



**NATIONAL OPEN UNIVERSITY OF NIGERIA**

**SCHOOL OF ARTS AND SOCIAL SCIENCES**

**COURSE CODE: ISL 439**

**COURSE TITLE: AL-HUDUD: PENAL LAW OF SHARIAH**

**COURSE  
GUIDE**

**ISL 439**  
***AL-HUDUD: PENAL LAW OF SHARĪ'AH***

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## INTRODUCTION

Welcome to ISL 439: *AL-HUDUD: PENAL LAW OF SHARĪ'AH* is a two-credit, one-semester undergraduate course. It comprises of 15 units subdivided into 4 modules. This course guide gives an overview of the course. It offers you with the necessary information on the organisation as well as requirements of the course.

## COURSE AIMS

This course aims to:

- provide a background to the student on the concepts of *al-hudud*
- equip the students with an understanding of the overall profile of the penal law of the *Sharī'ah*
- familiarise the students with the methods of different punishments and nature of the penal law of the *Sharī'ah*
- appraise some objectives, goals and achievements of penal law of the *Sharī'ah* as they affect the overall eradication of crimes in modern society.

## COURSE OBJECTIVES

To achieve the aims of this course, there are overall objectives which the course is out to achieve though, there are set out objectives for each unit. This is to assist the students in accomplishing the tasks entailed in this course. The objectives serves as study guides, such that student could know if he is able to grab the knowledge of each unit through the sets of objectives in each one. At the end of the course period, you are expected to be able to:

- explain the basic concepts of *al-hudud* and penal law of the *Sharī'ah*
- outline the features and profile the penal law of the *Sharī'ah*
- discuss the meaning, nature and execution of the various penal laws of the *Sharī'ah*
- evaluate the contribution of objectives, goals and effects of penal law of the *Sharī'ah* to the eradication of crimes in the society.

## COURSE MATERIALS

Main materials required to go through this course are:

1. Course Guide
2. Study Units
3. Assignment File
4. Textbooks and References
5. Presentation Schedule

## STUDY UNITS

There are 15 units (grouped under four modules) in this course stated as follows:

### **Module 1 Understanding the Penal Law of *Sharī'ah***

- Unit 1 Concept of Penal Law of *Sharī'ah*
- Unit 2 Nature of the Penal Law of *Sharī'ah*
- Unit 3 Overview of Crimes in the Society
- Unit 4 The Roles of Security Agencies in Crime Control

### **Module 2 Four Penal Laws of the *Sharī'ah***

- Unit 1 Punishments for Armed Robbery
- Unit 2 Punishments for Illegal Sexual Intercourse
- Unit 3 Punishments for Theft
- Unit 4 Punishments for *Qadhf*

### **Module 3 Four Penal Laws of the *Sharī'ah***

- Unit 1 Punishments for Murder and Manslaughter
- Unit 2 Punishments for Intoxicants
- Unit 3 Punishments for Torts and Hurts
- Unit 4 *Ta'zir* Punishments

### **Module 4 The Penal Law of *Sharī'ah* and Morality in Modern Society**

- Unit 1 Relationship between Morality and Islamic Penal laws of the *Sharī'ah*
- Unit 2 Islamic Measures and Mechanisms in Controlling Crimes
- Unit 3 Challenges Confronting the Islamic Penal Laws of the *Sharī'ah* in Modern Society

## **TEXTBOOKS AND REFERENCES**

Recommended books and eBooks for this course can be downloaded online as specified in the references and further reading section.

## **ASSESSMENTS**

An assignment file and marking scheme will be made available to you. This file presents you with details of the work you must submit to your tutor for marking. The marks you obtain from these assignments shall form part of your final mark for this course. Additional information on assignments will be found in the assignment file and later in this Course Guide in the section on assessment.

## **TUTOR-MARKED ASSIGNMENTS (TMAs)**

You are required to submit a specified number of Tutor-Marked Assignments (TMAs). Every unit in this course has a tutor-marked assignment out of which you will be assessed on four of them and the best three will be selected for you. The best three TMAs selected for you shall form 30 per cent of your total marks. You are expected to send your completed assignment and TMAs to your tutor on or before the deadline for submission. In case you are unable to complete your assignments on time, kindly contact your tutor to discuss the likelihood of extension. Note that extension will not be granted after due date, unless under extraordinary situation.

## **FINAL EXAMINATION AND GRADING**

You shall be examined on all areas of this course and your final examination shall be for three hours. It is necessary that you read through the units over and over again before the final examination. The final examination shall cover all the self-assessment questions for practice and the TMAs that you have come across earlier. Thus, it is advisable you revise the whole course material after studying from the first to the last units before you sit for the final examination. It is also advisable that you evaluate the TMAs and your tutor's comments on them before you sit for the final examination.

## COURSE MARKING SCHEME

The table below displays the broken down of how the course marks are allocated.

Assignment	Marks
Assignments (the best three assignments out of four that are marked)	30%
Final examination	70%
<b>Total</b>	<b>100%</b>

## PRESENTATION SCHEDULE

The date of submission of all assignments and date for completing the study units as well as the final examination dates shall be communicated to you online.

## COURSE OVERVIEW

The table below describes the number of units contained in ISL 439, number of weeks to complete them and end of unit assignments.

Units	Title of Work	Week's Activities	Assessment (end of unit)
	Course Guide		
<b>Module 1 Understanding the Penal Law of <i>Sharī'ah</i></b>			
1	Concept of Penal Law of <i>Sharī'ah</i>	Week 1	Assignment 1
2	Nature of the Penal Law of <i>Sharī'ah</i>	Week 2	Assignment 2
3	Overview of Crimes in the Society	Week 3	Assignment 3
4	The Roles of Security Agencies in Crime Control	Week 4	Assignment 4
<b>Module 2 Four Penal Laws of the <i>Sharī'ah</i></b>			
1	Punishments for Armed Robbery	Week 5	Assignment 1
2	Punishments for Illegal Sexual Intercourse	Week 6	Assignment 2
3	Punishments for Theft	Week 7	Assignment 3
4	Punishments for <i>Qadhf</i>	Week 8	Assignment 1
<b>Module 3 Other Four Penal Laws of the <i>Sharī'ah</i></b>			
1	Punishments for Murder and Manslaughter	Week 9	Assignment 1
2	Punishments for Intoxicants	Week 10	Assignment 2
3	Punishments for Torts and Hurts	Week 11	Assignment 3
4	<i>Ta'zir</i> Punishments	Week 12	Assignment 4



<b>Module 4 The Penal Law of <i>Sharī'ah</i> and Morality in Modern Society</b>			
1	Relationship between Morality and Islamic Penal laws of the <i>Sharī'ah</i>	Week 13	Assignment 1
2	Islamic Measures and Mechanisms in Controlling Crimes	Week 14	Assignment 2
3	Challenges Confronting the Islamic Penal Laws of the <i>Sharī'ah</i> in Modern Society	Week 15	Assignment 3
	<b>Revision</b>	Week 16	
	<b>Examination</b>	Week 17	
	<b>Total</b>	17 Weeks	

## HOW TO GET THE MOST FROM THIS COURSE

The study units in distance learning are replacements of the university classroom lectures. A major advantage of distance learning is that you can read and work at the same time through specially designed study materials. It assists you to study at your own pace, your own time and places that go well with you. Consequently, you shall have to read the lectures instead of listening to a lecturer. Just like a lecturer might give you some readings to do, so also are the study units which provides you with readings on the units as well as exercises to do at the end of each units. It also consists of instructions on when you should read each unit in the course material and when you should do your assignments. The study units follows a common simple format where the first item is an introduction to the subject matter of each unit followed by how a particular unit is integrated with the other units and the whole course.

In each unit, there are set of learning objectives intended to assist you to know what you should be able to do or what you should grab from the unit after completing it. These objectives should be your study guide such that at the end of completing each unit, you should reflect and check whether you have achieved the set objectives. Cultivating this habit will considerably increase your probability of passing the course. The main body of a unit guides you through the required reading from other sources. This will guide you through reading from other sources such as your text book or course guides. Realistic plans of working through the course are as follows: Phone or email your tutor if you have any trouble with any unit. Do not hesitate to call or email your tutor to provide assistance to you when you need one. In addition, follow the advices below carefully:

1. It is advisable you read the course guide with necessary care. See this as your first assignment.

2. Try to arrange a study plan by referring to the Course Overview in the Course Guide. The expected time to spend on each unit and the assignment related to it should be well noted. Writing out your own dates for working on each unit according to your study plan is a good idea
3. Stick to your study plan after you have created one. Student usually failed because they are lagging behind in their course work. In case you have any complexity in your study plan, do not hesitate to inform your tutor before it is too late.
4. Turn to each unit and read carefully the introduction and the objectives for them.
5. Information about what you need for a unit is given in the “Overview” at the beginning of a unit.
6. The contents of a unit is presented in such a way that it provides you with a sequential order to follow, so work through the course units. As you work through each unit, use it to guide your readings. You may be required to read sections from one or more references other than the course material.
7. It is suitable if you can review the objectives for each unit for you to know if you have achieved them or not. In case you feel uncertain after reviewing the objectives, review the study material or consult your tutor.
8. But when you feel convinced that you have achieved unit objectives, you can then move to the next unit. Progress unit by unit through the course and space your study plan such that you ensure you’re on to-do list.
9. After submission of an assignment, do not wait for your marks before you proceed to the next unit so as to keep to your study plan. If you have any question, clarification or observation, contact your tutor as soon as possible.
10. On completion of the last unit, evaluate the course; check that you have achieved the objectives of each unit as listed in each unit and the overall course objectives in the Course Guide. Then get prepared for the final examination.
11. The latest course information to keep you current about the course will be continuously available at your study center. So keep in touch.

## **FACILITATORS, TUTOR AND TUTORIALS**

There are four hours of tutorial for this course with allocated dates, time and location of the tutorial which you will be notified of. You will also be notified of your tutor’s name, phone number and email address as soon as you are allocated a tutorial group. Your completed and submitted assignment shall be marked by your tutor and you get your grade online. For this reason, you are to closely monitor your progress

just as your tutor is doing. Tutor shall be ready to assist you as you move through the course when any difficulty is observed. Ensure you email your tutor-marked assignment to your tutor before the deadline. It would be marked by your tutor and your marks are email and text to you.

As mentioned earlier, feel free to contact your tutor by email, phone or through your discussion group whenever you need help. You may need to contact your tutor under certain circumstances, for instance:

- if you do not understand any part of the study units or the assigned readings
- if you have problem answering the self-assessment questions
- if you have question or clarification on your assignment, your tutor's comments on the assignment and TMAs or with your grading.

You shall be doing yourself good by attending tutorials because of the opportunity it provides for you to have face-to-face contact with your tutor and also to ask questions which are instantly answered. Any problem faced in your course of study could be raised, you as well as others could benefit from participating in active discussions and in asking questions you prepared before attending the tutorials.

## **SUMMARY**

This Course Guide provides you with an overview of what you should expect in the course of study. ISL 439: *Al-Hudud: Penal Law of Sharī'ah* gets you acquainted with the meaning of *Al-Hudud*; the nature, structure and contribution of various Penal Laws of *Sharī'ah* to the eradication of crimes in the society were equally exposed. The course further appraises the implementation of the Penal Law of *Sharī'ah* as it affects morality and the eradication of crimes in modern society.


**MAIN  
COURSE**

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## MODULE 1      UNDERSTANDING THE PENAL LAW OF *SHARĪ'AH*

The general aim of this module is to introduce you to the basic concepts of the penal law of *Sharī'ah*, its objectives, goals, categories and effects or achievements in the eradication of crimes in modern society. Key elements include the definitions of the term, *Al-hudud*, *al-'uqubat* and *al-jinayyat* which are some of the basic concepts under the penal law of *Sharī'ah*.

In addition, you will be introduced to the broad overview of the penal law of *Sharī'ah* as a follow up to the definitions aforementioned. This module aims at providing a theoretical background for the comprehensive understanding of the penal law of *Sharī'ah*.

This module which introduces the concept of the penal law of *Sharī'ah* is made up of four units; in the first unit, you will have the opportunity of acquainting yourself with definitions of *Al-hudud*, *al-'uqubat* and *al-jinayyat* in respect of Islamic penal law of *Sharī'ah*. The second unit reviews the nature, objectives and goals of punishments in Islamic penal law of *Sharī'ah*. In the third unit, an insight into the nature of crimes in the society is given while the last unit gives a general overview of the role of law enforcement agencies in the controlling of crimes in the society.

Successive units in this module are linked with one another. At the end of this module, you would have understood the meaning of *Al-hudud*, *al-'uqubat* and *al-jinayyat*, identify various types of *Al-hudud*, *al-'uqubat* and *al-jinayyat* and the need for the use of the penal law of *Sharī'ah* in contemporary modern society.

Unit 1	Concept of Penal Law of <i>Sharī'ah</i>
Unit 2	Nature of Penal Law of <i>Sharī'ah</i>
Unit 3	Overview of Crimes in the Society
Unit 4	The Roles of Security Agencies in Crime Control

## UNIT 1 CONCEPT OF *AL-HUDUD* (PENAL LAW OF SHARI'AH)

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- 1.0 Introduction
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- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

The main thrust of this unit is to introduce you to 'penal law of *Sharī'ah*' as a concept and expound its significance, highlight its importance, identify the categories of *Al-hudud* as well as its other synonym such as *al-'uqubat* and *al-jinayyat*. This unit is fundamental to the understanding of subsequent units and modules.

This is simply because other units and modules will be discussed on the basis of the fundamental concepts explained here; hence, these concepts require your maximum attention and concentration.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the concept of *Al-hudud*, *al-'uqubat* and *al-jinayyat* as scholarly established and in your own words
- state the importance of the penal law of *Sharī'ah*
- identify the main characteristics of penal law of *Sharī'ah*
- enumerate the Penal codes of *Sharī'ah*.

### 3.0 MAIN CONTENT

#### 3.1 What is Penal Law of the *Sharī'ah*?

Generally, our focus in this course is to explain the penal law of the *Sharī'ah* in the light of the prevailing ineffectiveness of crime controlling measures in the society. To start with, it is important for us

to examine what ‘penal law of the *Sharī‘ah*’ is all about. This will provide a convenient platform for us to have a full grasp of the entire course content.

Let us begin our understanding of the concept of penal law of the *Sharī‘ah* by first defining the term *al-hudud*.

*Al-Hudud*, the plural of *al-hadd* literally means boundary, border, limit, confinement etc. (Maktab al-Dirasah wal-Buhuth, 2008:268). It is also used to describe punishments because it prevents the offender from committing the crime for which the *hadd* punishment has been given (Sabiq, 1987:317). The term is further used in the Qur’an to denote the boundaries of the lawful and unlawful for human beings in respect of Islamic regulations on religious duties such as fasting, sharing of the property of the deceased Muslim, foods, drinks, dressing, sexual relations and business transactions, etc.

For instance, in respect of regulations on fasting, Allah says “These are the bounds set by Allah; so do not even go near them” (Qur’an 2: 187 translated by Maududi, N. D.: 139). Again, in respect of regulations on divorce, Allah says “These are the limits imposed by Allah; therefore do not violate them, for those who violate the limits of Allah are the transgressors” (Qur’an 2: 229 translated by Maududi, N. D.: 165). Similarly, while discussing Islamic regulations on inheritance, Allah states as follows:

“These are the limits prescribed by Allah: whoso obeys Allah and His Messenger, He will admit him into the Gardens underneath which canals flow where he will abide forever; this is the great success (Qur’an 4: 13 translated by Maududi, N. D.: 308).

However, according to the *Sharī‘ah*, *al-hadd* means a punishment that is stipulated for violating the rights of Allah. Hence, punishments for offences that do not constitute the violation of the rights of Allah or are not stipulated by the Qur’an and Sunnah are outside the *Hudud* (Sabiq, 1987:317). *Hudud* therefore refers only to fixed and prescribed punishments and penalties regarding crimes set by Allah, which nobody can alter or change either by making them lighter or heavier.

It also refers to divinely fixed and prescribed punishments for crimes that cannot be waived or pardoned by anybody whether the head of state, governor or even the victim(s) of the crimes that carry these fixed punishments 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 categorised as the rights of Allah or

*huquq 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 prayer and obligatory fasting in the month of Ramadan but because of the violations of the rights of people (Doi, 1984: 221).

In essence, though the term *al-hudud* generally refers to all prescriptions of Allah that set limits and boundaries of the lawful and unlawful for His creatures whether in respect of foods, drinks, dressing, sexual relations and business transactions etc. but in Islamic penal law, it covers only such fixed punishments and penalties prescribed for crimes which are specifically spelt out in the Qur'an and or Sunnah of the Prophet, Muhammad (SAW).

*Al-hudud* also does not technically extend to sins that entail neglect of religious duties and obligations between human beings and their Lord, Allah. For example, the punishments for the neglect of religious obligations such as fasting and prayers are not covered by *al-hudud*. It is limited to only crimes that affect the wellbeing and welfare of members of the society.

Similarly, *al-hudud* also does not cover torts and discretionary punishments that are prescribed by the *Qadi* or Judge in the *Sharī'ah* courts (El Awa, 1985: 1). However, other crimes such as torts are treated separately under the penal law of the *Sharī'ah*.

In short, while the penal law of the *Sharī'ah* recognises both crimes and torts as punishable offences but *al-hudud* refers to only divinely fixed and prescribed punishments and penalties, which nobody can waive, pardon, alter or change either by making them lighter or heavier.

Other synonyms of *al-hudud* are *al-'uqubat* and *al-jinayyat*. In a more technical sense, the term *Al-'uqubat* though used synonymously with *al-Hudud* is the appropriate term for the penal law of the *Sharī'ah* as it embraces *al-hudud* and other punishments for torts and discretionary punishments that are prescribed by the *Qadi*.

Cowan; the editor of Hans Wehr Dictionary (1960:627) gives the meaning of *al-'uqubat* the plural of *'uqubah* as punishments, penalties, punitive measures, sanctions and penal code. The term, *al-'uqubat* is used in the Qur'an to denote punishments that only come or follow crimes or transgression of the limits set by Allah. In the Qur'an (16: 126), a verbal derivative of *Al-'uqubat* as follows:



“And if you punish, let your punishment be proportionate to the wrong that has been done to you: but if you show patience, that is indeed the best (course) for those who are patient” (Ali, 1405: 770).

In the above verse, it is clear that the term *al-'uqubat* connotes punishments that can be waived, pardoned, altered, changed or made lighter. This is because the person that is wronged or the victim of an offence is encouraged to forgive and pardon the offender (Q16: 126). Here punishment is regarded as something bad that should not be invoked except as last resort.

In fact, this point is made clear in the Qur'an (42: 40) where the term *Sayyi'ah* or evil is used for both a crime and its punishment. Therefore the implementation of *Al-'uqubat* though justified under the penal law of the *Sharī'ah* may be suspended and waived.

Another technical term for punishments under the penal law of the *Sharī'ah* is *al-jinayyat*. The term, *al-jinayyat* which is the plural of *jinayah* according to Sabiq above is derived from the trilateral verb, *jana* and it literally means to seize or take something. It is used in the penal law of the *Sharī'ah* to mean any crime or act that is forbidden by the *Sharī'ah* because it is harmful to religion, life, intellect, dignity or wealth (Sabiq, 1987:455).

The term, *al-jinayyat* is generally used for both crimes that fall strictly under the *al-hudud* above as well as crimes that fall under *al-Qisas* or the law of retaliation which is punishment for deliberate homicide, hurts and torts. It is however usually used technically for only the crimes of *al-Qisas*.

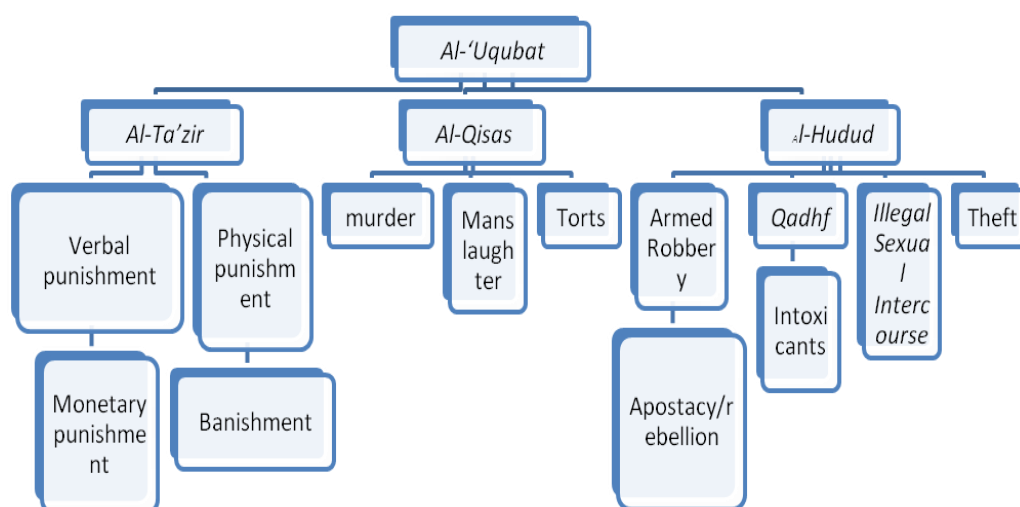
Accordingly, under the penal law of the *Sharī'ah* there are basically three classifications of punishments and penalties for all crimes. Firstly, is the above punishments called *al-hudud* which are generally five based on the Qur'an and Sunnah as would be explained in modules two and three respectively but recognised as six by most Muslim scholars based on consensus, namely the punishments for *al-hirabah* or armed robbery, *qadhf* or false accusation of illegal sexual intercourse, *Zina* or illegal sexual Intercourse, *al-sarqah* or theft, *shrub al-Khamr* or drinking intoxicants and *al-baghy* or *al-riddah*, rebellion or apostasy even though Sabiq (1987:318) lists the last two separately.

Apart from this classification of *al-hudud* punishments, there is also the *al-jinayyat al-Qisas* mentioned above or retaliatory punishments for deliberate homicide, hurts and torts. Lastly, we have *Al-Ta'zir* (Judicial discretionary punishment) which refers to all discretionary punishments

that are determined by judges in form of verbal reprimand, beating, fines and exile, etc.

These last two classifications as well as *al-Hudud*, put together constitute technically *al-'uqubat* (Peters, 2003: 1, Sabiq, 1987: 317-318 and El Awa, 1985: 1-2).

However, it is clear as would be explained later that the punishment for rebellion/ apostasy is actually a part of or embedded in the punishment for armed robbery, while the punishment for drinking is derived by majority of the scholars analogous to the punishment of *Qadhf*, hence, the illustration of the classification of the penal law of the *Sharī'ah* (Fig. 1.1).



**Fig. 1.1: Classification of Penal Law of the *Sharī'ah***

## SELF-ASSESSMENT EXERCISE 1

In line with the preceding definitions, define the terms *al-hudud*, *al-'uqubat* and *al-jinayyat*.

### 3.2 What are the Differences between *al-hudud*, *al-'uqubat* and *al-jinayyat*?

The differences between *al-hudud*, *al-'uqubat* and *al-jinayyat* include the following:

- i. *Al-hudud* technically refers to only divinely fixed and prescribed punishments and penalties, which nobody can waive, pardon, alter or change either by making them lighter or heavier while *al-'uqubat* and *al-jinayyat* include punishments and penalties that can be waived, pardoned, altered or made lighter.

- ii. *Al-hudud* technically is limited to crimes while *al-'uqubat* and *al-jinayyat* do cover both hurts and torts.
- iii. Though scholars generally differ on the number of punishments that constitute *al-hudud*, it technically can be said to consist of five punishments based on the Qur'an and Sunnah namely the punishments for armed robbery, *Qadhf*, illegal sexual Intercourse and theft while *al-'uqubat* and *al-jinayyat* covers the *al-hudud* and other punishments such as *al-Qisas* or the punishments for homicides and injuries as well as *Al-Ta'zir* which refers to all discretionary punishments that are determined by judges.
- iv. Also, *al-hudud* does not include punishments and penalties for violations of religious obligations while *al-'uqubat* and *al-jinayyat* may include punishments and penalties for violations of religious obligations, especially in form of *al-Ta'zir* or discretionary punishments that are determined by judges.

## SELF-ASSESSMENT EXERCISE 2

In what ways is *al-hudud* different from *al-'uqubat* and *al-jinayyat*?

## 4.0 CONCLUSION

From our discussion so far on the concept of penal law of the *Sharī'ah*, we can infer the following facts:

- Penal law of the *Sharī'ah* refers to the Islamic law of punishments and penalties for both crimes and torts.
- The terms, *al-hudud*, *al-'uqubat* and *al-jinayyat* may be used interchangeably generally for the penal law of the *Sharī'ah*.
- The term, *al-hudud* is however technically different from the terms *al-'uqubat* and *al-jinayyat* in many ways.
- The terms *al-'uqubat* and *al-jinayyat* contain three broad classifications which include *al-hudud*.
- They include the other two classifications, *al-Qisas* as well as *al-Ta'zir*.

## 5.0 SUMMARY

In this unit, we have explained the penal law of the *Sharī'ah* by giving different definitions of *al-hudud*, *al-'uqubat* and *al-jinayyat* from classical Arabic usages and various scholars of repute. Also, from the point of view of harmonisation, you have learnt that the terms, *al-hudud*, *al-'uqubat* and *al-jinayyat* can be used interchangeably for the penal law of the *Sharī'ah* even though *al-'uqubat* and *al-jinayyat* are generally inclusive of *al-hudud* and two other broad classifications, *Al-Qisas* as well as *Al-Ta'zir*.

It has also been identified that the penal law of the *Sharī'ah* consists of penalties in respect of armed robbery, unlawful sexual intercourse, drinking intoxicants, theft, false, homicides, manslaughter, injuries, etc. Your understanding of this unit has given you a basis for the understanding of the next unit and in fact subsequent modules. You should by now be anxious of reading more about the nature of the penal law of the *Sharī'ah* and its implementation which will be duly discussed in the next unit.

## 6.0 TUTOR-MARKED ASSIGNMENT

Submit a one page essay (A4, 1.5 spacing, 12pts, Times New Roman Font) on the meaning of, and significance of the penal law of the *Sharī'ah*.

## 7.0 REFERENCES/FURTHER READING

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## UNIT 2 NATURE OF THE PENAL LAW OF SHARĪ'AH

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Objectives of Penal Law of *Sharī'ah*
  - 3.2 Conditions of implementing Penal Law of *Sharī'ah*
  - 3.3 Waiving the Penal Law of *Sharī'ah*
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

You will recall that we explained in unit 1 the meanings of the penal law of *Sharī'ah* and its various classifications. This unit is the second unit in this module. Here, we shall begin our discussion with an exposition of the nature of the penal law of *Sharī'ah* by giving a further insight into the objectives the penal law of *Sharī'ah*. We will also attempt to explain the conditions for implementing the penal law of *Sharī'ah*. The level of dissimilarities in the implementation of the penal law of *Sharī'ah* and Common Law penal codes will be explained to you and this should not surprise you; it only reiterates the fact that the two penal systems are moulded from different ideologies. Lastly, in this unit, issues of evidence in the implementation of the penal law of *Sharī'ah* will be will be extensively discussed.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- describe the philosophy of the penal law of *Sharī'ah*
- highlight the features of the operations of the penal law of *Sharī'ah*
- explain the methods of evidence in the penal law of *Sharī'ah*
- enumerate differences between the penal laws of *Sharī'ah* and Common Law.

### 3.0 MAIN CONTENT

#### 3.1 Objectives of Penal Law of *Sharī'ah*

In Islamic law, there are different objectives; the punishments for crimes, whether those of *al-hudud*, *al-'uqubat* or *al-jinayyat* seek to achieve. According to many Muslim scholars such as Sabiq above, one of the objectives of the Islamic penal laws is mainly to deter culprits and offenders from repeating the crimes for which punishments are prescribed.

To him, the punishments for crimes of *al-hudud* in particular seek to a very large extent to achieve this object of deterrence (Sabiq, 1987: 317). In addition, as would be shown to you now, this retributive and deterrent objective or function of punishments in the penal law of the *Sharī'ah* are closely tied to the ultimate reformative and expiatory functions.

Based on the Qur'an (42: 40), where the term *Sayyi'ah* or evil is used for both a crime and its punishment as stated in the first unit there is no doubt that retribution and deterrence are two objectives of punishments under the penal law of *Sharī'ah*. This is clear from the use of *jaza* or the Arabic word for retribution in describing punishment or *Sayyi'ah* for a crime, also *Sayyi'ah*.

The severity of the fixed punishments for crimes and the prohibition of any human mediation or prerogative of mercy in respect to the divinely fixed punishments of the penal law of *Sharī'ah* are also clear proofs that support the retributive and deterrent functions of punishments in Islam. According to Muslim scholars such as Muhammad Qutb, the severity of these punishments is to ensure the realisation of both the retributive and deterrent objectives of the penal law of *Sharī'ah*. In short, these punishments seek to break the criminal inclination of an offender to commit crimes. This is why Mawardi goes to the extent of defining *Hudud* as “deterrent punishments which God established to prevent man from committing what He forbade and from neglecting what He commanded” (El Awa, 1985).

The efficacy of the penal law of *Sharī'ah* in preventing humans from committing what Allah has forbidden and from neglecting what He commanded and consequently combating crimes in the society is confirmed by the enormous decrease in the crime rate in many Muslim countries, especially Malaysia, Saudi Arabia and other Gulf states. It is also interesting as noted by El Awa that the implementation of punishments similar to the fixed punishments in Islam for theft was able to halt all kinds of thefts in the Irish province of Belfast. Perhaps a similar experiment made an American philosopher to state that

pickpockets might be deterred if their hands were burnt or cut by the purse they reach for, the same way touching a hot stove and getting painfully burned automatically deter one from touching the stove again (El Awa, 1985).

Specifically speaking, the Islamic commandment to carry out the fixed punishments in public (Q24: 2) is a strong mechanism to achieve the fullest deterrent effect. Another strong mechanism for this is the divinely disinheritance of an heir where she/he is found guilty of the murder of the deceased. The same punishment is applied by way of analogy to other legacies of the victim of murder by the *Hanafi*, *Hanbali* and *Zaydi* Schools of Islamic law as well as a section of the *Shafi'i* School (Peters, 2003: 2).

Despite the above efficacy of the retributive and deterrent functions of the penal law of *Sharī'ah*, the reformative and expiatory functions have a central place in the Islamic scheme of punishments. The reformative value of the fixed punishments in Islam was emphasised by Ibn al-Qayyim when he explained that since an individual already punished for a crime in this world will not be punished again by Allah in the Hereafter, it implies that the fixed punishments are also a mechanism for reformation of the offenders (El Awa, 1985). In support of this, the Prophet declared as follows:

“You pledge to me not to associate anything with Allah, not to commit illegal sexual intercourse, not to steal, and not to kill a soul that is sacred except by just cause. Whoever fulfills the pledge among you will have her/his reward with Allah, whoever commits any of the crimes and is punished for it (*‘uqiba bihi*); this will be her/his expiation. And whoever commits any of the crimes and Allah shelters her/him over it (from punishment), it is left to Allah to forgive or punish the crime” (Sabiq, 1987: 326).

This shows that the fixed punishments in Islam also possess expiatory and reformative functions in the sense that the punishments can purge any offender of sins as long as such offenders show sincere remorse and repentance after the punishments meted out to them. In line with the Islamic concept of repentance known as *tawbah*, the real goal of punishments in Islam is therefore to make offenders not to wait to be caught and punished but to repent on their own volition and begin a process of reformation before they are apprehended.

*Al-tawbah* literally means “turning to” and refers to the divine mercy of Allah to forgive those offenders who truly repent. The offenders truly repent when turn away from their sins or crimes and to Allah for

forgiveness. Then, Allah also turns to them in mercy and forgiveness (Q39: 53).

*Al-tawbah*, therefore, implies that an offender is not completely condemned because of his or her crime. Once she/he turns away from his/her crimes or transgression of the limits set by Allah and turns over a new leaf by turning to Allah in obedience, she/he is forgiven.

Thus, the concept of *al-tawbah* in Islam maybe viewed from reformatory perspective. This is because all punishments prescribed by Allah are for the violations of the rights of human beings, as you learnt in unit one. They are mainly to protect the lives and rights of the society. To achieve this public good, wellbeing or interest, the penal law of *Sharī'ah* encourages the repentance and reformation of offenders and not their mere punishments.

This argument can be understood further when it is borne in mind that the Prophet specifically admonished against the report of an offender of a crime that carries a fixed punishment to the authority. Instead he directed that the offenders should be encouraged to repent and desist from their actions.

Similarly, the Prophet (SAW) in practical demonstration of this reformatory objective of the Islamic punitive system, encouraged all those who confessed to the crimes of unlawful sexual intercourse, to withdraw their confessions and turn to Allah in repentance. For example, the Prophet once said in respect of a person punished for unlawful sexual intercourse as follows:

“Had you covered him with your cloth, it would have been better for you.” He also said “Pardon the ordained crimes that occur among you. What reaches me about an ordained crime becomes enforceable” (Fazlul Karim, 1939: 543).

### **SELF-ASSESSMENT EXERCISE 1**

In what way is the penal law of *Sharī'ah* reformatory and expiatory?

### **3.2 Conditions of Implementing Penal Law of *Sharī'ah***

The conditions governing the declaration of an accused person as guilty of the offences of the penal law of *Sharī'ah* indicate that the conviction of someone is very difficult if the application of Islamic law in contemporary society strictly abides by these conditions. The stipulation of the evidence of at least two witnesses for most crimes and four matured male witnesses of high moral probity and good reputation



before a person can be convicted for the offences of unlawful sexual relations and false allegation of illegal sexual intercourse 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 witnesses have not been able to prove the offences 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 (El Awa, 1985).

Unfortunately, those accused on the basis of such circumstantial evidence 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: 4-5).

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 (Doi, 1984: 224-225).

The Islamic punishment for *al-sariqah* or theft can also not be carried out unless the certain conditions are fulfilled. These include the condition that the stolen property is worth the minimum value of one quate of gold or 3 pieces of silver. It is only the *Hanafi* and *Zaydi* Schools 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).

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 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 addition, 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. Before a person can be guilty of the crime of *al-sariqah*, the property stolen must have been kept in its usual safe place. Again, 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: 254-261).

According to majority of the scholars, the punishment for *shrub al-khamr* or drinking intoxicants will not be given based on the smelling of the mouth of the accused even if it is reeking with alcohol (Doi, 1984: 265).

Similarly, according to the majority of Muslim scholars, in order to consider such allegation as *al-qadhf* or false accusation of illegal sexual intercourse 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 others 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* according to Qur'an chapter 24 was executed by the Prophet (SAW) 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 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's paternity has been denied (Doi, 1984: 246-247 and El Awa, 1985: 20-22).

## SELF-ASSESSMENT EXERCISE 2

In what way is the contemporary implementation of the penal law of *Sharī'ah* a departure from the practice of the Prophet (SAW)?

### 3.3 Waiving the Penal Law of *Sharī'ah*

As stated above, in implementing the there is a stipulation of evidence beyond any reasonable doubt before an accused can be convicted or found guilty. The Prophet specifically commanded that the divinely fixed punishments must be waived whenever there is any element of doubt. This can be seen in the following traditions of the Prophet:

“Set aside the fixed punishments whenever you find it possible to set aside” and “Waive the fixed punishments from Muslims as much as possible. Certainly, it is better for the Imam to make mistake in pardoning than to make mistake in punishment (Sabiq, 1987: 322).

In establishing evidence against a culprit, as stated in unit two above, the Islamic Law requires the testimony of two matured (four in the case allegation of unlawful sexual relations) witnesses of high moral probity and good reputation before a person can be convicted for any of the offences. These witnesses are also allowed to withdraw their testimony anytime they have second thoughts before the execution of the punishments. Their evidence must prove that they are on the spot eyewitnesses of the alleged crimes rather than relying on mere circumstantial evidence. In cases where evidence is based on circumstantial evidence, the accused is allowed to provide some probable defences.

For instance, Wā'il ibn Hujr reported that a woman, on her way to pray, was forced to commit adultery (she was raped) at the time of the Prophet. Despite her cries, the man escaped. Later, when some people came by, she identified and accused the man of raping her. They seized

him and brought him to the Messenger of Allah (SAW), who told the woman to go because Allah has forgiven you. He then ordered that the rapist be stoned him to death (Fazlul Karim, 1939: 544-545).

This shows clearly that a woman should be accused of adultery or fornication merely on the basis of pregnancy outside marriage claim as the pregnancy could be the result of sexual intercourse that took place during her rape or her sleep and without her knowledge, the consequence of sperm that accidentally enters her vagina without penetration or fathered by a former husband where she has been married for as long as seven years before because the *Maliki* school recognises the possibility of “the sleeping foetus” for as long as that (Peters, 2003: 4-5).

The above is supported by the report that when a pregnant woman was brought before Ali, the fourth caliph and accused of illegal sexual intercourse. The Caliph asked her “were you raped? She said no and he asked again “perhaps a man has sex with you while you were asleep? (Sabiq, 1987: 376-377).

Similarly, in the case of a conviction based on confession by the accused, the confession may also be withdrawn anytime the accused has second thoughts before the execution of the punishments according to most Muslim scholars. They base their view on the tradition reported by Abu Dawud and Al-Nasai that when a companion of the Prophet, Maiz was sentenced to death for committing adultery, he begged for leniency and requested the people to take him back to the prophet when he was hit by the stone. However, the people refused and stoned him till he died. When the Prophet heard, he asked “why did you not leave him and bring him to me” (Sabiq, 1987: 372).

### **SELF-ASSESSMENT EXERCISE 3**

How is evidence to be established or waived in fixed punishments?

## **4.0 CONCLUSION**

From our discussion so far we have examined the basic features of the implementation of the penal law of *Shari'ah* and how the conditions for the implementation of penal law of *Shari'ah* are not always fulfilled in contemporary society.

Though it is extremely difficult to get the required two or four witnesses before a person can be convicted of the fixed punishments, people are usually found guilty merely on circumstantial grounds. The use of pregnancy as evidence to punish women for both fornication and adultery is a case in point. However, under the penal law of the

*Sharī'ah*, it is possible for a woman to be pregnant without having committed illegal sexual intercourse.

Lastly, a person who confesses to any of the fixed punishments is also not only allowed but in fact also encouraged under the penal law of the *Sharī'ah* to retract her/his confession before the punishment is carried. This is the practice of the Prophet, Ali and Umar, the second and fourth Caliphs respectively (Sabiq, 1987: 376-372, 377).

## 5.0 SUMMARY

This unit has exposed you to the nature of the penal law of the *Sharī'ah*, its objectives and conditions of its implementation. The Islamic procedures of establishing evidence have also been discussed. The concept of repentance in relation to the fixed punishments has revealed that in Islam the penal law of the *Sharī'ah* does not only seek retribution and deterrence but also and most importantly, the reformation of criminals.

With this background on the concept of the penal law of the *Sharī'ah* and its objectives in units 1 and 2, you have successfully prepared yourself for a thorough understanding of the fixed punishments that will be treated in the successive two modules. But before then, we will examine in the next two units, the meaning and nature of crimes, factors inducing crimes and the role of law and law enforcement agencies in controlling crimes in modern society.

## 6.0 TUTOR-MARKED ASSIGNMENT

Submit a one-page essay (A4, 1.5 spacing, 12pts, Times New Roman font) discussing any two of the features of the penal law of the *Sharī'ah* mentioned in 3.2 above.

## 7.0 REFERENCES/FURTHER READING

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## UNIT 3 OVERVIEW OF CRIMES IN THE SOCIETY

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Crimes and Law in the Society
  - 3.2 Nature and Kinds of Crimes
  - 3.3 Factors that Induce Crimes in the Society
  - 3.4 Need for Law in Controlling Crimes
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

You have familiarised yourself with the basic concepts of the penal law of the *Sharī'ah* in the two preceding units, you have equally been exposed to the nature of the penal law of the *Sharī'ah*, its objectives and conditions for its implementation as a whole.

You have read and comprehended the procedures of establishing evidence under the penal law of the *Sharī'ah*, with all these you are set for a comparative discussion on crimes in the society. You will recall that we are taking off this broad discussion with the meaning of crime.

In this first unit, a broad definition of crimes, its nature and the factors inducing it in modern society are provided through a discussion on the nature and scope of crimes in the society as well as the role of law and law enforcement agencies in combating these crimes.

This will no doubt form an integral part of a comprehensive discussion of the penal law of the *Sharī'ah* as continued in subsequent modules. Therefore, a basic knowledge of crimes in this unit will facilitate not only your understanding of the remaining units in this module but also the remaining modules.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- state the meaning and scope of crimes
- enumerate the factors that induce crimes in the society
- mention the importance of law in the society.

### **3.0 MAIN CONTENT**

#### **3.1 Crimes and Law in the Society**

Crime is defined by Hornby (2010: 347) in Oxford Advanced Learner's Dictionary of Current English as "activities that involve breaking the Law." It may be viewed as a punishable offence that is committed against an individual or the state. It is often disgraceful and or regrettable though it may be glorified secretly by criminals and artistes through books, songs, movies and music. Crime happens in many forms and has different effects. Just about everyone in a society has been exposed to some form of crime in their lifetimes, if not performing crimes themselves.

Typically, going by the above definition of crime, it is the law that designates an offence as punishable. An action may therefore be disgraceful and or regrettable but not a crime if it not punishable under the law of the land. In Nigeria for instance, actions such as kidnapping, arson, treason, stealing, armed robbery, child and human trafficking constitute punishable offences and hence crimes under the law. However, atheism, apostasy, engaging in different un-Islamic businesses such as brewery and taking of interest, etc. are not punishable crimes and therefore do not constitute crimes.

Hence, all forms of crimes are designated and therefore made unlawful by the laws operative and enforceable in a society. Crimes generally have untold effects on the society. It is usually because of their untoward effects that crimes are constituted by the law. Organised crime in particular has tremendous adverse and dangerous effects on society and the people within it as a whole.

The law therefore plays a major role not only in the constitution of crimes but also in the prevention and control of crimes and criminal minded persons in the society. This informs the popular mantra "where there is no law, there is no offence."

#### **3.2 Nature and Kinds of Crimes**

Crimes come in different forms and are of different kinds. These different crimes have been committed to serve different purposes and functions. In the early 1990s, the different militant groups in the Niger Delta began a series of kidnappings, killings and robberies to fight for resource control. These different crimes fall under organised crime even though they were committed in the guise for fighting for the rights of the people of the Niger Delta.



Another organised crime group, the *Boko Haram* since 2009 has also been waging criminal warfare, also including kidnappings, killings, armed robberies and arsons such as burning of mosques, churches, motor parks and police stations to demand for justice and control and of police brutality and military mob operations.

Some crimes, however, are not as dangerous or destructive, such as violations of traffic regulations, prostitution or non-medical uses of “soft drugs” such as hemp or marijuana, cocaine and heroin. Crimes, contrary to the belief and claim of some people, are not committed solely by any single race of people or class of people. Crimes have been and are still been committed by people of all origins and backgrounds.

Similarly, the untoward and adverse effects of these crimes, contrary to the claims of some people, are felt by all in society, not just those in direct contact with the crime. A good example is the ongoing *Boko Haram* insurgency which has been directed at various law enforcement agencies and officials of governments, Muslims and Christians as well as mosques, churches, motor parks and even the UN headquartes in Nigeria.

In the end, all those who are involved in active society end up experiencing some effect of crime. Besides the obvious devastating effect and consequence of crimes that is experienced by all citizens of Nigeria that live or work in communities where the above crimes are committed such as the Niger Delta and Northern Nigeria, other Nigerians also feel these crimes indirectly.

For example, these crimes are experienced indirectly by all Nigerians who have lost one or more members of their families in these violent prone areas. The economic implication of crimes is also felt in the pockets of the working class who constitute the bulk of tax payers. Building and renovation of police stations, prisons and jails, establishment of joint military operations’ bases, feeding and different training programs for criminals and security votes for Nigerian politicians all come directly and indirectly out of the pocket of taxpayers in Nigeria.

Some neighbourhoods even involve themselves in private policing programs such as neighborhood watches and vigilantes to prevent crimes. In Nigeria, as a result of the prevalence of the above organised crimes, governments at various levels claim huge security votes while the citizens notice direct effects in terms of depreciated education, jobs, housing, transportation, electricity supply and other available basic infrastructure and amenities in the country.

## **SELF-ASSESSMENT EXERCISE 1**

What are the examples of crimes in Nigeria?

### **3.3 Factors that Induce Crimes in the Society**

As stated before, all forms of crimes are designated and kept under control by processes of the law and law enforcement. Sometimes, it is difficult to control crimes, especially organised crimes carried out through syndicate operations and networks. Nevertheless, attempts are being made through numerous researches by think tank bodies all over the world to find solutions to criminal activities by uncovering the root and remote causes of crimes.

Today, different theories have been propounded on the causes of crimes in the society. These theories, ranging from the sociological to the biological have attempted to trace the biological, sociological, criminological and religious explanations, among others about the causes of crimes. In addition, a body of scientific literature suggests that a major factor that induces crime can be identified in poverty.

An extensive body of research suggests that social conditions such as poverty, tribalism and socioeconomic inequality can precipitate violent behaviour and crimes. A study by an education expert, Babatunde (2006) for example, suggests that the correlation between poverty and crimes is very strong. Such studies like Babatunde have revealed that violent criminals may not be born that way; some of them who have been exposed to various economic hardships are more prone to criminal activities than those who have not.

For instance, poverty in Nigeria is reported to have led to many criminalities such that the rich can no longer sleep peacefully at night and have to heavily barricade their homes because of fear of armed robbers (Babatunde 2006). Besides armed robbery, other criminalities that poverty is reportedly breeding include advanced free fraud, child labour, prostitution and women trafficking (Molagun, 2006).

In summary, the role of different biological and sociological factors in the breeding of different crimes cannot be over emphasised. The biological state of a person may predicate her/his tendency to commit crime. It is also essential to understand the social conditions of a person in order to understand certain criminal inclinations or tendencies of the person. The prevalence of poverty among the teeming populace of the Nigerian nation may be a socio-economic explanation for the increase in poverty.

## **SELF-ASSESSMENT EXERCISE 2**

Which of the causes of crimes do you consider most important and why?

### **3.4 Need for Implementation of Law in Controlling Crimes**

Society is in need of appropriate laws to control crimes. Laws are necessary in the prevention and control of crimes because as stated before “where there is no law, there is no offence.” As a matter of fact, according to many political theorists, one of the basic functions of the state in modern society is the maintenance of order and security (Raphael, 1981: 46).

To realise the above function of the modern state, states must enact appropriate laws that guide the actions and activities of all members of their states. But laws are not enough if they are not enforced or implemented. Unless, there is a legal system for apprehending and prosecuting offenders, criminal minded persons may not be deterred from committing crimes.

This means that there is need for different law enforcement or security agencies to provide compulsory and rigorous enlightenment and education of the citizenry on the laws of the land, to boost and equip security agencies by empowering them to apprehend and arrest criminals, to keep them strong to fight violent and organised criminals. This shows that people are more likely to commit crimes when there are no appropriate laws, agents of implementation of such laws and prosecution of law breakers.

## **SELF-ASSESSMENT EXERCISE 3**

In what way are law, its implementation and prosecution of criminals significant to the control of crimes?

## **4.0 CONCLUSION**

We learnt in this unit that, crimes come in many forms, with different purposes and caused by different factors. Furthermore, we noted that Nigeria possesses a high rate of poverty which makes a sizable population of the people predisposed to criminal activities. Law was identified as a source of determining what constitutes a crime in addition to preventing crimes, and controlling their effects among other significance. To do these various law enforcements agencies are necessary. These law enforcement agencies consist of the police, armed forces, civil defence, traffic regulators, etc.

## 5.0 SUMMARY

In this unit, we have been introduced to the meaning, nature and features of crimes in the Nigerian society. A brief mention was also made on the potential of law as well as law enforcement agencies in preventing and controlling crimes. Some of these issues will be discussed in a broader perspective in the remaining unit of this module. In this case, a comprehensive understanding of all the units in this module will bring about a holistic view of the criminal activities in the Nigerian society.

## 6.0 TUTOR-MARKED ASSIGNMENT

Discuss in details the seriousness of crimes in the Nigerian society.

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## **UNIT 4 THE ROLE OF LAW ENFORCEMENT AGENCIES IN CRIME CONTROL**

### **CONTENTS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Security Agencies in Nigeria
  - 3.2 The Effectiveness of Nigerian Security Agencies
  - 3.3 Role of Social Welfare in Controlling Crimes in Nigeria
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### **1.0 INTRODUCTION**

The basic concepts of crime and law were explained in the preceding unit, just as you have equally been exposed to the nature of crimes in the society, factors that induce crimes and the need for law and its implementation as a whole.

Similarly, you have been introduced to the need for law enforcement agencies to implement laws, apprehend as well as prosecute offenders, with all these you are better informed and prepared for this discussion on law enforcement.

We will take off this broad discussion with the enumeration of some the law enforcement agencies in Nigeria. In this unit, we will also examine the effectiveness of these agencies in combating crimes, the factors militating against this effectiveness as well as a discussion of the role of social welfare in combating crimes.

This will no doubt form an integral part of a comprehensive discussion of the penal laws of the *Sharī'ah* as to be engaged in subsequent modules. Therefore, a basic knowledge of this unit will facilitate not only your understanding of the remaining modules.

## 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- enumerate the security agencies in Nigeria
- explain the factors militating against effectiveness of security agencies
- mention the role of social welfare in combating crimes.

## 3.0 MAIN CONTENT

### 3.1 National Security Agencies in Nigeria

According to Ishaq Oloyede (2006:231), the existence of security and intelligence agencies in Nigeria has not guaranteed internal security in Nigeria. He listed security and intelligence agencies as follows:

- i. The trinity of the Armed Forces - Army, Air Force and Navy
- ii. The Nigeria Police Force
- iii. State Security Service
- iv. National Intelligence Agency
- v. Defence Intelligence Agency
- vi. Nigerian Immigration Service
- vii. Nigerian Prisons Service
- viii. National Drug Law and Enforcement Agency
- ix. National Agency for Food and Drug Administration and Control
- x. Federal Fire Service
- xi. Federal Road Safety Commission; and
- xii. Nigerian Security and Civil Defence Corps (Oloyede, 2006: 230-231).

Typically, going by the above agencies, one would expect a better and “reasonable level of internal security in Nigeria” (Oloyede, 2006: 231). Why this is not so will be the focus of the next unit.

### SELF-ASSESSMENT EXERCISE 1

Give examples of some of the security and intelligence agencies in Nigeria.

### 3.2 The Effectiveness of Nigerian Security Agencies

Crimes of different forms and kinds are on the increase in Nigeria despite the preponderance of national security agencies. Right from independence, different crimes, political, civil and organised have been committed increasingly in all parts of the country.

Today, while the country continues to confront series of criminal activities by the *Boko Haram* such as kidnappings of foreigners, killings, and burning of mosques, churches, motor parks and police stations in Northern Nigeria, militant groups in the Niger Delta are also committing criminal activities such as kidnappings of oil workers, destruction of oil pipelines and installations.

Similarly, other parts of the country are also unsafe. In the South East, various militant groups are also committing organised crimes like kidnapping of people, especially the elites and politicians for ransom while in the South West; it is armed robberies, especially of banks that are rampant.

In the face of all these criminalities, the various national security agencies, especially the police and military appear to be helpless. All their joint operations are to a very large extent ineffective in nipping these criminal activities in the bud. The little achievement that has been made in curtailing the criminal activities in the Niger Delta for instance was through a political programme of amnesty to the militants granted by the late President Musa Yaradua and not as a result of the effectiveness of military operations.

Some analysts are therefore of the view that the Nigerian securities agencies are largely ineffective in combating crimes. Various reason have been adduced for this in effectiveness which range from poor funding of the security agencies, poor morale among the ranks and file of the various agencies, inter agencies rivalry and political interference in their operations.

One major factor that accounts for the ineffectiveness of the Nigerian security agencies according to Oloyede (2006:229) would appear to be the misplaced emphasis on “regime-security” or the security of those in government. The manner that the efficiency of the police to police the people is undermined through the attachment of police officers to guard government officials, politicians, important dignitaries and rich personalities in the society is a case in point. In a country where the police force is understaffed, it is poor security to dissipate the force of this poorly staffed and poorly paid police.

Similarly, the untoward and adverse effects of the economic conditions of the teeming Nigerian populace appear to be making the task of security agencies in combating crimes herculean. A good example in support of this view is the ongoing insurgency in the Niger Delta. Though, the militant groups claim to be fighting for the rights of the people in the area to resource control and development, when they committing criminal activities such as kidnappings of oil workers and



paid huge sums of money as ransom, this money do not get to the poor people of the Niger Delta.

In the end, the young men and women in these militant groups have taken to crimes because of joblessness, lack of educational and technical skills and hence, no potential of any form of social mobility. Besides the manner corrupt politicians enrich themselves have also made many young ones to emulate these politicians by resulting to crimes to get their own shares of the 'national cake.'

According to Onwubiko (2013:80), "corruption and the diversion of public funds is responsible for the institutional rot in the police" and the entire Nigerian armed forces and has made these institutions "professionally ill prepared, poorly trained, poorly equipped and grossly undisciplined" to police and protect Nigerians from organised crimes and criminals.

All these factors combine to make the task of national security and prevent of crimes in Nigeria ineffective. To add to this, most of the huge security votes claimed by the president and the 36 states governors in particular do not get to the security agencies as seen in the poor state of the police college in the country. This is why Onwubiko above asks, "What has happened to the huge budgetary releases to the Nigerian defence sector since 1999 when democracy returned? Why have the Nigerian Custom Service, the Nigerian Immigration and armed forces been unable to stop the incursions of armed bandits from neighbouring countries to launch vicious terrorism in parts of the North of Nigeria? He answers that corruption and outright theft of the huge public funds must have been responsible.

## **SELF-ASSESSMENT EXERCISE 2**

What are the factors responsible for the ineffectiveness of security agencies in Nigeria?

### **3.3 The Role of Social Welfare in Controlling Crimes in Nigeria**

As stated before, a major factor contributing to the increase in crimes and the ineffectiveness of the various security agencies in Nigeria is the ever-worsening economic conditions of the teeming populace. Sometimes, it is difficult to persuade the young from joining organised crimes because their future is apparently hopeless.

This is why some contemporary scholars are drawing the attention of governments and politicians to the importance of social welfare in

combating crimes in the society. Raphael above (1981) argues that national security must be perceived as all forms of protection from deliberate infringements of the rights of the people. Hence, whatever guarantees all the basic rights of the people in a modern state should form the components of national security.

According to Oloyede (2006: 230), “the provision of coercive and deterrent forces” maybe more useful in national security against external aggression as “internal requires far more than military or coercive agencies.” He therefore argues that investment in social welfare is a cheaper and more effective way of achieving national internal security than the investment in coercive agencies."

To Oloyede (2006: 234), major threats to national security in Nigeria include injustice, ignorance, and unemployment, ineffective control of arms, political opportunism, ineffective judicial system and corruption. In summary, the role of social welfare in the control of crimes cannot be over emphasised. The investments in sound educational and judicial systems are necessary social means of combating crimes. It is also essential to understand the social nexus between the economic conditions of a person and the willingness of the person to join organised crimes.

### **SELF-ASSESSMENT EXERCISE 3**

Why in your view should the provision of social welfare be considered important in the fight against crimes?

## **4.0 CONCLUSION**

We learnt in this unit that the economic condition of many Nigerians is one of the factors that contribute to the ineffectiveness of the various national security agencies. Furthermore, we noted that because of the absence of serious investment in social welfare, Nigeria possesses a high rate of many young people predisposed to criminal activities. Social welfare provisions were therefore identified as a means of effective control of crimes.

## **5.0 SUMMARY**

In this unit, you have been taught the various national security agencies in Nigeria as well as the reasons these law enforcement agencies are largely ineffective in preventing and controlling crimes. Social welfare has been identified as a veritable solution to this ineffectiveness. The Islamic social welfare provisions will be discussed in the last module of this course. In this case, a comprehensive understanding of all the

modules in this course material will bring about a holistic view of the application of social welfare in solving the criminal activities confronting the Nigerian society.

## 6.0 TUTOR-MARKED ASSIGNMENT

Discuss in details the role of security agencies in combating crimes in Nigeria.

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## MODULE 2      PENAL LAWS OF THE SHARĪ'AH

The general aim of this module is to discuss with you four basic penal laws under the *Sharī'ah*, their meanings, methods of implementation and different conditions that must be fulfilled before their implementation.

These punishments include the punishments for armed robbery, illegal sexual intercourse, theft and false accusation of illegal sex. In addition, you will be taught the broad view of the Islamic scholars and schools of jurisprudence on these punishments. This module aims at providing you the practical and comprehensive understanding of these four penal laws of the *Sharī'ah*.

This module which explains the above four penal laws is made up of four units; in the first unit, you will have the opportunity of acquainting yourself with definitions and application of the different punishments in respect of armed robbery under the Islamic Law. The second unit examines the definitions and application of the different punishments in respect of illegal sexual intercourse under the Islamic law. In the third unit, explanations of the definitions and application of the different punishments in respect of theft under the Islamic law are given while the last unit gives a comprehensive explanation of the definitions and application of the different punishments in respect of *qadhf* under the Islamic law.

Successive units in this module are linked with one another. At the end of this module, you would have understood the meaning and application of the different punishments in respect of armed robbery, illegal sexual intercourse, *qadhf* and theft under the Islamic law , identify various views of Islamic scholars and Schools of jurisprudence on these penal law of *Sharī'ah*.

Unit 1	Punishment for Armed Robbery
Unit 2	Punishment for Illegal Sexual Intercourse
Unit 3	Punishment for Theft
Unit 4	Punishment for <i>qadhf</i>

## UNIT 1 PUNISHMENT FOR ARMED ROBBERY

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Definition of Armed Robbery
  - 3.2 Punishments for Armed Robbery
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

It is assumed you have familiarised yourself with the basic concepts of *al-hudud* in module 1, you have equally been exposed to an overview of the concept of crime and crimes in the Nigerian environment. It is also believed you have read and comprehended the introductory comments of this module, with these you are set for a detailed discussion on specific punishments under the penal law of the *Sharī'ah*. You will recall that we are taking off this broad discussion with the punishment for armed robbery.

In this first unit, a background of the punishment for armed robbery is provided through a discussion on the definition and scope of the crime of armed robbery as well as its various punishments. This will be followed by a comprehensive discussion of the application of these punishments. Other units in this module will discuss other crimes and their punishments under the penal law of the *Sharī'ah*. Therefore, a basic knowledge of this concept will facilitate your understanding of the remaining units in this module.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the meaning and scope of the crime of armed robbery
- enumerate the different punishments for armed robbery
- highlight the methods of the application of these punishments.

### 3.0 MAIN CONTENT

#### 3.1 Definition of Armed Robbery

The first of the penal laws of the *Sharī'ah* to be discussed in this course is in respect of armed robbery and the term for armed robbery under the penal law of the *Sharī'ah* 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" (El Awa, 1985: 8 cited in Oloso and Uthman, 2011). The crime of *al-hirabah* 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 is however not restricted to only crimes committed on the highway or outskirts of the town or city as opined by some scholars such 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*. In reality, the above definition 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.

A crime in short remains *al-hirabah* in short regardless of whether it occurs in the dessert, city or in the wilderness where people have no access to help or prevented from getting or crying for help. This is the view of majority of Muslim scholars and the position of the *Malikis*, *Shafi'i*, *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 penal laws of the *Sharī'ah* can only be committed on the highway (Doi, 1984: 252 and El Awa, 1985: 9-10).

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 (El Awa, 1985: 7).

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 and His Prophet as well spreading mischief on earth (Q5: 33-34).

## SELF-ASSESSMENT EXERCISE 1

What are the classical terms for armed robbery under the penal law of the *Sharī'ah* and what do they mean?

### 3.3 Punishments for Armed Robbery

According to the above passage (Q5: 33-34), the punishments for *al-hirabah* under the penal law of the *Sharī'ah* 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. Furthermore, where the robber or robbers also commits other atrocities in addition to killing, then they should be crucified or inflicted with the same injuries they inflicted on their victims.

Based on this explanation of Islamic scholars in respect of the punishments for armed robbery, it is correct to argue that the application of Islamic penal law is based on the five essential and fundamental objectives: the preservation of life, religion, intellect, property and lineage.

Furthermore, if these *maqasid* are appropriated together with the legal maxims that revolve round the permissibility of accruing all benefits and warding off all harms, alleviating harms and assigning the warding off of harm, precedence over accruing benefits, then the punishment of 'apostasy' which is usually treated as a separate penal law by Muslim scholars (Peters, 2003: 1, Sabiq, 1987: 317-318 and El Awa, 1985: 1-2) will be better understood.

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 *Jihād* in Islam (Qutb, 1978: 93).



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, 256, 10:99-100 and 88:22-24).

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 apostatise after they die on the Day of Judgment (2:217). Allah also specifically warns the Prophet Muhammad (SAW) 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" (*Sahih al-Bukhāri* cited in Sabiq, 1987: 317-318), the Prophet 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-Bukhāri* 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-Bukhāri* 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 (Khan, 1986 cited in Oloso and Uthman, 2011: 125-155).

This interpretation clearly shows that what is called the punishment for apostasy by Muslim scholars is in reality the punishment for terrorism, felony, arson and treason, which are embedded in the punishments for armed robbery. The last punishment for armed robbery is banishment which shows that the gravity of the crimes committed by an offender is taking 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 (Peters, 2003: 1).

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 (El Awa, 1985: 10-13).

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: 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 deterrence to anyone who also desires life or other parts of the body.

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 (Doi, 1984: 252 and El Awa, 1985: 10-12).

## **SELF-ASSESSMENT EXERCISE 2**

Which of the punishments for armed robbery under the penal laws of the *Shari'ah* do you consider most harsh and why?

## **4.0 CONCLUSION**

We learnt in this unit that, armed robbery as defined under the penal law of the *Shari'ah* involves stealing, use of force, killing, intimidation and or terrorism. Hence, the punishments for the crime of armed robbery 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.

The exact punishment to be imposed on a culprit or culprits will be determined by the enormity and number of the crime of armed robbery committed. Furthermore, we noted that Muslim scholars and schools of jurisprudence differ on the exact methods of carrying out these punishments.

## 5.0 SUMMARY

In this unit, you have been taught the meaning, scope, and methods of the implementation of the punishments for armed robbery under the penal law of the *Sharī'ah*. A brief mention was also made that this is just the first of the penal laws of the *Sharī'ah*. Three other penal laws of the *Sharī'ah* will be discussed in the remaining units of this module. In this case, a comprehensive understanding of all the units in this module will bring about a holistic and comprehensive knowledge of the penal laws of the *Sharī'ah*.

## 6.0 TUTOR-MARKED ASSIGNMENT

Discuss in details the penal law of the *Sharī'ah* in respect of armed robbery.

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## UNIT 2 PUNISHMENTS FOR ILLEGAL SEXUAL INTERCOURSE

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Islamic Teachings on Illegal Sex
  - 3.2 Meaning and Scope of Illegal Sex
  - 3.3 Punishments for Illegal Sexual Intercourse
  - 3.4 The Controversy over Stoning to Death
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

You have familiarised yourself with the penal law of the *Sharī'ah* in respect of the crime of armed robbery in unit 1 of this module, you have equally been exposed to the different crimes embedded in the crime of armed robbery. You have understood the different punishments for armed robbery. You will recall that we are now on the second unit in our discussion on penal laws of the *Sharī'ah*.

In this second unit, the Islamic teaching on illegal sexual intercourse is provided as well as the meaning and scope of illegal sexual intercourse, its punishments and the controversy surrounding the punishment of stoning to death under the penal law of the *Sharī'ah*. Therefore, a basic knowledge of this concept will add to your understanding of the remaining penal laws of the *Sharī'ah* discussed in the remaining units in this module.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the meaning and scope of illegal sexual intercourse under the penal laws of the *Sharī'ah*
- enumerate the punishments for illegal sexual intercourse under the penal laws of the *Sharī'ah*
- mention the features of the punishments for illegal sexual intercourse under the penal laws of the *Sharī'ah*.

### 3.0 MAIN CONTENT

#### 3.1 Islamic Teachings on Illegal Sex

The second of the penal laws of the *Sharī'ah* to be discussed is illegal sexual intercourse. In Islam, illegal sexual intercourse termed *al-zina* has been proscribed (Q17: 32). According to the passage, the Islamic prohibition 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 (Q17: 32). In fact, the prohibition of *al-zina* under the penal laws of the *Sharī'ah* is to regulate all sexual acts and relationship because sexual intercourse outside marriage has some dangerous and bad consequences.

Illegal sex causes permanent or long lasting damages to all parties involved, including any product of the illicit union. It also destroys the mutual love and trust that exist between legitimate married couples, where either of them commits sexual intercourse outside marriage. This leads many a time to divorce and broken homes with the children suffering psychological, emotional and other deprivations.

Thus, the penal laws of the *Sharī'ah* frowns at illegal sexual intercourse to curb the above and many other damages that may result from the sexual instincts. In short, the penal law of the *Sharī'ah* in respect of illegal sex seeks to regulate the 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 health consequences of illegal satisfaction of the sexual desires include fatal and deadly diseases like AIDS, gonorrhoea and syphilis. These diseases coupled with 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 penal laws of the *Sharī'ah* therefore limits sexual transgression in order 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. This will help to prevent the above ailments and crises.

#### 3.2 Meaning and Scope of Illegal Sexual Intercourse

The *Hanafi* School of Islamic law 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* (Doi,

1984: 236 and El Awa, 1985: 10-13). *Al-zina* therefore refers to any unlawful sexual intercourse between a man and a woman or men and women outside marriage, whether he or she is married or not. In short, *al-zina* refers to both fornication and adultery.

This shows that the main element of *al-zina* is unlawful sexual intercourse or sexual intercourse between a man and a woman who are 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 intimacy between a man and a woman which does not include sexual intercourse is not considered *al-zina* and does not fall under the fixed punishments discussed here.

According to majority of Muslim scholars, the offence of *al-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 (El Awa, 1985: 18-19).

### SELF-ASSESSMENT EXERCISE 1

Why is illegal sexual intercourse prohibited in the penal laws of the *Sharī'ah*?

### 3.3 Punishments for Illegal Sexual Intercourse

The importance in the above categorisation of illegal sexual intercourse into two lies in the punishments for *al-zina* in the penal laws of the *Sharī'ah*. The punishments for the crime of *al-zina* are contained in two different passages of the Qur'an (Q4: 15-16 and 24:2).

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 *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) 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 (Doi, 1984: 238).

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 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 in the Sunnah while explaining the revelation of the verse of canning (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: 15-17).

Based on the above passage (Q24: 2) and the Sunnah, Muslim scholars agree that the punishments for *al-zina* are two, namely canning 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 beating for adultery.

This agreement occurs because when the Prophet ordered canning for fornication, he did not include banishment except on one occasion due to public interest. Neither did he include canning 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.



However, as stated in module one, the conditions for establishing evidence for the crime of illegal sexual intercourse have been made stringent because of the harshness of the punishments. Hence, it is almost impossible to establish evidence against culprits. 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 (Doi, 1984: 224-225).

## SELF-ASSESSMENT EXERCISE 2

Why in your view are the conditions for convicting a culprit for illegal sexual intercourse so stringent in the penal laws of the *Sharī'ah*?

### 3.4 The Controversy over Stoning to Death

Today, the punishment of *al-rajm* or the stoning to death penalty for an adulterer or adulteress is a subject of controversy in modern society, even among Muslim scholars. In addition, advocacy for fundamental human rights appears to be “the most thrilling” issue of constitutional law which hovers around the application of “Islamic State” (Jen-T' Chiang, 2007: 5).

According to different human right organisations, capital punishment violates the personal liberties of Muslim and non Muslims by Muslim countries who implement the penal laws of the *Sharī'ah*. 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 which include the protection of life.

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 penal law of the *Sharī'ah* especially in the area of capital punishment like stoning to death.

Stoning to death and many other punishments and penalties for different crimes called *hudud* punishments 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 (Oloso and Uthman, 2011: 125-155).

Therefore, aside from the issue of apostasy already discussed above, the implementation of capital punishment in itself like stoning to death is another example that is used by human rights' activists to gauge Islamic law compliance with human rights' declarations.

For instance, Muslim countries which assign the death penalty, especially stoning to death to such offences as illegal sexual intercourse, armed robbery, deliberate homicide, kidnapping, trafficking in dangerous drugs and possession of firearms are regarded as violating the fundamental human rights of its citizens by abolitionists. The abolitionists who call for abolishing the implementation of capital punishment in Muslim countries base their argument for the abolition of the death penalty on the fundamental human right to freedom to life as enshrined in 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 various findings of the Amnesty International reports (Oloso and Uthman, 2011: 125-155). However, many Muslim scholars all over the world have generally opposed the abolition of death penalty because of its divine origin. Hence, they insist on the implementation of stoning to death and other capital punishments in the penal laws of the *Sharī'ah* such as *al-qisās* or the law of retaliation in cases of homicides that shall be discussed in the next module.

This position is in line with the views of Muslim scholars who uphold the classical interpretation and opine that the Islamic penal law of stoning to death and *other* capital punishments are still relevant so as to prevent the deadly consequences of illegal sexual intercourse as already discussed above in this unit as well as 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 (Jen-T' Chiang, 2007: 10).

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 the penal law of the *Sharī'ah* today. The Islamic law according to Muslim scholars revolves round a scheme of benefits and harms (*masalihah* and *mafasid*). Most Muslim scholars, as already stated above in unit one of this module postulate that the Islamic law is aimed at protecting five ultimate objectives. These objectives are religion, life, intellect, offspring and property (Oloso and Uthman, 2011: 125-155).

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.

Based on the above schemes of human benefits, Muslim scholars who uphold capital punishments such as stoning to death, 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.

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 *Sharī‘ah* court of appeal’s judge in Sokoto City who acquitted her because the alleged offence occurred before the implementation of the criminal aspects of *Sharī‘ah*.

The third woman, Amina Lawal Kurami, was also convicted for adultery and sentenced to death though she was divorced. A *Sharī‘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 *Sharī‘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 *Sharī‘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 last module 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.

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).

### **SELF-ASSESSMENT EXERCISE 3**

Of what significance is the punishment of stoning to death in the penal laws of the *Sharī'ah*?

## **4.0 CONCLUSION**

We learnt in this unit that, illegal sexual intercourse under the penal laws of the *Sharī'ah* refers to all forms of sexual intercourse outside marriage. Illegal sexual intercourse was identified as a source of untold hardship in addition to causing deadly diseases, and fatal calamities in the society. Illegal sexual intercourse was categorised into 'fornication' and 'adultery'.

This informed the two different punishments for illegal sexual intercourse. Furthermore, we noted that there is a lot of controversy surrounding stoning to death due to different interpretation of a saying of the Prophet and human rights advocacy in contemporary society.

## **5.0 SUMMARY**

In this unit, you have been taught the meaning, scope, categorisations and punishments of illegal sexual intercourse under the penal laws of the *Sharī'ah*. A brief mention was also made on the stringent conditions for implementing the punishments for illegal sexual intercourse. The conditions are very stringent on the whole because the penal laws of the *Sharī'ah* are put in place to guarantee that innocent persons are not punished for crimes they have not committed.

Some of these conditions have been discussed in a broader perspective in the first module of this course and will still be revisited in the remaining units of this module as well as other modules. In this case, a comprehensive understanding of all the units in this module will bring about a holistic view of the conditions for punishments under the penal laws of the *Sharī'ah*.

## 6.0 TUTOR-MARKED ASSIGNMENT

Discuss in details the significance of capital punishment under the penal laws of the *Sharī'ah*.

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## UNIT 3 PUNISHMENTS FOR THEFT

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 The Definition and Scope of Theft under the Penal Law of *Sharī'ah*
  - 3.2 Punishments for Theft
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

In the second unit, you have learnt the meaning, scope and punishments for illegal sexual intercourse under the penal laws of the *Sharī'ah*. As was earlier mentioned at the beginning of this module, another punishable offence is theft. In this unit, a definition of the concept and scope of theft under the penal laws of the *Sharī'ah* is made. In addition, the various views of Muslim scholars and the punishments for theft, methods of their implementations and conditions to be fulfilled before a person can be convicted for the crime are discussed.

A careful study of this unit will enable you to have the opportunity of having a comprehensive understanding of the penal laws of the *Sharī'ah* in respect of theft. This unit therefore requires your deep attention in order to have a holistic knowledge of the penal laws of the *Sharī'ah* being discussed in the preceding and successive units.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- describe the crime of theft under the penal laws of the *Sharī'ah*.
- discuss the punishments for theft
- enumerate the conditions required in convicting a culprit of the crime of theft.

### 3.0 MAIN CONTENT

#### 3.1 The Definition and Scope of Theft under the Penal Laws of the *Sharī‘ah*

The term for the crime of theft under the penal laws of the *Sharī‘ah* is *al-sariqah*, which means an illegal means of acquiring 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).”

*Al-sariqah* 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 offences that are considered the violation of the divine rights or *haqq Allah* (El Awa, 1985: 2-3).

In addition, there are many traditions in the Sunnah that dwell on the gravity of *al-sariqah* by equating it to the crime of *al-zina*. This shows while *al-sariqah* is a theft of property, *al-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 encourage 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 quatre 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: 254-261).

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.

## SELF-ASSESSMENT EXERCISE 1

What is the definition of theft in the penal laws of the *Sharī'ah*?

### 3.2 Punishments for Theft

The Islamic punishment for *al-sariqah* as prescribed in the Qur'an (Q5: 38) is amputation or cutting off the hands of a convicted thief. As reported in the Sunnah, the Prophet 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 categorisation 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 quare of gold or 3 pieces of silver. It is only the *Hanafi* and *Zaydi* Schools 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).

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 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 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 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 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 offence 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" (El Awa, 1985: 5-6).

## SELF-ASSESSMENT EXERCISE 2

Mention the punishment for theft under the penal laws of the *Sharī'ah*.

## 4.0 CONCLUSION

From our discussion so far, we can infer that theft under the penal laws of the *Sharī'ah* is stealing of property while illegal sexual intercourse is theft of dignity. Though theft is the order of the day today, it is a grave crime that may lead to the cutting off of a culprit's wrist. The theft of property which has reached the *al-nisab* is punishable once other conditions are fulfilled. In contrast, theft necessitated by hunger is not punishable. Nevertheless, the owner of property is also obliged to ensure its safe custody.

## 5.0 SUMMARY

This unit described the meaning and scope of theft. The punishments for theft and its methods were also discussed. Also, the controversy involved in what constitutes *al-nisab* has been discussed. Here, you also learnt about the importance of legitimate work. This gives an ample opportunity to compare and contrast between the punishments for armed robbery, illegal sexual intercourse and theft. Other crimes and their punishments will be taken care of in the next unit and module.

## 6.0 TUTOR-MARKED ASSIGNMENT

Compare and contrast the punishments for illegal sexual intercourse and theft in the penal laws of the *Sharī'ah*.

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## UNIT 4 PUNISHMENT FOR *QADHF*

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    - 3.2 Punishment for *qadhf*
    - 3.3 Repentance of a *qadhif*
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- 5.0 Summary
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### 1.0 INTRODUCTION

You have been taking through a discussion on the three crimes and their punishments under the penal laws of the *Sharī'ah*. It is obvious that the penal laws though very harsh, are also difficult if not impossible to implement. This unit while being the last unit in this module is not a round off discussion on the under the penal laws of the *Sharī'ah*. Rather, it only discusses the punishment for the crime of *qadhf*. It explains the meaning and scope of *qadhf*. Finally, the punishments for the crime as well as their methods of execution and stringent conditions are also discussed.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the meaning and scope of *qadhf* under the penal laws of the *Sharī'ah*
- enumerate the punishments for *qadhf* under the penal laws of the *Sharī'ah*
- discuss the conditions for the acceptance of the future testimony of a person once punished for *qadhf*.

### 3.0 MAIN CONTENT

#### 3.1 Definition and Scope of *qadhf*

*Al-qadhf* according to Sabiq (1987: 393) is derived from throwing stone and any similar thing. It is in this sense that the word is used in the Qur'an (20: 39) when the mother of Prophet Musa (AS) was told by Allah to throw the child into a chest and throw the chest into the river.

*Qadhf* in the *Sharī'ah* parlance therefore means throwing the allegation of *zina* at another person.

It refers to an unprovable action or expression that is made to allege a person of committing the act of illegal sexual intercourse. It is defined as an unproved allegation that an individual has committed *Zina* without proof or evidence of four witnesses (Qur'an 24: 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 and freely. 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 (Sabiq, 1987: 395-398).

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.

### SELF-ASSESSMENT EXERCISE 1

List the different ways a person can be considered to have committed the crime of *qadhf* *Qadhf* under the penal laws of the *Sharī'ah*?

### 3.2 Punishments for *Qadhf*

The punishments for *al-qadhf* are according to Qur'an chapter 24: 4-5 eighty lashes as well as rejection of the future testimony of the accuser. These punishments were executed by the Prophet 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 *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 (Doi, 1984: 246-247 and El Awa, 1985: 20-22).

The above two verses are followed by two other verses that prescribe the punishment for the crime of *al-qadhif* committed by a person against his or her spouse. According to Qur'an 24: 6-7, 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 on himself or herself for telling a lie. The accused spouse can however avert the punishment of *al-qadhif* 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 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 lecture 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 (Doi, 1984: 248-250).

## **SELF-ASSESSMENT EXERCISE 2**

In what ways are the punishments highlighted above for *qadhif* beneficial to the society and individuals?

### **3.3 Repentance of *Qadhif***

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-Qadhif*. 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 (El Awa, 1985: 23).

## **SELF-ASSESSMENT EXERCISE 3**

What is the implication of the repentance of a convicted culprit on the punishments for *qadhif*?

#### 4.0 CONCLUSION

This unit being the last unit in this module has highlighted and discussed the meaning and scope of *qadhif* as well as its punishments under the penal laws of the *Sharī'ah*. These punishments include eighty lashes and rejection of the future testimony of the *qadhif*.

#### 5.0 SUMMARY

In summary, you have been exposed in this module to four different crimes and their punishments. The meanings and scopes of the crimes of armed robbery, illegal sexual intercourse, theft and *qadhif* have been explained. The methods and conditions to be employed and fulfilled before implementing the punishments for these crimes were discussed. It is obvious from this discussion that though these punishments are very harsh, it is also almost impossible to execute them because of the stringent conditions attached to the conviction of a person.

By this, you have acquired the knowledge of these crimes and their punishments. This concludes our discussion on the four crimes and their punishments discussed in this module, you can now proceed to the next module for subsequent discussion on the remaining punishments in Islam.

#### 6.0 TUTOR-MARKED ASSIGNMENT

Can the person convicted and punished for *qadhif* reclaim his/her right to give future evidence?

#### 7.0 REFERENCES/FURTHER READING

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### **MODULE 3      OTHER PENAL LAWS OF THE SHARĪ'AH**

In Module 2, you have been taken through specific but extensive discussion on the penal laws of the *Sharī'ah*. You have found it enlightening and educating enough. It is high time we moved to other specific aspects of the penal laws of the *Sharī'ah*.

Here our attention shall be on other penal laws of the *Sharī'ah* as well as their meanings, scope and methods of implementation. You will be treated to an extensive discussion on the punishments for murder, manslaughter, intoxicants and torts.

This module is made up four units which forms a continuum. In the first unit, the concept, scope and of murder and manslaughter are discussed with their punishments. This unit is followed by a second unit which discusses the concept, scope of intoxicants and the punishments for the crime. The third unit in this module discusses the concept of hurts and torts in terms of the penal laws of the *Sharī'ah* and the punishments for different hurts torts. You will also be opportuned to learn the various *Ta'zir* punishments under the penal laws of the *Sharī'ah* in the last unit.

Unit 1	Punishments for Murder and Manslaughter
Unit 2	Punishments for Intoxicants
Unit 3	Punishments for Hurts and Torts
Unit 4	<i>Ta'zir</i> Punishments

## UNIT 1 PUNISHMENTS FOR MURDER AND MANSLAUGHTER

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Concept of *al-qisas*
  - 3.2 Punishment for Murder
  - 3.3 Punishment for Manslaughter
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

This is the first of the three units in this module. It comprises essentially of brief definitions and meanings of *al-qisas*; its usage and application in Islamic penal law. In addition, the importance and sacredness of life in Islam shall be discussed. These discussions will no doubt familiarise you with some rudiments of the punishments for murder and manslaughter under the penal laws of the *Sharī'ah*.

It will also introduce you to relevant Islamic teachings that will feature along the line of discussion in subsequent units in this module. Hence, a thorough understanding of this introductory unit is important to facilitate your understanding of subsequent units in this module. You should therefore give it the utmost attention it deserves.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- define the concept of *al-qisas* and state its scope
- explain the significance of law of *al-qisas* in the protection of the sacredness of life
- discuss the overall benefits of the law of *al-qisas*.

### 3.0 MAIN CONTENT

#### 3.1 Concept of *Al-qisas*

*Al-qisas* which literally means retaliation is used in the Qur'an to mean the law of retaliation which is punishment for deliberate homicide, hurts and torts. This is confirmed by the statement of Allah, the law-giver in the following passage:

O ye who believe! The law of equality is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord.

After this whoever exceeds the limit shall be in grave chastisement. In the law of equality there is (saving of) life to you. O ye men of understanding, that you may restrain yourself (Q2: 178-179 translated by Ali, 2005: 72-73).

*Al-qisas* refers under the penal laws of the *Sharī'ah* to all punishable crimes that are strictly outside the *al-hudud* crimes. *Al-qisas* crimes are crimes that befall life or any aspect of the body in form of injury or hurt for which the victim or his/her heirs, agnates or relatives are permitted to avenge the loss of life or part of the body of the victim.

*Al-qisas* therefore covers both loss of life and hurts and torts such that if someone murders, hurts or harms another person, he or she must be subjected to the penal law of the *Sharī'ah* in respect of *al-qisas* except the victim or his/her heirs, agnates or relatives choose not to avenge the murder, hurt or harm (Sabiq, 1987: 455-485).

The Islamic law of retaliation, *al-qisas* was revealed by Allah 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 (Doi, 1984: 234-236).

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. The divine law of equality or equitable retaliation, *al-qisas* ensures that the horrible act of homicide, manslaughter or torts is

adequately punished through equitable retaliation or by payment of *diyah* (blood money or price) in favour of the victim or his agnatic relatives. The details of *al-qisas* are explained by Allah, the law-giver in the passage quoted before as follows:

O ye who believe! The law of equality is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this, whoever exceeds the limit shall be in grave chastisement. In the law of equality there is (saving of) life to you. O ye men of understanding, that you may restrain yourself (Q2: 178-179 translated by Ali, 2005: 72-73).

*Al-qisas*, the law of equality in punishment as contained in the above passage therefore does not make any distinction in human life. Human life regardless of the station or rank of a person is equally sacred such that *Qatl* (killing) of the life of the young or old, the slave or free, the woman or man is equal. That the penal of the *Shari'ah* in respect of *al-qisas* is no respect of any person is stated more clearly by Allah in the following passage:

We ordained therein for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal." But if any one remits the retaliation by way of charity, it is an act of atonement for himself. And whosoever does not judge by what Allah hath revealed, they are wrong-doers (Q5: 45 translated by Ali, 2005: 298-299).

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) (Doi, 1984: 234-236).

## SELF-ASSESSMENT EXERCISE 1

Attempt a definition of *al-qisas* and *diyah*.

### 3.2 Punishment for Murder

According to the second verse above (Q2: 179), 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 according to the following passage:

Because of that we ordained for the children of Israel that if any one killed a person not in retaliation of murder or to spread mischief in the land, it would be as if he killed all mankind and if anyone saves a life, it would be as if he saved the life of all mankind (Q5: 32).

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 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 majority of Muslim scholars, the punishment of intentional killing or homicide is *al-qisas*, retaliation by death in the case of homicide or payment of *diyyah* in the case of manslaughter or killing by mistake. 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 and demand for retaliation in the case of deliberate murder or homicide. 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 above view of Muslim scholars shows that a murderer 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 *diyyah*. In addition, the pardoned offenders are to be given a hundred strokes of the cane and imprisonment for a year.

In the same vein, the *diyyah* 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 *diyyah* 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).

## **SELF-ASSESSMENT EXERCISE 2**

Which of the punishments of deliberate murder identified above do you considered to be materially in favour of the family of the deceased?

### 3.3 Punishment for Manslaughter

According to the penal of the *Shari'ah*, *al-qisas* or the law of retaliation is not prescribed for manslaughter or murder committed through mistake. The following verse shows that *Qatl* (killing) taking of life through a mistake is punished through expiation, making atonement and payment of *diyah*.

It is not for a believer to kill a believer except that it be by mistake; and whosoever kills a believer by mistake, it is ordained that he must set free a believing slave and pay *diyah* to the deceased family unless they remit it. If the deceased belong to a people at war with you and he was a believer, the freeing of a believing slave is prescribed and if he belonged to a people with whom you have a treaty of mutual alliance, *diyah* must be paid to his family and a believing slave must be freed. And whosoever is unable to free a slave must fast for two consecutive months in order to seek repentance from Allah. And Allah is Ever All-knowing, All-wise (Q4: 92).

Manslaughter or unintentional killing therefore only requires expiation, making atonement and the payment of full or complete *diyah*. Killing caused by a mad person also requires the payment of *diyah*. Similarly, the rule applies to killing by a young child or a minor. However, the payment of *diyah* will only come from the minor's property if it does not exceed one third. In all cases of *Al-Qisas* in Islamic law, the death penalty cannot be imposed on a person unless h/she confesses or there are two witnesses to the crime. A woman shall be killed for killing a man just as a man shall be killed for killing a woman.

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. As stated before, 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 (Doi, 1984: 234-236).

#### SELF-ASSESSMENT EXERCISE 3

How does the punishment for murder differ from that of manslaughter?

#### 4.0 CONCLUSION

Having defined *al-qisas* and *diyyah* according to the penal of the *Sharī'ah*, we have highlighted the punishments for deliberate murder and manslaughter. We further defined the scope of the penal of the *Sharī'ah* in respect of both retaliation and compensation. We equally highlighted the significance of the payment of *diyyah* in respect of material benefits to the family of the deceased. On a final note, we also discussed the sacredness and importance of life under the penal of the *Sharī'ah*.

#### 5.0 SUMMARY

This unit has defined the concepts *al-qisas* and *diyyah* in relation to the punishments for murder and manslaughter under the penal of the *Sharī'ah*. The importance and significance of saving and protecting human life under the penal of the *Sharī'ah* have also been mentioned. In essence, a platform has been built for a comprehensive discussion on the punishments for torts in a later unit in this module.

#### 6.0 TUTOR-MARKED ASSIGNMENT

1. State and discuss the significance of *diyyah* under the penal of the *Sharī'ah*.
2. Highlight in separate terms the importance of saving, protecting and taking care of life under the penal of the *Sharī'ah*.

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## UNIT 2 THE PUNISHMENT FOR INTOXICANTS

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 The Concept and Prohibition of Intoxicants
  - 3.2 Philosophy of Gradualism
  - 3.3 The Punishment for Intoxicants
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

As a follow up to unit 1, we shall examine the meaning and concept of *khamr*; its status under the penal of the *Sharī'ah* and the philosophy behind its prohibition. The discussion will then move to the different stages of the prohibition of intoxicants and the lessons for the need for graduation in the process of reformation and revivalism. Finally, you will be exposed to the phases of the development of the punishments of intoxicants right from the time of the Prophet (SAW) to the time of Umar, the second Caliph. Furthermore, the views of the different schools of Islamic jurisprudence and Islamic scholars on the punishment of intoxicants shall be explained in this unit.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the meaning and scope of *khamr*
- highlight the phases of the development of the punishments of intoxicants
- give an overview of the significance of the philosophy of graduation in the process of reformation and revivalism
- evaluate the effectiveness of the philosophy of graduation in the elimination of alcoholism during the early history of Islam.

### 3.0 MAIN CONTENT

#### 3.1 The Concept and Prohibition of Intoxicants

*Khamr* has been defined as “any intoxicant that puts a curtain on one’s intellect or befogs the human brain.” *Al-khamr* includes any substance whether fruit, juice or drug that intoxicates by nature. In the penal of the *Shari’ah*, *al-khamr* therefore refers to 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 any other drink or liquor that intoxicates (Sabiq, 1987: 335-336).

Thus, *al-khamr* extends to the taking of hashish, opium, marijuana, cocaine, any intoxicating wine or liquor. *Shurb al-khamr* or drinking intoxicants and the taking of any intoxicating drug wine or liquor is prohibited according to the following passage of the Qur’an:

O you who believe! Intoxicants and gambling, Sacrificing to stones, and (divination by) arrows are an abomination, of Satan’s handiwork: Eschew such (abomination), that ye may prosper. Satan’s plan is (but) to excite enmity and hatred between you with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: Will you not then abstain? (Q5: 90-91 translated by Ali, 2005: 315-316).

Before the above revelation, *Shurb al-Khamr* was common among the Arabs as it is common among many people today. In fact, many people have always being addicted to taking or drinking *al-Khamr*. However, with the revelation of the above passage, *Shurb al-Khamr* becomes not only prohibited but also a punishable crime in Islam because of the attendant harm on the individual and the society.

This shows that the main element of prohibiting *Shurb al-Khamr* is inherent vices that it leads to. One of such vices is 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. This is why Islam has prohibited *Shurb al-Khamr* despite some of its benefits and usefulness as contained in the Qur’an 2: 219. 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 (SAW) 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* in Islam has given Muslims a degree of

temperance or sobriety unknown among the followers of other religions (Doi, 1984: 61-265).

## SELF-ASSESSMENT EXERCISE 1

Why is *Shurb al-Khamr* prohibited under the penal of the *Sharī'ah*?

### 3.2 Philosophy of Gradualism

According to the penal of the *Sharī'ah*, the Islamic law in respect of *Shurb al-Khamr* is guided by the principle of gradualism. 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.

After accepting Islam, the Arabs having understood its strictness in terms of morality seek to know the Islamic law in respect of *Shurb al-Khamr*. They continued to ask the Prophet about its lawfulness in Islam until the first quoted verse was revealed (Q2: 219). 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.

Consequently, while some people quickly took to the moral lesson of the verse by stopping *Shurb al-Khamr*, some continued with it. Later the divine revelation prohibited *Shurb al-Khamr* partially by conditioning it to retention of senses in prayers (Q4:43). Accordingly, more 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. In this connection, the gradual approach employed by the penal of the *Sharī'ah* in persuading the people of the evils of alcoholism and the need for abstinence succeeded where force would have failed.

In the above gradual approach, there is a lesson for Islamic revivalist advocates to seek the revival of Islam and the reform of corrupt practices that had crept into the practices of the religion. Though there are many faces and voices within these Islamic revivalist movements, bringing about Islamic influences into the lives of Muslims who have abandoned Islamic teachings can be better achieved through the gradual approach of education and persuasion of the people than through the use of force.

The Egyptian Shaykh Ḥasan al-‘Attār (d. 1834/35) may have been one of the first reformists/revivalists to note this point when he said that “Our countries should be changed and renewed [*tatajaddadah*] through knowledge and sciences that they do not possess.” This approach will confirm the statement of Robert Pelletreau, Jr., of the United States State Department that "Islamists" are Muslims with political goals that are not necessarily sinister: there are many legitimate, socially responsible Muslim groups with political goals. However, there are also Islamists who operate outside the law (quoted in Martin Kramer’s *Coming to Terms: Fundamentalists or Islamists?* The Middle East Quarterly, Spring 2003, Volume X, number 2).

From the point of view of the success of the penal of the *Sharī‘ah* in almost complete and total eradication of alcoholism at the time of the Prophet (SAW), it does make great sense for Muslim revivalists to adopt a gradual and peaceful approach. With this Islamic revivalist or reform movements will achieve far greater success than they can imagine, they can achieve with violence and force.

## SELF-ASSESSMENT EXERCISE 2

Why was the eradication of alcoholism successful at the time of the Prophet (SAW)?

### 3.3 The Punishment for Intoxicants

The fixed punishment or the penal law of the *Sharī‘ah* for the crime of *Shurb al-Khamr* is neither contained directly in the passages of the Qur’an or in the Sunnah. Though there are some reports that the Prophet (SAW), Abubakr, the first Caliph and ‘Ali, the fourth gave forty stripes as punishment to men who drank *al-Khamr*, yet there are also reports that the companions through a consensus fixed a punishment of eighty lashes for anyone who drank *al-Khamr* (Sabiq, 1987: 353-354).

According to the last reports, when a man drank *al-Khamr* at the time of ‘Umar, the second Caliph, he sought the views of the companions on the

appropriate punishments and ‘Abdul Rahman ibn ‘Awf advised him to “make it the least of the *Hadd* punishments-eighty lashes” and upheld eighty lashes and also wrote his governors to do the same. This was also the second view reported from ‘Ali, the fourth Caliph who said “Whoever becomes intoxicated will utter falsehood and whoever utter falsehood will commit defamation. So make it the *Hadd* punishment of defamation” which is eighty lashes (Sabiq, 1987: 353).

Based on the above analogy drawn by these companions from the above preceding punishment of *al-qadhif* because whosoever drinks is most liable to slander and defame people’s character hence the punishment for *al-qadhif* as mentioned in the Qur’an was fixed for *Shurb al-Khamr*. Therefore, most Islamic jurists such as Imams Malik, Al-thawri, Abu Hanifah and Hanbali, according to a report agree that the fixed punishment for drinking of intoxicants is eighty lashes. However, Imam Shafi‘i disagrees, saying that the fixed punishment is forty lashes only (Sabiq, 1987: 353).

Sabiq (1987: 354) however, is of the view that the correct fixed punishment or the penal law of the *Sharī‘ah* for the crime of *Shurb al-Khamr* is what is reported above in the Sunnah and upheld by Imam Shafi‘i which is forty stripes. To him, the additional forty lashes imposed by ‘Umar, the second Caliph based on the advice of the companions should be viewed as an additional discretionary punishment.

This explanation by Sabiq on the view of Imam Shafi‘i that the punishment of drinking intoxicants is forty stripes appears to be the more correct opinion since the companions could not have arrived at a consensus contrary to an explicit practice or the Sunnah of the Prophet (SAW).

As far as establishing the crime of *Shurb al-Khamr* is concerned, it can be done through the evidence of two upright witnesses or the confession of the culprit. 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: 265).

### SELF-ASSESSMENT EXERCISE 3

Of what significance is the consensus of the companions on the fixed punishment for *Shurb al-Khamr*?

## 4.0 CONCLUSION

The fact revealed in this unit is that *Shurb al-Khamr* is essentially a punishable crime in the penal law of the *Sharī'ah*. As also studied in this unit, Islamic jurists differed on the fixed punishment for the crime of *Shurb al-Khamr*. Consequent upon this, many of the jurists uphold eighty lashes as the punishment for *Shurb al-Khamr*. Though only Imam Shafī'i argues that the punishment for *Shurb al-Khamr* is forty lashes, his view is supported by the practices of the Prophet (SAW), the second Caliph, Abubakr and even 'Ali, the fourth Caliph. The methods of establishing the crime of *Shurb al-Khamr* has also been discussed.

## 5.0 SUMMARY

In this unit, we reviewed of the crime of *Shurb al-Khamr* in the penal law of the *Sharī'ah*. The meaning, scope and status of *Shurb al-Khamr* in the penal law of the *Sharī'ah* was stated. The role played by the use of a peaceful and gradual approach in the eradication of alcoholism among the Arabs at the time of the prophet was examined as well as the different phases in the prohibition of *Shurb al-Khamr*. You were also taken through how the above philosophy of gradualism can be beneficial to Islamic revivalists. On the final note, you were exposed to different views of Islamic jurists on the punishment of and methods of establishing the crime of *Shurb al-Khamr*. Having read and digested this, you can now appreciate better not only the penal law of the *Sharī'ah* in respect of *Shurb al-Khamr* but also why it is a punishable offence.

## 6.0 TUTOR-MARKED ASSIGNMENT

How can a country like Nigeria reverse the high rates of alcoholism and accidents resulting from *Shurb al-Khamr* using the lessons of the penal law of the *Sharī'ah*?

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## UNIT 3 PUNISHMENTS FOR TORTS AND HURTS

### CONTENTS

- 4.0 Introduction
- 5.0 Objectives
- 6.0 Main Content
  - 6.1 The Meaning and Scope of Torts and Hurts
  - 6.2 The Punishments for Torts and Hurts
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

This unit is primarily aimed at discussing specific issues relating to the penal law of the *Sharī'ah* of equality or equitable retaliation, *al-Qisas* in respect of torts and hurts. As explained in unit one of this module, the crimes of torts and hurts are adequately punished the penal law of the *Sharī'ah* through equitable retaliation or by payment of *diyāh* (blood money or price) in favour of the victims of torts and hurts.

In the first part, you will learn the meaning and scope of torts and hurts under the penal law of the *Sharī'ah*. The second part will take you through a discussion of the various punishments for torts and hurts under the penal law of the *Sharī'ah*. At the end of this unit, you would have studied the penal law of the *Sharī'ah* for torts and hurts.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- discuss the penal law of the *Sharī'ah* in respect of *al-Qisas* for torts and hurts
- assess the payment of *diyāh* in favour of the victims of torts and hurts in the penal law of the *Sharī'ah*
- appraise the verse of the Qur'an in support of the penal law of the *Sharī'ah* in respect of *al-Qisas* or payment of *diyāh* for torts and hurts.



### 3.0 MAIN CONTENT

#### 3.1 The Meaning and Scope of Torts and Hurts

The penal law of the *Sharī'ah* in respect of torts and hurts is referred to as *al-Qisas fi al-atraf wal-juruh* which means equality or equitable retaliation in respect of torts and hurts. *Al-Qisas* in the penal law of the *Sharī'ah* as stated before allows the victims or the avengers of the crime of torts and hurts to seek retaliation or forgive the offenders and in that case, demand compensation or the payment of *diyah* (blood-money or price) (Sabiq, 1987: 486-493). This penal law of the *Sharī'ah* for torts and hurts is contained in the following verse:

We ordained therein for them: "life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal." But if any one remits the retaliation by way of charity, it is an act of atonement for him. And whosoever does not judge by what Allah hath revealed, they are wrong-doers (Q5: 45 translated by Ali, 2005: 298-299).

Though the verse above specifically discusses the penal law revealed to the Jews in respect of torts and hurts, the same law of retaliation in cases of murder, torts and hurts has also been prescribed for Muslims.

In fact, the obligation of the law of retaliation was proclaimed by the Prophet (SAW) himself when Rubayyi', the granddaughter of Anas broke the middle incisor (tooth) of a slave woman and was brought before the Prophet (SAW). Her brother, Anas begged the Prophet (SAW) not to allow the breaking of her teeth in retaliation but the Prophet (SAW) answered "*al-Qisas* or equitable retaliation is the decree of Allah contained in His book" (Sabiq, 1987: 486-487).

Thus, it is clear that the Prophet (SAW) was referring to the above verse. Accordingly, the majority of Muslim scholars hold that the punishment of intentional torts and hurts is *Al-Qisas* or retaliation by inflicting the same injury or hurt except in the case of slave owner or a Muslim who injure or hurt their slave or non-Muslim respectively. This view is based on the argument that the blood of a slave and a non-Muslim is not equal to that of a free person and Muslim respectively. To them, only compensation or payment of *diyah* can be imposed as punishment in these cases. The *Hanafi* School however disagrees and holds that in the two cases, the punishment is *al-Qisas* or retaliation by inflicting the same injury or hurt (Sabiq, 1987: 487).

This view of the *Hanafi* School appears to be the correct since various verses of the Qu'an such as Q5: 32 shows that all human life is sacred and equal regardless of status and religion. Thus, the *Hanafi* other view

that *al-Qisas* is not applicable when the victim of tort or hurt is a woman and the culprit is a man is also not tenable (Sabiq, 1987: 487).

It is only when the victim of torts and hurts forgive the offender that compensation or the payment of *diyah* should be made as seen in the case of Rubayyi', the granddaughter of Anas who broke the middle incisor (tooth) of a slave woman and was brought before the Prophet (SAW) above.

### SELF-ASSESSMENT EXERCISE 1

Can the religion, rank or sex of the victims of torts and hurts affect the punishment?

### 3.2 The Punishments for Torts

According to the above, the law of retaliation, *al-Qisas* in the penal law of the *Shari'ah* 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* (Doi, 1984: 234-236).

Similarly, the rule applies to the deliberate injury of a pregnant woman which leads to the death of the child or embryo in her womb. Whether the injury of the pregnant woman is deliberate or not, as long as she lives and only the child in her womb dies, the payment of *diyah* or compensation of five hundred pieces of dirham or one hundred goats or five camels becomes obligatory (Sabiq, 1987:510-511).

In the same vein, the majority of Muslim scholars hold that the punishment for the injury of the pregnant woman that leads to the death of the child in her womb in case of a non-Muslim attracts a lesser *diyah* or compensation. This view, as stated above is based on the argument that the blood of a slave and a non-Muslim is not equal to that of a free person and Muslim respectively. The *Hanafi* School however, upholds its position that *diyah* or compensation for a non-Muslim is the same for the *diyah* or compensation of a Muslim (Sabiq, 1987: 511).

This view of the *Hanafi* School, again, appears to be the correct since various verses of the Qur'an such as Q5: 32 shows that all human life is sacred and equal regardless of status and religion.

## SELF-ASSESSMENT EXERCISE 2

How can you justify the payment of *diyah* or compensation for the killing of a child in the womb in the penal law of the *Sharī'ah*?

### 4.0 CONCLUSION

This unit is an exposition of the punishments for both torts and hurts in the penal law of the *Sharī'ah*. The unit commenced with a discussion of *al-Qisas fi al-atraf wal-juruh* in respect of the law of equality or equitable retaliation of torts and hurts in the penal law of the *Sharī'ah*. This penal law of the *Sharī'ah* for torts and hurts is based on the injunction contained in the Qur'an 5: 45 and the practice of the Prophet (SAW) himself in the case of Rubayyi', the granddaughter of Anas broke the teeth of a slave woman and where the Prophet (SAW) declared that "*al-Qisas* or equitable retaliation is the decree of Allah contained in His book" (Sabiq, 1987: 486-487).

The above was followed by a discussion of the various punishments for torts and hurts in the penal law of the *Sharī'ah*. Various opinions of Muslim scholars on the punishments for torts and hurts in the penal law of the *Sharī'ah* were also discussed, especially in respect of the differences in the cases of slave owners and Muslims who injure or hurt their slaves or non-Muslim and vice versa respectively. We then gave preference to the views of the *Hanafi* School on the application of *al-Qisas* or the law of retaliation and compensation or payment of *diyah* to non-Muslim in the same manner as applied to the cases of Muslims. This view of the *Hanafi* School, we concluded, best reflect the correct meanings of various verses of the Qu'an such as Q5: 32.

### 5.0 SUMMARY

So far this unit has treated us to a discussion on the punishments for both torts and hurts in the penal law of the *Sharī'ah*.

Here you have been taught that the penal law of the *Sharī'ah* for torts and hurts is based on injunctions in the Qur'an and the Sunnah of the Prophet (SAW). You have also learnt about the various punishments for torts and hurts in the penal law of the *Sharī'ah* as well as the different opinions of Muslim scholars on these punishments for torts and hurts in the penal law of the *Sharī'ah*.

In the final section of this unit, we discussed the punishment for deliberate or accidental killing of a child in the womb of her mother. Having learnt all these, you are through with the study of the penal law of the *Sharī'ah* in respect of torts and hurts and are now set for a

comprehensive discussion on discretionary punishments the penal law of the *Sharī'ah* in the next and last unit of this module.

## 6.0 TUTOR-MARKED ASSIGNMENT

Write short notes on the different opinions of Muslim scholars on:

1. Punishment for Torts.
2. Hurts in the penal law of the *Sharī'ah*.

## 7.0 REFERENCES/FURTHER READING

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## UNIT 4 AL-TA 'ZIR PUNISHMENTS

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Meaning and Scope of *Ta'zir* Punishments
  - 3.2 Kinds of *Ta'zir* Punishments
  - 3.3 *Ta'zir* and Death Penalty
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

This unit is the last of the four units in this module. The main thrust of the unit is to review the meaning and scope of *Ta'zir* in the penal law of the *Sharī'ah*. The kinds of *Ta'zir* punishments in the penal law of the *Sharī'ah* will be enumerated. This unit also discusses the death penalty as a *Ta'zir* punishment in the penal law of the *Sharī'ah*. Specifically, the challenges of fixing the *Ta'zir* punishments in the penal law of the *Sharī'ah* will be examined along with proffered solutions to these challenges. Reading this unit to completion will arm you with comprehensive and complete information on the *Ta'zir* punishments in the penal law of the *Sharī'ah*.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the general and technical meaning of the *Ta'zir* in the penal law of the *Sharī'ah*
- enumerate the various kinds of the *Ta'zir* punishments in the penal law of the *Sharī'ah*
- highlight the place of death penalty within the *Ta'zir* punishments in the penal law of the *Sharī'ah*
- suggest general and specific measures for tackling the challenges confronting the *Ta'zir* punishments in the penal law of the *Sharī'ah*.

### 3.0 MAIN CONTENT

#### 3.1 Meaning and Scope of *Ta'zir* Punishments

The term *al-Ta'zir* means honour and assistance and this is the usage in statement of Allah below:

In order that you may believe in Allah and His Messenger and honour and assist him (The Messenger) Qur'an 48:9 quoted in (Sabiq, 1987: 531).

The same Sabiq explains further that the term *al-Ta'zir* also means humiliation and is used when a person humiliates another person as a warning and discipline for a crime which emanates from the person so humiliated. It is therefore used in the penal law of the *Sharī'ah* to mean "a disciplinary punishment for a crime for which specific fixed punishment is not prescribed or any form of expiation." It is the use of judicial discretion by a judge in awarding punishments on crimes outside the limits set by Allah (Sabiq, 1987: 532).

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, the law-giver for those offences against public peace and tranquility. Thus, the *al-Ta'zir* punishment is the punishment for a crime that attracts no *Hadd* (fixed punishment) or *Kaffarah* (expiation). It is outside punishments defined by Allah which nobody can alter either by making them lighter or heavier.

In the penal law of the *Sharī'ah*, there are basically four classifications of crimes and their punishments and penalties even though Sabiq (1987: 532) mentions only three. Firstly, are the interpersonal crimes that attract *Hadd* or fixed punishments contained either in the Qur'an or Sunnah. Apart from this classification, there are also religious crimes that attract *Hadd* or fixed punishments. Such crimes only attract *Kaffarah* (expiation) such as the crime of sexual intercourse during fasting. Thirdly, which is not mentioned by Sabiq above, there are crimes that attract both *Hadd* or fixed punishments and *Kaffarah* (expiation) such as the crime of murder. Lastly, there is *al-Ta'zir* punishment which attracts neither *Hadd* or fixed punishments and *Kaffarah* (expiation) but only discretionary judicial punishments.

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* punishments 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 Saudi Arabia, Afghanistan, Pakistan and 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 (Oloso and Uthman, 2011: 125-155).

### SELF-ASSESSMENT EXERCISE 1

Explain the meaning and scope of *Ta'zir* punishments.

### 3.2 Kinds of *Ta'zir* Punishments

According to Islamic jurists, there are basically ten classifications of *Al-Ta'zir 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-Taahdid*. 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*. Ninthly, 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 (1985: 96-109) mentions death penalty that will be specifically discussed in the next section and last section of this unit.

However, there are differences of opinions among Islamic jurists on some of the above *Ta'zir* punishments, such as flogging. The view on flogging that is clearly supported by the penal law of the *Sharī'ah* is that flogging as a *Ta'zir* punishment should not exceed ten lashes. This is in line with a directive of the Prophet (SAW) that “Do not flog above ten lashes except in one of the *Hadd* or fixed punishments” (Sabiq, 1987: 532).

### SELF-ASSESSMENT EXERCISE 2

Of all the views of Islamic jurists on flogging as a *Ta'zir* punishment discussed above, which one do you consider most supported by the penal law of the *Sharī'ah*?

### 3.3 Death Penalty and *Ta'zir* Punishments

As stated before, some Islamic jurists include death penalty as one of the *Ta'zir* punishment (El-Awa, 1985: 96-109).

For instance, it is claimed that Al-Hafidh ibn Taymiyyah is of the view that the *Hanfiyyah* School holds that crimes that do not attract the death penalty, when repeated severally, then the judge may impose the death penalty (Sabiq, 1987: 534). This view appears faulty because it grossly violates the above tradition of the Prophet (SAW) that “Do not flog above ten lashes except in one of the *Hadd* or fixed punishments” (Sabiq, 1987: 532).

If the Prophet (SAW) restricts flogging as a *Ta'zir* punishment to ten lashes, it is clear that he does this to curb the excesses that may be committed by a judge in the use of discretionary punishments. It is therefore completely untenable to allow any judge to impose the death penalty in offences outside the crimes that attract the *Hadd* or fixed punishments.

#### SELF-ASSESSMENT EXERCISE 3

Of all the *Ta'zir* punishments discussed above, why in your view, should the death penalty not be considered a *Ta'zir* punishment.

### 4.0 CONCLUSION

It can be inferred from our discussion so far that the implementation of the penal law of the *Sharī'ah* in respect of *Ta'zir* punishments is faced with a number of challenges of which inadequacy in training of judges, widening of the powers of judges in discretionary punishments and flogging offenders above ten lashes are of paramount importance.

Yet, overtime, a number of Muslim countries such as Malaysia have adopted a number of reforms, to tackle these challenges. There is therefore the need for proper harmonisation of the implementation of the penal law of the *Sharī'ah* in contemporary Muslim countries.

### 5.0 SUMMARY

This concluding unit of module 3 has reviewed the meaning, scope, kinds and challenges of implementing the penal law of the *Sharī'ah* in respect of *Ta'zir* punishments. It has also taken us through the views of various Islamic jurists regarding *Ta'zir* punishments. The unit was rounded off with proffered solution to the excesses of the discretionary powers of judges in respect of *Ta'zir* punishments under the penal law



of the *Sharī'ah*. With these you have successfully completed this module. It is hoped you found the module educative and rewarding. You will be very enthusiastic by now to proceed into the next and last module to commence a specific study of other sectors of the effectiveness of the penal law of the *Sharī'ah* in combating the moral challenges in contemporary society.

## 6.0 TUTOR-MARKED ASSIGNMENT

Do you foresee an increasing or decreasing role of the penal law of the *Sharī'ah* in years to come in combating crimes in contemporary society?

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## **MODULE 4 THE PENAL LAWS OF SHARĪ'AH AND MORALITY IN MODERN SOCIETY**

You have discussed the various penal laws of the *Sharī'ah*, scope and methods of implementation. There is the need to evaluate the contributions of these penal laws of the *Sharī'ah* substantially, to moral reformation, and their effectiveness in serving as deterrence to the perpetration of crimes in modern society. Our intention is to attempt a cursory look into the meaning and scope of morality in modern society, the relationship between the penal laws of the *Sharī'ah* and morality, effectiveness of the Islamic measures in controlling crimes in this module. In essence, we shall examine how the penal laws of the *Sharī'ah* view and tackle the problems of immorality in modern society.

This module consists of three separate, independent units though not mutually exclusive of one another. At the end of this module, you will have been acquainted with the measures and mechanisms used by the penal laws of the *Sharī'ah* to combat the problems of immorality and crimes. You will also have an insight into the moral teachings and lessons contained in Qur'an 6: 151-153. Similarly, you will learn about the effectiveness of these Islamic moral teachings and measures in controlling crime in unit three. All you need is therefore a dedicated attention as we go through all these three units. This last module, of this course, rounds off our discussion on the relevance of the penal laws of the *Sharī'ah* in the contemporary society.

- |        |  |
|--------|--|
| Unit 1 | Relationship between Islamic Penal Laws of the <i>Sharī'ah</i> and Morality            |
| Unit 2 | Islamic Measures and Mechanisms in Controlling Crimes                                  |
| Unit 3 | Challenges Confronting the Islamic Penal Laws of the <i>Sharī'ah</i> in Modern Society |

## UNIT 1      RELATIONSHIP BETWEEN ISLAMIC PENAL LAWS OF THE *SHARĪ'AH* AND MORALITY

### CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Meaning and Scope of Morality in Modern Society
  - 3.2 Morality, Modern Society and the Penal Law of the *Sharī'ah*
  - 3.3 Moral Precepts under the Penal Law of the *Sharī'ah*
- 7.0 Conclusion
- 8.0 Summary
- 9.0 Tutor-Marked Assignment
- 10.0 References/Further Reading

### 1.0 INTRODUCTION

The first unit of this module discusses issues relating to the meaning and scope of morality in modern society. This is followed by an exposition of the interplay between morality, modern society and the penal law of the *Sharī'ah*. You will further read some examples of moral precepts under the penal law of the *Sharī'ah*.

### 2.0 OBJECTIVES

At the end of this unit you should be able to:

- define the meaning and scope of morality in modern society
- highlight the features and implications of immorality in modern society
- describe the relationship between morality and the penal law of the *Sharī'ah* in modern society.

### 3.0 MAIN CONTENT

#### 3.1 Meaning and Scope of Morality in Modern Society

We are gradually socialised as we grow up to the distinction between what is good and bad, on the one hand, and what is sometimes called expediency or what good and bad, according to our circumstances on the other hand. Hence, in modern society, people tend to have different views on what is good or bad. This is why what constitutes immoral conduct may be quite different from one society to another.

Equally important is the fact that in modern society, people distinguish between the moral obligation to do a thing and the legal obligation to do it. It is a common-place in modern society that the sphere of morality is much wider than the sphere of law: that we may be morally bound to do and avoid many things but which are not enjoined or forbidden by the common laws of modern societies.

It is for the above and many other reasons that today, moral philosophy is a department of philosophy concerned with the study of morality in modern society. The debate on what constitutes moral obligation is, so far, a very important focus of moral philosophy. To understand this idea of a moral obligation better, we will begin by looking at the definition of morality.

The term morality which is derived from the Latin word *mores* means people's conduct, practice and custom (Uthman, 2010:54-73). It refers to the principles concerning what is right and wrong in human conduct, practice and behaviour. It focuses traditionally on what ought to do or what constitutes a person duty to do. That is to say, the question of morality involves both the ideas of moral and legal obligations.

It is in the sense of both moral and legal obligations that morality is understood in Islam. This is why most moral rules in Islam consist, to a very large extent, in assertions to the effect that it is always right or wrong to do certain actions or to refrain from doing certain others. In other words, moral precepts in Islam are always presented as obligations to carry out or refrain from certain actions. Good examples are the Ten Commandments for example in Qur'an 6: 151-153 and Qur'an 17: 22-39 respectively. These two passages are instances of moral precepts that proclaim both negative rules which assert that it is wrong to do certain actions, and therefore our duty to refrain from these actions and rules which assert positive actions, which are our duty to do.

This Islamic understanding of morality is different from the scope and perception of morality in modern society. As stated before, what constitutes morality is different from one person to another and one society to another. Similarly, people and societies differ on whether morality entails moral or legal obligation. This is one of the reasons though many people are religious today, they are not necessary moral. For instance, many Nigerians who are religious would not hesitate to commit an immoral act once they feel they can get away with it (Abdulrahmon and Uthman, 2011: 46-57).

## SELF-ASSESSMENT EXERCISE 1

How is the Islamic understanding of morality different from the modern?

### 3.2 Morality, Modern Society and the Penal Law of the *Sharī'ah*

The term modernity according to Harbermas is derived from the Latin word 'modernus' which distinguishes between an officially Christian present and a Roman pagan past; while according to Cahoon, it is derived from the Latin word 'modo' which simply means "of today" and "what is current" different from earlier times (Uthman, 2010: 87-198).

For the Enlightenment thinkers, a major thrust of modernity is rationalism and the incompatibility of religion and by implication, the penal law of the *Sharī'ah* with human reasoning. Human reason, to them, is above revelation and the only criterion upon which the modern worldview could be based. Thus, a key pillar of modernity is the use of human intellect and knowledge based on human experience as the sole determinant of human understanding and interpretation of life and the entire cosmos. By so doing, modernity gives dominant role to rationalism, scientism and empiricism above everything in line with Kant's critique of metaphysics and theology in his *Critique of Pure Reason* and Hegel's declaration of the triumph of *Pure Reason*. This is why Alain Touraine considers the organisation of human thoughts and values or rationality as a key component of modernity (Touraine, 1995).

Going by the above, Ahmad Rufai, a retired university of Ibadan don, observes rightly that the core bone of contention between the proponents and opponents of modernity is the role of reason in the human cosmos or the spheres of life (Rufai, 2009: 75-94). It is also for this reason that unlike Christianity in particular which has been secularised and subjected to human reasoning and rationalisation, Islam and indeed the penal law of the *Sharī'ah* still rejects the consideration of reason and rationality as the criterion of modern development and progress. It is for this reason that many Muslims while refusing to follow the Christian experience have at the same time also adopted modernity in certain aspects. Thus, some of these Muslims in this age of modernity, still view the penal law of the *Sharī'ah*, to borrow from Eisenstadt, as an overlapping civilisation within the framework of "multiple modernities" adopt only what they consider to be the positive resources, values and aspirations of modernity (Eisenstadt, 2000 and 2006).

As a matter of fact, the dichotomy between most Muslim understanding and acceptance of only what they consider to be the positive resources,

values and aspirations of modernity in the plural and most Christians' understanding and acceptance of same in the singular, offers explanations for the seeming incompatibility of Islamic civilisation or the penal law of the *Sharī'ah* as with modernity when understood as Westernisation or Europeanisation (Salvatore and Bruinessen, 2009: 1-7). According to Alasdair MacIntyre therefore, Christianity in modern society has lost its social context and become immersed in the social context of the Enlightenment, which may explain why many Christian beliefs have lost their religious and moral significance in the face of Enlightenment rationality (MacIntyre, 1991: 571-574).

The above is not the case with Islam which has maintained its social context from Turkey to Egypt, Iran and Malaysia etc. The Muslim World has not experienced or embraced the Enlightenment and it is because of the pagan roots of western modernisation that the traditional modernisation theory of secularisation has not happened in Muslim societies. In the words of Ernest Gellner, "there is one dramatic and conspicuous exception to all this: Islam. To say that secularisation prevails in Islam is not contentious. It is simply false." To him, Islam is as strong now as it was a century ago and in some ways, it is probably much stronger. The question that poses itself here is why Islam is resistant to secularism. According to Gellner, out of the three Abrahamic religions, Judaism, Christianity and Islam, Islam is most resistant to secularism because it is closest to modernity due to its universalism. To him, the holistic message of Islam, which makes it applicable to the community, the principle of 'the community will not agree on error' which gives the community a political authority of communal consensus and the theoretical absence of clergy which makes Muslim theology egalitarian, all combine together to make Islam a universal worldview for Muslims to construct their values and practices (Gellner, 1992: 5-8).

In short, despite the onslaught of modernity and the glitters of westernisation and secularisation, the penal law of the *Sharī'ah* is still attracting Muslim societies, and the more these societies achieve development and progress, the more they tend to increase their religiosity and faithfulness to the Islamic social context unlike Jews and Christians. This may be because of the effectiveness and efficacy of the penal law of the *Sharī'ah* and its crime controlling measures, as would be seen shortly. The measures of the penal law of the *Sharī'ah* that facilitate the control of crimes will be the focus of the next unit after discussing some moral precepts in the following section of this unit.

## **SELF-ASSESSMENT EXERCISE 2**

Why in your view is the penal law of the *Sharī'ah* still relevant in modern society?

### 3.3 Examples of Moral Precepts under the Penal Law of the *Sharī'ah*

As stated in 3.1 above, examples of moral precepts under the penal law of the *Sharī'ah* which confirm obligations are also legal obligations are the Ten Commandments in Qur'an 6: 151-153 and Qur'an 17: 22-39 respectively. These two passages command some moral precepts that are either obligatory on us to refrain from or those we are duty-bound to do. The following verses of the Qur'an 6: 151-153 contain what is referred to as the Ten Commandments of some of moral precepts established by Allah for humanity against various crimes:

Say! "come, I will rehearse what Allah hath (really) prohibited you from: join not anything with Him; be good to your parents; kill not your children on plea of want; – we provide sustenance for you and for them; - come not nigh to indecent deeds, whether open or secret; take not life which Allah hath made sacred, except by way of justice and law: Thus, He commands you so that you may learn wisdom.

And come not nigh to the orphan's property, except to improve it, until he attains the age of full strength; give measure and weight with full justice; - no burden do we place on any soul but that which it can bear; whenever you speak, speak justly even if a near relative is concerned; and fulfill the covenant of Allah: Thus doth He command you, that you may remember Him.

Verily, this is My Way Leading straight: follow it: Follow not other paths: They will scatter you about from His path: Thus doth He command you that you be righteous.

In the above verses, we are commanded, as stated earlier, to uphold some intra-personal, interpersonal and communal moral obligations. The penal law of the *Sharī'ah*, therefore, does lay down the above moral rules which the believer is expected to abide by. The moral rules, elements or virtues, which may be divided into "to do" and "not to do", are evident from the above verses. The "to do" divinely ordained moral virtues include: following the straight path, goodness to parents, giving full measure, speaking justly and fulfilling while "not to do" moral virtues and elements include "associating partner with God, infanticide, all shameful deeds, murder and embezzlement.



A careful contemplation of these moral virtues would reveal the fact that they constitute important parameters both for the measurement of the incidences of intra and interpersonal as well communal interactions on earth even as they speak to the identities of the religious and law abiding in human societies. The verses show that the penal law of the *Sharī'ah* views the employment of bad measurement in the market-place and the embezzlement of public fund as criminal acts.

In the latter, the marketers and politicians who indulge in these criminal acts not only corrupt the market and the political system through their unholy acts but equally corrupt their personal spiritual well-being. Again, the marketer or politician who engages in these corruptible practices might probably not be involved in the act had it been the case that he chose to work in line with the "shame theory" that is mentioned in this verse. In other words, when Allah says: "come not nigh to shameful deeds" attention is being called to the fact that one of the identities of the criminal is a person who lacks modesty; he is the rational being who is willing to engage in an act which the lower animals would ordinary not engage in.

The criminally minded person is the subject who could go naked in the market even though nakedness is antithetical to his physiology and destiny. The penal law of the *Sharī'ah*, therefore, desires to keep humankind within the purview of its destiny: an honoured and ennobled creature - a vicegerent of the creator of the worlds through the provision of these basic virtues and anti-corruption elements.

### **SELF-ASSESSMENT EXERCISE 3**

What are the positive moral precepts contained in Qur'an 6: 151-153?

## **4.0 CONCLUSION**

From our discussion in this unit we can infer that morality consists of human conduct. From time immemorial, people are socialised to distinguish between what is good and bad, which may be differ from one society to another. A feature of modern society is that what people are morally bound to do and avoid is growing wider than what is legally enjoined or prohibited.

Hence, moral philosophy, a department of philosophy concerned with the study of morality in modern society focuses more on what constitutes morality or immorality and the idea of moral obligation as different from legal obligation, than on the codification of a code of morality.

In fact, a major thrust of modernity is rationalism and the incompatibility of religion and morality and by implication, the penal law of the *Sharī'ah* with modern employment of human reasoning in defining morality. In this respect, Christianity in particular has been secularised and subjected to human reasoning and rationalisation, hence, the accommodation of a lot of modern orientation that were traditionally considered immoral and forbidden such as homosexuality.

The penal law of the *Sharī'ah* differs from Christianity on the above, hence, many Muslims refuse to follow the Christian experience and continue to uphold many traditional moral precepts of Islam.

Such moral precepts of penal law of the *Sharī'ah* include the Ten Commandments contained in Qur'an 6: 151-153 and Qur'an 17: 22-39 respectively. This Islamic understanding of morality makes moral obligations entail legal obligation.

## 5.0 SUMMARY

In this unit, you have been introduced to the meaning scope of morality in modern society. The implications of the modern conception of morality were fully discussed. The influence of modern Enlightenment on Christian morality was equally examined from the angle of penal law of the *Sharī'ah* and some Muslims' insistence on its relevance in modern society. As you have completed a discussion on the relationship between morality and penal law of the *Sharī'ah* in modern society, you are now set for the other two subsequent units in this module.

## 6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the challenges of morality in modern society.
2. Suggest ways of surmounting such challenges.

## 7.0 REFERENCES/FURTHER READING

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## UNIT 2 ISLAMIC MEASURES AND MECHANISM IN CONTROLLING CRIMES

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
  - 3.1 Preventive Measures and Mechanisms
  - 3.2 Punitive Measures and Mechanisms
  - 3.3 Reformatory Measures and Mechanisms
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

### 1.0 INTRODUCTION

How does Islam offer solutions or antidotes to the cankerworm of crimes? To answer this question is what is known by all as the dreaded punitive penal law of the *Sharī'ah*, though there are two other mechanisms of the penal law of the *Sharī'ah* prescribed to control crimes. These are the tolerated preventive and the unsung reformatory. Let us now start by looking first at the preventive precepts of the penal law of the *Sharī'ah*. This will then be followed by the punitive and reformatory measures of the penal law of the *Sharī'ah*. As brief as our discussion in this unit shall be, the discussion shall be stocked with key points which you will find very interesting, and taken mostly from *Suratu n-Nur*, *Suratu 'l-Ahzab* and some *Ahadith* of the Prophet (SAW).

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- enumerate the measures of the penal law of the *Sharī'ah* in controlling crimes
- explain the difference between the preventive, punitive and reformatory measures of penal law of the *Sharī'ah* in controlling crime
- appraise the practicability of these measures.

### 3.0 MAIN CONTENT

#### 3.1 Preventive Measures and Mechanisms

The preventive measures established by the penal law of the *Sharī'ah* against crimes include the fact that Islam views the human conduct, and

in fact the whole gamut of human existence, as a test for which the believer shall be held to account on the day of resurrection (Qur'an 4: 58-59, 6: 165 and 67:2). To be a head of state, teacher, parent or child, for example, therefore, is to occupy a position of trust. In order to prevent or at worst reduce the possibility of crimes, Islam, therefore, enjoins the Muslims to entrust these positions of trusts to the most spiritually and morally qualified (Qur'an 4: 58-59).

Now let us assume the morally and spiritually qualified has been given authority, how does Islam grapple with the fact that power often becomes a "honey" at the tip of the tongue of the statesman? How does Islam ensure that the powerful does not become inebriated by and become hostage to the entrapments of power? Answer to this question might partly be in how potent and strong the spiritual status of the powerful is before his ascension to authority. This is because insights abound in Islamic history of the possibility of that scenario in which one may find the 'honey' of power on one's tongue without taking more than the law permits.

This is particularly the case with Umar b.Khatab that once saw a very lean and thin young girl. He said: "What a sad plight the child is? He soon got to know that the girl was actually his grand-daughter. Then Abdullah, his son, told him: "whatever is in your charge you give us nothing from it...this has brought her this sorry state." Perhaps out of pity for her, the people then asked 'Umar what his entitlement (to fix his salary and emoluments) from the treasury should perhaps so that he could take care of his family as befitting the head of the Islamic state and he said he was satisfied with just two sets of clothing, one for summer, and one for winter, enough to perform *hajj* and sufficient to provide me with food for myself and my household on the level that meets the needs of average Quraysh. I am an ordinary Muslim and I share the lots of all Muslims (Kilani, 2011: 14).

Here Umar's statement and conduct not only portrays him as a just ruler but also one who is conscious that he would give an account before Allah. By refusing to give to his family more than the law provides, he also keeps in view the possibility that power and authority could indeed be honey and poison at the same. He had the serenity of the mind not to succumb to temptation; he was sufficiently conscious of the implication of such an action on his spiritual status and the welfare of the State. Thus, his action feeds the suggestion that consciousness of the existence of God is the only armour against the most tempting of all temptations. Umar's conduct emphasises the importance of such elements as justice (*adl*), equity (*qist*) and benevolence (*Ihsan*) as critical elements in the penal law of the *Sharī'ah* control of crimes.

In talking about the Islamic ethos which could serve as preventive measures against crimes, Islamic teachings on *Zina* as illuminating on the capability of the penal law of the *Sharī'ah* in eradicating crimes from human societies such that there can be total eradication of sexual lawlessness in which case its opposite (sexual purity, righteousness and honesty) comes into being. This is as mentioned in *Suratu n-Nur*, *Suratu 'l-Ahzab* and some *Ahadith*. For instance, in *Suratu n-Nur*, the Qur'an 24: 30-31, Allah instructs both men and women to lower their gaze in order not to cast glances at what is forbidden to look at in each other. The details of this commandment are explained by the Prophet (SAW) in numerous *Ahadith* as follows:

It is reported that the Prophet (SAW) said that men could commit adultery with all their sensory organs such as the evil look at women, lustful talk, touching and finally use of the sexual organs to complete the act of adultery. He also said that the chance look is pardonable but it is unlawful to cast a second look. Lastly, on the occasion of the farewell pilgrimage, a woman stopped to ask the Prophet (SAW) a question and Fadal bin 'Abbas cast a full gaze at her, so the Prophet (SAW) turned his face to the other side (Maududi, N.D. 349-350).

The above *Ahadith* and many others cited by Maududi above show that it is both morally and legally wrong for Muslim men to fix their gaze on non-*Mahram* women. In this same vein, as contained in *Suratu n-Nur*, the Qur'an 24: 31, above Muslim women are also prohibited from fixing their gaze on men. This is part of the preventive measures legislated in the penal law of the *Sharī'ah* to curb the crime of *Zina* in the society.

Similarly, in the same *Suratu n-Nur*, the Qur'an 24: 31, Muslim women were commanded to cover their heads and bosoms. This instruction was later expanded in *Suratu 'l-Ahzab*, the Qur'an 33: 59 where Allah commands both the wives of the Prophet (SAW) and other Muslim women to cover their body with loose and outer garments. However, contrary to the views of some scholars, like Maududi above (289), the penal law of the *Sharī'ah* does not demand of Muslim women the covering their faces.

The penal law of the *Sharī'ah*, however, makes it compulsory for the wives of the Prophets alone to cover their faces as contained in *Suratu 'l-Ahzab*, the Qur'an 33: 53. It is argued that the wives of the Prophet (SAW) were so enjoined because of their position as the "Mothers of the Believers," who were not to be remarried after the Prophet's death (33: 53). Thus, Allah prohibited Muslim men from looking at their faces so as their eyes and minds away from marital interest in them after the Prophet's death. Thus, by the injunction of veiling the face, Allah saved the companions of the Prophet (SAW), such as those nursing the desire

to marry 'Aishah after the prophet's death from the sin of marrying their "mothers," with whom they were always in contact to learn about Islam (Uthman 2001: 52-53).

Another preventive measure of the penal law of the *Sharī'ah* in respect of the crime of *zina* contained in *Suratu n-Nur*, the Qur'an 24: 32, is the commandment to encourage marriage among the unmarried and single Muslims. Even slaves who are responsible and have attained the marriageable ages are not encouraged to remain unmarried. The best commentary on this measure of the penal law of the *Sharī'ah* in respect of the crime of curbing *zina* as noted by Maududi above (369) include these *Ahadith* of the Prophet (SAW) that encouraged young men who has the means to marry because marriage restrains the eyes from unlawful gaze and cools down sexual passion and one of those Allah has taken it upon Himself to assist is the one who marries in order to abstain from *zina*.

One way of preventing crimes by the penal law of *Sharī'ah* which must be mentioned as evident in Islamic history is the provision of adequate welfare for the people. As stated in the Qur'an (28: 77), the penal law of *Sharī'ah* discourages the perpetration of crimes by ensuring the provision of essential and basic material needs of the masses. A case in point, in this instance, is that of 'Umar b. Abdul Aziz. It was during his reign as Caliph that the Muslim community became so prosperous that only the tax-payer remained in the polity; there remained no tax-receiver. He gave instruction for tax distributors to travel round the caliphate in search of tax-receivers but tried as they did, they could not come across a citizen of the caliphate who would collect the alms. He achieved this because of his transparency according to al-Ghazali. For instance, he used a lamp to do domestic chores and a different lamp to study government daily report (Kilani, 2011: 16).

Thus, Islamic perspective to a crime-free society is hinged not only on the nexus on divine punitive and retributive measures but equally on the promotion of public weal and prosperity. It is in line with this philosophy that Islam demands the payment of a regime of wages that will not only make the employees of the state "exist" but "live" a descent life. This ideal operates at the core of Islamic concept of an egalitarian society. The ideal serves the preventive functions in any attempt at confronting the scourge of crime in the world today.

In short, the penal law of the *Sharī'ah* does not promote only punitive measures to purge the society of crimes. However, given its natural inclination, the penal law of the *Sharī'ah* seeks to build a crime-free human society through the above and many other preventive measures

and mechanisms. This invariably leads to the strong and righteous society that constantly rises against crimes and criminal tendencies.

### **SELF-ASSESSMENT EXERCISE 1**

Discuss some of the preventive measures and mechanisms in controlling crimes?

### **3.2 Punitive Measures and Mechanisms**

The most popular and dreaded pathway of the penal law of the *Sharī'ah* in controlling crimes is the infamous institution of stiff punishments to deter the perpetration of crimes. That the punishments Qur'an of the penal law of the *Sharī'ah* mentioned in modules two and three above are harsh, strict and stiff is confirmed as discussed under the objectives of the penal law of the *Sharī'ah* in module one by the Qur'an (42: 40).

In the above verse, the term used for punishment is *Sayyi'ah* or evil. This is a clear indication that punishments under the penal law of *Sharī'ah* are severe and retributive so that they serve as deterrence against crimes. Therefore these severe punishments for crimes under the penal law of *Sharī'ah* are parts of the measures and mechanisms to curb crimes.

As a matter of fact, these punitive measures are directed at curbing the criminal inclination of serious offender so that they don't become hardened. This is why Mawardi as mentioned before views the *Hudud* as "deterrent punishments which God established to prevent man from committing what He forbade and from neglecting what He commanded" (El Awa, 1985). The efficacy of these punitive measures of the penal law of *Sharī'ah* in combating crimes in the society is confirmed by the enormous decrease in the crime rates in such Muslim countries as Malaysia, Saudi Arabia and other Gulf states.

A very important aspect of the punitive effect of the *Hudud* is the fact that they are carried out in the public. The shame caused by this public disgrace of criminals also serves as a strong measure or mechanism to curb crimes. Similarly, the disinheritance the murderer from inheriting a murdered deceased is another strong measure or mechanism against the crime of murder (Peters, 2003: 2).

The punitive measures also help to ensure justice. This is because the best ways to cure societies of its heinous crimes is the application of punishments that would not only deter the commission of such crimes but would equally render justice to the victims of criminals. In applying punishment against crimes, the penal law of the *Sharī'ah* therefore



insists on equity and justice; that no member of the society should be treated differently from the rest of the society no matter his/her status and that no member of the society becomes a risk to others whether because of insanity or greed.

Thus, the penal law of the *Sharī'ah* values human lives equally and supports the development, progress, goodness, wellbeing, comfort and living of all segments of the society. Based on this foremost and fundamental duty of the Islamic State which is encapsulated in the *al-daruriyyat al-khamsah*, Muslims are obliged to employ all natural, human, and non-human resources to empower people and ensure that none is neglected, degraded, wasted, or exploited. In short, it is for this reason that Islam enjoins those in authority or governance to direct the ruled towards sustainable physical, material, intellectual, political moral and ethical development. The rejection or neglect of this Islamic teaching, has precipitated the ongoing criminality and its attendant crisis, chaos, and suffering in Nigeria. In order to eradicate crimes and propel the development and progress of Nigerians in general, the country must embrace these measures and mechanisms for a good quality of life for the protection of all, youths and the girl child and woman (Uthman, Abbas and Oloso, 2011, 21).

## **SELF-ASSESSMENT EXERCISE 2**

Why does the penal law of the *Sharī'ah* adopt punitive measures?

### **3.3 Reformative Measures and Mechanisms**

The penal law of *Sharī'ah* also employs some reformative schemes to curb crimes in the society. This shows that the penal law of *Sharī'ah* also possess expiatory and reformative functions that can purge any offender of criminal tendencies and reform them before they are apprehended.

One of these reformative measures is penal law of *Sharī'ah* or turning to Allah for forgiveness. Then, Allah also turns to an offender once she/he turns away from his/her crimes or transgression of the limits set by Allah and turns over a new leaf by turning to Allah in obedience, she/he becomes forgiven. The penal law of *Sharī'ah* encourages the repentance and reformation of offenders and not their mere punishments. This can be understood further from the fact that the Prophet specifically admonished against the report of an offender of a crime that carries a fixed punishment to the authority. Instead, he directed that the offenders should be encouraged to repent and desist from their actions.

Similarly, the Prophet in practical demonstration of this reformative measure of the penal law of *Shari'ah*, encouraged all those who confessed to the crimes of unlawful sexual intercourse, to withdraw their confessions and turn to Allah in repentance. For example, the Prophet once said in respect of a person punished for unlawful sexual intercourse as follows:

“Had you covered him with your cloth, it would have been better for you.” He also said “Pardon the ordained crimes that occur among you. What reaches me about an ordained crime becomes enforceable” (Fazlul Karim, 1939: 543).

Another reformative measure is mentioned in the punishment of criminals who commit armed robbery. The following verse is cited which represents the penal law of *Shari'ah* for the crime of armed robbery:

The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom except those who repent before they are apprehended... (Qur'an 5: 33-34).

Here, Allah calls attention to the fact that though the penal law of *Shari'ah* for the crime of armed robbery includes the death penalty, crucifixion, cutting off of the hands and feet on alternate sides and imprisonment, according to the views of majority of Islamic jurists yet where the offenders out of their own volition repents before apprehension, they are forgiven their crimes.

The above is contrary to the practice in most modern societies where apprehended criminals are allowed under the common law to plea-bargain after they have been apprehended for a crime. In Nigeria today, many corrupt individuals now believe that the crime of corruption is only punishable when the money stolen is not much such that the thief can part away with something substantial during prosecution by plea-bargaining and still retaining the lion share of the huge theft.

This is unacceptable under the penal law of *Shari'ah* where criminals can only be forgiven past crimes such as the crime of armed robbery if they have repented before apprehension.

### SELF-ASSESSMENT EXERCISE 3

Do you think the abolition of plea-bargaining can help curb crimes in Nigeria?

#### 4.0 CONCLUSION

The unit began with the preventive measures and mechanisms in curbing crimes under the penal law of the *Sharī'ah*. An examination of these measures shows that if they are implemented, there will be little or no reason for the punitive measures of the penal law of the *Sharī'ah*. From our observations, it is clear that inadequate knowledge of these preventive and reformative measures constitutes a major problem of the perception of the penal law of *Sharī'ah* as too harsh in modern society.

#### 5.0 SUMMARY

Here we have examined the various measures put in place by the penal law of the *Sharī'ah* in curbing crimes. You have equally been treated to a concise appraisal of the preventive and reformative measures of the penal law of the *Sharī'ah* while some suggestions were proffered to curb the numerous crimes in Nigeria, using lessons from the penal law of *Sharī'ah*. With the understanding of this, you can now progress to the last unit of this module, to study the challenges confronting the penal law of *Sharī'ah* in modern society.

#### 6.0 TUTOR-MARKED ASSIGNMENT

In your own opinion, how can the preventive measure of the penal law of the *Sharī'ah* help to reduce crimes in Nigeria?

#### 7.0 REFERENCES/FURTHER READING

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## UNIT 3 CHALLENGES CONFRONTING THE ISLAMIC PENAL LAW OF THE SHARĪ'AH IN MODERN SOCIETY

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### 1.0 INTRODUCTION

The misconception of the penal law of *Sharī'ah* is a general problem in contemporary society. This is the reason many people oppose the implementation of the penal law of *Sharī'ah* despite its effectiveness in curbing crimes in the society. A general outlook of the misconception shows that the penal law of *Sharī'ah* and is believed to violate fundamental human rights. In addition, the penal law of *Sharī'ah* is also believed to command the seclusion of Muslim women. Another misunderstood aspect of the penal law of *Sharī'ah* is its provisions on marriage. This unit is made up of three sections, the first discusses the human rights dimensions and the penal law of *Sharī'ah*. In the second section, we shall discuss the issue of seclusion of women and the penal law of *Sharī'ah* while the last section will be a brief discussion of the penal law of *Sharī'ah* and the institution of marriage.

### 2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the various dimensions of the human rights issue and the penal law of *Sharī'ah*
- explain the significance of female veil under the penal law of *Sharī'ah*
- evaluate the place of marriage in the penal law of *Sharī'ah*.

### 3.0 MAIN CONTENT

#### 3.1 Human Rights and the Penal Law of *Sharī'ah*

One major issue that has given the penal law of *Sharī'ah* a notorious image is many people's perception that it is anti human rights. Contrary to this popular image that the penal law of *Sharī'ah* is anti human rights and that human rights can only be attained through the western secular modernising project, the penal law of *Sharī'ah* has in guaranteed the provision of numerous human rights.

Though many Muslim scholars do dismiss feminist claims that Islamic tenets are anti human rights and oppressive, they at the same time counter-pose the indignity some people such as Muslim women are suffering in other religions with the advancement of women in Islam and conclude that in Islam lays true liberation. Thus, such scholars like Maududi (1977), imply that so-called human rights in Islam are relative and subsists only when juxtaposed with a degrading status in other religions.

Thus, the above scholars give the impression that the penal law of *Sharī'ah* is supportive of familial, communal and state institutions and structures which engender violations of human rights as long as these violations are better than what obtains in other religions and cultures. This popular image has therefore made many people believed that Islamic teachings and practices are incompatible with the western values and notions of human rights. These western values and notions as stated before include the standard for human rights contained in the Universal Declaration of Human Rights in 1948, 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 (Oloso and Uthman, 2011).

The penal law of *Sharī'ah* according to Peters Ruud (1999: 5) in his *Islamic Law and Human Rights*, reflecting upon the above popular image of Islam is not totally opposed to western notions of human rights, on the one hand and neither on the same level with western notions or even on more impressive levels and as incriminating. This popular image is outrightly rejected by Riffat Hassan (2012), a professor in Religious Studies at the University of Louisville who objects to advocates of human rights among both secular Western and non-

Western activities that believe human rights can exist only within a secular context and not within the framework of Islam.

In the penal law of *Sharī'ah*, the term *haqq* is used to denote human right in Islamic legal discourse. The term *haqq* means reality, truth, benefit, reward and punishment among others (Lane, 1984: 605). Thus, human rights in Islamic law are referred to as *huquq al-insan* which refers to divine rights bestowed on human beings by Allah (Kamali, 1993: 342 and Baderin, 2001: 85-88).

These rights are classified into the rights of Allah or *huquq Allah* and the rights of the people or individuals, *huquq al-nas* or *al-ibad*. In Islamic law, the rights of Allah refer to both basic duties of human beings towards their creator, Allah as well as divine laws and regulations enacted for public good while the rights of the people are private rights of one individual or group of individuals against another. These are mutual rights and duties which people are allowed by the divine law to claim or waive, seek retaliation, recompense or overlook completely (Mansour, 1982: 195).

Thus, there is a thin line between the rights of Allah and the rights of people as rights of Allah are not limited to the personal and spiritual duties of human beings to Allah but also encompass human interpersonal rights and duties among one another as well as in their interaction with the state (Baderin, 2001: 87). Hence, some rights can be categorised as both the rights of Allah and the rights of the people.

The *Mālikīs* have divided the rights of the people into three, namely, general, private and special rights. General rights pertain to the rights that ensure the wellbeing of the entire human race by virtue of being human, private rights pertain to rights that ensure wellbeing of the private individuals while special rights pertain to rights that ensure wellbeing of some specific people like Muslims, women, workers and non-Muslims.

The term *haqq* under the penal law of *Sharī'ah* also stands for truth and is also one of Allah's most important attributes. Hence, upholding the *huquq* or rights of people is Islam can be declared a divine responsibility which a Muslim must fulfill no matter the odds. Islam commands believers to testify to the truth at all costs while ensuring that no harm befalls those who testify (Parwez, 1986: 346).

It is for this reason that standing in support of the human rights of Muslim women for instance, to me constitutes standing for the Truth as commanded in Islam. On this, the early sources on Islam has shown that the Prophet Muhammad (SAW) defended the rights of women in the

face of the onslaught of patriarchy as during his time, the hitherto matrilineal system prevalent in Arabia was in the process of being replaced by a patriarchal system. Arabian men who had amassed considerable power and wealth wanted to be inherited by their own sons, and not daughters. This led to deterioration in the rights and conditions of women. Men killed their daughters and women to deny them the right to own property. They in fact regarded women as property of men, and if a man died everything owned including women was shared to his sons and male relations (Uthman, 2001: 47-62). It was within this milieu that the Islam instituted women's property, inheritance, education, sexual and divorce rights, among others. By so doing, it offers women both general and special rights which will be discussed later alongside their abuses in the remaining sections.

### **SELF-ASSESSMENT EXERCISE 1**

Differentiate the notion of human rights among the different schools of Islamic jurisprudence?

### **3.2 The Penal Law of *Sharī'ah* and the Seclusion of Women**

As for the prevailing practice of seclusion of Muslim women or *Purdah*, it violates many Islamic teachings (Uthman, 2001). For instance, some of the *Bamidele* who imposed *purdah* or seclusion and *Niqāb* or face veil on Muslim women opine that a woman can only be seen on three occasions, when she is born, when she gets married and when she dies (Doi, 1969: 101-118).

The issue of Muslim women covering their faces is another human rights' issue that has been greatly debated by Islamic scholars, with some insisting that it is compulsory (Akindele, 1992). The general opinion, however, as shown before, is that it was compulsory for the wives of the Prophet but also allowed for other Muslim women. It is argued that the wives of the Prophet (SAW) were so enjoined because of their position as the "Mothers of the Believers," who were not to be remarried after the Prophet's death (33: 53). Thus, Allah prohibited Muslim men from looking at their faces so as to put their eyes and minds away from marital interest in them after the Prophet's death. Thus, by the injunction of veiling the face, Allah saved the companions of the Prophet (SAW), such as those nursing the desire to marry 'Aishah after the prophet's death from the sin of marrying their "mothers," with whom they were always in contact to learn about Islam (Uthman, 2001: 52-53).

At the same time, as it has been shown above Islam does not disallow women to go out to satisfy their personal, educational, economic and



communal needs, etc, contrary to the view of some scholars in Nigeria who opine that women should normally be in seclusion and can only go out when there is no male relation to fend for their needs and even then must be covered from head to toe and segregated from men. To such scholars, the basic reason for seclusion of Muslim women is to prevent illicit sexual relations, protect the woman from being exploited by evil men due to her weak nature as well as to protect men from being seduced by lewd women (Akindele, 1992: 46).

Yet, right from the time of the Prophet (SAW), when he was available to fend for their needs, his wives used to go out to satisfy their needs. In fact, one of his wives on a trip to the town was accosted by 'Umar, who challenged her venturing outside without the company of the Prophet (SAW). Sawdah returned home and narrated the incident to the Prophet (SAW). Immediately, Qur'an 33: 59 was revealed to the Prophet (SAW), who then declared that "Allah has permitted you (women in the plural) to go out for their needs" (Uthman, 2001).

Therefore, the practice of not giving Muslim women free choice whether to cover their faces or not as done by some Muslims is condemnable and anti women's human rights, because it has no basis in Islam. So also is the practice of not allowing them to earn a living. According to the *Sharī'ah*, every man and woman has the right to gainful employment and fruits of such work belong to the one who has worked for them, irrespective of whether it is a man or a woman (Q4: 32).

Malaysia is a good example of a Muslim country that upholds the fundamental human rights of women. Though, the *hijāb* wearing women are usually portrayed as poor, backward and oppressed by a patriarchal Islam and which therefore needs to be emancipated, this is not true of Malay Muslim women who are in fact playing leading roles in all sectors of the 'Islamic Malaysian' society.

The visibility of Malay Muslim women who make up about half the Malaysian population today could be said to reflect what is termed as the contemporary phenomenon of authentic Islamic feminism and which many of the Muslim women represent (Uthman, 2005, 2006, 2010 and 2011).

Though this phenomenon of authentic Islamic feminism in Malaysia could be traced to the publication of Kāssim Amīn Bey's *Tahrīr al-mar'ah* under the title *Alam Perempuan* in Penang in 1930, it recorded a remarkable landmark during the then Prime Minister, Dr. Mahathir Mohamad who boldly declared Malaysia an Islamic country above. It was in Islamic Malaysia that women's percentage in all sectors of the

economy increased from about 30% in 1957 to about 48% in 1995. Today Malay Muslim women enjoy basic constitutional rights. They enjoy the freedom to vote, run for office, pursue education and hold administrative and political positions as notable as university presidents and government ministers. Contrary to the claim of the Norwegian Professor, Ingrid Rudie, the Islamic revival in the 1980s that brought about the Malaysian model of development has not curtailed the rights of Malay Muslim women (Uthman, 2009: 245-265).

With the Domestic Violence Act (DVA) enacted in 1994, Muslim women in Malaysia could seek protection from the *Sharī'ah* court and get civil and criminal remedies for cases of domestic violence such as assault and beating as well as lack of maintenance, denial of children's custody, irregular divorce. In addition, before a man can marry a second wife, he has to obtain permission in writing from the *Sharī'ah* court with evidence that he can satisfy certain conditions such as maintenance. *Sharī'ah* Judges therefore do refuse to entertain applications for second wives if applicants can not satisfy any of the stipulated conditions. Hence, the applications for the practice of polygamy have decreased. So also, the Islamic Malaysia recognises the wife's rights to maintenance, divorce, *Mut'ah* or consolatory gifts after divorce without just cause, her share of jointly owned property, inheritance, custody of children and protection from violence including statutory rape. In short, generally according to Zaleha Kamaruddin, a professor of Islamic law and currently, the rector of the International Islamic University, Malaysia and a former Dean of the Centre for Postgraduate Studies, the Malaysian Muslim woman is better off than her colleagues elsewhere (Uthman, 2009).

A key area of the implementation of Islamic civil laws in Malaysia that could of serious significance to Muslim women in Nigeria is in the use of forensic evidence as an integral part of admission of evidence. Today in Malaysia, forensic evidence has performed many wonders in the apprehension of unknown perpetrators of many heinous crimes, especially where women are the victims such as rape and even stark murder. How the use of forensic evidence in the application of *Sharī'ah* law in Nigeria may represent hope for many Muslim women who suffer various forms of sexual abuse has been addressed elsewhere by me (Uthman, 2007).

## **SELF-ASSESSMENT EXERCISE 2**

Why in your view is the seclusion of women anti penal law of *Sharī'ah*?

### 3.3 The Penal Law of *Sharī'ah* and Marriage

The right to marriage is another general human right under the penal law of *Sharī'ah* which many political and cultural practices seek to annul, especially in respect of Muslim women. Muslim women like men are granted the right to make choices on wide range of issues. In the matter of religion for instance, the *Sharī'ah* insists that there is no compulsion and for each person is his or her religion (Q2: 256 and 109: 6). In decision making, whether in the political, marital or social realm; the *Sharī'ah* makes *Shurah* or the principle of mutual consultation compulsory as commanded in the Qur'an (42: 38) obligatory.

The married couple for instance, according to the *Sharī'ah* are key partners in matters of child upbringing such as breastfeeding and weaning that must be decided based on mutual consent and agreement (Q2: 233). The Prophet Muhammad (SAW) also demonstrated this on many occasions, when he consulted his wives in all marital issues such as if they wanted to suffer exceptional demands and sacrifice in marriage with him or would rather opt for riches and divorce (Q33: 28-34).

The right of Muslim women to exercise free choice in marriage and divorce is granted in the Qur'an where believers are prohibited from inheriting women in marriage against their wish or denying them a cordial termination of marriage (Q4: 19, 127-130). In the context of the human right of Muslim women to exercise their marital choice to marriage or divorce, it is pertinent to state here that the determinant factor is always the happiness and welfare of these women. They have the right to stay in marriage that make them fulfilled just as they can opt out of any marriage that has become joyless. In similar vein, they have both the right to take back their former husbands, if they mutually agree to remarry or to marry new men entirely (Q2: 230-235).

The right of a man to divorce, unfortunately, has been another way by which many Muslim women are abused today. According *Hajiya Bilikisu Yusuf*, the divorce rate in *Sharī'ah* States in Northern Nigeria is alarmingly too high. According to these Muslim women, even in South West Nigeria, the Customary Courts are not faring better as the manner men constantly divorce women is a big constraint to the protection of women in marriage, child support and other forms of fair treatment. One of the abuses of women's rights in Islam is the way many girls are married off by their fathers when they are still minors or virgins (never-previously married daughters). Though marriage in Islam is a pure contract and not a sacrament between the contracting would-be husband and wife, the notion of the father's power to enforce the marriage of a minor or virgin daughter is in vogue in Nigeria, particularly in the North

where early or child marriage is associated with *Vesico Vagina Fistula* (VVF). In addition to Female Genital Mutilation, (FGM), VVF has accounted for many cases of violence against women. There are many cases of underage girls that are married off to old men by their parents (Uthman, 2008).

### **SELF-ASSESSMENT EXERCISE 3**

Does a Muslim woman have the right to marriage under the penal law of *Sharī'ah*?

## **4.0 CONCLUSION**

It can be deduced from our discussion so far that the human rights issue in relation to the *Sharī'ah* has many dimensions, including dimensions affecting Muslim women. The rights granted by the *Sharī'ah* are generally trampled upon while implementing the penal law of *Sharī'ah*, hence the general view that the penal law of *Sharī'ah* is anti human rights. Thus, the different rights guaranteed by the *Sharī'ah* have been discussed in this unit.

## **5.0 SUMMARY**

This unit has simply explained the different dimensions of human rights guaranteed by the *Sharī'ah*. It further exposed you to the specific human rights of Muslim women and how they are enjoying these rights in a Muslim country like Malaysia. With this, we have come to the end of not only this module but also this course material.

## **6.0 TUTOR-MARKED ASSIGNMENT**

What can be done to improve human rights of Muslim women in Nigeria?

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