CRITICAL APPRAISAL OF TA'AZIR PUNISHMENTS UNDER THE KATSINA STATE SHARI'A PENAL CODE LAW, 2001

BY

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DECLARATION

I hereby declare that this thesis is written by me and it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations and references are acknowledged by way of end notes.

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MOHMED LAWAL OMAR

CERTIFICATION

This thesis entitled "Critical Appraisal of Ta'azir Punishments under the Katsina State Shari'a Penal Code Law, 2001" meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to all the Shari'a Courts Judges in Katsina State for their endurance during the period of Shari'a implementation in the State.

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My special and profound gratitude goes to Almighty Allah for all His blessings on me.

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ABSTRACT

The topic "Critical Appraisal of Ta'azir Punishments under the Katsina State Shari'a Penal Code Law, 2001" is considered a topic worth writing-on, especially with the implementation of Shari'a in most of the Northern States and Katsina State in particular.

For convenience and clarity, the research work has been divided into chapters; touching on the historical background of Shari'a implementation in Katsina State.

It has been pointed out in the work that even before the advent of the colonial period, people in Northern Nigeria have their own legal system based on the Qur'an, Sunnah of the Prophet (SAW), Ijma's and Qiyas; some aspect of which were partially dislodged by the colonial masters.

The work also attempted to distinguish between Ta'azir offences and their punishments related to Hadd offences, thereby citing examples of some Ta'azir offences as reflected in the Shari'a Penal Code Law, 2001 of Katsina State.

A highlight was made on the re-adoption of Shari'a Legal System in Katsina State which was mainly due to the yearning of the populace living in the State.

Re-adoption of Shari'a is indeed a welcomed development. However, this writer attempted to point out some problems in relation to the codification of the Shari'a Penal Code Law, 2001. And conclude the work by making some observations and recommendations which we believe, if implemented will bring about good administrations which we believe, if implemented will bring about good administration of Justice in the State.

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CHAPTER ONE

1.0 INTRODUCTION

A work like this is at its primary stage because not much, if any, has written on the aspect of Ta'azir punishments under the Katsina State Shari'a Penal Code. And even Penal Codes of other States that recently implement the Shari'a Legal System. The first State to re-introduce Shari'a Criminal Law was Zamfara State on 27th January, 2000; followed by Niger State in May, 2000. Other Northern States like Jigawa (also 2000), Kano (November 2000), Kebbi (December 2000), Sokoto (January 2001), Yobe (April 2001) and Bauchi (June 2001)[1].

The study will therefore serve as a pointer to the Government and people of Katsina State as to whether the system is being implemented in accordance to the letter and spirit of the law and the areas requiring the attention of the policy or decision makers, or serve as a guide to source of information for other research on this topic or any other topic related to Islamic Criminal Justice System by law students or those formulating policies on the Islamic Criminal law.

To introduce the work on the general basis, it is meant to highlight on the meaning and nature of Ta'azir offences and their punishments as distinct from *Hudud* offences under the Shari'a Legal System. And the rationale for *Ta'azir* punishments is being deterrent in nature as it affects the human society. The work will also highlight on how, some judges and *Ulamas* interpret some laws regarding *Ta'azir* punishment to suit their interest for the simple reason that it is not codified.

Therefore the people must have a codified law which they understand and which they respect i.e Islamic Law.[2] That is why anybody learned in the Shari'a will submit that it is a law which, If understood and applied property will remedy most of the social problems haunting nations of the world[3].

Thus, since the law making body does make law in the interest of the citizens, in making such laws consideration is given to their relevance to the society.

In considering the various issues surrounding the shari'a, the Katsina State Government have come to the conclusion that they must provide for those who wish to come under the jurisdiction of the Shari'a Courts,

and who strongly believe that they can get justice only from Shari'a courts because they believe denying them Shari'a courts will be denying them justice.

And recently in this millennium, the Shari'a Legal System was introduced and implemented by some Northern States including Katsina State. A Shari'a Penal Code was enacted for the State where offences and their punishments were prescribed having established the Shari'a Court earlier[4].

Ta'azir Punishment has been reflected in the Katsina State Shari'a Penal Code for offences not attracting *hadd* punishment and these, among others includes:

- Buying or Selling minor or unsound minded persons for immoral purposes.
- Trafficking in Women
- Lesbianism *(Sihaq)*
- Bestiality *(Watal Bahimah)*
- Gross indecency: here the write intends to focus on what amount to indecency in Islamic Society vis-à-vis the concept in the Western World.
- Defamation
- Praise-Singing and Drumming

- ❖ Unlawful gathering of male and female adults specified under chapter X[5] Shari'a Penal Code Law 2001, not minding the economic and social consequences of these provisions to the citizens of the State.[6]

1.1 OBJECTIVE OF THE WORK

i. *Ta'azir* offences and their punishments cover a bulk part of punishments in the Islamic Criminal Justice System. And as it remains to be seen, these punishments in Islamic Law are preventive, reformative and deterrence in nature. It is therefore the objective of this study to expose and analyze the Ta'azir offences and their punishments as contained in the Shari'a Penal Code Law of Katsina State.

ii. The work will identify the contributions made by the Penal Code Law of Northern Nigeria in drafting the said Shari'a Penal Code Law of Katsina State. The study will also focuses on examining whether Shari'a implementation as regards Penal System has succeeded or failed in practice as regards to certain offences which affects the day-to-day affairs of the

people living in the society such as girl-child hawking, praise-singing and drumming and unlawful gathering of male and female adults.

iii. The study also aims at coming up with some useful recommendation that will generally improve on the administration of Criminal Justice System in Katsina State in particular and the whole country in general. The work will also provide an in-depth understanding of the concept of Ta'azir vis-à-vis its punishment in Islamic Law.

1.2. ORGANIZATIONAL LAYOUT

The whole work will be laid in chapters, each on a different heading but all related to each other on the subject matter under discussion i.e Ta'azir Punishments under the Katsina State Shari'a Penal Code Law 2001, Chapter one is on general introduction, Chapter two is on Ta'azir Punishments generally, while Chapter three will make a comparative analysis of the Penal Code Law of Northern Nigeria, 1963 and the Katsina State Shari'a Penal Code Law, 2001. Chapter four will attempt to digest the Ta'azir punishments as reflected in the Katsina State Shari'a

Penal Code Law, 2001 and critically appraise these punishments. While Chapter five will summarized the work, make necessary observations and recommendations.

1.3 SCOPE OF THE STUDY

Giving the title of this research work it is intended that *Ta'azir* Punishment will be discussed as administered with particular reference to Katsina State. The focus on Katsina State is important having in mind the fact that it is one of the States that have recently extended the application of Shari'a Legal System to cover criminal matters and by implication all other matters of human Endeavour.

This research will therefore identify, examine and evaluate the loopholes, short-comings and defects of the law i.e. the code with a view of proffering correctional measures. However, limiting the scope to sections dealing with offences now referred to as *Ta'azir* offences under the Katsina State Shari'a Penal Code Law, 2001.

There will however be significant reference to the Primary and Secondary sources of law under Islamic Law and the Shari'a Penal Code Law, 2001 of Katsina State.

1.4 RESEARCH METHODOLOGY

This thesis will adopt the doctrinal method of research because the materials for the research are mainly available in Statutes (especially the Katsina State Shari'a Penal Code Law, 2001), some Islamic Law reference books touching on the topic, Journals and Articles.

1.5 LITERATURE REVIEW

Though the topic of this thesis (*Ta'azir*) does not enjoy a tremendous amount of literature, but the learned author and academician in Islamic Law, Bambale, Y.Y. in his book : Crimes and punishments in Islamic Law brings to light most of the *Ta'azir* punishments and how they are being administered.

Muhammad Bukar Isma'il in his book Fiqhul-Wadhi has clearly drawn a line of demarcation between

Ta'azir and other related offences; which this researcher reviewed in the course of this work.

The researcher also reviewed the book of Ibn Rushd called Bidayatul Mujtahid in comparison with Sharh-al-Ahkam Fil-Jarimah in an attempt to distinguish what amounts to crime under Islamic Law and those that attracts Ta'azir punishment.

Some *Qur'anic* verses and *Hadith* are also to be reviewed regarding the subject matter of the research.

Even though, the code has never been amended since its inception, after reviewing the law, a great *lacuna* has been discovered. For instance under section 190 of the law which provides that:

> *"Whoever, being a parent or guardian of any girl-child allows his daughter or ward of any age to engage in street hawking is said to encourage girl-child hawking"*

But the law is silent on where, for instance a grown-up girl set up a street hawking herself and manages it by herself.

Also in reviewing the law it is discovered that section 132 (c) is not in compliance with the shari'a by providing that "where the complainant (*maqzuf*) is a descendant of the accuser (*qazif*)", he will not be punished. This and others we intend to bring out so that it will be amended to better the criminal justice system in the state.

Ta'azir punishment has been dealt with squarely in most of Islamic law books. But the code did not take into considerations the condition of people living in the state especially on the imposition of fines. Attempt will be made to bring to light the need to review this law.

For a penal system to achieve the required result there must be a procedure code through which offences are established and punishments executed as reviewed in most of Islamic law books. But there is no criminal procedure code as regards Katsina State shari'a penal code,

hence, calling on the legislature to enact a criminal procedure code for easy dispensation of criminal justice in the state.

END NOTES AND REFERENCES

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CHAPTER TWO

2.0 TA'AZIR PUNISHMENTS IN ISLAMIC LAW

The word *Ta'azir* is a derivation of the Arabic verb *azar*' meaning 'to prevent', 'to respect' and 'to reform'[1]. In the Islamic Legal Context, *Ta'azir* is defined thus:

> *"Discretionary punishment to be delivered for transgression against Allah, or against an individual for which there is neither fixed punishment nor penance (Kaffarah)"*[2]

The definition excludes all crimes for which *Hudud* or *Qisas* are applied, and *Ta'azir* cannot intervene or replace any of them. But, *Ta'azir* can be a possible alternative i.e. (where no punishment could be found in Qur'an or Sunnah, court can resort to alternative punishment in *Ta'azir)* and or additional punishment in some cases, but not as a sole punishment.[3]

Ta'azir has been defined *luggatan* in *Lisanil Arab*[4] to mean a derivation of *"Azra"*. Its literal meaning in Arabic came from *Al-Laum* (accusation), *Al-Man'u* (to prevent) because it prevents a criminal from going back to commit another crime.

It is also known as *Al-Dharb* (beating), *Ta'adeeb* (Punishment), *Nusra* (assisting) as provided in *Sira* of the Prophet (SAW) in the tradition of *Warqat bn Naufin,*

> *"…. If you are sent and I am alive, I will assist you*[5]

In *Al-Qamusul-Muhid, Ta'azir* has been defined to mean "a discretionary punishment simpliciter"[6]

Istilahan or Shar'an, (i.e in the legal context) Ta'azir mean a punishment which attracts no *Hadd* no *Khaffara*[7].

In *Fiqhul-Wadhi,* it has been stated that Ta'a*zir* is to punish a person on a crime which does not attract *Hadd* nor *Khaffara*[8]

Al-Fauza, in his *Al-Mulakkas Al-fiqh* defined Ta'azir *as* Al-Ta'adeeb. According to him, it has been called with this name because it prevents a person from committing an evil deed[9].

Ta'azir denotes a punishment aimed at the prevention of crime and reformation of the criminal. It is stated by Ibn Farhun that the aim of *Ta'azir* punishment is thus:

> *"Disciplinary, reformative and deterrent..."*[10]
> But according to M.B. Uthman the word "*Ta'azir*" is derived from the root word "*Azzara*" or "*Azru*" which means to defend or to prevent. He says, where one defend another, he actually prevents that other from being maltreated.[11]

The Holy Qur'an states:

> "*That ye may assist and honour him (The Prophet S.A.W)..."*[12]

Al-Mawardiy, a Shafi'i Jurist defines *Ta'azir* technically to mean:

> *"Punishment given for a crime over which the Shari'ah has not fixed a particular punishment"*[13]

Other Jurists attempted to be a little more elaborate than Al-Mawardiy. They have generally define *Ta'azir* penalties to be unfixed punishments that apply to wrongs committed against public and private interests in respect of all offences that do not carry a fixed

statutory punishment (*hadd*) or expiatory punishment (K*affarah*)[14]

It should be stated, here, that the fact that *Ta'azir* penalties are referred to as "unfixed" *Gair al-muqaddarah* does not necessarily presuppose that just because a certain offence carries a specified penalty, it ceases to be of *Ta'azir* nature. In fact, there are several punishments prescribed by the Prophet (S.A.W) but which are still understood as Ta'azir penalties. For instance, the Prophet (S.AW) ordered that perpetrators of the unnatural act of bestiality *(wat-al-bahimah)* should be put to death[15]. He also ordered killing of sodomites[16] despite these directives, the jurists are not unanimous that the two punishments above are of *hadd* nature and therefore beyond the scope of Ta'azir.

A contemporary Jurist Dr. Muhammad Bukar Isma'il in his book *Fiqhul-Wadhi*[17] defined *Hadd* to mean "to protect". It is been said in Arabic *Hadduhu min kaza i.e Man'uhu min hu m*eaning "he is bunged from here"

Hadd is also used literally to mean "Hajiz" i.e something differentiating two things.

It is also used directly in differentiating one thing from the other as in the saying of the Prophet (SAW). The difference between us (Muslims) and them (the Non-Muslims) is (Salat) prayers.

It is called Hadd punishment on who committed an offence, why? Because it protect the offender from going back into committing the crime, which he has been punished on.

Hadd can also be used directly to mean the offence or the crime like Allah said in the Holy Qur'an:

> *... These are the limits (set) by Allah...*
> *Allah set limits, orders to mankind*
> *that they may become Al-muttaqun*
> *(the pious)*[18]

Hadd has been used *Istilahan/Shar'an* (i.e. in the legal context) as prescribed punishment for disobeying the right of Allah.

2.1 NATURE OF HADD

Nature of Hadd has been classified into seven:

(1) Hadd for Zina
(2) Hadd for Qadhaf
(3) Hadd for Drinking Alcohol
(4) Hadd for Theft
(5) Hadd for Robbery
(6) Hadd for Apostasy
(7) Hadd for Bagyi

But in relation to Qisas and Injuries, many jurists considered it to be out of *Hadd* punishment. This is because Qisas and Injuries are purely right of a certain person.

The Jurist opined what is *Hadd*, like we have said earlier to mean the right of Allah (SWT).

The Author of the book (Fiqhul-Wadhi) said, in his opinion nothing stops merging Qisas in relation to killing from being a *Hadd* punishment because Allah has also prescribed Qisas and Injuries just like *Hadd* punishment[19].

He continued to assert that some Jurists did not merge what Judges have right to determine i.e. Ta'azir to be within the ambit of Qisas and Injuries.
Here, it is for a judge to flog an accused person who commits an offence which has no fixed punishment. He can either imprison or exiled the accused person with a condition that the punishment should not reach that of *Hadd*.

And this writer conceded to this line of thinking because it will be contrary to the general rule if Ta'azir punishment reaches or exceeded a *Hadd* punishment.

It suffices to say that *Ta'azir* punishments are understood to apply to all cases that are outside the scope of the *Hudud* or *Qisas*. In all these cases *Ta'azir* may not be applied as the primary and original penalty (*Uqubah asliyya*) except as an alternative penalty as explained earlier (*Uqubah badaliyya*), which may become necessary due to the lack of attainment of the standard of proof required by the *hudud* or *qisas* or where the *Ta'azir* is merely incidental or secondary (*tab'iyyah*) to the *hudud* already prescribed. Examples of the later case are the punishment of exile for one

year (*taqreeb*) in cases of fornication (*Zina*) according to Imam Abu-Hanifa; or the application of the *Ta'azir* as an incidental penalty in cases of injuries (*Jarah*) that cannot be made subject to retaliation because of the fear of inexactitude in the retaliation as upheld by both Malik and Abu-Hanifa; and the additional forty lashes or stripes above the stated forty stripes for wine drinking as held by Imam Al-Shafi'iy[20]

It may be understood that the aim of *Ta'azir* is to occupy the vast scope of the Islamic Criminal Justice System in such a way that nothing is beyond its scope except the few penalties that are defined as *Hudud* or *Qisas*[21].

By this premise, having mentioned offences that fall under *hudud* and *Qisas*, one will agree that the actual scope of the *Hudud* and *Qisas* is very limited.

> *"The bulk of the Islamic Criminal Law is consisted of Ta'azir offences. The fixed categories of offences and punishment of the Hudud and Qisas can be said to occupy only a restricted portion of the Criminal Law."*[22]

Furthermore, the standard of proof of *Hudud* and *Qisas* offences and their punishments have been made extremely difficult. Therefore, where the standard of proof fails to be attained, the Ta'azir will be made to apply.[23]

In the interpretation schedule of the Katsina State Shari'a Penal Code Law, 2001 *Ta'azir* is interpreted to means 'a discretionary punishment for offences whose punishments are not specified'. And specification here means punishments which were not prescribed specifically by the *Holy Qur'an* and or *Sunnah*. *U*nlike *Hudud* punishments which were specifically prescribed in the Holy Qur'an, for example punishment for drinking alcohol.

As shall be seen the bulk of Islamic Criminal Law is consisted of *Ta'azir* offences and their punishments. The fixed categories of offences and punishments of the *Hudud* and *Qisas* can be said to occupy only a restricted portion of the Islamic Criminal Justice System.

Throughout human history, enforcement of State Laws on defaulters has been a subject of protection by various Law Enforcement Agencies. As to whether these laws were or are based on fairness and justice is more a subjective issue than an objective one. Law and punishment have from the earliest times been regarded as of fundamental importance to which there exists a general consensus amongst the people of this world.

But before we start discussing '*Ta'azir*' punishment generally', it will be of importance to know what a crime is or what amounts to a crime under Islamic law; this is because there cannot be punishment without committing a crime or an omission which is considered in law to be an offence.

It has been stated earlier that a crime is an act which is prohibited and which carries with it a penalty by way of *Hadd* or *Ta'azir*. It has also been stated that an offence may take the form of commission or omission.

The Shari'a in its commands and prohibitions, applies to all subjects that have complete legal capacity. Therefore, the minor and the insane are not legally

responsible in the general sense, because they lack the capacity to comprehend the commands and prohibitions of the law.[24]

The likes of *Al-Amidi*[25] and *Al-Ghazzali* would regard this position as ideal. This might be ideal for the *Hudud* offences. But the *Ta'azir* offences may not be so dependent upon structural rules. It has been said that the application of the *Ta'azir* is interlocked with the precept of *Maslahah* and the requirement of an act being both prohibited and punishable may not always be necessary.

The definition is largely concerned with the various precepts that bring an act under the meaning of prohibition which would consequently make its violation punishable.

The necessary and general conditions for offences under Islamic law are basically three:

i. That there must be a text that prohibits the act and makes it punishable.
ii. The actual performance of the act by the way of commission or omission and

iii. That the offender be of complete legal capacity.

These conditions are main conditions for committing offences. Therefore, we do not contemplate the various and particular requirements that we find under specific offences. These conditions are present in all offences. However, beside these, there are some particular conditions that are peculiar to specific offences. For example, the conditions that theft most have been done stealth fully, or that penetration of the glands of the male organ must have been achieved before the offence of *Zina* is completed.[26] the first condition is the most relevant to this work because of the complexity and technicality that surrounds the principles which applied to *Ta'azir* offences which is the subject under discussion.

The first general condition that there must be a text that prohibits the act committed, i.e. ***La Jarimata wa la Uqubata bi la nassin fi Jara'im al Ta'azir***. The term '*nass*' under this heading must be understood to mean both particular texts and general texts.[27] Furthermore; this maxim applies in different ways to the different types of *Ta'azir* offences.

But according to Muhammad Abu Zahra, the term Jarimah or crime must be understood in the light of other Arabic terms bearing related meanings such as *Ithm* (Sin), *Khata'ah* (Error) and *Masiyah* (offence). He goes on to say that "No one can differ to the fact that *Jarimah* or crime means an act which entails punishment and is blameworthy[28]. Thus a crime is what Allah has forbidden and also disobedient to what Allah has ordered. *Jarimah*, then, is a general term encompassing the above-mentioned terms signifying an act forbidden by the *Shari'ah*.

Dr. Abdul Aziz Amir[29], AbdulQadir Audah[30] and *Ibn Rushd Aldalusi*[31] also of the Maliki School are by implication unanimous by the above definition of crime. From the discussion above, it comes to view that almost all Jurist consider a crime under Islam to be in general terms, acts against the Shari'ah which attracts punishment.

Having seen what a crime is, we shall now examine the theory of punishment. The general theory of punishment is based upon the Qur'anic verse which says:

> *"Do not spread chaos on the earth after it has been set in order"*[32].

It is understood from this command that the order of the community serves as a protection for the individual from committing crime, therefore, the notion of *Ta'azir* punishment is to act as a deterrent, to prevent further inclinations towards the crime and to cleanse society of uncivilized behaviour. The crux of the matter lies in the fear to be struck in the minds of all those who intend to perpetrate similar offences.

This reveals that there is quite a lot of reserve jurisdiction controlled by the *Ta'azir* because the Courts, in the majority of cases, will have to impose the *Ta'azir* and not *Hudud* or *Qisas*. This points to the over-present requirement of the judge or Court to make recourse, not only to the particular text of the law *(Daleel Khas)*, but also to the wider and more general texts that are interlocked with the philosophy of *Ijtihad*- the philosophy of the *Ta'leel al ahkam* (Rationalization of Legal Rules), which is the bedrock of Ijtihad including the doctrines of *Istihsan* and *Masalih al Mursalah*. And this is why the Maliki Jurist have evolved this doctrine of *Masalih al-Mursala*, i.e.

interests that are unrestricted – not tied to any specific text. The only consideration is that the spirit and ultimate purpose of the law be preserved. The term M*asalih, Masalih al-Mursalah, Istidlal bil Masalih Siyasah al-Shari'iyya* have all been generally used to mean the same thing, i.e. the following of what brings about goodness, justice and betterment in the application of law.

One of the advocates of this view is a prominent Maliki Theologian and grammarian, *Al-Shatibi*, who dedicates his scholarly work on legal philosophy, *Al muwafaqat fi Usul al-Ahkam* to the establishment of this reality. He argues that there are several texts of the Holy *Qur'an* that clearly indicates the necessity and imperativeness in the ratiocination of legal rules[33]. And he quotes this verse:

> *"To those against whom war is made, permission is given to fight because they were wronged"*[34]

It appears that the opponents of *Masalih al-Mursalah* seek to create, technically, concrete rules that would bind jurists to do Justice and not to leave them

unguarded and without rein. To the *Shafi'iys*, for instance, this is by relying upon texts for determination. Therefore to some of them where *Maslahah* is to be done, a particular text must be found. According to Sheikh Abu Zahra, "the source of the *Masalih al Mursalah* should be allowed to stand on its own. The *Hanafi* and *Shafi'i* Jurist placed it under the *qiyas,* and *Maliki* and Ahmad allow it to stand by itself[35].

2.2 FEATURE OF TA'AZIR

Having discussed some general features of *Hudud*, *Qisas* and *Ta'azir* punishments in the Islamic Criminal Law, now attempt will be made to point out some features of *Ta'azir* punishment in isolation to the others.

It is also another feature of Ta'azir punishment to allow a judge to pass more severe sentences against a recidivist. This is so, where, in the opinion of a judge, and his court members known as assistant Alkali or *Muftis* believes that no other punishment except a severe one can deter and reform such recidivist.

(a) A distinct feature of *Ta'azir* punishment is that it is not determined in fixed or specific terms.

Here, the flexibility of the punishment may sometimes affects the individual judgement of a person. This is because, where a judge is influenced by certain factors he may chose to inflict a very light or severe punishment on a certain accused person, hence, drafting the Code to check-mate the possible injustices that may occur[36].

(b) A wide range of punishment is available for the judge to choose the one that suits the crime in question bearing in mind the criminals intentions, record, psychological condition, etc.

For instance, where an accused person steal a bathroom slippers the value of which is below the minimum standard *(Nisab)* or someone who steal some properties the value of which is up to or more than *Nisab* but not within *Hirz*, since his hand is not to be amputated as stipulated by Qur,an, then consideration of choosing the appropriate punishment come to play[37].

(c) Here, the authority of the judge is limited by his obligation not to order a punishment which is not allowed by Islamic law.

No matter how habitual an accused person is in committing crimes, a judge cannot order a punishment which is not in line with the Sunnah of the Prophet (SAW). A judge cannot for instance order the beard of a convicted person to be shaved.

(d) Another feature of *Ta'azir* is the fact that cumulative punishment is allowed; i.e. the judge can inflict more than one punishment at a time – i.e. flogging and imprisonment as provided for in Section 134(2) Shari'a Penal Code Law of Katsina State where it reads

> *Whoever, commits the offence of theft where the punishment of theft was remitted under paragraph 135(1) above may be punished with imprisonment for a term, which may extend to one year and shall also be liable to caning which may extend to fifty lashes*[38].

This is an exception to the general rule in Islamic law that one punishment is imposed for one crime[39].

Hanafi School allows *Ta'azir* punishment to be imposed in addition to any *Hadd* punishment when the circumstances justify it. This view was derived from the Judgement of Sayyidna Ali (R.A) where he flogged Shuraha Al-Hamdaniyya for Zina on Thursday and killed her on Friday as quoted in *Bidayatil Mishtahid*[40].

Maliki School, on the other hand, allows *Ta'azir* punishment to be inflicted in cases of wounds or injuries, even when *Qisas* is applicable and has actually been inflicted. Example to order an accused person to pay medical expenses as *Ta'azir* after his finger nail is removed as *Qisas* punishment for removing finger nail of his victim. They consider this punishment to be an affective deterrent for the criminal as well as for other potential criminals. It is clear from the above that *Ta'azir* may be either the original punishment for crimes which have no fixed punishment or an

additional punishment for crime which deserve *Hadd* or *Qisas* punishment[41].

With all respect, this writer submits that it would be wrong to inflict any other type of punishment after Qisas has been inflicted on the accused person. One cannot imagine, for example where somebody's ear or tooth has been removed by way of Qisas as provided in the Qur'an and also be asked to face a Ta'azir punishment. If God wanted it that way, He should have stated it categorically immediately after the verses dealing with Qisas in the Holy Qur'an.

Ta'azir therefore, is an evidence of flexibility of the Islamic Penal System. Without *Ta'azir*, the Islamic Penal System would certainly have been inadequate. Within the context of *Ta'azir*, necessary power is given to the authorities to safeguard the public interest by making harmful and disturbing behaviour unlawful and prescribing punishments for it.

On this point, the Jurists are unanimous that authorities must not prescribe punishments in

advance. This is a clear exception to the application of the general principle of Islamic Criminal law, which holds that no punishment can be inflicted except for an offence which has been so defined in advance i.e **La Jarimata wa la Uqubata bi la nassin fi Jara'im al – Ta'azir** which has been discussed earlier.

Common Law also has taken this position rightly by providing that no law should be made with retrospective effect for the purpose of trying someone[42].

The authorities are given a very wide range of powers to punish harmful acts and omissions which may threaten the public interest. Even though, the right to determine what constitutes an offence and what is not is reserved for Allah alone as expressed in the Holy *Qur'an* and *Sunnah*.

Therefore, in such cases of offences for which they have been prohibited and punishments have not been fixed in the Holy *Qur'an* and *Sunnah*, the duty of the Judge or Ruler is to choose the proper punishments for such

prohibited behaviours, but he does not determine the crime.

The question now is, can a Judge enter his Judgment based on his personal knowledge?

According to Zahiri School of Thought, it is obligatory upon a Judge to enter his Judgment based on his foreknowledge in cases of blood, Qisas, property, Furuj (cases that relates to sexuality) and Hadd offences.

It is the same, whether the Judge know the issue before his appointment or after his appointment as a Judge. Best of what a Judge can enter his Judgement upon, is his foreknowledge because he can be depended upon for his truthfulness.

Next on what a Judge can base his Judgement is confession and then on witnesses[43]. Allah (SWT) said:

> *O you who believe! Stand out firmly for Justice, as witnesses to Allah, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allah is a Better protector to both (than you). So follow not the lusts (of your hearts) lest you avoid Justice; and if you*

distort your witnesses or refuse to give it, verily, Allah is Ever Well-Acquainted with what you do[44].

In translating this verse, the Prophet (SAW) was asked about the great sins as narrated by Anas. And he (Prophet SAW) said, they are:

"... And to give false witness"[45]

On the issue of whether a Judge can base his Judgement on his personal knowledge, the Prophet (SAW) said:

He who sees evil deed, he should change it with his hand, if he cannot, he should change it with his tongue...[46]

It is pertinent on a Judge to be just. It is not just for a Judge to leave a criminal on his criminality without changing him. It is necessary for a Judge to change any evil deed known to him with his hand, should try as much as possible to give everything due to the right owner.

The majority view (*Jamhur*) opined that a Judge should not enter his Judgment based on his foreknowledge[47]

Caliph Abubakar (R.A.) said:

> *If I will see somebody committing any offence attracting punishment, I will not punish him based on my personal knowledge[48].*

Therefore, if a Judge will stone an adulterer based on seeing him committing the adultery without getting the required witnesses, then the Judge will be punished for the offence of *Qadhaf*.

Since it is forbidden for a Judge to talk based on his knowledge, the best for him is restrain himself from entering Judgment based on his personal knowledge.

The basis of this opinion is in the Holy Qur'an where Allah says:

> *"These are the limits set by Allah……and whoever obeys Allah and His Messenger (Muhammad SAW) will be admitted to Gardens and which rivers flow (in Paradise), to abide therein, and that will be great success"[49]*

But this writer is of the opinion that these punishments must be prescribed in advance for the human society to be free from laxity. This is because if punishments are not prescribed in advance one may commit an offence and go free and another be punished.

From our discussion above, there is, established, a firm nexus between the idea of *Masalih* and that of *Ta'azir*. The division between the *Hudud*, *Qisas* on the one hand, and that of *Ta'azir* on the other, simply proves to be a reflection of the same jurisprudential pattern that exists over the general law; the existence of the particular texts and principles on the one hand, and the free and apparently limitless scope of the *Masalih* on the other.

Therefore, what the Judge enjoys in *Ta'azir* penalties is not the freedom to determine wrongs, but rather, the freedom to use his good discretion to determine, within the circumstances of each case, whether to give out the maximum penalty or anything lesser, which may be extremely wide. He may choose to admonish or reprimand the offender or give a sterner penalty such

as lashes or imprisonment or both. He may choose to execute punishment directly or give a suspended sentence, or even avoid the penalty altogether[50].

As to *Ta'azir* for the public interest, it has been observed that *Ta'azir* penalties are applicable for wrongs. But an exception lies where an act which is not an offence under a particular text of either the Qur'an or Sunnah is nonetheless punishable by way of Ta'azir if by so doing some general public interest my be saved. Under Islamic law, interests are generally divided into two:

Public Interest or in strict terms 'interest of Allah", and Private Interest or 'interest of the individual.' These two divisions represent only the broad extremes. In fact, there are several sub–classifications advance by various Jurists.

Khallaf, in his *Ilm Usul al – Fiqh* prefers to maintain this position under Islamic Law[51].

Where a particular interest affects the public or community, it is called an 'exclusive interest of Allah' *(Haqq Khalis Lillahi)*. In such matters, the individual is not disposed to proffer options, and the execution of the right is a sole responsibility of the State.

On the other hand, where the interest affects private rights exclusively, the individual may exercise the options open to him such as to retaliate, elect for compensation or to pardon the offender[52].

But it is possible to have interests that are common to both public and private rights, or to be more detailed, interests that are common to both; but where public rights are more prominent, this type actually follows the legal conclusion obtainable under exclusive public rights. In the same way, where an interest projects the prominence of private rights, the legal conclusion follows that of exclusive private rights.

2.3 KINDS OF TA'AZIR PUNISHMENT

As discussed earlier, the Judge, in cases of offences for which *Ta'azir* punishment is prescribed, has a variety of punishments from which he can choose the one

suitable for a particular crime. Such punishments would be chosen according to the criminal circumstances of the case i.e. criminal record of the offender, his psychological conditions, etc. The following are some kinds of punishments allowed as *Ta'azir,* but they are by no means exclusive and exhaustive.

In other words, there is no hard and fast rule that insist upon a specific penalty that the Judge must met-out. And some penalties may occur more often than other. For instance, the penalty of flogging and imprisonment may occur on a much higher ratio than, say, the death penalty as asserted in *Fiqhul-sunnah* referred earlier.[52]

1. **Admonition *(Wa'az)***

   This is a punishment that is restricted to offender who commits minor offences for the first time provided the Judge believes it is enough to reform the offender and restrain him from any further offence or transgression[53].

   Through admonishing the attention of the offender is drawn to the fact that he has acted

unlawfully. The *Holy Qur'an* instructs husbands to 'admonish them' (wives) where Allah says:

> *"Men are the protectors of women, As to those women on whose part you see ill-conduct, admonish them (first)... Surely, Allah is ever Most High, Most Great"*[54].

Audah has mentioned the summoning of a person to the Courtroom to be a form of *Ta'azir*. But he adds that these types of 'penalties' are not to be relied upon unless it is preponderant in the reasoning of the Judge that they will work and will have far reaching effects on the person receiving them[55].

Considering the fact that law is an ass. It always goes on to suit times and generations, this kind of punishment will not have a far reaching effect on the present time when people's minds are hardened.

Presently, calling somebody in a Court room and admonishing him will not serve the purpose for which the laws were made. Therefore, if it is

admonishing, more and more people would be committing one crime or the other.

> *The Holy Prophet (SAW) admonished Abu Zarr that you are a person and in you there are acts of barbarism (Jahiliyya people). He also told his companions to admonish people who transact business in a mosque during prayers; and pray that may Allah not bless their business*[56]

2. **<u>Boycott (*Hajr*)</u>**

Boycott as a Ta'azir punishment is recommended in the *Holy Qur'an*[57]. It was practiced by the Holy Prophet (SAW) in the case of those men who did not participate in the battle of *Tabuk*[58]. It was inflicted by Caliph Umar on one Dabi who used to ask about difficult words in the *Holy Qur'an* so as confuse people[59].

Boycott as a punishment, does not have the efficiency it requires today, because it was base on a powerful religious feelings among people and this no longer exists[60]. This argument does not

appear to hold much water because it is not for anyone to presume that a particular penalty or punishment will not work in any Islamic environment or Islamic State in the world. It might be a plausible argument in a rotten neighborhood but nothing stops its free application in neighborhoods that are decent. The punishment is inflicted, mainly by preventing the offender from communicating with other people, but then it would become a sort of imprisonment rather than the intended boycott[61].

It can be argued that in the present world of Information Technology and Communication, this kind of punishment cannot serve the purpose it is intended to serve. This is because even if someone is boycotted, he could have an even larger contact through his mobile handset where he could have contact calls or click into various websites, make discussions or even transact other businesses.

The Holy Prophet (SAW) instructed this type of Ta'azir punishment on men who inclined

themselves to womenfolk in dressing, talking and action, to be far away from Madina.[62]

3. **<u>Death Sentence By Way Of Ta'azir (*Ta'azir Bil – Qatl*)</u>**

The *Ta'azir* punishment /penalty is primarily, aimed at correcting the offender. Therefore, only penalties which are not life threatening are to be meted out as a general rule [62].

However, many of the Jurists have raised exceptions to this rule, and allowed the death penalty by way of *Ta'azir* if the interest of the public demand; such as where the evil and mischief or harmful conduct of the offender cannot be removed save by it. Examples of such situations are the case of espionage and propagation of hearsay.

The Hanafi Jurist refers to this penalty as ***Al-qatlu Siyasatan.*** *A* section of the Hambalis such as *Ibn Taymiyyah and Ibn Qayyim* have followed this opinion. A group of the Malik Jurists

have also allowed this type of penalty where necessary[63].

It should be observed that most of the death sentences that the *Hanafi* Jurists refer to as 'Siyasatan are actually penalties which fall under *Qisas* and *Hudud* in other legal theories. For example, the Hanafi Jurists allow the death penalty in cases that they refer to as ***Al – qatlu bil-muthqil***, the offence of sodomy (Liwat) and deliberate homicide by indirect means (*Sababiyah)* however, the other leaders will punish the above offences by way of *Hadd* or *Qisas*, as the case may be[64].

In another instance, the Maliki Jurists and some of the *Hambali* Jurists are of the view that a propagator of hearsay may be executed by way of *Ta'azir*. The *Hanafi* Jurists have gone to the extent of holding that where an offender become notorious, such as where he is in the habit of repeating sexual offences or theft, will be liable to the death penalty by way of '*siyasah*'[65].

The Jurists who allow the death sentence support themselves with the following authorities.

(a) It has been report by Ahmed that *Daylam Al – Humayriy* narrated that:

> *I asked the prophet (SAW) O Prophet of Allah, we live in a land where we need (beverages) because of hard labour; we therefore take a beverages made from wheat as it stimulates us to work and it keeps out the cold in our environment. The Prophet (SAW) asked; does it intoxicate? I replied 'yes.' Then he said: ' Then avoid it.' I said, the people will not be able to keep away from it.' He then said: 'If they do not keep away from it, then kill them*[66].

(b) Mu'awiyah (R. A) also narrated that the Prophet (SAW) said:

> "*Whip the drinker of wine, and if he repeats it (to a fourth time kill him)*[67].

(c) It is reported that the Prophet (SAW) said:

> *"Whosoever seceded whilst the will of the people is united, thereby intending to separate them, kill him"*[68]

(d) The Prophet (SAW) is also reported to have said:

> *"Whoever you find committing the act of Sodomy, Kill the active and passive offenders"*[69]

On the other hand, some Jurists have tried to argue that it is not lawful to execute an offender except for the three offences mentioned by the Prophet (SAW) in a particular tradition; i.e. adultery, murderer and apostasy.[70]

This writer summits that these three offences mentioned in that Hadith relates only when it comes to punishment of Qisas or Hadd.

The opinion of the Jurists who accepts that *Ta'azir* may be by way of death penalty is better. The opinion of the opponents is really unrealistic in the light of the obvious realities to the contrary in the numerous proofs which exist to show support for the application of the death penalty by way of *Ta'azir*. To attempt to wriggle out of this confrontation simply establishes, further, the

truth and force of the justification for the death penalty.

4 Exile (*Tagreeh*)

Beside its form under the offence of *Zina*, the penalty of exile is recognized by all Jurists to constitute a Ta'azir punishment. The penalty of exile is usually resorted to when the offence is repeated frequently by the offender and there is the risk of others following the example of the persistent offenders[71].

Some of the Jurists within the *Shaf'i'i* and *Hambali* Schools have subscribed to the view that an offender may not be exile for a period that reaches one whole year; so as not to reach the period prescribed for the *Hadd* of fornication[72].

However, Imam Abu Hanifa holds the penalty of exile to be without a minimum period. He therefore, leaves the determination of the period to the good discretion of the state as it deems it fit; and the offender is subject to the penalty until such a time as the State becomes satisfied with his level of repentance and reform. The opinion of Abu Hanifa may not be unconnected with

his position that exile, even in the case of fornication, is applied as *Ta'azir* penalty and not a *Hadd* one [73].

Imam Malik, to him, the penalty of exile may exceed one your even though he considers the penalty to belong to the *Hadd* category in the case of *Zina* [74].

The method a person is sent to exile is not to be detained as a general rule under the Ta'azir. Some Jurists have required that the offender be put under some sort of observation (*Muraqabah*). All the Jurists concede that he may not return to his ordinary place of residence until the penalty is lifted[75]. This penalty has far reaching consequences as, for a period of one year, to make a struggle to sustain a new life and atmosphere, to make a livelihood in a strange environment. This type of penalty is especially effective in the case of effeminate men who are rather a menace because of their embarrassing and irritating behaviors, persons who are unmanageable to the State may also be exiled. Umar exile Nasir bn Hajjaj because women of the city could not resist his charming looks[76]

And in relation to exile, the Holy Qur'an states:

> *The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their fits be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter*[77]

It is also on record that *Muharibin* who did not kill any person and did not rob anybody they only threatened people passing through the way. They were exiled from the land[78]

The question is can such type of people still be exiled? Or will it be better for the State to imprison them?

This writer submits that considering the present day circumstances, such type of people are better to be imprisoned under the offence in question i.e. *Muharibin* because if you exiled them, they will

still go to another Muslim land and continue committing the evil deeds.

5 Fines and Seizure of property (*Gharramah Wal-Musadarah*)

Regardless of the fact that the Muslim Jurists have generally agreed that the Prophet (SAW) did order that one who steal fruit which does not amount to minimum standard (Nisab) should be fined twice the value of the fruit taken, the Jurists have nonetheless, differed over the question as to whether the fine can be made applicable to the general corpus of the law.

Some of the Jurists are of the opinion that it is lawful to do so while another group holds that fines cannot be said to apply generally to the corpus of the law.

Those who argue against the imposition of fines, led by Abu Hanifa and Muhammad, have argued that fines were allowed at a point during the time of the Prophet (SAW) but they were abrogated. It is not lawful, therefore, according to the Jurists, to allow the use of fines in the same way as other means of punishment are used.

However, Abu Yusuf and several later Hanafi Jurist have allowed the use of fines if so doing will be in the general interest of society.[79]

Imam al – Shafi'i allowed the use of fine in his earlier opinion (Qadim) and Imam Malik has also said to have allowed the use of fines in the better opinion (*Mashhur*)[78].

Again Abu Yusuf, a disciple of Abu Hanifa is reported to have said that it is lawful for the State to seize property by way of *Ta'azir* but temporarily as a deterrent. Then the property is to be returned to the owner, not that the State may keep it for the ruler or for the public treasury as is practiced erroneously by tyrants[81].

Ibn Taymiyyah in his work ***Al – Hisbah fil-Islam*** has proposed three divisions of financial penalties including destruction of the property (*Ihlak)* whereby idols and instrument used for games that are prohibited are destroyed. The other divisions is alteration or transformation of goods *(Al – Tagyeer)* which means transforming the goods or property to a

better uses or use that is acceptable, while the last type is known as *Tamlik* which literally means transfer of ownership. In this type of case, the offender actually loses ownership of the property[82].

In *Fiqhul-Sunnah*, Sayyidil Thabiq quoted Ibn Qaiyum saying: The Prophet (SAW) inflicted Ta'azir punishment on someone who refused to pay Zakkat by ordering the seizure of half of the property. Quoted from *Musnad* of Imam Ahmad[83]

In another Hadith, the Prophet (SAW) in a form of Ta'azir by fine ordered that whoever had sexual intercourse with his wife while she is in her menstrual period, he should be fined one Dinar, in another report half a Dinar[84]

It is observed by this writer that even *Kaffara* is a form of *Ta'azir* by fine. This is because the offender is asked to feed the needy or free a slave all of which touches his property.

6. **<u>Flogging (Al – Jald)</u>**

The penalty of lashing is recognized by the law to apply, in some types of the *Hudud* and the law even seems to prefer it to all other methods of punishments in *Ta'azir* cases. Audah has observed that the reason for this is the powerful deterring force of the penalty. Another reason is utility in the sense that government spends very little on its execution; the offender is finished with and sent off, without delay, and his folk are not deprived, either permanently or temporarily, of their bread winner[85].

As to whether *Ta'azir* punishment may exceed the *Hadd* punishment there is a prophetic tradition which says:

> "The *man who shall inflict scourging to the amount of punishment in case where Hadd is not established shall be counted an aggravator"*[86].

Also in another tradition, Al – Bayhaqi related that the Holy prophet (SAW) labeled those who exceed the limits of the *Hadd* punishment, in a *non – hadd* offence as transgressors (*Mut'adun*)[87]

Despite the above traditions, the Jurists are divided on whether flogging as a *Ta'azir* punishment may exceed that of *Hadd*. Maliki School is of the view that *Ta'azir* punishment may exceed the *Hadd* as long as the Judge or the Ruler thinks the circumstance require it[88].

Part of *Hambali* School, *Zahiri* and *Zaydi* School believe that flogging as a ta'azir punishment cannot exceed ten (10) lashes. They relied on a Prophetic tradition thus:

> "*Stripes more than ten shall not be inflicted except for an ordained crime out of the ordained crimes of Allah"*[89].

Hanafi, Shafi'i Schools and some of the Hambali Scholars hold an intermediate view between the first two opposition views.

The minimum number of lashes is three (3) strokes. Imam Abu Hanifa supported it[90].

But others disagree with Imam Abu Hanifa and say there should be no minimum, since the number of lashes can vary from one crime to another depending on the offender's character, etc[91].

Imam Abu Hanifa says the greatest number of lashes is thirty –nine (39). He argues that the smallest number of *Hadd* inflicted is forty (40) lashes with repect to slaves. He then deducted one from it to establish 39 as the greatest number of lashes to be inflicted in *Ta'azir*[92].

But some Jurists are of the view that 75 lashes is the maximum; others hold it to be 99 lashes. Some fixed It at 20 lashes[93].

But Caliph Umar Flogged a person who forged his official stamp and receive money from Government Treasury. The person was flogged 100 lashes every day for three days making it 300 lashes for that offence.

According to (Jamhur) majority view, there is no limit as to caning. The bottom point is the gravity of the offence committed[94]

The writer is of the opinion that the traditions which limits lashes in *Ta'azir* cases must be curtailed to the time of the Prophet (SAW) because, at that time, one,

ten or twenty lashes was sufficient to curb the crime rates.

Therefore, the position of *Ibn Taymiyyah* and Ibn *Qayyim* must be resorted to i.e the lashes by way of *Ta'azir*, are to be fixed according to *Maslah*; and this is to be left to the discretion *Ijtihad of* the State.

7. Imprisonment (*Habs*)

Imprisonment is of two kinds; imprisonment for a definite term, which is inflicted for minor offences and imprisonment for an indefinite term, which is imposed on habitual criminals who cannot be reformed by ordinary punishment[95].

Al-Jaza'iri, in his book *Minhajil Muslim* quoted a hadith narrated by Abi-Daud, Tirmithi and Ahmad that the Prophet (SAW) imprisoned someone a day and one night[96].

Ibn Farhum from Qarafi states that imprisonments are of eight kinds:

1. To remand the offender until the victim arrives.
2. Where a slave runs a way he can be remanded.

3. One who is owed somebody and refuses to pay.
4. One whose capability of paying debt is not known.
5. Imprison a criminal to prevent him from committing further crimes.
6. Imprison someone who refuses to comply and no one can represent him in that capacity. Example, imprison a new convert marrying two sisters or mother and daughter and refuses to divorce one of them. He can be imprisoned until he chooses one and divorce one.
7. Imprison someone who makes confessional statement. E.g. where one confessed he owed a person one of two things but did not mention the particular one he owed. He should be imprisoned until he mentioned the one in his possession.
8. Imprisonment of a person who refuses to do something which is Allah's right and cannot be represented. E.g. prayers or Fasting.

According to him anything out of these eight circumstances a person cannot be imprisoned [97]

The minimum period for imprisonment is one day[98]. But as to the maximum period for imprisonment, the schools differ.

Maliki, Hananfi and Hambali School did not fix a maximum period for the Ta'azir punishment because it varies for each offence and from one individual to another[99]. But Shafi'i School says the maximum period of imprisonment is one month for investigation and six months for punishment and in any case, it must last for less than one year[100].

But what appears more in line with the philosophy of the *Ta'azir* is that the matter should not be fixed, and even if the minimum is fixed, it should not be seen as a permanent and indispensable proposition of the law Allah knows best.[101]

8. **Public Disclosure (*Al – Tashhir*)**

It suffices as *Ta'azir* to make known the act of the offender. It is usually resorted to in cases that involve character and honour such as deception, false testimony and other.[99]

In the past, *Al – Tashhir* used to be done through the town crier together with representatives of the court. But in modern times this may be done by way of publications on news print and media or by any other similar means.[103]

In addition, public disclosure as Ta'azir punishment can be inflicted by removing the offender's clothes, leaving on him only what will cover his *aura*, and again, making it known to the people living in the locality.

If he repeats, the authority will continue to repeat disclosing what he did to the public, shaving his head, putting black paint or writing some words on his body signifying what he has done wrongly.

This is what the vigilante groups have been doing and it yielded the required results.[104]

9. **Reprimand (*Tawbikh*)**

Reprimand is to rebuke somebody severely and officially for an offence, fault etc. It may be done through any word or act which the Judge feels to be

sufficient to serve the purpose of *Ta'azir*. Jurists usually refer to some specific words and acts as a means of reprimand. The means of reprimand however may vary according to the offence and the character of the offender.[105]

The Jolt that the reprimand can give sometime is much more than some other penalty. In this case, the reprimand was so effective as to remove age-long prejudices that societies may breed.[106]

10. **Warning (*Tahdeed*)**

The aim of this Ta'azir is to make the offender fear the punishment he is threatened with. It is carried out by threatening the offender with punishment if he repeated what he had done, or by pronouncing a sentence against him and delaying its execution till the offender commits another offence (within a limited period of time). The intention to carry out the threat must be sincere.[107]

The Ta'azir penalties that have been discussed above must be understood to be major categories only. There are numerous other incidental penalties that may be

given by the Judge. The Judge may cause the offender to stand up or remain outside in the sun or he may order that the cap or turban of the man be removed. There is a difference of opinion as to whether the beard of the offender may be shaved as a *Ta'azir* penalty. Some also have proposed that the gardens or plantations of the offender may be destroyed as discussed earlier. But it is obvious that whatever penalty is given, it should bear a consciousness and objective of disciplining and correcting the offender.[108]

Warning can be made verbally. The Prophet (SAW) warned people to pay Zakkat or have a portion of their property confiscated.[109]

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CHAPTER THREE

3.0 TA'AZIR PUNISHMENTS IN PENAL CODE LAW OF NORTHERN NIGERIA, 1963 AND THE SHARI'A PENAL CODE LAW OF KATSINA STATE 2001

3.1 TA'AZIR PUNISHMENTS IN PENAL CODE LAW OF NORTHERN NIGERIA 1963

The penal code law of Northern Nigeria, 1963, which took as its model similar codes in the Sudan and Pakistan (both countries also once under British rule) established in codified form the Shari'a as the basis for personal law but modified the Criminal Procedures of the Shari'a. Notably among others, in disallowing amputation for theft, stoning for adultery and beheading for murder. For instance, in the Penal Code Law[1] Section 391, dealing with defamation, the wordings are in compliance with that of Shari'a; but the punishment is different in the sense that even for the imputation for *Zina*, the code provided for two years imprisonment or fine or both, no mention of eighty (80) lashes was made as provided in the Qur'an.

The situation in Northern Nigeria when this penal code was established was very similar to that of India.

The draftsmen of the Penal Code Law of Northern Nigeria unfortunately did not separated *Hudud* offences from *Ta'azir* offences thereby giving a lacuna in the law that no *Hadd* punishment has ever been passed nor executed. Like we have said earlier, even offences that attract *Hadd* punishments, in most cases, it is fine or imprisonment that has been provided in the Code.

In December, 1958, the legislature of the Northern Region of Nigeria approved a statement issued by the government of the Northern Region on the subject of reorganization of the legal and judicial systems of the Region. This statement included the acceptance by the Government of most of the recommendations, which had been made to it by a distinguished panel of jurists, which has visited the Region in September, 1958. The Chairman of the panel was Sayyed Muhammad Abu Rannat, Chief Justice of the Sudan and other two overseas members were Mr. Justice Muhammad Sharif, a retired judge of the supreme court of Pakistan

and Prof. J. N. D Anderson, Professor of oriented laws of the University of London. Membership of the panel was completed by the inclusion of the Waziri of Borno, Shettima Kashim, C. B. E, Mr. Peter Achimugu, O. B. E, and Mallam Musa Othman, the Chief Alkali of Bida.

The most important of the Panels recommendations was that it was necessary for a self – governing Northern Region to establish a system of criminal law, which would gain international acceptance, which would apply uniformly to all persons living within the region, which would not discriminate against any section of the community and which would be generally acceptable throughout the region[2].

Since the majority of the people living within the Region are Muslims, it was also consider advisable that the new system should not be in conflict with the injunctions of the Holy *Qur'an* and *Sunna*. After carefully considering various possible systems, the panel recommended that the Northern Region should introduce a Penal Code and Code of Criminal Procedure based upon the equivalent Sudan Codes, which had worked satisfactorily in a country in many

ways similar to the Northern Region. The Sudan Codes were introduced into that country in 1899 and were, in their turn, modeled closely upon the Indian codes. It was recognized that local modifications to suit the particular requirements of the Northern Region would be necessary[3].

In January 1959, the draft Bill was submitted to the scrutiny of a committee on Muslim jurists, presided over by Mallam Junaidu yahaya, the Waziri of Sokoto. This committee made numerous recommendations for the amendment of the Bill, many of which, and in particular the recommendations regarding the law of homicide.

For example, in Islam, Sudden and grave provocation is not a defence. The committee recommended and the Bill indeed amended and incorporates provocation as a defence in the Penal Code[4].

Again in Islam relatives of victim in homicide case are the complainants and are enjoined in the Qur'an[5] either to pardon or ask for *diyya*. But this committee recommended that state be the complainant thereby

ousting the rights of the relatives of the victim from enjoining *diyya* since it has not been provided in the penal code[6]

It was also recommended that *Hadd* punishment as regard theft, adultery and *Qadhaf* be expunged[7].

It should be noted that a number of offences formerly contained in the Nigerian criminal code but not contained in the Sudan penal code were included in the draft Bill in order that nothing, which was an offence under the criminal code would cease to be an offence in the Northern Region after the commencement of the new penal code. This provision was necessary because the criminal code of Nigeria would continue to have effect elsewhere in the federation of Nigeria and it is desirable that any system of substantive criminal law prevailing in the federation should be as uniform in content as possible[8]. From the foregoing, it is understood that the Penal Code Law of Northern Nigeria, is not wholly in compliance with the provisions of the Shari'a.

3.2 THE KATSINA STATE SHARI'A PENAL CODE LAW, 2001

To live wholly according to Shari'a is one of the defining ideals of a Muslim community. The Shari'a is ordained by Allah for ensuring order and justice[9]. To reinstate the Shari'a, therefore is not only good religion, it is supremely sound politics. Only through the Shari'a, people say, can Nigerian Muslim society realistically escape from the effects of many immoralities.

It was in this atmosphere of disillusion, almost despair that the Governors of many states in Northern Nigeria have been reluctantly forced to announce that their states will implement the shari'a.

The first Governor to do so (and the only one to do so with shari'a as part of the programme on which he fought his election) formally announced his timetable for implementing the shari'a at a special "launching" in 1999 was Ahmed Sani (Yariman Bakura)[10].

As a result some nine states are in various stages of implementing the shari'a, putting through the required legislation, re-training judges for the new Shari'a

Courts and working-out in their different ways how they will apply the law in their very different circumstances, the nine 'Shari'a States' so far are Zamfare, Sokoto, Kebbi, Katsina, Kano, Jigawa, yobe, Borno and Niger[11].

As for the legislation as regards Katsina State, a law was enacted to make provision for the establishment of Shari'a courts and related matters[12] on 1st day of August, 2000 and on the same date a law to provide for the Adoption of Islamic Penal System for the State[13] was passed. Consequently, on the 20th day of June, 2001, law No. 2 of 2001 was passed to provide for the Penal Code Law[14]. With the implementation of Shari'a Legal System in Katsina State in the year 2001, it was considered necessary that a penal law be enacted to govern crimes and their punishments. This is because in the Criminal Justice System there must be a law prescribing an act to be an offence even though in the Islamic Criminal Justice System, *Qur'an* and *Sunnah* have prescribed what act amounts to an offence leaving some to be determined by *Ijma* and *Qiyas*. This is to say, offences like inhaling solution, waste in the gutter and other intoxicating substances are not prescribed in

the Qur'an. It is through *Qiyas* such acts were made to be offences.

And it is in the light of these (the consensus opinion and independent reasoning of the leaders) that the Shari'a Penal Code Law had been enacted without which, like we have earlier pointed-out the revealed law and others would be subjected to different interpretations, sometime to suit the views or interest of the interpreter (i.e. the Judge). The Katsina State Shari'a Penal Code law 2001, which has been gazette in the Laws of Katsina State[15] has Twenty One Chapters with Two (2) schedules all consisting of 394 sections[16], and of these Chapters, Chapter Ten consisting of Nine parts covering sections 164 – 195[17] deals with *Ta'azir* offences and their punishments which is the subject matter of this research work. And all these are to be discussed in chapter four of this work which will look into the *Ta'azir* punishments as reflected in the code and its critical appraisal.

3.3 NATURE OF TA'AZIR PUNISHMENTS AS REFLECTED IN THE KATSINA STATE SHARI'A PENAL CODE LAW, 2001.

Ta'azir offences and its punishments has been reflected in Chapter X of the Code[18] consisting of IX Parts, covering Sections 164-195.

Sections 183 and 184 deals with the offence and punishment of *Sihaq* (lesbianism), while sections 185 and 186 defines the offence of *Watal-Bahimah* (bestiality) and its punishment therein. But the code is silent on the position of the animal with which the offence is committed. This work will delve in bringing out the different juristic views as regards the position of such an animal.

The code has also reflected and made acts of gross indecency to be an offence under section 187. A critical appraisal will be made in this regard touching in the "shape out" type of dresses worn by the Muslim youth especially females in the State.

A line of demarcation will also be drawn between the offence of defamation as reflected in section 188 (i), the

exceptions in Sub-Section (2) paragraphs (a-j) and the offence of *Qadhaf* (false accusation of adultery) which laymen tend to fuse together as the same offence.

Another *Ta'azir* punishment reflected in the code is for the offence of girl-child hawking which would be appraised later with consideration of the socio economic situation of the people living in the State.

Socio-economic and political considerations will also be discussed as regard the offence of Praise-Singing and Drumming which has been reflected under section 192 of the code and even the almost impossible implementation of section 194 of the code which made gathering of males and females adults unlawful.

All these *Ta'azir* offences are considered to be in compliance with the Shari'a in the opinion of this research work.

Some other offences though not listed under Chapter X of the code will also be appraised for their importance to this work[19].

ROLE OF A JUDGE

Undoubtedly, the role of a Shari'a Court Judge is to apply the provisions of this law and since it is Ta'azir, he can sometimes change to what he deems fit to suit the circumstances before him.

It is also for him to develop the law to suit changing circumstances in the Jurisdiction he is adjudicating. Where it appears to a Shari'a Judge that a certain kind of *Ta'azir* punishment may not reform the offender, he can change for another kind or add to the initial one[20]

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CHAPTER FOUR

4.0 CRITICAL APPRAISAL OF TA'AZIR PUNISHMENT UNDER THE KATSINA STATE SHARI'A PENAL CODE LAW, 2001

This segment of the work will attempt to evaluate the merits and the loopholes of some of the *Ta'azir* punishments as reflected in the Katsina State Shari'a Penal Code.

4.1 THE OFFENCE OF LESBIANISM

The offence of lesbianism for instance, which has been a disturbing phenomena to the *Muslim ummah* and which a strong warning has been laid in relation to it by Sunnah in a Hadith where the Prophet said:

> *"It has been prohibited for a man to look at a man (with excitement) and also prohibited for a woman to look at a woman (with excitement). A man should not rub his body with another man (in one blanket/bed sheet) and a woman should not rub her body with another woman (in one blanket/bed sheet) with excitement"*[1] *reported by Ahmad, Muslim, Abu Dawuud and Tirmizi.*

This has been emphasized in the code by making a provision very stern of that matter by equating it with the punishment for the offence of adultery committed by a married person, i.e. stoning to death[2].

Section 183 defines lesbianism thus:

> *"Whoever being a woman, engages another in canal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another"[3].*

And its punishment has been provided in Section 184 as follows:

> "Whoever, commits the offence of lesbianism shall be punished (under paragraph 129) with stoning to death (*Rajm)[4]*.

Explanation: The offence is committed by the unnatural fusion of the female sexual organs and or by the use of natural or artificial means to stimulate or attain sexual satisfaction or excitement.

People in the State have welcomed the idea of putting this section into the Law; especially by including the phrase "by means of stimulation or sexual

excitement". This is because since women does not have a male sexual organ, they uses stimulating instruments which are similar to male sexual organs in committing lesbianism which is very rampant among 'Senior Ladies' and even among the young girls in most of our Boarding Girls Secondary Schools. The effect of which, the religion of Islam regarded to be negative to the society.

4.2 THE OFFENCE OF BESTIALITY *(ITYANUL BAHIMA)*

Bestiality, though classically a Hadd offence, it has been classified under the chapter dealing with Ta'azir offences in the Katsina State Shari'a Penal Code Law. This work will suggest that definition of the offence and its punishment be taken back to chapter viii of the Code which deals with Hudud offences and their punishments because it has a fixed punishment (i.e. killing).

The code has also defined the offence of bestiality thus:

> *"Whoever, being a man or a women has canal intercourse with any animal is said to commit the offence of bestiality"*[5]

And punishment is therein provided in Section 186 of the Code with caning of ***one hundred lashes*** and in addition shall be sentenced to a term of imprisonment of two years[6]

To constitute the offence of bestiality the code has just said 'whoever being a man or a woman' without specifying whether married or single as provided for in the offence of adultery between a man and a woman; so as to reiterate the essence of *Ta'azir* which has been stern warning for Muslims not to come closer to the commission of the offence. And the majority view, *Janhur* led by Imam Malik as to the position of the animal is that

> *"The animal should not be killed, it can be retained for continuous domestic uses and can even be slaughtered and use the meat".*

And the reason why the code is silent on the position of the animal may not be unconnected with the fact that Islamic Law only punishes "person" with conscience and conscious; conditions not possessed by animals. But the minority view of the Shafi'iys is that the animal

should be killed and even if it belongs to the category of *An'amul Ni'ima*, its meat should not be eaten[7].

Even though in *Minhajul-Muslim*, it is stated that whoever has sexual intercourse with an animal, it will be obligatory to punish him with a harsh Ta'azir like beating or imprisonment because he has committed an offence which has a consensus opinion of Jurist on its prohibition.

The essence of this harsh *Ta'azir* is to reform the offender.

There are many *Hadiths* that suggests killing of the offender together with the animal with which the offence is committed. But the *Hadiths* are not strong enough to be an authority to be relied upon in killing the offender.

Therefore, it will be better to punish him with Ta'azir which the law allows, but not killing[8]

4.3 ACT OF GROSS INDECENCY

For a better religious and moral discipline in the State, acts of gross indecency, were made an offence in the State by the code under section 187 and read thus:

> *"Whoever commits an act of gross indecency by way of kissing in public and other related acts of similar nature in order to corrupt public morals upon the person of another without his consent or by the use of force or threat or compels a person to join him in the commission of such act shall be punished with caning of forty lashes and shall also be liable to fine of ten thousand naira or with both".*

It continues:

> *"Except that a consent given by a person who does not attain puberty to such an act when done by his teacher, guardian or any person entrusted with his care or education shall not be deemed to be consent within the meaning of this paragraph"*[9].

If you analyze this provision of the Law, one will understand that it is meant to stop or at least curve the commission of the acts clearly mentioned in the section and even related acts especially among the youth in our schools campuses and in social gatherings (parties).

The issue of consent was raise, but the law is not silent on how and who can give or obtain the consent. This is because if that exception or proviso is not stated, many offenders will claim that he or the other offender has consented to the commission of the offence.

And the punishment provided for this offence, in the opinion of this writer is too harsh because most of the prospective offenders are youth, most of who cannot cater for their livelihood even though as pointed earlier in this work *Ta'azir* punishment is deterrent in nature.

There has been a serious argument among public speculations as to "whose fault" in connection with the 'shape- out' type of dresses being used by the Muslim girls and sometimes even married women forgetting what Allah has ordained to them in the *Qur'an* as regard their dressing[10] where Allah said:

> *O Prophet, tell your wives, your daughters, and the women of the believers to draw their clothes (veils) all over their bodies (i.e. screen themselves completely except the eyes or one eye to see the way). That will be better, that they should be known (as free respectable women) so as*

not to be annoyed. And Allah is ever Oft-forgiving, Most merciful.

Some people argue that it is the fault of the parents of the girls wearing such dresses. Another view is that the fault is with the tailors sewing the dresses. And some said tailors are only taking command, directives and job description of their customers.

This writer is of the opinion that the fault is squarely that of parents. This is because in my opinion if one carefully look at most of the girls wearing these (in the Islamic context) barbaric type of dresses you will see that they are girls under the care and control of their parents. And with all respect a serious minded parent or guardian will not just watch helplessly without stopping his daughter or ward from wearing such type of dresses.

But, it is pertinent to note here that this Law applies only on people who profess Muslim faith. Christians and other people prophesying other faiths were covered by the Penal Code Law of Northern Nigeria, 1963 unless they consented to the jurisdiction of the courts applying the Shari'a Law.

4.4 THE OFFENCE OF *QADHAF*

The offence of *Qadhaf* is a *Hadd* offence. This research work felt/think it will be of importance if discussed in order to differentiate it from the offence of defamation.

*Qadhaf (*false accusation of adultery*)* covers defamation and slander. For those who practice the Law either at the bar or at the bench and or even court officials do hear people in the State and in other Hausa speaking jurisdictions saying "*ya yi mani kaz*afi, *yace mani 'barawo*', "*ya yi mani kazafi, yace mani* '*maye'* or "*ya yi mani kazafi, yace mani 'shege'* and more others. But the code made the two offences each distinct from another:[11]

Section 188 (1) of the code define defamation thus:

> *Whoever by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any imputation concerning a person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame that person except in cases*

mentioned in Sub-paragraph (2) of this paragraph.

The exceptions are (a- j)[12] but were summed-up to mean if the imputation is either true or made for public good.

While section 130 of the Code define *Qadhaf* as follows:

Whoever by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any false imputation of (Zina) adultery or (Liwat) sodomy concerning a chaste person (Muhsan), or contests the paternity of such person even where such person is dead, is said to commit the offence of (Qadhaf) false accusation of adultery or fornication.

Provided:

That a person is deemed to be chaste (Muhsan) who has not been convicted of the offence of Zina or sodomy[13].

Each of the sections clearly defined its **Modus Operandi,** one talks of harming imputation while the other is talking of *Zina* or sodomy to a person.

Again the offence of imputation of *Zina is* clearly defined and its punishment therein stated in the *Holy Qur'an*[14], defamation has been made by the *Sunnah* of the prophet and that is why the code prescribed a different punishment for each of the offences. As to the first offence, a punishment for imprisonment for a term, which may extend to one year with caning which may extend to forty lashes is prescribed under Section 189 of the code. While for the second offence, eighty lashes of the cane and testimony of the offender shall not be accepted thereafter unless he repents is prescribed in line with the provision of the Holy Qur'an as stated above.

If one makes a critical analysis of these sections, he will understand that it is only imputation of *Zina* that will amount to *Qadhaf*. All other imputations fall within the ambit of defamation, though the offence of *qadhaf* can also be remitted according to the proviso under Section 132 of the Code where it is provided thus:

(a) Where the complainant *(Maqzuf)* pardons the accuser *(Qazif)*.

(b) Where a husband accuses his wife of Zina and undertakes the process of mutual imprecation *(Li'an).*

(c) Where the complainant *(Maqzuf)* is a descendant of the accuser *(Qazif).*This sub-section is not in compliance with shari'a.

4.5 GIRL- CHILD HAWKING

Another *Ta'azir* punishment, which is reflected in the code, is for the offence of girl-child hawking. Section 190 of the code provides that:

> *Whoever, being a parent or guardian of any girl-child allows his daughter or ward of any age to engage in street hawking is said to encourage girl-child hawking*[15].

And Section 191 provides for the punishment of the offence thus:

> *Whoever encourages girl- child hawking shall be punished with a term of imprisonment, which may extend to one year or with caning which may extend to fifty lashes or with both* [16].

Interestingly, one should notice that the main actress (i.e. the girl) is to go free not punished may be because of her minority based on the tradition of the Prophet *(SAW)* which says:

> *Pen (of punishment) is lifted…….. And a minor until it reaches majority*[17]

Since in Islam one is exempted from criminal liability until he reaches *bulug* stage (majority). But the question is that since the Law said "whoever being a parent or guardian, of any girl-child allows his daughter… "What if a grown-up girl set-up a street hawking herself and manages it by herself? Do we say the Laws will catch-up with her? Since she doesn't fall within the ambit of this legal provision?

And again, how tenable or practicable this law is as regards its enforcement? This is because in a State like Katsina where there is no much industries many people especially women living in *purdah* rely to a certain extent on this petty trading carried-out and managed by their children on the streets. It is may be on this premise that even when the Shari'a legal System is newly re-introduced in the State and even

the rest of the States practicing Shari'a, the *Da'awa* and *Hisbah* agents have not worried themselves in arresting and bringing to book parents and guardians who have been violating this provision. May be because some of them or their wives are, or prospective offenders of this provision of the law.

4.6 PRAISE-SINGING AND DRUMMING

Section 192 of the code is meant to stop praise singing, drumming, etc in the whole of the State. It provides:

> *Whoever, at a function attended by two or more persons flatters others, sings rhymes, whistle praise words or beat drums, tambourine or plays guitar or flute or other objects that produce sounds with intent to give pleasure to any person is said to commit the offence of praise-singing and drumming*[18]

And the code goes on to provide punishment of this offence under Section 193 where it said:

> *Whoever, engage in any activity mentioned in paragraph 192 shall be punished with a term of imprisonment, which may extend to one year or with caning which may extend to thirty lashes or with both.*

One will continue to wonder the practicability of these provisions considering the culture of the people living in the State. In the first place, whenever any of the Emirs, District Heads and other people holding traditional titles are coming-out from their houses into the palace, you will see people flattering on them.

And also you cannot imagine a Sallah celebration without flattering, singing, beating drums at least of a tambourine of which some people tried to exempt saying tambourine is meant for Emirs and "KUGE" is meant for warriors - not minding the provision of the law which starts by saying "whoever".

You will also find that whenever there is a wedding in the houses of the executive who sponsored the bill of this law and or the members of the parliament who passed it into law, you cannot escape seeing or hearing people flattering others, singing or drumming. And this might be the reason why, to the best knowledge of this researcher there has never been any conviction based on the provision of the law. Especially that there are some group of people in the society who made these activities mentioned in Section 192 as their way of

livelihood and therefore it is difficult for them to stop it.

This researcher is of the opinion that this Section of the law; and unlawful gathering of male and female adults, which has been made an offence[19], be repealed for its impracticability. What we are saying here is that machinery be put in motion and the government should be more serious in shari'a implementation so that it will be more practicable.

END NOTES AND REFEERENCE

1. Bn Hujjaj,I.M. (1996) *Sahih Muslim,* Dar-ul-Ma'arifa. Beirut, Lebanon. Hadith No. 766

2. Katsina State Shari'a Penal Code Law, 2001, CAP. 179 Laws of Katsina State, 2002.
3. Ibid Section 183
4. Ibid Section 184
5. Ibid Section 185
6. Ibid Section 186
7. See Al-Dasuki, S.M.A *(nd)* *Hashiyatul Dasuki Ala Sharhil-Kabir,* Darul-Ihya'ul Kutubi Al-Arabiya, Cairo, Vol. IV, P. 205.
8. Jabir, A.A. (1976) *Min –Hajul Mislim,* Dar-ul-Fikr, Beirut Lebaon P.457
9. Section 187 supra
10. Qur'an Ch. 33 V. 59.
11. Ibid section 188 & 130
12. See Sub-Paragraph (2) of Section 185 of the Code
13. Section 130 supra
14. Suratul Nur Qur'an Ch. 24 V. 6
15. Ibid
16. Ibid

17. Muh'd bn Ismail (1986/1407H) Sahih-Al-Bukhari, Dar-ul-Rayyan Lil-Turath, Cairo, P.99
18. op. cit. at P. 31
19. Section 194 of the Code. supra

CHAPTER FIVE

5.0 SUMMARY, OBSERVATION AND RECOMMENDATION.

5.1 SUMMARY.

The purpose of this research work namely, critical appraisal of the *Ta'azir* punishments under the Katsina State Shari'a penal Code Law, 2001 was necessitated by the fact that the code was drafted in a haste due to the yearning of the people in the state to implement the shari'a instantly without any further waste of time.

In summary, chapter one of this thesis mainly touches on the objectives of the research and what engineered the re-introduction of Shari'a legal system in most of the Northern States. And also how the enabling law regarding Criminal Justice System came – about.

In chapter two, discussions were made on *Ta'azir* punishments in Islamic law as distinct from *Hudul* punishments.

Features of *Ta'azir* was also discussed, pointing out the wide range of punishments available for the Judge to

choose depending on the circumstances of the case before him.

Various kinds of *Ta'azir* punishments were discussed as practiced by the prophet *(S.A.W.)*. And some divergent views of Islamic Scholars were pointed-out.

Attempt was made in chapter three to discuss some of the provisions of Penal Code Law and the Shari'a Penal Code Law with a view of finding-out how these provisions relating to *Ta'azir* are in compliance with the provisions of the Shari'a law.

Chapter Four critically appraised some *Ta'azir* punishments under the Katsina State Shari'a Penal Code Law.

5.2 OBSERVATION

During the Course of the research work, it is observed as follows:-

1. The code was drafted at the time of political sensation when people started writing in all the public buildings walls inscriptions such as:

"*Shari'a Dole*", *"Shari'a Muke So"*, "*No Shari'a No Vote", etc* and that has been towards the 2003 General Elections when the incumbent governor (then) and other political office holders were vying for the second term. This made the government and the legislature to rash in drafting the laws to back-up the Shari'a implementation in the State.

2. Another observation is that having drafted this law in an urgent situation a lot of things come to question in relation to its practical application - hence the writer was moved to assess the merits or the quality of the law.

3. As we have seen earlier, there is no trouble in the code in respect of *Hudud* and *Hudud* related offences because their punishments are revealed from the Almighty in the Glorious *Qur'an.* Where the problem lies is in respect of *Ta'azir* offences and their punishments which must be in line with the condition of people living in the society, their way of living, the period they are living in, and even their socio-economic and political

conditions, which this code, in our opinion did not consider properly.

4. There is indiscriminate provision of fines in the Katsina State Shari'a Penal Code. The Code did not take into consideration the gravity of the offence and the economic condition of the people living in the State.

   One may wonder, for instance under section 373 of the Code where a fine of **N100,000:00** is imposed for mischief by injury to public road, as stated in the law i.e. obstruction making it impassable or less safe, not minding the fact that in the village a farmer may decide to fence his farm which may be close to public road with thorny trees thereby making the road less safer to pass. And that offender may not have ever seen **a Hundred Thousand Naira** and it may not be probable for him to get **N100, 000:00** through-out his life time.

   And again a fine of **N100, 000.00** for the offence of criminal breach of trust under section 209 of the Code. Though as stated earlier, *Ta'azir*

punishment is meant to be deterrent to curtail the commission of the offences.

A similar instance is in section 354 of the Code which imposes a fine of **N30,000:00** for somebody who may urinate, thereby vitiating the atmosphere and making a place noxious; while the government did not provide enough public conveniences to cater for the need of the people living in the state, and for strangers passing through the State, before reaching their destinations.

5. It is also observed that provisions of caning or lashing are very rampant, even though other kinds of *Ta'azir* punishments can be meted-out in its stead, like wa'az and hajr (boycott)
6. The thesis also observed that the punishment of assault or criminal force is vague. Under section 167 of the Code, it is stated in paragraph (b) that:

> *"If grievous hurt is caused to any person by such assault or criminal force, (be punished) by (Qisas) retaliation".*

But the code did not expatiate on the mode, nature and way the *Qisas* is to be carried out, the Code did not provide for the mode, nature or a way of executing *Qisas, where* only injury is inflicted and no limp is lost.

7. It is also common knowledge that more often than not one will see some girls hawking on the streets through out the State; not minding the prohibition in the Code. And as pointed-out earlier no one has ever been brought to book. It is one of the impracticability of the Law.

Enforcement of the provision that prohibited gross-indecency is also observed to be impracticable, since none of the offenders has ever even been challenged not to talk of arresting and arraigning before a court of law.

9. No law can operate well without a procedure for operating it. It is observed that there is no Criminal Procedure Code for the State, which is a great setback for the Shari'a Courts operating in the State.

5.3 RECOMMENDATIONS

In the light of the issues that have been highlighted in the course of this study and based on the observations made in this chapter, we would like to recommend the following, which is believed, would assist to bring about better administration of justice in Katsina State. It is recommended that:

1. The legislative arm should sit up to re-visit these laws with the aim of improving it.

2. Government should be serious in ensuring application of these laws by the shari'a court.

3. It is also recommended that punishments in respect to Ta'azir offences should be in line with the condition of people living in the society, their way of living, the period they are living in, and even their socio-economic and political condition.

4. Another recommendation is that the provision on the indiscriminate imposition of fines be amended to be in the same parameter with the condition of

people living in the state. Public conveniences should also be made available.

5. The use of caning should be amended in some of the offences, or abolished altogether. This is because it is practically found out that most of the offenders have no fear as to lashes. In the Shari'a courts many a times, most of the offenders in their mitigation plea normally plead to be caned than any other punishment. To this effect, we are of the opinion that the spirit of *Ta'azir* is being defeated. Though the stigma of lashing must be preserved. Therefore, in some cases, this could be substituted with *wa'az* or *hajr* in offences such as misappropriation. And also option of fine could be added.

6. It is further recommended that guidelines should be given to Shari'a Courts judges as to the mode, nature and way of executing *Qisas* punishment because as at now, there is no procedure for executing *Qisas;* especially where only injury is inflicted and no limb is lost.

7. Government should assist in providing small scale industries to curtail the menace of girl-child hawking which in some cases resulted to indecency.

8. And finally, since no criminal justice can work well without a procedure code, this study recommends that government of Katsina State and its legislature should as a matter of urgency bring-out a Criminal Procedure Code which will be in line with the Islamic procedures to ease the work of the practicing Shari'a courts judges. And by having a uniformed procedure all over the State, probable injustices and procedural errors will be curtailed.

But for now as we are operating dual procedures, there is likelihood of selfishness. A certain judge may claim to have relied on Islamic procedure while another will say there is no coded law, and he cannot operate in vacuum, he is still relying on the former Criminal Procedure Code, which has not been repeal officially. For instance, a court has enjoined to refer a criminal matter to a police station for further investigation under section 144 of the Criminal Procedure Code. But you hardly find this provision in the Islamic Criminal procedure books. Therefore, there is need for codification.

In totality of the foregoing, to address the main theme, it is recommended that the Code should be re-drafted for obvious reasons mentioned above so as to make Shari'a Courts work properly. This is because based on statistics obtained from the Katsina State Judiciary, over 75% of the cases (44,850) filed this year, are handled by the Shari'a Courts as against 4,967 filed in the Magistrate Courts across the State the reason being these Courts are more accessible to the litigants and without much procedural technicalities.

In conclusion, not all hope is lost. Because it has made a lot of contributions to the welfare of the people living in the state and many achievements in relation to the religious and moral behaviours are achieved. In Katsina State now you cannot point any particular house where the 'professional sex workers' popularly known as prostitutes or Ashawo are operating their businesses. No liquor houses and all other vices are either abolished or reduced to a minimum.

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