting 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.⁵⁶ 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: 101),⁵⁷ 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. As stated by Ansari above, hurting women is categorically prohibited in Islam.⁵⁸ 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 longer married and this has also been addressed and found contrary to the spirit of the Islamic Criminal law in this paper.

CONCLUSION

To conclude this paper, it is necessary to mention that there is need for a re-interpretation of Islamic Criminal Law to correct the current

flaws in the application of the Islamic penal codes in many Muslim countries today. Consequently the application of Islamic penal laws today may subject people to being punished for offences that have not been properly proven beyond reasonable doubts which are contrary to the ultimate objectives of the penal codes. While Muslim scholars have attempted to respond to these objections 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. It is also clear that there is a need for redrafting most of the Islamic legal codes in operation in the Muslim world today.

Notes

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4. *Ibid*, p. 8.
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6. El Awa, *Punishment in Islamic Law*, p. 7.
7. Qur'an, 5:33-34.
8. Doi, *Shari'ah*, p. 252 and El Awa, *Punishment in Islamic Law*, pp. 10-12.
9. Peters, *Islamic Criminal Law*, p. 1.
10. El Awa, *Punishment in Islamic Law*, pp. 10-13.
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12. Qur'an, 17:32.
13. El Awa, *Punishment in Islamic Law*, pp. 18-19.
14. Qur'an, 4:15-16 and 14: 2.
15. Doi, *Shari'ah*, p. 238 and El Awa, *Punishment in Islamic Law*, pp. 15-17.
16. See El Awa, *Punishment in Islamic Law*, pp. 15-18.
17. Peters, *Islamic Criminal Law*, pp. 4-5.
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21. El Awa, *Punishment in Islamic Law*, p. 4.
22. *Ibid*, pp. 5-6.
23. Qur'an, 24: 4-5.
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