THE ISLAMIC CRIMINAL JUSTICE SYSTEM: A CASE FOR THE APPLICATION OF HUDUD OFFENCES IN NIGERIA

BY

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SEPTEMBER, 1999

DECLARATION

I hereby declared that this project has been produced by me. It has not been presented on any previous application for a higher degree. All quotations are indicated in the Notes and References and Sources of information are duly acknowledged by means of list of references.

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CERTIFICATION

This thesis entitled **THE ISLAMIC CRIMINAL JUSTICE SYSTEM: A CASE FOR THE APPLICATION OF HUDUD OFFENCES IN NIGERIA** by YAHAYA YUNUSA BAMBALE meet the regulations governing the award of **DOCTORATE OF LAW** (Ph.D) of Ahmadu Bello University, Zaria, Nigeria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my children

1. *Aisha*
2. *Yunusa*
3. *Zainab*
4. *Imran*
5. *Lukman*
6. *Maryam*

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ABSTRACT

Islamic Criminal Justice System i.e. the Hudud is an aspect of the Sharia which has been villified and misrepresented as archaic, inhuman, harsh, cruel and barbaric etc and above all outmoded.

This aspect of the sharia has been unceremoniously ousted from the Islamic Legal System, because of ignorant and the grotesque manner of its presentation.

The application of the sharia especially, the aspect of the Islamic Criminal Law, is not only absolutely necessary but is the panacea to our emerging problems which are not amendable to our present legal systems.

Islamic criminal justice system can never be more relevant at any time of human history than today, crime has virtually forced our society to Its knees.

It is in view of the above,the choice of this topic, is necessary so as to clear the misconceptions surrounding it and the relevance of its application.

Chapter one of the thesis is the general survey on the Islamic Criminal Law. It discusses the 3 (three) types of punishments namely hadd, Qisas, and Ta'azir. Put together, Hadd, Qisas, and Ta'azir constitute the whole of the Islamic Criminal justice system which in its comprehensiveness and beauty, no other legal system can match.

Hudud is the plural form of Hadd, and apply to seven crimes namely zina (adultery or fornication); Qadhf (slander or false accusation); Shurb ul-khamr (wine drinking); Sariga (theft) Riddah (Apostasy); Hirabah (Robbery or Brigandage) and Baghyy (Treason or Rebellion). The punishments by way of Hadd are of the following forms: Death by stoning or crucifixion, amputation of a hand, flogging by one hundred (100) or eighty (80) lashes.

Qisas (Retaliation) is known as the law of equality. It is the punishment prescribed for murder and infliction of injury. where retaliation has not taken place the payment of Diyya (blood-money) is effected.

Ta'azir (discretionary punishment) is applicable to all cases of Hadd and Qisas which have not been established beyond reasonable doubt, and to all other

cases. Infact, the bulk of the Islamic Criminal Law with the exception of Hadd and Oisas fall under Ta'azir. The range of punishment under Ta'azir extends from mere warning, to fines, flogging, imprisonment, banishment and death penalty.

Chapter two discusses the features of the Islamic Criminal Justice System and which noble features makes it distinct from any other legal system.

The reason for this, uniqueness is its concept of equality before the law, which makes no distinction between the rich and the poor, ruler and the ruled. Also, other reasons are the strict adherence to the rules as enshrined in the Holy Qur'an and Sunnah, and faith was firmly entrenched in the minds of the Muslims.

The features of Hudud offences are specifically discussed, the prescribed punishment is inflicted neither lightened nor made heavier, not subject to any amendment or alteration as result of change in time, place and situation, or anyone having the power to waive it. It is only prevented in cases of doubt.

Also, discussed are factors that vitiate criminal responsibility as far as the commission of the Hudud offences are concerned. Infancy or minority, insanity, coercion, self defence etc are some of the factors responsible for the vitiation.

Chapter three discusses crimes against human body. i.e. zina and Oadhf. They are the two hudud crimes for which failure to establish one will lead to the infliction of the other. Where a case of zina is not established,it will result in the commission of Qadhf.

Zina is condemned by all systems as religiously sinful, morally wicked, socially evil and objectionable, where the disagreement arose,is in relation to what are considered unlawful and punishable relations. Under Islamic Law, no such distinction for the purpose of waiving the punishment. In other legal systems, only when adultery is with a married woman, that is considered the real and major crime. Even then, the situation is tackled in most cases' by the payment of compensation. The standard of proof for zina is made so high i.e. evidence or testimony of 4 (four) witnesses so as to protect and bring about peace and tranquility in the society. It is

also proved by confession or pregnancy of the woman concerned.

The punishment for Zina is either Raim (stoning to death) for the married or 100 lashes plus one year in exile for the unmarried. No such or similar provisions existed in other legal systems, except in the Penal Code,where the punishment is imprisonment for 2 years with or without fine. In addition, there is Haddi lashing of 12 strokes for a Muslim who commits the crime.

Qadhf, on the other hand, is an accusation that involves accusation of zina or contesting ones paternity. Before, the punishment of 80 lashes is inflicted, there are certain conditions on the part of the accuser, I slandered person and the act of Qadhf itself, which must, be satisfied. These conditions distinguishes slander in Islamic law and slander in other legal systems. The area covered by slander in Islamic Law is restrictive, compared to that, under other laws. It is also differentiated by the Punishment. Under the Sharia, apart from the 80 lashes,the offender is treated as a liar and transgressor. This is not found in other laws.

Chapter four discusses crimes against the property i.e. Sariqa (theft) and Hiraba (robbery or brigandage). Thieves and armed robbers are a menace to the peaceful society and naturally looked upon with terror. It is in order to put them under guard that stricter measures are prescribed.

The punishment for theft is cutting the hand, and before it is inflicted, there are conditions relating to the thief, and the stolen property which must be satisfied. There are juristic differences as to whether the property or its value is returned to the owner of such stolen property. The punishment for theft under the criminal and penal codes ranges from 2, 3, 4, 5, 7 and 14 years of imprisonment.

Hiraba is a very heinous crime which involves the killing of innocent persons and work havoc with their honours and properties. This accounts for why Islam prescribed the severest and deterrent punishment for those who commit Hiraba. This is one of the crime which takes place, mostly in the absence of people who witnesses the incident. Witnesses may have to come from the victims themselves, opinions of jurists are divided as to the admissibility of evidence of such victims. There are

several alternative punishments i.e. execution, crucifixion, amputation of hand and foot, and exile, depending on the form the crimes take.

In Nigeria, despite the provisions contained in the two codes, i.e. Penal and Criminal Codes as regard robbery,the 1970 Robbery and Firearms. Act No.47 of 1970 was promulgated to cater for. robbery cases which are committed at an alarming rate. This Act of 1970 amended 5 times, all, in an effort to curb incidences of robbery in Nigeria.

Chapter five discusses on crimes against the Islamic State. Shurbul Khamr (wine drinking) is regarded as the mother of all evils. Islam forbids wine drinking and anything that intoxicates. Wine drinking is a bad habit formation and it is because of that it is prohibited in phased and measured stages. If it is proved by the evidence of 2 witnesses or confession, 80 lashes is inflicted.

In Nigeria, the contradiction lies in legalizing wine drinking and a person is only punished when, in a state of voluntary intoxication, crime is committed. The only attempt made to punish mere wine drinking is contained in

the Penal Code, where the accused is a Muslim, even that the punishment is inadequate to deter offenders of this crime.

Baghyy is an act of treason or rebellion against the state by a collective action of a group of Muslims. Even, where rebellion sets in, the rights and liabilities of the rebels have been spelt out to ensure their humane treatment. The punishment, for this crime, is death sentence. In Nigeria, the concept of treason is different from the position under Islamic Law. No taking over of a government outside the constitution, mutiny or rebellion and it is punished with death. But, the contradiction lies in the military take overs through coups.

Riddah is regarded as one of the seven destructive crimes that may be committed by any Muslim and Is punishable by death. This will not negate the recognized principle of freedom of thought arid religion. The Qur'anic verse let there be no compulsion in the religion will not be in conflict with the tradition of the Holy Prophet Muhammad (S.A.W) which indicates that 'whoever changes his religion kill him. The two are in agreement with each other. The verse is a pointer that no one shall be forced to accept Islam, but the moment one

freely accepts it. cannot back out: of it. Where he does, the tradition will be invoked. In Nigeria, Apostasy is not a crime, and has no premise. The constitution of Nigeria has given this stance legal backing, where it is stated that there is the right to freedom of thought, conscience and religion. The case of Maitatsine in Kano, is a good example of apostasy, and punishment, could have been invoked if Sharia is applied in Nigeria.

Chapter six is ttie conclusion. It summarises what has been discussed in the 5 earlier chapters. It also made some observations and then proffer some useful suggestions that will dispel the misconceptions surrounding the application of Sharia specifically the Islamic Criminal Justice System.

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Fasiqoon	-	Transgressors
Ghanimah	-	Spoils of war
Hadd (Plural Hudud)	-	Crime with fixed Punishment
Halal	-	Lawful Act
Haqq Adami	-	Right of individual
Haqq Allah	-	Right of Allah
Haram	-	Prohibited Act
Hiraba	-	Highway robbery or brigandage.
Hirz	-	Proper custody of a property
Huruj alal Islam	-	Rebelling against Islam
Huruj Minal Islam	-	Leaving Islam and joining another religion simpliciter
Ijma	-	Consensus of opinion of Muslim Jurists.
Ijtihad	-	Efforts by Muslim Jurists to deduce rules of Shariah from their detailed evidence in the sources.
Imam	-	Leader
Jahiliyyah	-	Period of Ignorance or darkness.
Jaram	-	To cut and earn what is not good
Jarima	-	Crime
Jizya	-	Tax imposed by an Islamic State on its non-Muslim subjects
Kaffarah	-	Atonement for the sin
Kalimatush-Shahadah	-	The testimony that there is no God but Allah and Muhammad is His messenger.
Khalwah	-	Seclusion in a place where no third party interferes.
Khamr	-	Wine
Li'an	-	Cursory testimony
Maqdhuf	-	The accused or one who has been slandered.

Masruq	-	Stolen property
Murtadd	-	Person who forsakes Islam for unbelief or another religion.
Mutawattir	-	Recurrent Hadith
Nisab	-	Minimum value of a property if stolen the Hadd of cutting the hand applies.
Qadhf	-	Slander or false accusation.
Qasamah	-	collective responsibility.
Qadhi	-	The accuser of one who slanders
Qisas	-	Retaliation
Radd	-	Return
Rajm	-	Stoning to death
Riddah	-	Apostasy
Sadaq	-	Dowry
Sadd al-Dhara'i	-	Precautionary measures
Sariq	-	Thief
Sariqah	-	Theft
Shurb ul-Khamr	-	Wine drinking
Sunnah	-	Tradition of the Holy Prophet Muhammad (S.A.W).
Ta'azir	-	Discretionary punishment
Tahrim	-	Prohibited act
Tajrim	-	Condemnation or conviction
Ummah	-	Islamic community
Wali	-	Guardian
Yathrib	-	Name of Madina before Hijrah
Zakat	-	Poor rate (alms).
Zina	-	Adultery or fornication.

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CHAPTER ONE

1.0 INTRODUCTION

Criminal offences relate mostly to human body, property, reputation, religion, the state, public peace and tranquility, decency or morals.

It is in line with this, that the Islamic Penal System recognizes three types of punishments namely, Hadd (fixed punishment); Qisas (retaliation) and Ta'azir (discretionary punishment).

Put together, Hadd, Qisas and Ta'azir constitute the whole of the Islamic Criminal Justice system which in its comprehensiveness and beauty, no other civilization can match.

The reason being that in Islamic Law, the theory of crime and punishment is based on the belief in the divine revelation contained in the Holy Qur'an and the Sunnah of Holy Prophet Muhammad ((S.A.W)). Whereas in other penal systems, the theories of crime and punishment are based on, and justified by, considerations of social utility.

The main purpose of the Islamic Criminal Law is to

protect the interests of the Public at large by punishing those found guilty of crimes. If the offence committed is one that is classified as a Hadd offence, the punishment is prescribed by either Hadd offence, the punishment is prescribed by either the Holy Qur'an or Sunnah of the Holy Prophet (S.A.W). This is purely an area where the right of Allah is dominant.[1] The conducts here are most detrimental to the society and the public welfare. Hence,the Punishments, cannot be waived or changed whatever the reason, once it is incontrovertible established. This is supported by the Qur'anic verse thus:-

> "These are the limits of Allah. Do not transgress them."[2]

If the offence is one that is classified as a Qisas punishment, requiring retaliation or payment of Diyya on amicable settlement, then it shows that the rights of Allah and that of the individual overlap. The punishments are also provided in the Holy Qur'an and Sunnah of the Holy Prophet (S.A.W).

In all other cases, which the punishments are not textually specified, but left to the discretion of the

human judge or authority to decide is known as Ta'azir punishment. This cover all cases of Hadd punishments which are not established beyond reasonable doubt, Qisas punishments after pardon in which retaliation has not been effected and all other crimes (not covered by Hadd and Qisas).

1.1 Hudud - (Fixed Punishments)

Hudud is the plural form of the Arabic word Hadd. Hadd means measure, limit and in law, it means a punishment, the measure of which has been definitely fixed.[3]

In Islamic law, Hudud apply to only seven crimes[4] namely:-

1.1.1 al-Zina - (Fornication or Adultery)

Technically, the act of zina can be referred to as fornication or adultery. The yardstick that determines the act of Zina as fornication or adultery is ones marital status. If a party to the act of zina is not married at the time of committing it or married before, it is referred to as fornication. But if the party is married at the time of committing the act of zina or married

before, it is referred to as adultery. This distinction exists to vary the extent of punishment depending on ones marital status.[5]

1.1.2 al-Qadhf - (False accusation of zina)

The accusation here, to warrant the infliction of the Hadd of al-Qadhf, it must be a false accusation in relation to the following:-

a) Accusation of unchastity to a man or woman.

b) Accusation to a man or woman of committing adultery or fornication.

c) Accusation to a man or woman of being bastard i.e. contesting one's paternity.

Any other accusation will fall under the general ambit of Ta'azir.[6]

1.1.3 Shurb ul-Khamr - (Wine Drinking)

The type of wine anticipated by the Holy qur'an is the one made out of grapes, fruits or any other intoxicant like drugs, Indian hemp, cocaine etc. In short, any thing that intoxicates, particularly, where it is voluntary, will attract the punishment of wine drinking.[7]

1.1.4 al-Sariqah - (Theft)

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The sanctity of property has ben enshrined in the law, to the extent that it is inviolable and anything to the contrary will attract the punishment of al-Sariqah. Whatever that will constitute property and be a subject-matter of theft must be lawful in the eyes of the law, movable, reach a certain minimum value (Nisab) before the punishment is inflicted.[8]

1.1.5 al-Riddah - (Apostasy)

This is renouncing the faith of Islam and to be received into the faith of unbelievers. There are a lot of acts not necessarily pronouncements that will amount to al-Riddah. The essence of this punishment in the legal system of Islam is to protect the society generally.[9]

1.1.6 al-Hirabah - (Highway Robbery or Brigandage)

Technically, the act of Hirabah can be referred to as highway robbery or brigandage depending on the number of people involved. Where the number of people involved in the act of Hirabah is between one and four, armed with weapons, it will amount to high way robbery. But where the number is between five and above, armed with weapons it will amount to brigandage.[10] This aspect has been reflected in the Penal Code applicable in the Northern Nigeria.[11]

1.1.7 al-Baghyy - (Rebellion)

Rebellion is against the constituted authority according to the tenets of Islam. Distinction is made between rebellion or insurrection under a justifiable ground and that under an unjustifiable ground. Rebellion under a justifiable ground attracts no liability whatsoever. It is only when it is a rebellion or insurrection under an unjustifiable ground that is punishable. This, in another way, can be referred to as Treason.[12]

1.1.8 Types of Punishments Under Hadd

The punishments by way of Hadd are of the following forms.

a) Death by stoning or crucifixion.

b) Amputation of a limb or limbs

c) Flogging by 100 or 80 stripes.[13]

These punishments are punishments defined by Allah in the Holy Qur'an or the Sunnah of the Holy Prophet (S.A.W).

In establishing any of the Hadd above, a lot of

considerations are to be put in view, like the certainty regarding the commission of the crime; the capacity of the accused; competency of the witnesses; or the credibility of their statements etc.

In short, proof in any of the Hadd is to be made beyond reasonable doubt without any iota of doubt. The infliction of the Hadd punishment is to prevented in cases of doubt. This is based on a prophetic tradition thus:-

> "Prevent the application of the Hadd punishment as much as you can whenever any doubt exists."[14]

1.2 Qisas - (Retaliation)

Qisas is popularly known as the law of equality. The word Qisas is derived from an Arabic word Qassa, meaning, 'he cut or he followed his tract in pursuit' and it comes thereafter to mean retribution or the law or equality of equitable retaliation for murder or infliction of bodily injury.[15]

Undoubtedly the greatest crime known to mankind is murder. It has been punished under all systems of law since early in the history of mankind and throughout the ages up to the present.

The punishment prescribed in Islamic law for murder and the infliction of injury is called Qisas (retaliation), that is inflicting on a culprit an injury exactly equal to the injury he inflicted on his victim.[16]

Alternatively, where retaliation has not taken place, the payment of Diyya (blood-money) can be effected. As for Diyya, the term is commonly used to designate blood-money owed for killing, while the term Arsh is used for blood-money owed for injuries.[17]

Murder is either deliberate or accidental as mentioned in the Holy Qur'an. For deliberate murder the punishment prescribed in the Holy Qur'an is the killing of the culprit or the payment of blood money if the relative(s) of the victim do not demand Qisas. The Holy Qur'an enjoins thus:-

> "O you who believe! The Law of equality is prescribed to you in cases of Murder; the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him

> with handsome gratitude. This is a concession and a mercy from your lord. After this whoever exceeds the limits shall be in grave penalty. In the law of equality there is (saving of) life to you, O you men of understanding, that you may restrain yourself."[18]

As to accidental murder, it is prescribed thus:-

> "Never should a believer kill a believer; but (if it so happens) by mistake; (compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely."[19]

Taking these verses together, the jurists laid down the principle that no Qisas is owed for accidental murder but only the blood-money (diyya) and penance, or Kaffara.[20]

As to retaliation for injuries the following verse is

important towards that thus:-

> "We ordained therein for them: life for life, eye for eye, nose for nose, ear for ear, tooth for tooth and wounds equal for equal. But if anyone remits the retaliation by way of charity, it is an act of atonement for himself: and if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers."[21]

The following conditions must exist before Qisas for injuries can be applied, thus:

1) The injury must be deliberate and not accidental;

2) The part, of the body on which Qisas may be inflicted must be same, and in the same condition, as the part of the victim's body which was injured by the culprit; and

3) Qisas must be practicable to inflict, i.e. the injury must involve cutting off from a joint as, for example, from the wrist.[22] If all these three conditions are fulfilled, Qisas must be inflicted. This view is accepted by Maliki and Shafi'i Schools.[23]

In crimes of this nature (i.e Qisas), the victim or the heirs of the deceased possess the right to prosecute the criminal.

The implementation of the retaliation is effected only by the proper authority after the due process of a law prescribed by Islam is followed. The individual victim or the heirs of the deceased cannot take the law into their own hands, by becoming judges and executioners, since this would result in chaos and disorder. This is in obedience to the saying of Allah (S.W.T), thus:-

> "And whoever is killed wrongfully, we have given authority to the heir; but let him not go to excess in killing (by way of retaliation), for indeed he will he helped.[24]

1.2.1 How Qisas is Effected Against a Group for the Killing of a Single Person

It is a settled matter that murder can be committed by one person or by a group of people. If it is committed by a single person there is no problem about inflicting Qisas on him. But where it is committed by a group, as to

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how the Qisas will be inflicted is a subject matter of controversy among the Muslim jurists.

Imams of the Hannafi, Maliki, Shafi'i and Zahiri schools are of the view that the group of people can be punished by means of Qisas for killing one person. They argued that Qisas is a punishment for a specific act i.e. the killing of a person, and any punishment can be inflicted for the commission of the act for which it was prescribed, regardless of the number of people who shared in it. They also relied on what caliph Umar and Ali did. Thus, when four people shared in the killing of a boy in Yemen, Umar ordered his representative there to carry out Qisas against them. The same was done by Ali when three men killed a single man.[25]

Imams Zuhari Ibn Sirin and Habib b. Abi Thabit among others are of the view that a man should be punished for Qisas for killing a man, and a group should not be punished for Qisas for killing a man.[26]

The first view by the majority should be preferred, because if the second view were to be preferred, it would open the door to anyone who wants to kill a person by

1.2.4 Where the Murderer is Unknown

Where the murderer is unknown, Qasama i.e. Oath applies. Qasama is defined as that oath which is taken either by the legal heir of the person murdered in order to establish responsibility of the murder on particular persons or by those about whom there is a doubt of being criminal for proving their innocence.

It happens in a situation where a dead body is found in a place, the inhabitants of the quarter (owner of the house and his relations), or if it is in a ship or boat or car etc., the passengers and the crew, etc, fifty (50) out of them must swear that to oaths that they have not killed him and do not know who has killed him. If there are no fifty (50) of them they must swear more than once. They are imprisoned if they refuse to swear until they do so, if they do swear, they thereby become free from liability to Qisas, but must pay the bloodmoney as Akila (paternal relatives who pay the Diyya).[34]

1.3 Ta'azir (The Discretionary Punishment)

Ta'azir is a derivation from the Arabic verb Azar which means to prevent, to respect and to reform.[35]

But in Islamic Legal system, Ta'azir denotes a punishment aimed first at preventing the criminal from committing further crimes and secondly at reforming him.[36]

The aim of Ta'azir punishment can be summed up thus:-

> "Disciplinary, reformative and deterrent in nature"[37]

Therefore, a functional definition of Ta'azir can be given as:-

> "discretionary punishment to be delivered for transgression against Allah, or against an individual for which there is neither fixed punishment nor penance (Kaffarah).[38]

This definition excludes all crimes for which Hadd or Qisas are prescribed from the operation of Ta'azir. But it can be an alternative and/or additional punishment in some cases of Hadd and Qisas .

Ta'azir punishment is inflicted for offences against human life and body, property, public peace and tranquility, decency, morals, religion and so on. Infact, the bulk of the criminal law with the exception of the

value required for inflicting the Hadd punishment, and refusing payment of Zakat etc.[50]

The third group, says it is legal only if the offender does not repent. The money or property will then be spent on public requirements.[51] Here, caution is to be exercised in the fines and seizures, not to allow unjust judges or rulers to abuse such a practice, in the name of its collection for the sake of public treasury.

Imprisonment (al-Habs), is of two kinds in Islamic Law as a form of Ta'azir punishment. There is the imprisonment for a definite term imposed for minor offences and that for an indefinite term for habitual criminals. The minimum period for imprisonment is one day.[52] As to the maximum period for imprisonment, the schools hold different views:- The Hannafi, Maliki and Hambali Schools do not fix a maximum period for the Ta'azir imprisonment, because it varies for each offence and from one individual to another.[53]

Shafi'i School on the other hand, says the maximum period of imprisonment is one month for investigation and six months for punishments; and, in any case,it must last

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for less than a year. It based its view on an analogy with punishment of banishment for one year in addition to 100 lashes for unmarried adulterer. To this School, imprisonment as a Ta'azir punishment must not last longer than the banishment allowed for fornication, which is a hadd punishment according to the Shafi'i jurists.[55]

Flogging (al-Jald) is a common punishment in Hadd and Ta'azir offences. As to whether Ta'azir punishment of flogging 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."[56]

The minimum number of lashes allowed as Ta'azir punishment is three (3).[56] As to the maximum number of lashes allowed the schools differ:[57]

Maliki School is of the view that the Ta'azir punishment of flogging may exceed the Hadd punishment as

long as the judge or the ruler thinks the circumstances require it.

Hambali, Zahiri and Zaydi Schools are of the view that flogging as a Ta'azir punishment cannot exceed ten lashes.

Hannafi, Shafi'i and some Scholars in Hanbali Schools are having an intermediate view. They are not unanimous about the maximum number in these schools; because some say it is 75 lashes, others hold it to be 79, and some fix it at 39, while others do not allow more than 20 lashes.

Death penalty (al-Ta'azir bil Qatl) as a Ta'azir punishment, is to be inflicted in exceptional cases like murderer on whom Qisas cannot be imposed because of the means used in the crime, spying for the enemy, propagating heretical doctrines or practices which split the community, habitual offender whose harmful conduct may not be stopped by other punishment.[58]

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CHAPTER TWO

2. FEATURES OF THE ISLAMIC CRIMINAL JUSTICE SYSTEM

2.0 Definition of Crime

`Jarima' is the Arabic word for Crime and is derived from the word `Jaram', which literally means `to cut and to earn' what is not good.

Therefore, crime in Islamic Law, is defined as the legal prohibition imposed by Allah punishable by Hadd, Qisas and Ta'azir.[1]

This definition points to the fact that crime refers to prohibition imposed by Allah,the violation of which gives rise to punishments. These punishments take the form of Hadd, Qisas and Ta'azir.

Generally, crime that injure or inflict wounds on innocent individuals are oppressive in nature and offensive to the creator. This shows that in crimes, the rights of Allah and that of the individual infringed,because the perpetrators of such crimes are offender to both. The rights of Allah are more

conspicuous to some crimes and that of the individuals are dominant in the other crimes. In any crime, where the right of Allah is more dominant, the punishment is called Hadd and where the right of an individual is more dominant, the punishment is called Qisas.

2.1 Features of the Islamic Criminal Law

Islamic Law, unlike other laws, has certain noble features, which are distinct from any legal system. This is reflected in the first Islamic state established after the Holy Prophet's migration from Makkah to Madinah in the year 622 A.D. The rate of crimes then was reduced to the barest minimum in comparison with the period of Jahiliyyah i.e ignorance or the contemporary world today. The reason being, that no distinction exists between the rich and the poor, ruler and the ruled, laws were executed to its letter as stated in the Holy Qur'an or Sunna of the Holy Prophet (S.A.W) . Moreover, faith was firmly entrenched in the minds of the Muslims. Some of these noble, distinctive features are hereunder discussed.

2.1.1 Intention of the Accused

In the Omission or Commission of an act that constitutes a Crime, intention of the accused plays an important role. Thus, an accused person will only be

liable for the crime he committed if he intended the consequences of his acts. This is explained by the following Qur'anic verse, and tradition of the Holy Prophet (S.A.W) respectively:-

> "And that every human being is responsible for what he does"[3]

> "Actions are to be judged by the intention behind them and everybody shall have what he intends."[4]

Since the mental element is the sole criterion determining the nature of punishment a crime may attract upon the criminal, a distinction is drawn between acts which are intended and that which are not intended. If it is an intended act i.e. it is proved that the accused deliberately perpetrated the crime severe punishment is inflicted on him. while unintended acts draw milder punishment upon the accused, as understood from the following Qur'anic verse, thus:-

> "But there is no blame on you if you make a mistake, therein what counts is the intention of your hearts. Allah is forgiver, merciful."[5]

The Holy Prophet (S.A.W) is also reported to have

said that:-

> "Verily, Allah has for my sake overlooked the unintentional mistakes and forgetfulness of my Ummah (community), and what they are forced to do."[6]

2.1.2 The Accused is Solely Responsible

It is very fundamental that only the accused who commits the crime would be answerable for his evil deeds. No other person whatever his relationship with the accused shall be charged with any responsibility for that crime. The Holy Qur'an and the Sunna of the Holy Prophet (S.A.W) seem to insist on the concept of strict liability of the accused in committing crimes. A man can neither attribute his conduct to unforeseen forces nor can he deny his liability after his intention is established. This principle has been emphasized in a number of Qur'anic verses thus:-

1) "Nor bearer of burdens can bear the burden of another."[7]
2) "Whoever works evil, will be requitted accordingly."[8]
3) "And that every human being is responsible for what he

does."[9]

4) "Whoever works righteousness does so for his own good, and whoever commits evil does so to his own detriment."[10]

The Holy Prophet (S.A.W) also said:-

"Nobody shall be held responsible for what his father or his brother does."[11]

2.1.3 Equality Before the Law

An important feature of the Islamic Criminal Law is the cardinal principle relating to the concept of equality before the law. Legal punishments for crimes are to apply to all members of the public irrespective of rank, caste or creed etc. Everybody is equal before the law and as long as the charge is sufficiently proved, the prescribed punishment cannot be waived whoever the accused might be. In short, there must not be discrimination in the award of punishment to persons.

The Holy Qur'an has this to say on the issue, viz:

> "O you who believe! stand out firmly for justice as witnesses to Allah, even as against yourselves or your parents, or your kin, and whether it be against rich or poor: For Allah can best protect both, follow not the lust of your hearts lest you swerve, and if you distort justice or decline to do justice. Verily Allah is well acquainted with all that you do."[12]

It has also been reported that when one Makhzumiyyah lady committed theft, Quraysh people became very worried about her. They said nobody can speak in favour of the lady to Allah's Apostle, and nobody dares to do that except Usama who is the favourite of Allah's Apostle. When Usama spoke to Allah's Apostle about the matter, the Holy Prophet (S.A.W) said "Do you intercede with me to violate one of the legal punishments enjoined by Allah?"[13]

Then He got up and addressed the people saying:-

> "O people! the nations before you went astray because if a noble person committed theft, they used to leave him; but

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> if a weak person among them committed theft, they used to inflict the legal punishment on him. By Allah, if Fatima, the daughter of Muhammad committed theft; Muhammad will cut off her hand."[14]

Thereupon, the Makhzumi woman's hand was cut off.

2.1.4 Proof of Guilt Beyond Reasonable Doubt

Another important aspect of the Islamic Criminal Law is that nobody is liable until he is proved guilty beyond reasonable doubt under the law. It is for this reason that every accused person is presumed innocent until he is proved guilty. But, where there is doubt as to the guilt of the accused, the benefit of the doubt should be given to the accused person.

The Holy Prophet (S.A.W) was reported to have said thus:

> "Avert the infliction of the prescribed punishment when there is doubt."[15]

In another vein, the Holy Prophet (S.A.W) said:

> "It is better for the leader (Imam) to make a mistake in giving pardon than

to make it in giving punishment."[16]

2.1.5 Confession to the Commission of a Crime Should be Made Voluntarily

Under Islamic Criminal Law, the confession of the accused to the commission of a crime should be made voluntarily. Coercive means cannot be used to compel the accused to confess the commission of any crime.

The only exception where the coercive means is used so as to confess, is only when it pertains the recovery of property. Even then, there must be conclusive presumptions that the accused has committed the crime but he still refuses to confess. A view allows the use of arrest, detention or slight physical punishment, so as to force the accused to confess the commission of the crime. This is strictly to extract the truth of the case. But, another view is that in offence other than that of Hudud and Qisas, an accused can be put under Ta'azir to confess the commission of a crime.[17]

For example, it was reported that Yahya Ibn Akhtab collected a large amount of money that filled a cow leather by fraud in Madinah. And that was when the Holy Prophet (S.A.W) was preparing for the campaign of Khaybar.

When the Holy Prophet (S.A.W) called and ordered him to bring the money, Ibn Akhtab said that he has spent it on the preparations for the war. The Holy Prophet (S.A.W) said: "The money is plenty and the time is so short." The Holy Prophet (S.A.W) then ordered al-Zubayr ibn Al-Awwam to handle him. In dealing with him, al-Zubayr tortured him and he confessed and showed him where he buried the money.[18]

Another example, is given in the case of a woman in Sedan who was sent with a letter to Makkah. the letter contained vital information pertaining to the preparation of the Muslims for waging war against the Quraysh. Revelation came telling the Holy Prophet (S.A.W) that one of his companions wrote the letter telling the secrets of Muhammad. The Holy Prophet (S.A.W) sent al-Zubayr ibn Al-Awwam and Ali ibn Abi Talib on her tract to collect the letter from her. They got her and she refused to submit the letter. They said to her, 'you either submit the letter or we remove your dress'. When she heard this, she released the letter.[19]

2.2 Hudud Offences

The Arabic word, Hudud is the plural form of Hadd.

It has many different meanings. It means prevention, restraint, obstruction, hindrance, prohibition or the limit of something.[20]

In the Islamic Legal sense, Hudud is defined as punishments being textually designated and apply to crimes whose penalties are specifically provided for in the Holy Qur'an or prophetic tradition.[21] In otherwords, Hudud are crimes with fixed punishments provided in the Holy Qur'an and Sunnah.

In the penal context, Hudud embodies the following main aspects:

First, the punishment in Hudud offences cannot be lightened nor made heavier, Allah (S.W.T) says:-

> "Let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day: and let a party of believers witness their punishment."[22]

Secondly, the punishment in Hudud offences is prescribed in the public interest, because the right of

Allah is involved.

Thirdly, after being reported to the Judge, Hadd is not to be pardoned, waived, substituted or commuted, by political authority or amicable settlement with the victim of the offence.[23] The only thing which a judge or political authority can do as far as Hudud offences are concerned is to delay the punishment whenever necessary for fear of harm. For example, if the culprit is pregnant or suckling a baby, the punishment is to be delayed until delivery and separation; or because of weather condition, the punishment or lashing may be delayed until it becomes normal.[24] The rigidity of the Hudud punishments is supported by the following Qur'anic verse:

> "These are the limits of Allah. Do not transgress them."[25]

In short, Hudud offences are not subject to any amendment or alteration. Even change in time, place and situation does not affect the punishment nor has any one any power to waive it.

Fourthly, the infliction of the Hadd punishment is to be prevented in cases of doubt. This is based on the

prophetic tradition.

> "Prevent the application of the Hadd punishment as much as you can whenever any doubt exists."[26]

Where a culprit confesses an offence under Hadd and later withdraws that confession, his withdrawal should be accepted without being questioned because the presumption is that, the earlier confession is doubtful. This withdrawal is only when it is before the infliction of the punishment.

2.3 Vitiating Elements of Criminal Responsibility

There are circumstances that exist under which the law exempts an offender of a criminal act from any of the Hadd punishment. This may be due to reasons like the absence of intention, mental defect etc.

The basis for this is the tradition of the Holy Prophet (S.A.W) which says:-

> "Three categories of people ar exempted from punishment and religious accountability; an infant until he attains majority, an insane person until he regains sanity and a

person who is asleep until he wakes up."[27]

2.3.1 Infancy/Minority

Infancy or minority vitiates the criminal liability of the person in that state, because he is not legally responsible for his actions, until he attains majority. The reason being that the is charged with limited obligations. Thus,he is not liable to punishment in criminal cases. For example, where a child levels a false accusation of unchastity (Qadhf) or where he commits fornication (zina) he is not punished with the Hadd of 80 or 100 lashes meant for those who commit Qadhf and Zina respectively because he is not matured.[28]

Despite this, the Judge has the power to admonish the child or impose upon him any restriction(s) or light punishment which will help to reform and stop him from committing any future crime. But an infant or minor is liable to pay damages for his civil wrongs by compensation of loss, destruction or consumption of another's property. He should also pay for goods contracted or purchased on his behalf out of his property.[29] Where the infant has no property, his guardian shall effect the payment on his (infant's) behalf.

Thus every child passes through the following stages namely:-

1. Prior to the age of discretion

This stage extends from birth to the age of seven. In this stage, the law regards the child as non-discriminating. Like the insane person, the child is considered unfit and not held responsible if he commits an act which requires legal punishment. But he would be held responsible on civil wrongs as far as his money or property is concerned, so that others may not be harmed by whatever harmful acts he might commit against them.[30]

2. The Age of discretion

This is the period between seven years of age and the onset of puberty. it is determined by age, by signs of puberty or both. The child at this stage has the same status as a mentally retarded person in all rulings. It is suggested that premeditation on the part of a child and an insane person should be regarded as a mistake, and its indemnity is to be paid by the guardian.[31]

3 The age of Puberty

If a child reaches the age of puberty and is of sound

mind, he/she is held legally responsible for any criminal act he/she commits. A child becomes an adult at the age of puberty which is determined by the physical signs which denote that state. Failing such signs, a child of either sex, is held to have reached the age of puberty on completing its fifteenth year.[32]

2.3.2 Insanity

Insanity is a derangement in one's power to discriminate between what is good and what is bad, or in the ability to know such choice exists. Insanity, whether from birth or later, deprives one of reason and the ability to discriminate and suspends perception. It may be total, in other words, it may completely block one's rational and discriminatory capabilities and totally vitiate ones perception. Criminal responsibility is completely vitiated where an insane person commits any of the Hudud crimes. The exemption of criminal liability does not extend to Murder, because compensation in the form of Diyya is payable. The reason being, that any killing by an insane person is regarded as accidental killing.[33]

2.3.3 Coercion

Coercion is defined as an act of compelling a person to do an act against his will which reasonably causes the apprehension that instant harm will fall on him if he fails to execute the threat.[34] In otherwords, coercion is the act of compelling someone to do something by suggestion and threat.

For coercion to remove criminal responsibility, certain conditions must be established namely:-

1. Harm must be threatened i.e. induce sense of fear.

2. The the harm threatened must be of a constraining nature i.e.it must be death or grievous harm.[35]

3. It must be of an instant nature i.e. immediate. Where there is time for one to seek the protection of the authority, the defence is not available.[36]

4. The compeller must be present and capable of carrying out the threatened harm. The defence is not available where the threat is carried out

against strangers i.e. third party. But Maliki jurists advocate that the threat may even extend to strangers.[37]

5. The compelled person must believe that there is no way of escaping the execution of the threat against him, other than to commit the act in question.[38]

There is no liability for a crime committed under this condition of coercion, if it is so proved. This is based on the tradition of the Holy Prophet (S.A.W) which says:-

> "Allah Has lifted away from my people the responsibility for acts done by mistake, in forgetfulness and under coercion."[39]

Even though, there is no punishment for criminal acts committed under coercion it does not extend to the commission of murder and grievous bodily harm. This is based on the Qur'anic verse which says:-

> "Take not life which Allah Hath made sacred except by way of Justice and Law."[40]

Muslim jurists unanimously agreed on the point that murder is excluded from the operation of this defence, so that one will still be liable where he is faced with the unfortunate choice of killing an innocent person or loosing his own life, by killing the innocent person, the law will not help him as his conduct will be immoral and unethical.

2.3.4 Self Defence

Self defence is a person's natural right,and its legality has been approved in Islam. That is, one is to defend his person or property, etc, to the extent that if the other is killed or injured he incurs no liability of any kind.

> "And those who, when an oppressive wrong is inflicted on them, care not cowed but) help and defend themselves .... But indeed if any do help and defend themselves after a wrong (done) to them, against such there is no cause of blame."[41]

Abu Hurairah reported the Holy Prophet (S.A.W) as saying:-

> "He who is killed in defence of his religion is a Martyr; he who is killed in self-

> defence is a Martyr; he who is killed in defence of his property is a Martyr; and he who is killed in defence of his family is a Martyr."[42]

Also, that:-

> "If anyone were to look into your house without permission and you were to throw a pebble at him and put out his eye, you would be guilty of no offence."[43]

From the above Qur'anic verse and prophetic traditions, it shows that a person who commits a crime in the process of defending himself is not liable to any punishment. Hannafi and Shafi'i schools advocate that self defence is a duty the failure or breach of which will legally constitute sin.[44]

The self defence that vitiates one's criminal responsibility is subject to certain conditions. In otherwords, for one to make a plea of self defence in respect of the commission of a criminal offence, the following conditions must exist namely:-

1. There must be an attack

That is, there must be the occurrence of an act which is considered a crime against a person or property. This condition conforms with the Maliki view which states that the act is considered an attack irrespective of the initiator (human being or animal).[45]

2. The attack must be of an instant nature that is, there is no time to prevent the attack.

3. The force used in self-defence must be the only means of preventing the threatened attack and must be justifiable.

4. The injury inflicted must be proportionate to the violence threatened, i.e. he should not use force more than absolutely necessary for the defence.

5. The defender must show his bonafide belief on reasonable grounds that he had reasonable fear of violence which he could not prevent except by the use of force.[46]

From the above discussion on the vitiating elements of criminal responsibility, it appears that the test of criminal liability is intention accompanied by a guilty

mind. Any one who wants to take advantage of any of these defences, the burden of bringing the defence to the notice of the court lies on him. The court in turn, will consider and decide whether such circumstances leading to the commission of crime are justifiable or not.

CHAPTER TWO

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26. Transmitted by Bukhari and Muslim as quoted by A. O. Naseef, (1982), Ibid p.776.

27. Khan, M. M.; (n.d); Sahih al-Bukhari, Vol. VIII; Dar al-Arabia, Beirut, Lebanon pp.527-528.

28. al-Aqyrawani, Abdullahi ibn abi Zaid; (n.d) al-Risalah, Gaskiya Corporation, Zaria, p.129.

29. Ibn Qudamah; (1348H); al-Mughni, Vol. 4; Cairo; pp.520 - 521.

30. Ibid

31. Ibid

32. Ibid

33. Ibn qudamah; (1348H al-Mughni, Vol.9; Cairo; p.375.

34. Auda, A; (n.d); al-Tashri al-Jana'i al-Islami Mugaranah bi al-Qanun al-Wad', Vol.I Cairo; p.563.

35. Ibid, p.565.

36. Ibid, p.565.

37. Ibid.

38. Ibid, p.567.

39. Transmitted by Bukhari as quoted by Dr. M.M. Khan; Sahih al-Bukhari, vol.9; Dar al-Arabia, Beirut, Lebanon; p.65.

40. Chapter 6 v. 151.

41. Chapter 42 v. 39 and 41

42. Transmitted by Tirmidhi, Abu Dawud and Nisa'i as quoted by A.O. Naseef (1982); Ibid, Vol. II p.787.

43. Transmitted by Bukhari as quoted by Dr. M. M. Khan; (1391H); Sahih al-Buhkari, Vol.9; Dar al-Arabia, Beirut, Lebanon; p.31.

44. Al-Hattab; (n.d); Muhawib al-Halil, Vol.6; p.323.

45. Ibid

46. Ibid.

CHAPTER THREE

3. ZINA AND QADHF

3.0 Introduction

Zina and Qadhf are two Hudud crimes for which failure to establish one will lead to the infliction of the other. That is, where a case of zina is not established it will result in the commission of Qadhf. In otherwords, the infliction of the punishment for Qadhf implies that there has been an accusation of Zina against a person which has not been proved. It in this sense that the two crimes, have been referred to, in the following Qur'anic verse thus:-

> "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence even after, for such men are wicked transgressors."[1]

The above verse is in relation to the accusation of Zina against a woman, but the majority of the jurists say that by way of analogy it extends to a man as well. Also from the verse, it shows that masculine gender has been

used for the accusers,the law is not confined to male accusers only, but extends to the female accusers as well.[2]

3.1 Zina (Adultery or Fornication)

According to all social systems, since the beginning of history to date, there is unanimity of views that Zina is religiously sinful,morally wicked, socially evil and objectionable. It is a social crime committed against public morality. The idea of sexual freedom is completely unknown to all the sacred laws. All laws, Islamic, Christian, Jewish etc, forbid all types of sexual relations outside marriage.

The crime of Zina has been variously defined by scholars, some of the definitions are explained below. The commonest meaning of Zina is that is

> "Sexual intercourse between a man and woman without the legal relationship of husband and wife existing between them."[3]

In otherwords, it is defined thus:-

> "Sexual intercourse between a man and a woman who are not

lawfully married to each other."[4]

Also, it is defined as follows:-

"Sexual intercourse by a man with a woman who is not his wife and a woman with a man who is not her husband."[5]

Therefore, to sum up the various definitions above and put in a simple legal term, Zina is the insertion of the male organ into the female sexual organ between those, who are not lawfully married to each other.

Homosexuality is one crime that is related to Zina. Homosexuality is a great sin in Islam and a disgracing unnatural act of sex to satisfy one's passion. It arises in a situation where a man engages another through the anus to satisfy his sexual urge. Thus, it is a carnal intercourse committed against the order of nature by a man with a man, or in the same unnatural manner with a woman.[6] Related to it is lesbianism (sihaq). It arises in a situation where there is a friction or the touching together of the organs of two females. Bestiality is another related crime to Zina. It arises in a situation when a man falls to the level of a beast and commits

sexual intercourse with an animal i.e. monkey, dog, donkey, cow, horse etc.[7]

The position of Islamic law is contrasted with that in other laws, as to what are considered unlawful and punishable sexual relations,and the punishable sexual relations,and the punishment prescribed for the prohibited practices.

Under Islamic law,the act of Zina is technically referred to as either adultery or fornication; and they are all considered unlawful and attract punishments. The dividing line between the two is in ones marital status. If one or all the parties involved in Zina is or are married, it is regarded as adultery. But,if one or all the parties involved in Zina is or are not married, it is regarded as fornication.

The distinction between adultery and fornication exist in Islamic law not to waive the punishment for one against the other, but to vary the degree of punishment to be meted out. Stoning to death (Rajm) is for the married person(s) that committed Zina which is determined by the Sunnah of the Holy Prophet Muhammad (S.A.W),[8] whilst

flogging of 100 lashes is for the unmarried person(s) that committed Zina, determined by the Holy Qur'an.[9]

The reason for this distinction is based on the fact that a married person has no reason to commit Zina since he/she can enjoy lawful sexual relation with his/her spouse. This is an opportunity which is not available to the unmarried, consequently, the punishment of the unmarried should be lighter than that of the married.[10]

Also, another reason for the distinction in punishment is that the immorality involved differs, especially where there is a valid marriage subsisting.[11]

But, in other laws or legal systems, the distinction exists between adultery and fornication or the purpose of waiving the punishment. Therefore only illicit affairs with a married woman is the real and major crime. The reason for this is because of the vow of fidelity taken by each of them.[12]

According to the Holy Bible (Old Testament) Revised Standard Version, when it is fornication, only monetary compensation is payable to the aggrieved party. The same

Bible says thus:-

> "If a man seduces a virgin who is not betrothed and lies with her,he shall give the marriage present for her, and make her his wife. If her father utterly refuses to give her to him, he shall pay money equivalent to the marriage present for virgins."[13]

Also, in the same Bible, in another place it is stated thus:

> "If man meets a virgin who is not betrothed, and seizes her and lies with her,and they are found, then the man who lay with her shall give to the father of the young woman, fifty shekels of silver, and she shall be his wife,because he has violated her."[14]

It is only when it is adultery with a married woman, the Bible says the punishment is stoning to death.[15]

In Hindu Law, where it is fornication, it says:-

> "Anybody who commits illicit intercourse with an unmarried

> girl of his caste does not deserve any punishment. If the father of the girl is willing, the man shall pay compensation and marry her..."[16]

But, where it is adultery, it says:-

> "Where the woman is married, she should be thrown to the dogs to be torn and the man should be subjected to a hot iron bed with fire all around him and burn him alive."[17]

Under the Jewish law, where the adultery is with a married woman; only then punishment is death. It is provided thus:-

> "If a man commits adultery with the wife of his neighbour, both the adulterer and the adulteress shall be put to death."[18]

In Nigeria, the Criminal code applicable to the Southern part of Nigeria, did not contain any provision relating to adultery or fornication as a criminal offence. This might not be unconnected with the fact that it is regarded as a private sexual behaviour, which is best left

to religious, social and educational influences. The state can only intervene beyond the protection of moral code if there is some utilitarian justification. It is even advocated and recommended from this area that adultery or fornication should cease to be an offence under Nigerian Criminal Law.[19]

It is only when a marriage had broken down irretrievably as a result of adultery, that damages for such adultery may be awarded, bearing in mind the petitioner's loss i.e. blow to one's feeling, honour and family etc.[20] But, in the Northern Nigeria, where the Penal Code is applicable, adultery or fornication is a criminal offence and punishable. In short, adulterous sexual intercourse on the part of a husband or wife with a third party attracts a penalty of two years imprisonment. The offence is however, restricted to those persons who are subject to any law or custom that regards extra-marital intercourse as a criminal offence.[21]

3.1.1 Means of Proof

The position of Islamic Law is that no one can be punished with the flogging of 100 lashes or stoning to death, on the basis of unreliable and direct evidence, for

committing Zina. It has to be proved beyond reasonable doubt. So, less than four witnesses do not prove the offence of Zina, and they are considered as false witnesses even if they are telling the truth. The Holy Qur'an, in this regard states thus:-

> "Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars!"[22]

The other means of proof under Islamic Law, is by confession of the accused. Mere confession is not enough, it has to be made by a person who is sane, adult and must be made freely without any element of compulsion, before such confession is said to be valid.

It was reported on the good authority of Abu Hurairah that a person from amongst the Muslims came to the Holy Prophet Muhammad (S.A.W) while he was in the Mosque and said that he had committed adultery. The Holy Prophet Muhammad (S.A.W) turned away from him. He came round ageing facing the Holy Prophet Muhammad (S.A.W) and said that he had committed adultery. The Holy prophet (S.A.W) turned away until he did that four times, testifying

against his own self. The Holy Prophet Muhammad (S.A.W) inquired whether the man was insane. It was reported that he was sane. The Holy Prophet Muhammad (S.A.W) inquired whether he was married. It was confirmed that he was. Thereupon, the Holy Prophet Muhammad (S.A.W) ordered he be stoned to death and it was done. This incidence is attributed to Ma'iz ibn Malik.[23]

This is the strongest means of proof and all executions done in the early days of Islam were done as a result of confessions. The confession made in the case of Zina can be withdrawn at any time before the infliction of the punishment. This position is re-iterated by Shafi'i and Hanbali schools, that an offender who confesses to the commission of Zina can withdraw or contradict it.

They said, if a man runs away when stones are flung at him, stoning should be stopped. But if he sticks to his words by refusing to run away, then he should be stoned until he dies. They based their view on the Hadith of the Holy Prophet Muhammad (S.A.W) in which he asked his companions engaged in stoning as to why they had not let off the man i.e. Ma'iz ibn Malik, who had tried to escape.[24]

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But, Maliki School, is of the view that person who had made confession of his crime voluntarily, should be stoned to death, even if he is to be chased.[25]

As to whether the confession should be made once or at four different sittings, the schools differ on the issue. Hannafi and Hambali schools are of the view that confession is valid only when it is repeated four times in different sittings. They based their opinion on the case of Ma'iz ibn Malik, as decided by the Holy Prophet Muhammad (S.A.W) Himself, and also on the analogy of four witnesses.[26] But, Maliki, Shafi'i and Zahiri Schools are of the view that confession made once is sufficient to prove the case of zina against the person confessing.[27]

The person who confessed committing zina is not to be questioned about the other party with whom the zina has been committed. But, where the person confessing happens to mention the name of the party, then that other party is to be questioned in order to ascertain whether the person confessing has falsely accused him/her in order to determine the crime of Qadhf (slander). If that happened, he will be flogged 80 lashes for Qadhf.[28]

A case in point here, is that one man came to the Holy Prophet Muhammad (S.A.W) and confessed of committing zina with a particular woman. But when the woman was called, she denied it. The Holy Prophet Muhammad (S.A.W) inflicted a punishment of 100 lashes for zina on the man (who was not married) in addition to 80 lashes for Qadhf, but left the woman unpunished.[29]

Another means of proof under Islamic law is the that the act of zina is established by the pregnancy of the woman concerned especially when she is not married and does not allege that she was compelled. Opinions differ as to whether pregnancy alone is sufficient to inflict upon a woman the punishment prescribed for zina.

According to Caliph Umar Ibn Khattab, as adopted by maliki School, pregnancy furnishes sufficient proof of the act of zina on the part of a woman who does not have husband.[30]

But, the majority of the jurists do not subscribe to this view and assert that mere pregnancy (without witnesses or confession on her part) does not make a woman

liable to such a severe punishment. They said, the spirit of the Shari'ah shows that the benefit of doubt goes to the offender even if it is very slight.[31]

In societies other than Islamic, fornication or adultery is not a criminal offence. Hence, it is easily committed without impugnity or fear of punishment. This indeed sets up passions, of people who put extremely low value upon sexual morality; because the chastity as virtue in Mankind, especially a woman, is easily compensated for a few Naira.

In Nigeria, i.e. the North, where adultery or fornication is a crime as enshrined in the Penal Code, the punishment provided for it is not adequate enough. The Penal Code provides that for one to succeed in a criminal action of adultery or fornication, it must be proved that:-

a) The accused had sexual intercourse with a woman or man,

b) That such accused had reason to know that the woman/man was not his/her wife or husband.

c) That such accused is subject to a law or custom that regards extramarital relationship a criminal offence.

d) And that where the accused is a man, that the sexual intercourse was not such as to amount to rape.[32]

Even under this law i.e. the Penal Code, there is the obvious difficulties in proving the commission of adultery or fornication, especially by direct evidence. What the law can do, is to infer its commission from the surrounding circumstances.[33]

Generally speaking, the state of things prevailing in societies other than of the Islamic shows an absolute sexual licence and freedom, which has caused the dissolution of family ties, jeopardizing the conjugal happiness, confusion with regard to paternity among others.

Also, because of the absence of a severe punishment (as under Islamic Law) which is religiously motivated it tends to make people lose the fear of Allah, and are more tempted to fall in this crime.

But the position of Islamic Law on the crime of Zina as regards its punishment may seem cruel in principle to some, but in practice it is extremely rare. The severity

of the punishment has succeeded in preventing dislocation of the family and confusion with respect to paternity.

In short, the society under Islam is better off, because the fear of Allah is enough to prevent the crime. Thus, securing the integrity of the family and happiness of the married couple.

3.1.2 **Punishment**

Before one who commits Zina is punished under Islamic Law, it must be established that such an offender is an adult, sane, Muslim, free person and must have committed the crime voluntarily. Anything short of these, such offender is to be punished with a lesser punishment i.e. Ta'azir.

The punishment varies depending on the marital status of the offender which determines whether the act of zina is adultery or fornication.

It is fornication, where the offender is not married and the punishment is 100 lashes as stated in the Holy Qur'an, plus one year in exile which is added by the Holy Prophet Muhammad (S.A.W) .

In the Holy Qur'an it is stated thus:-

> "The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the last Day: and let a party of believers witness their punishment."[34]

The above verse is in reference to the punishment for fornicators who have never been married.

The exiling of the offender implies that he should be banished from the locality and sent to a very far place. But the purpose of banishment can be served by imprisonment today.

It is adultery, where the offender is married and the punishment is stoning to death i.e. rajm as provided in the Hadith.

Ubada Ibn as-Samit reported Prophet Muhammad (S.A.W) as saying:-

> "Receive (teaching) from me, receive (teaching) from me. Allah Has ordained a way for those (women). When an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committing adultery with a married female, they should receive one hundred lashes and be stoned to death."[35]

There is difference of opinion amongst the jurists as to whether it is essential to combine lashing with stoning as recorded in the above Hadith for married persons. The jurists of Hanbali and Zahiri Schools, on the authority of the above Hadith are of the view that in case of married persons there are two punishments i.e. 100 lashes and stoning to death, and both should be awarded.[36]

The other jurists of Hannafi, Maliki and Shafi'i schools, who form an overwhelming majority are of the opinion that it is not advisable to award two punishments together as it was not done by the Holy Prophet Muhammad (S.A.W) Himself, but only in one case and that too was

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under an exceptional circumstance. It is narrated on the authority of Jabir Ibn Abdullahi that a person committed adultery, and the Holy Prophet Muhammad (S.A.W) punished him with one hundred lashes, but, later on, it was found out that the offender was married and then the Holy Prophet Muhammad (S.A.W) awarded him the punishment of stoning to death.[37]

The position is entirely different in other laws. For example, in the Holy Bible, (Old testament) Revised Standard Version, if it is fornication, no punishment. The highest that can be done is for the offender to pay compensation and possibly marry the woman.

It is only a crime and punished when it is committed with a married woman.[38] In the Southern Nigeria, adultery or fornication is not even a crime let alone punishable. It is only in the Northern Nigeria, that Adultery or fornication is a crime and punishable. Even then, the punishment prescribed is two years imprisonment, with or without fine.[39]

It also include Haddi lashing if the offender is a Muslim. This is in addition to the punishment specified

for the commission of adultery or fornication. The maximum strokes allowed is twelve.[40]

The punishment here, is not by any standard adequate, bearing in mind the enormity and the effects of such crime.

Apart from the Divine instruction of prohibiting zina as evidenced in the Qur'anic verse thus:-

> "Nor come nigh to adultery:
> for it is a shameful (deed)
> and an evil, opening the road
> to other evils."[41]

It has the effect of leading to confusion of lineage, child abuse, breaking up of families, bitterness in relationships, the spread of AIDs and veneral diseases; general laxity in morals and opening the door to a flood lusts and self gratification.[42]

Then, there is no better punishment than that prescribed by Islamic Law, i.e. stoning to death for married adultery or 100 lashes plus one year in exile for offenders that are not married. This will go a long way to serve as a check to the incidences and occurrences of zina in our society.

3.2 Qadhf (Slander)

Islam safeguards human dignity and honour to such an extent that it is regarded as inviolable and sacred. Its sanctity has been re-iterated by the Holy Prophet Muhammad (S.A.W) thus:-

> "Your lives, your honour, and your property are as sacred to each other as the Sacredness of this your day, in this your month, and in this your city."[43]

This safeguard is available to a Muslim's honour even if what is said about him is true. How much more abhorrent it is, then, if what is said is false and baseless. The Holy Prophet Muhammad (S.A.W) said:-

> "If anyone says something about a person which is not true in order to defame him, Allah will confine him in the fire of Hell until it extinguishes his utterances."[44]

Therefore, it is regarded as not only a sheer wrong but a great sin. The most wicked and worst aspect of this crime, is the false accusation on virtuous believing muslims of immorality. such an accusation not only ruins ones reputation and family, but destroys ones future, it spreads evil passions in the society.

The Holy Qur'an threatened the perpetrators of such crime with dire punishments.

> "Those who slander chaste women, indiscreet but believing are cursed in this life and in the Hereafter: for them is a grievous penalty, on the Day when their tongues, their hands and their feet will bear witness against them as to their actions. On that Day Allah will pay them back (all) their just dues, and they will realise that Allah is the (very) Truth, that makes all things manifest."[45]

At the societal level, the crime of Qadhf can cause social disharmony and disintegration. There can hardly be

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mutual confidence, trust and understanding among the people. In fact, the general image of the community will be tarnished if those responsible for the crime of Qadhf are not subjected to strict punishment. Hence, the reason why Qadhf is considered a heinous crime and punishable.

Qadhf is defined as an unproved allegation that an individual has committed Zina.[46]

This crime is committed when one falsely accuses another of committing zina (adultery or fornication) or unchastity to a man or woman, or who injuriously contests the status or the paternity of a Muslim.[47]

Any other accusation such as of theft, wine drinking, taking of interests etc does not come within the definition of Qadhf. For example, to call or accuse someone as a thief, slut, robber, drunkard, kafir etc, is a criminal offence but does not involve the Hadd of Qadhf, but Ta'azir may apply.

Under the criminal code applicable to the Southern Nigeria, defamation is defined as matter likely to injure

the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation. Such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony. It is immaterial whether at the time of publication of the defamatory matter, the person concerning whom such matter is published is living or dead.[48]

The Penal Code defines defamation as any imputation by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes such 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.[49] From the above, it shows that the areas covered by defamation in the two Codes are wider than Under Islamic Law. The reason being that other accusations (apart from that of committing zina and contesting ones paternity) are covered by Ta'azir. For example, in the

case of

TAFIDA DAN ISKA & V. ABDU DABI,[50] a distinction was drawn between accusations that fall under Hadd and Ta'azir. IN this case, the Appellants were brought before the Chief Alkali of Hadejia by the respondent, who alleged that they had called him a thief. Witnesses testified to that effect, but were objected to, by the Appellants and found unacceptable by the court. The Appellants were called upon to swear by the Holy qur'an to deny ever calling the Respondent a thief. They refused to swear but there was some suggestion that they later confessed to the Chief Alkali. They were thereupon sentenced to 3 months' imprisonment. It was held, inter alia, that Qadhf consists in imputing upon a person bastardy or fornication. Whereas, if a man says to another, "you are a thief" then the punishment shall be according to the discretion of the Judge i.e. Ta'azir. The conviction was quashed and sentence of 3 months imprisonment was set aside by allowing the appeal.

3.2.1 Conditions on the Part of Qadhi (Accuser)

The Qadhi (i.e. the accused who slandered) can be a man or a woman, muslim or non-muslim, and deserves the

punishment of Qadhf, if the following conditions are present:-

a) The Qadhi must be an adult.

Where the Qadhi is a minor, the Hadd of Qadhf does not apply to him; but may be given a discretionary punishment (Ta'azir).[51]

b) The Qadhi must be sane

The Qadhi must posses normal common sense, because an insane or mentally abnormal person is not to be punished with the Hadd of Qadhf.[52] It has a base in the tradition of the Holy Prophet Muhammad (S.A.W) which says:-

> "Three categories of people are exempted from punishment and religious accountability. An infant until he attains majority; an insane person until he regains sanity and a person who is asleep until he wakes up."[53]

c) The Qadhi must have uttered the slanderous statement voluntarily. The slanderous statement uttered by the Qadhi must be out of his own free will or choice, without any element of compulsion or duress. If it is shown that the slanderous statements were uttered under compulsion or duress, then the Hadd of Qadhf lapses. This is reflected in the tradition of the Holy Prophet Muhammad (S.A.W) which says:-

> "Verily, Allah Has for my sake overlooked the unintentional mistakes and forgetfulness of my Ummah (community) and what they are forced to do."[54]

d) The Qadhi should not be the father, grandfather or grand grand father (H.H.S) of the Maqdhuf (slandered person), because the ascendent cannot be punished with Hadd.[55] This is the view of the majority scholars,but a minority view states that a descendent can have an ascendant punished by Hadd; as the law of defamation is general.[56]

In a situation like this, the descendant is deemed as a moral sinner, because of the Qur'anic verse, which says:-

> "and do not say unto either of them; (parents) `fie' and `be not harsh unto them..."[57]

e) The Qadhi should not be drunk

There are two views on this condition. One view is canvassed by the Hannafi School, that the Qadhi should not be drunk, because the person who only gesticulates cannot be held guilty of slander.[58]

The other view, is being canvassed by the Shafi'i School, that is the Qadhi is liable for slander if uttered in a state of drunkenness, the reason being that the act of drinking, if voluntary, is prohibited in Islam.[59] This is the preferred view.

3.2.2 Conditions on the Part of the Maqdhuf (the slandered person)

Since the aim of the Hadd of Qadhf is the promotion of modesty, chastity, goodness and protection of the Muslim Ummah generally, the Maqdhuf must satisfy the following conditions:-

a) The Maqdhuf must be a Muslim (whether male or female).

All the Muslim jurists are unanimous on this requirement. Imam Malik even added that where paternity of a child is challenged, the mother of the child must be a Muslim. If she is not, then the challenge is justifiable.[60] But where the false charge especially of adultery is against a non-muslim, it is not punishable by way of Hadd. It can

Shafi'i school, on the other hand, is of the view that a separate punishment is to be meted out in favour of everyone in that group or congregation.[71]

3.2.3 Conditions Which are Required in The Act of Qadhf Itself

The conditions are the following:-

a) The accusation must be unambiguous and in clear terms.

In other words, the accusation must be uttered in a direct and explicit terms. For example, the accusation is in a direct and explicit terms, when one says `ABC is an adulterer or a bastard.'

All the jurists of the schools of thought are unanimous that accusations uttered in clear and explicit expressions are punishable with Hadd.[72]

But, as to accusations in an implied or insinuated form the schools differ as to the punishment to be meted out. Maliki School, is of the view that insinuated or implied accusations is punishable by Hadd.[73] The School relied on a

tradition which says that one person said to another thus: "By Allah, my father is not an adulterer and my mother is not an adulteress." Umar Ibn Khattab sought for an advise from the companions on the statement. Some of them said that the accused has only praised his parens. While, the majority said that was Qadhf and so Umar punished the accuser with the Hadd punishment.[74] Hannafi, Shafi'i and Hanbali schools are of the view that there can be no Hadd punishment unless the Qadhi has used an unambiguous words.[75] Shafi'i School went on to say that if the intention of the Qadhi is determined and he intends to accuse, he is then punished with Hadd. In otherwords,the three schools above are of the view that for implied or insinuated accusations, Ta'azir, punishment applies.[76]

b) The accusation must be uttered in any language understood in the locality and it does not matter whether the accusation is made secretly or publicly.[77]

c) The offence of Qadhf is not compoundable especially when the case is brought to the court. The Qadhi

will be called upon to prove his accusation and if he fails to prove it, he will be awarded the prescribed punishment. This is based on the prophetic statement thus:-

> "Forgive among yourselves offence that deserve the prescribed punishment, but when a case is brought before me, the punishment will become obligatory."[78]

d) Where the Qadhi is a husband to the woman he slanders, and cannot produce four (4) witnesses to testify, the legal procedure laid down is that the law of li'an (cursory testimony) should apply as stated in the Holy Qur'an thus:-

> "And for those who launch a charge against their spouses, and have in support no evidence but their own, their solitary evidence (can be received) if they bear witness four times (with an oath) by God that they are solemnly telling the truth; and the fifth (Oath) should be that they solemnly invoke the course of God on themselves if they tell a

> lie. But it would avert the punishment from the wife if she bears witness four times (with an oath). By God, that her husband is telling a lie, and the fifth (oath) should be that she solemnly invokes the wrath of God on herself if (her accuser) is telling the truth."[79]

In short, the Li'an proceedings as stated in the above Qur'anic verse is an exception in favour of the husband who accuses his wife of adultery, and could not produce four (4) witnesses to support his claim.

3.2.4 Means of Proof

Under Islamic Criminal Law, the crime of Qadhf is established by either of the following means:-

a) The testimony or evidence of two men. These two men must be adults, sane and muslims. This is the majority view of the jurists of the sunni schools. But, some jurists of the Maliki School accept the evidence of one man and two women.[80] The testimony or evidence of two men is the ordinary judicial means of proof. In otherwords, it is the standard means of proof required.

b) The confession or admission of the Qadhi.

This is the strongest means of proof, once it is done voluntarily, by a Qadhi who is sane and an adult. Once, the crime has been confessed to, it cannot be withdrawn or retracted. This is the views of all the schools especially Hanafi and Hanbali Schools.[81]

Different methods of proof obtain under other laws. For example, under the Penal Code, for one to succeed in an action for defamation, he must prove that the accused uttered or published an imputation, that it concerned the complainant or some other person thereby aggrieving the complainant; and that the imputation amounts to defamation. It is even compounded where the defamation arises from words imputing adultery; because such defamation is not actionable per se, as special damages needed to be proved. Thus in,

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The plaintiff claimed damages for slander from the defendant arising from words imputing adultery between plaintiff and his sister-in-law. Publication was established, but it was proved that the local law and custom which applied to the parties did not regard

adultery as a criminal offence. Although, an offender is liable to be caned, such a punishment was never inflicted unless he failed to make financial compensation to the party injured, usually the woman's husband. It was held, inter alia, that this defamation was not actionable per se, and special damages needed to be proved.

3.2.5 Punishment

The fact that Qadhf is viewed as an offence against public morality, shows the right of Allah (haqq Allah) and that of the individual (haqq Adami) overlap. Because of the overlapping, the schools are divided as to the categorization of the punishment. Three views are proffered thus:-

i) Hannafi and Zahiri School are of the view that the punishment for Qadhf is haqq Allah; because the punishment is designed to safeguard the public interest by protecting the individual's reputation.[83]

ii) Shafi'i and Hanbali School are of the view that the punishment is haqq Adami, because it is only imposed if the Maqdhuf (one who has been slandered) or his representative demands it; if he forgives the Qadhi, there is no punishment.[84]

- iii) Maliki School agrees with the views of Shafi'i and Hanbali Schools that he punishment is haqq Adami. But make a distinction between the case before and after it is brought before the judge. Once reported, if proved, the punishment must be carried out.[85]

To sum up, despite the categorisations above, the punishment for Qadhf is one which pertains to the realm of the public interest. The infliction of the punishment is not dependent upon the request of the Maqdhuf and once the crime is proved either by the testimony or by confession, the guilty person should be punished.[86]

The punishment for the crime of Qadhf has three limbs, thus:-

a) The infliction of eighty (80) lashes whether the Qadhi has slandered one or many collectively. This is the position, if the punishment is not carried out. It is related by Malik thus:-

> "If the (accusations) are one separate occasions there is still only one Hadd against

him."[87]

A second offence of Qadhf after the punishment for the first will be punished with the same number of lashes (80 stripes). This is the view of Maliki School.[88]

But, according to the other three schools, namely, Hannafi, Shafi'i and Hanbali if after the punishment, the Qadhi repeats the accusation, the Hadd punishment is not repeated but Ta'azir is to apply.[89]

b) The testimony or evidence of the Qadhi will not be accepted in law as evidence again. As to whether the Qadhi's testimony will be accepted after repentance as clearly stated in the Holy Qur'an thus:

> "Unless they repent thereafter and mend their conduct ..."[90]

the schools are divided.

Hanafi School is of the view that even if the Qadhi repents and mends his conduct, his evidence should never be accepted.[91]

But Maliki, Shafi'i, Hanbali and Zaydi Schools are of the view that if the Qadhi repents and mends his conduct his evidence can be accepted thereafter.[92] But the jurists are unanimous that the repentance is not to waive the punishment. In otherwords, repentance will not render the punishment of 80 lashes null and void.[93]

c) The Qadhi is treated as "fasiqoon" i.e. transgressor who ought to be cast out by the community unless and until he repents and mends his conduct and thereafter may be re-admitted to the community. After repentance and reformation, the Qadhi will no longer be a sinner and Allah will forgive him.[94]

Under the Criminal Code, the Punishment is of three kinds namely:-

i) any person who publishes any defamatory matter is guilty of a misdemeanour and is liable to imprisonment for one year.

ii) any person who publish any defamatory matter knowing it to be false is liable to imprisonment for two years.

iii) any person who publishes any defamatory matter with intent to extort is liable to imprisonment for seven years.[95]

While under the Penal Code, the punishment for defamation is two years imprisonment or with fine or with both.[96]

The various punishments under the two codes do not really satisfy the public interest and that of the aggrieved parties. Hence, the need to fall back to the punishment under Islamic Law.

CHAPTER THREE

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CHAPTER FOUR

4. CRIMES AGAINST PROPERTY UNDER ISLAMIC LAW

4.0 Introduction

Theft and Robbery are crimes committed against property. And property is one of the three things which Almighty Allah Has declared inviolable. In otherwords, the protection to people's property is guaranteed against any violation from others. This is reflected in a number of injunctions of the Holy Qur'an and Sunnah of the Holy Prophet Muhammad (S.A.W).

For example, the Holy Qur'an states that:-

> "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property."[1]

It is also reported in the sayings of the Holy Prophet Muhammad (S.A.W) thus:-

> "Whoever usurps even a small part of the land (or property) of another person will be made to wear the same as a collar (of fire) on his

neck (on the Day of Judgement."[2]

Also that:

"Anyone who takes the property of another Muslim without any right to it will be presented to Allah and He will be extremely angry with him (and His wrath) will fall upon him"[3]

Lastly that:

"It is Haram (prohibited) for the Muslim to take (so much as a stick) without the consent of its owner."[4]

From the above, the emphasis is on what Allah Has prohibited to the Muslims in respect of other people's property. Thus, Theft and Robbery are then criminal offences against property. Robbery is regarded as the great theft and can be distinguished from theft from the basic element of each crime. In Theft, the basic element is the taking of someone else's property by stealth i.e. secretly. While in robbery, the basic element is the intention to take someone else's property by the use of force.[6] Also, in robbery, even if the intended crime is not completed, the offender is liable to punishment. For

example, to lie in wait on travelled highways with the intention of committing the crime constitutes a complete crime in itself.[7]

4.1 Al-Sariqa - (Theft)

Sariqa (theft) is a criminal act that involves the unlawful possession of another's property from where it has been safely kept in custody and without knowledge of the owner of such property.

Ibn Rushd, a Maliki Jurist defines Sariqa as a mischievious act of a person who takes away property not entrusted to him and without the knowledge of the owner.[8]

But Al-Zailai, a Hannafi jurist defines Sariqa as an act by a person of full legal capacity, of possessing a property valuwing 10 Dirhams or more belonging to another person who had kept such property in a proper place of custody.[9]

From the definitions above, it is not in doubt that theft deprives a person of his hard earned money and property. This shows an encroachment upon the property of such a man without any justifiable reason. Where such

happens it is bound to cause unrest in the society.

Therefore, thieves and armed robbers are nothing but a menace to the peaceful society (which the Islamic Society ought to enjoin) and are naturally looked upon with terror.

Thus, in order to put them under guard, stricter measures have been ordained in the Holy Qur'an thus:-

> "As to the Thief, male or female, cut off his or her hands: a punishment by way of example from Allah for their crime. And Allah is exalted in power."[10]

In Nigeria, the crime is either called theft under the Penal Code or stealing under the criminal code. The criminal code defines stealing as fraudulent taking of anything belonging to another capable of being stolen, or fraudulently converts to his own use or to the use of any other person anything capable of being stolen.[11]

The Penal Code on the other hand, defines theft as dishonestly taking any movable property out of the possession of any person without that person's consent.[12]

A look at the various definitions discussed about will reveal that the essential elements of theft under Islamic Law are more pragmatic compared to that under the two codes.

4.1.1 Conditions Relating to Al-Sariqa

The scholars have laid down a number of conditions, for which the act of theft is complete by their presence as hereunder discussed.

4.1.1(a) Conditions as to the Thief (Sariq)

i) He must be an adult

Where the thief is not an adult i.e. under age, the Hadd punishment will not be applicable, but may apply Ta'azir punishment in its place.[13]

ii) He must be sane

Where the thief is insane, the Hadd punishment is not inflicted.[14]

iii) He must have committed the act of theft voluntarily. Because, if the thief is forced to steal, Hadd punishment is not inflicted. The

force leading to the stealing is a vacating factor.[15]

iv) The thief should not be the father of the one from whom the property is stolen. This is based on the tradition of the Holy Prophet Muhammad (S.A.W) thus:-

"You and your property belong to your father."[16]

4.1.1(b) Conditions as to the Stolen Property (al-Masrug).

i) The stolen property must be lawful.

The theft of things that are unlawful, like wine, pork, etc, neither Hadd nor Ta'azir is inflicted. But, if the things stolen belong to a non-muslim, it should be returned or its value and Ta'azir punishment is inflicted. But, if the things stolen belong to a muslim, it is never returned to him or its value, instead it should be destroyed and the thief is not punished at all.[17]

ii) The Stolen property must be valuable.

This condition is important and required, because compensation may be demanded in case of destruction, loss or consumption.[18]

iii) The stolen property must be owned by someone.

The theft of things which every being has a right over it, will not warrant the infliction of the Hadd punishment. But if someone has become the owner of such property, if it is stolen, then the Hadd punishment will be inflicted. It is stated thus:-

> "Every human being has a right over these things, but once any part of these things are secured by an individual and kept in a proper custody, it becomes his own property and nobody is to interfere and if it is stolen and the value reaches Nisab, Hadd is applicable."[19]

iv) The stolen property must be kept in a proper place of custody (Hirz).

The storage place, or the custody of the goods is known as Hirz. It is also a place where people normally keep their property so that they

might not be described as careless or not giving care to their own property.[20]

The normal thing is that house is for keeping furniture, the shop for keeping goods, the safe for keeping money, the stable for keeping horses etc. So, if one keeps his property in a place that is not a normal place of custody for that purpose and if a person steals that property, he will not be punished by Hadd but may be punished by Ta'azir. Therefore, any property taken not from the proper place of custody, then, it will not amount to theft to warrant the Hadd punishment. But, it may amount to misappropriation, embezzlement or criminal breach of trust etc.[21]

The four Sunni and the Zaydi Schools are unanimous in agreeing that in order to consider the taking of someone else's property as a theft, it must be proved that the property was being kept in its proper place (Hirz).[22] But, Zahiri School disagree with the view above, by holding that the taking of property belonging to

others is a theft even if the property in question was not being kept in its proper place.[23] What is considered a proper place of Hirz for keeping property, is determined according to custom and usages, which may change from one locality, time to another.

v) The stolen property must reach the Nisab.
Nisab is the minimum value of the property when stolen, the Hadd Punishment of amputation of the hand will be applied.

The purpose of determining a minimum value of stolen property is to avoid infliction of the severe Hadd punishment for theft unless the stolen property is of considerable value. All the Schools are unanimous that if stolen property is worthless the punishment is never inflicted. Although, the thief will still be liable to a Ta'azir punishment, but not to the Hadd punishment prescribed for the crime of theft.[24]

According to the Hannafi and Shi'a Schools, the punishment for theft cannot be inflicted unless the value of the stolen property is ten (10) Dirhams. They relied on

the fact that the Holy Prophet Muhammad (S.A.W) Has decreed that a hand of a thief should not be cut off unless the value of the stolen property is not less than the value of a shield which is ten (10) Dirhams.[25]

While, Maliki, Shafi'i and Hanbali Schools maintained that the punishment is to be inflicted for stealing property; the value of which is three (3) Dirhams of silver or ¼ Dinar of gold. ¼ Dinar of gold is equal to three (3) Dirhams, as a Dinar is twelve (12) Dirhams.[26]

Aisha (R.A) was reported to have said:

> The Holy Prophet Muhammad (S.A.W) used to cut off the hand of a thief if the value of the stolen property was a ¼ of Dinar or more."[27]

The fact that the stolen property must reach the Nisab, goes with it that the thief must be aware of the amount of the property he had stolen as equal to the Nisab.[28]

vi) The stolen property must be taken away secretly. That is without the knowledge and consent of the owner of the property and with bad intention. If it is with

the knowledge of the owner, the taking away of the property from its place of custody is punishable by Ta'azir only.[29]

4.1.2 Means of Proof

Having the above features at the background, the crime of theft is proved by either of the following means, namely:-

a) By the ordinary judicial means of proof.
That is by the evidence of the two witnesses, who must satisfy that they are sane, adults, reliable and morally upright witnesses.[30]

b) By the confession of the accused which has to be spontaneous and voluntary.
It was reported that a thief was brought to the Holy Prophet Muhammad (S.A.W) but no property was found with him. The Holy Prophet Muhammad (S.A.W) said to him 'I do not think you have stolen.' He replied, that he had and repeated it to him three (3) times, making acknowledgement all the time. So He (the Holy Prophet Muhammad (S.A.W) gave orders and his hand was cut off.[31]

Under the criminal code, the main features, which need to be proved are fraudulent taking or conversion; intention to permanently deprive the owner the use of the stolen property and that the property must be movable.[32]

> While under the Penal Code, the main features which need to be proved are that the property in question is a movable property; that the property was in the possession of a person; that the accused moved the property whilst in possession of that person; that he did so without the consent of that person; that he did so in order to take the property out of the possession of the person; and that he did so with intent to cause wrongful gain to himself or wrongful loss to that person.[33]

From the two codes above; the means of proof is not as pragmatic as the position under Islamic Law. The reason being, that under the two codes, a single witness can establish the crime of theft.

4.1.3 Punishment

Once the crime of theft is committed and it is incontrovertibly established, the punishment i.e. cutting the limb, must be inflicted on the thief. This is so regardless of the fact that he is ignorant of the law that theft is prohibited and punishable as such.[34] It is a good defence only for thieves living in an unislamic state or newly converted muslims.[35]

Therefore, the punishment for theft under Islamic Law is prescribed in the Holy Qur'an thus:-

> "As to the thief, male or female, cut off his or her hand: a punishment by way of example from Allah for their crime. And Allah is exalted in power."[36]

In otherwords, the punishment for theft is the amputation of the hands. The Holy Prophet Muhammad (S.A.W) practiced and acted upon this punishment on thieves. He was reported to have said thus:-

> "If he (a thief) steals, cut his hand and if he steals for

> the second time cut his leg and if he steals for the third time cut his hand and if he steals for the fourth time cut his leg and if the steals after that kill him."[37]

In the light of the above Hadith, the Schools proffer the following views:-

Maliki and Shafi'i Schools, hold that a thief after his first theft must lose his right hand, after the second theft, his left foot; after the third theft,his left hand; after the fourth theft, his right foot; and after the fifth and following thefts he must be punished by Ta'azir.[38]

Hannafi School, hold that a thief after his first theft, must lose his right hand; and in the case of a second theft, must lose his left foot. In the case of further thefts, the thief is merely imprisoned until he shows repentance i.e. punished by Ta'azir,[39]

If after the punishment of the Hadd of amputation,

the property stolen is there, it should be returned to the owner. This is based on the tradition of the Holy prophet Muhammad (S.A.W) which says:-

> "Whoever finds his own property in the unlawful possession of another person could claim it."[40]

But, if the property is not there, i.e. either, consumed or disposed of etc, the Schools differ on the position of the law.

Maliki School is of the opinion that after amputation and the property is not there, then the thief is to be fined its value if he is rich, but if poor or destitute, is not to be fined its value; and it is immaterial if he gets rich after the date of punishment.[41]

Shafi'i and Hanbali Schools are of the opinion that the thief whether rich or poor, as long as the property is not there, he is to be fined its value.[42]

Hannafi School, is of the opinion that the thief, whether rich or poor, should not be fined its value if the

property is not there. It relied on a prophetic tradition which says:-

"If the thief is amputated,
he is not to be fined."[43]

The wisdom behind the amputation of the hand as a punishment for theft (though grave), is to serve as an effective means of protecting people's property (and to some extent people' life). This will make it possible for the society to live in perfect security and tranquility. The choice is now left to those who may be tempted to steal, either not to or steal and loose their hands.

In societies other than the Islamic Society i.e. Nigeria; people could not feel secured for their properties and lives, and the rate of the crime is always on the increase. The reason for this, might not be unconnected with the fact that stiff punishment has not been provided as under Islamic Law. For example, under the Criminal Code, the punishment for stealing ranges from two, three, seven to fourteen years imprisonment respectively depending on the gravity of the stealing.[44] While, under the Penal Code, the punishment for theft ranges from five, seven to fourteen years.[45]

4.1.4 Whether the Hadd of Cutting the Hand Lapses?

The Hadd of cutting the hand for a theft of a property worth ¼ Dinar lapses when there is a genuine repentance on the part of the thief. This is possible where he returns the stolen property to the owner before an application for the prosecution is made.[46]

The Hadd of cutting the hand also lapses when the owner of the stolen property had pardoned the thief before the matter is reported to the Judge, ruler or person in authority. Once it has been reported no pardoning.[47]

It was reported that when one Safuwan was sleeping in the Mosque, a thief took away some property from under his head but he caught him and straight away, took him to the Holy Prophet Muhammad (S.A.W), who after investigating the matter ordered him to be amputated. There and then, Safuwan said to the Holy Prophet Muhammad (S.A.W) that he has gifted that property to the thief, but the Holy Prophet Muhammad (S.A.W) replied that:-

> "This should have been done
> before your coming to me.
> But once it is reported no

pardoning."[48]

On another similar occasion, the Holy Prophet Muhammad (S.A.W) is reported to have said thus:-

> "Pardon the crimes between yourselves, but once they are reported to the ruler, no pardoning."[49]

4.1.5 Mode of Amputation of the Hand

The punishment prescribed for theft is the amputation of the hand. This is expressly stated in the Holy Qur'an and the jurists are unanimous on it. The jurists are also unanimous that the hand is to be amputated from the wrist. The difference arose as to the particular hand to be amputated, and the subsequent thefts committed by the same thief.

According to Hannafi and Hanbali Schools, the amputation is to be inflicted only on the right hand and left leg for the first and second acts of theft.[50]

But according to Maliki and Shafi'i Schools, the amputation is to be inflicted on the right hand, then left

leg, then the left hand and then right leg for the first, second, third and fourth acts of theft.[51]

The Imamiyya sect of the Shi'a School is of the view that the hand should be amputated from the fingers.[52] This is a minority view, since the jurists are unanimous that the hand should be amputated from the wrist. Thus, the majority view is to be preferred.

4.2 HIRABA - (Brigandage or Robbery)

Sympathy is a noble act no doubt about it. It is for this reason, Islam exhorts the Muslims to adopt a sympathetic attitude and approach, not only towards human beings but to other creatures i.e. animal,plants etc.

Islam regards it as a sheer injustice to allow criminals to work havoc and play with the life, honour and property of innocent people and make them victims of their highhandedness.

It is then incumbent upon the Islamic State to ensure free movement, grant full security and protection to its law - abiding citizens so that they may live in peace. This accounts for why Islam prescribed the severest and

deterrent punishment for those who commit heinous crime such as Hiraba.

Those engaged in this crime, killed innocent persons with unspeakable tortures for no fault of theirs and took away their properties. Such heartless and treacherous persons hardly deserve any leniency since they not only subvert the security of the society, but provide an incentive to other criminals to commit heinous crimes. The extreme severity of the punishment prescribed by the Holy Qur'an and the sunnah can be well understood if one bears in mind the enormity of the crime which these people committed.

4.2.1 Definition of Hiraba

The term Hiraba is variously defined hereunder. According to a contemporary jurists, Sayyid Sabiq in his book Fiqh al-Sunnah, Hiraba is defined as an act of robbery by a group of armed men within the territory of the Islamic State so as to create anarchy under which the property, privacy, safety, dignity and religious values of the people will be violated. It is immaterial whether the persons committing the Hiraba are muslims or non Muslims, or the act is committed by a group or individual.[53]

According to Maliki School, Hiraba is a criminal act by a person or persons who obstructs the highway or any other place by causing disorder among the community or attack people with the intention of appropriating their property by the use of force, in a situation where he victim(s) is/are unable to defend himself/themselves or get immediate help. It makes no difference whether such a person, has killed people or not and whether he is known or famous for that or not.[54]

Hannafi School and a view in Hanbali School defines Hiraba as a criminal act which involve the use of force and causes considerable insecurity along the Highways.[55]

Shafi'i School defines Hiraba as a criminal act in which the offender(s) unlawfully appropriated other people's property by the use of force and instil fear or terror in the minds of the community.[56]

This crime is regarded as a war against Allah and His Messenger and an attempt to spread mischief, horror, grave or widespread breach of public peace, mutiny, sedition, riotous tumult etc in the world.[57]

The definition by the Maliki School on Hiraba should be preferred.

In Nigeria, under the Criminal Code, robbery means stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is said to commit robbery.[58]

This definition is the same with the definition of robbery under the laws of the Federation of Nigeria Cap. 398.

While,under the Penal Code, robbery is a special and aggravated form of theft or extortion. The distinguishing element of robbery is the presence of either an act of violence or an imminent fear of violence in the committing of theft or extortion.[59]

The Penal Code also contained Brigandage as robbery committed by five or more persons acting together.[60]

The position of the Penal Code regarding Brigandage is re-iterated by Bairamaian, J.S.C. as he then was thus:-

> "Brigandage is robbery, or attempted robbery by a group of five or more persons acting together."[61]

From the various definitions above, the use of force and armed with weapon is common as features of the crime.

4.2.2 Place of Hiraba (Robbery or Brigandage)

The place of the robbery happens mostly on the highways, forests, mountains, and may also happen in towns, inside houses, lanes, streets etc, where the victim(s) cannot find help for rescue.

Maliki, Shafi'i, Hanbali, Zahiri, Zaydia Schools and Imamiyya sect of Shi'a School, are of the view that Hiraba can take place anywhere whether outside towns or inside houses and lanes so long as confrontation or the frightening is there and rescue is not available or the crime cannot be prevented.[62]

But, Hannafi School is of the view that armed robbery can take place only on the highway, outside towns and villages, because rescue in the towns and villages should always be available. But, where it is committed in towns and villages where the victim(s) can be helped will not be considered as Hiraba.[63]

4.2.3 Conditions of Hiraba

A person is said to have committed the Crime of Hiraba, when the following conditions are met.

a) Legal capacity of the accused person(s).

The jurists are unanimous that the accused should be adult and sane. As insane and minor persons are not strictly responsible for committing Hiraba.

This is based on the prophetic tradition that:-

> "Three categories of people are exempted from punishment and religious accountability: an infant or minor until he attains majority; an insane person until he regains sanity and a person who is asleep until he wakes up."[64]

However, the jurists are divided as to the position

of insane and minor persons taking part in robbery together with other adult and sane robbers.

Maliki, Shafi'i and Zahiri Schools are of the view that the insane and minor are exonerated and may be punished by Ta'azir but the sane robbers are criminally liable and punished by Hadd.[65]

Hannafi School, on the other hand,held that the exoneration should cover both the sane and insane/minor robbers.[66]

The jurists are also divided as to the position of female robbers taking part with male robbers.

Maliki, Shafi'i and Zahiri Schools do not differentiate between male and female robbers, only that the female robbers are not crucified or exiled as the male robbers, but may be killed or amputated.[67]

Hannafi School, on the other hand, held that female robbers are not liable to Hadd of Hiraba and the male robbers who took part with the female robbers are to be treated the same way.[68]

The views of Maliki, Shafi'i and Zahiri Schools should be preferred. This is so if consideration is given to the way the womenfolk are demanding for gender equation, and can even out-smart the menfolk in most cases. Thus, the need to do away with the difference, and insist on punishing the male and female robbers accordingly.

b) The accused person(s) should be armed at the time of committing the robbery. All the jurists are unanimous on this condition. However, they differ as to the type of arms used in the robbery. Maliki, shafi'i and Hanbali Schools are of the view that it is immaterial what type of arms the offender(s) used in committing Hiraba.[69] While Hannafi School, is of the view that the offender(s) are not liable to Hadd of Hiraba by not using arms but insignificant things like stones, sticks etc.[70]

c) The accused person(s) should have committed the act of robbery by open attack. All the jurists are unanimous on this condition.[71]

4.2.4 Proof of Hiraba

There is consensus among the jurists that as a general rule, all Hudud offences are proved either by confession of the accused or the testimony or evidence of two reliable witnesses.[72] But Hiraba is a kind of crime which takes place mostly in the absence of people, and victim(s) may not readily find people who witnesses the incident. Then, the witnesses may have to come from the victims themselves.[73] There are divided opinions as to whether the victims may give evidence against the robbers or not. One opinion, (which is preferrable) is that the victims may give evidence against the robbers. But the other opinion that the victims should not give evidence against the robbers, because as a victim the position is that there exist an enmity between him and the accused. Since, there exists that enmity between them, the competence of the victim to give a valid testimony against the robber(s) becomes doubtful.[74]

The position of proof under Nigerian law is different from the position discussed above under Islam.

Under S.31(2) (a) of the Robbery and Firearms Act No.47 of 1970, the prosecution must prove that:

a) There was a robbery.

b) Accused was the robber or one of the robbers and that

c) The robbery was with arms.

The standard of proof required from the prosecution in establishing the conditions A - C above, is proof beyond reasonable doubt.[75]

The victim of robbery can be one of the prosecution witnesses in proving the fact of robbery as is evidence in the case of

Ugwumba v. The State.[76]

The appellant and another person were jointly charged in the HIGH COURT OF Lagos State for an offence of armed robbery. He was alleged to be amongst a team of four (4) men that robbed the sum of₦ 21,150.00k property of S.C.O.A. Ltd from two of its staff who were taking the money to bank. The appellant who was armed with a pistol snatched the bag containing the money from the complainant's messenger. An alarm was raised, people chased up the arm robbery gang in spite of Appellant's shootings to prevent that. Two armed Policemen emerged at

the time Appellant was being chased and arrested him after some exchange of shootings. Appellant was subsequently tried and convicted for the offence of armed robbery after 5 prosecution witnesses had testified, and death sentence was passed on him. His appeal to the Court of Appeal was dismissed whilst the other accused jointly convicted with the Appellant was acquitted. Being dissatisfied, appellant has further appealed to the Supreme Court. His counsel submitted inter alia, that the two lower courts erred in basing Appellant's conviction on the evidence of the two policemen that arrested him when such evidence was hearsay as they were not eye-witness to the crime. The Supreme Court had to determine whether the prosecution proved its case beyond reasonable doubt, and whether the trial court properly evaluated the evidence before it.

Held, (unanimously dismissing the appeal) inter alia, that the evidence of two prosecution witnesses were not hearsay as both witnesses testified as to what they actually saw and did. None of them claimed to be an eye-witness of the actual robbery but they testified as to the part they played in arresting the Appellant soon after the robbery.

In the above case, the victim was one of the prosecution witnesses, and his testimony was accepted as a credible one.

Also, in the above case, it was held per Ogwuegbu J.S.C. that "a court can act on the evidence of one single witness if that witness can be believed given all the surrounding circumstances. A single credible witness can establish a case beyond reasonable doubt"[77] This position of the law in Nigeria, negates the position under Islamic Law that in all Hudud offences (as in this case of robbery) it is proved by the testimony or evidence of two reliable witnesses.[78]

4.2.5 Punishment

In Hiraba, unlike in other Hudud offences, there are several alternative punishments i.e. execution, crucifixion, amputation of hand and foot, and exile. And since this crime is regarded as waging war against Allah and His Messenger and an attempt to spread mischief, the Holy Qur'an provides for these forms of punishment thus:-

> "The punishment of those who wage war against Allah and His Apostle, and strive with might and main for mischief

> through the land is: execution, or crucifixion, or the cutting off of hands and feet from the opposite sides, or exile from the land. That is their disgrace in this world,. and a heavy punishment is theirs in the Hereafter."[79]

Therefore, it is open to the judge to pass any one of these sentences which he thinks fit under the circumstances of each case.[80]

The Jurist of the four Sunni Schools have suggested the following punishments under the following circumstances:-

a) Where murder is committed and property robbed, the punishment is crucifixion.

b) Where murder is committed,but no property is robbed, the punishment is death sentence.

c) Where there is no murder committed, but property is robbed, the punishment is cutting off of a hand and a foot.

d) Where no murder is committed and no property is robbed, but the road is made unsafe, the punishment is exile or imprisonment.[81]

The effect and end result of crucifixion and death sentence is one and the same, the only difference is in the mode of carrying out the punishment. Death sentence is inflicted by using the sword.[82] While crucifixion is effected by first crucifying the robber alive and then be thrust by a Javelin. This view is canvassed by Hannafi School and Ibn al-Qasim of Maliki school.[83] Another view on crucifixion which is canvassed by Shafi'i and Hanbali Schools and some jurists of the Maliki School. That is the robber should first be executed in the usual manner and his body should subsequently be crucified on the gibbet for three (3) days as warning and deterrent to others.[84]

Under the Criminal Code,the punishment for armed robbery is far below what has been discussed above. The punishment under it, ranges from fourteen (14) years, twenty one 21) years, life imprisonment with or without whipping to death sentence where wounds are inflicted on victims.[85]

While, under the Penal Code, the punishment for robbery ranges from imprisonment of seven (7), ten (10), fourteen (14) years respectively; life imprisonment to death sentence where culpable homicide is involved. In addition, the robber with the exception of death sentence, shall be liable to fine.[86]

In the case of

JALO GURI & ANOTHER V. HADEJIA N.A.[87]

The two appellants were convicted by a Native Court of the murder of one Shahade in the course of a highway robbery (Hiraba). The evidence was that Shahade was returning from the market at dusk with two witnesses, Mamman and Kani, when the two appellants attacked them, killing Shahade and stealing his goods. Mamman said that he had known the appellant for 10 Years, The native court convicted the two appellants and sentenced them to death. The appealed to the Muslim Court of Appeal, which dismissed their appeal. They further appealed to the High court, Northern Region which was also dismissed. They further appealed to the Federal Supreme Court, arguing inter alia: that they were not given an opportunity in the Native Court to defend themselves or to call witnesses in their defence. They submitted that it was repugnant to natural justice, equity and good conscience for an accused person in cases of

Hiraba under Maliki Law to be denied the right of questioning witnesses for the crown, or defending himself. It was held, inter alia, that the procedure which does not permit an accused person to put forward his defence is repugnant to natural justice, equity, and good conscience and by S.15(2)(a) of the Muslim Court of Appeal Law, the Muslim Court of appeal is required to reject it. The appeal was allowed and appellants were acquitted and discharged.

A critical look at the above case will reveal that on technicality an accused can escape punishment regardless of the harm he has done to the society.

It was also a misnormer for Judges of the Federal Supreme Court (Ademola, F.C.J; Abott, F.J; and Mbanefo, F.J.) who were not Muslims and not learned in Islamic Law to adjudicate on matters relating to Islamic Law i.e case of Hiraba. What was even worse, was their holding that the procedure of Maliki Law relating to Hiraba was repugnant to natural justice, equity and good conscience.

Despite, the provisions of the law relating to robbery under both the Criminal Code and Penal code, an

Act containing comprehensive provisions for matters relating to armed robbery was enacted i.e Robbery and Firearms (Special Provisions) Act of 1970. This Act makes robbery a capital offence. The reason for making it so, is the use of fire-arms and dangerous weapons in the process of its commission and consequently, the increased rate of victim fatalities that accompanied its commission.

The Act of 1970 was amended in 1971, 1974, 1977 and 1979 and then repealed and replaced by the Robbery and firearms (Special Provisions) act of 1984 Cap. 398. This Act now vests the powers to try armed robbers only in the Robbery and Firearms Tribunals established by each state.

Under the present dispensation, the punishment for robbery upon conviction is twenty (20) years imprisonment. If there is evidence of the infliction of wounds or using any personal violence to any person the punishment upon conviction is death sentence either by hanging the robber by the neck till he be dead or by firing squad. But, where it is an attempted robbery,the punishment upon conviction is imprisonment of between fourteen (14) to twenty (20) years. Where,during the attempted robbery, there is evidence of inflicting wounds or using personal

violence to any person,the punishment upon conviction is life imprisonment.[88]

Since 1970, when robbery was made a capital offence in Nigeria, the situation has not changed. The rate of robbery is on the increase and many reasons were advanced for that, like the economic and social pressures; educational deprivations and its attendant frustrations etc. This led to the Robbery and Firearms (Special Provision) Act 1970 to be subjected to series of amendments and repeals, all in attempt to curb the problem of robbery incidents in Nigeria.

This is not the position under an Islamic Society and there can never be a time to come when its laws relating to robbery will be amended or repealed, as it was the case with the Robbery and Firearms (Special Provisions) Act.

CHAPTER FOUR

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CHAPTER FIVE

5. CRIMES AGAINST THE ISLAMIC STATE

5.0 INTRODUCTION

Shurbul-Khamr (wine drinking), Baghyy (Rebellion or Treason), and Riddah, (Apostasy) are crimes committed against an Islamic State.

Wine drinking is regarded as the mother of all evils. The Holy Prophet Muhammad (S.A.W) is reported to have said:

> "Stay away from Khamr (wine) as it is the mother of evils."[1]

From the above tradition of the Holy Prophet Muhammad (S.A.W) it is stating the obvious to say that, the harmful effects produced by wine drinking are so elaborate and the manner in which it proliferate in our society is a source of concern for all. Moreso, when government could not abolish it, by passing and attempting to enforce laws prohibiting it. It is only Islam which has succeeded in combating and eradicating it. Thus, the stand of Islam in prohibiting wine and blocking all the avenues leading to its consumption is very clear and

unequivocal.

Rebellion is regarded as a political crime and the purpose of such crime is the achievement of certain political goals. A political crime does not take place in normal condition, it takes place in extraordinary condition i.e. state of revolution or civil war.[2]

An Islamic State which holds the mantle of power through a lawful means, has the right to protect itself from rebellion. To do this, is in line with public interest, because Rebellion causes instability and destruction to the socio-political system of the Islamic state. It is in consideration of these and other factors, that under the sharia, Rebellion is regarded as a crime greater than murder. Therefore, extreme penalty i.e. death has been sanctioned for the perpetrators of this crime and it is deemed as the political weapon of Islam for the suppression of rebellion and disorder.[3]

While Apostasy is classified among the seven destructive crimes that may be committed by any Muslim. One basic aim and objective of the Shariah behind the punishment of Apostasy is the preservation of the Islamic

faith, because the whole bedrock of Islam and the Shariah rests on faith. By committing the crime of Apostasy, a lot of issues are involved. There is the withdrawal from the dominion of Allah, the Most High; blasphemy; heresy and mockery to the Islamic Community. Viewing all these, the crime of Apostasy is made punishable so as to close all doors that will debase the sacred notions of the Islamic religion.[4]

Based, on the above, it goes without saying that wine drinking, rebellion or treason and Apostasy are crimes against the Islamic State.

5.1 Shurbul-Khamr (wine drinking)

Wine drinking is an offence against public morality. The arabic word Khamr signifies any alcoholic drink which causes intoxication. This is re-iterated by a tradition of the Holy Prophet Muhammad (S.A.W) thus:-

> "Every intoxicant is Khamr and every (type of) Khamr is prohibited.[5]

Also, Maliki, Shafi'i and Hanbali schools hold that any intoxicating substance is considered Khamr.[6]

The three Schools did not distinguish between wine and other substances that intoxicate as well. While Hannafi School,made a distinction between wine and other intoxicating substances.[7]

This school is of the view that only if a person consumes wine, that the Hadd punishment of wine drinking will be inflicted while if it is any other intoxicating substance, the punishment to be inflicted will be under Ta'azir.[8]

In short, the definition of Khamr extends to any substance which intoxicates in whatever form or under whatever name it may appear. Thus, for example, beer, campari, cocaine etc and similar drinks are prohibited.

The prohibition of wine drinking cannot be compromised by whatever standard. So, a situation where a person says the quantity of wine he takes is not much or very little, will not avail him of the punishment. This is why the Holy Prophet Muhammad (S.A.W) said:

> "What intoxicates in greater quantity is unlawful, it is

also unlawful in its small quantity."[9]

Also, that it is used as a medicinal value is ruled out by the Holy Prophet Muhammad (S.A.W), when a man told Him that he used wine as medicine. The Holy Prophet Muhammad (S.A.W) said:

> "It is not a medicine but a disease."[10]

The prohibition did not stop at either prohibiting the drinking of wine, whether much or little; or using it for medicinal purposes,but also prohibited trading in it, even with non-Muslims. It is not permissible for a Muslim to import or export, sells, own or work in a place associated with wine. It is in this connection, the Holy Prophet Muhammad (S.A.W) cursed ten categories of people saying:

> "Truly, Allah Has cursed wine and the one who drinks it, the one who serves it, the one who sells it, the one who earns from the sale of it, the one who brews and extracts it, the one for whom it has been brewed and

> extracted, the one who buys it, and the one for whom it is brought; the one who carries and the one for whom it is carried.[11]

Since Islam is aiming at not only prohibiting wine drinking it also blocked all avenues which lead to the prohibition. That is why, it is prohibited for a Muslim to sell grapes, maize, guinea corn, millet etc to any person or body i.e. (breweries) whom he knows will make wine from them.

A tradition of the Holy Prophet Muhammad (S.A.W) states that:

> "If someone stockpiles grapes during harvest time and holds them in order to sell them to a Jew or Christian or anyone else (even if he be a Muslim) who produces wine, he will be leaping into the fire with his eyes open."[12]

It is also prohibited for a Muslim to give wine as a gift to anyone such as a Christian or Jewish friend. Nor can it be received or given out to a Muslim as a Gift. It is reported that a man brought a cask of wine to the

Holy Prophet Muhammad (S.A.W) as a gift. The Holy Prophet Muhammad (S.A.W) informed him that Allah Had prohibited it. The man asked whether he can sell it. The Holy Prophet Muhammad (S.A.W) replied that the one who prohibited drinking it Has also prohibited selling it. The man asked, then what Shall I do with it. The Holy Prophet Muhammad (S.A.W) replied that he should pour it on the ground.[13]

In the same vein, a Muslim is required to stay away from any gathering in which wine is being served. 'Umar narrated that he heard the Holy Prophet Muhammad (S.A.W) as saying:-

> "Whoever believes in Allah and the Last Day must not sit at a place at which wine is consumed."[14]

From the discussions so far, it shows that wine is prohibited in clear terms and all loopholes that will give an opportunity to deal with wine in whatever form is blocked.

Drugs such as marijuana, cocaine, opium, hashish and

the like are included in the prohibited category of wine.

In order to eradicate this pervasive evil from the society, Allah adopted a wise course of education and training, prohibiting wine drinking in measured stages.

At the first stage, Allah made it clear, that the harm of wine drinking is greater than its benefits.

> "They ask thee concerning wine and gambling say: in them is great sin, and some profit for men, but the sin is greater than the profit."[15]

This mere disapproval as reflected from the above verse of wine drinking is to serve as a preliminary caution to the pious Muslims.

The second stage prohibited a Muslim to come to Salat (prayers) while intoxicated, as reflected thus:-

> "O ye who believe approach not prayers while you are drunk until ye can understand all that ye say."[16]

And the final stage prohibited all kinds of intoxication totally and decisively in these words:-

> "O ye who believe,

> intoxicants and gambling, dedication of stones and divination by arrows, are an abomination of satan's handiwork: eschew such abomination that ye may prosper. Satan's plan is but to excite enmity and hatred between you, with intoxicants and gambling and hinder you from the remembrance of Allah, and from prayer; will ye not then abstain?"[17]

The above prohibition in measured stages is necessary because wine drinking is a bad habit and for habitual drunkards time is needed to abstain from it altogether.

In Nigeria, the criminal code applicable to the Southern Nigeria, did not contain any provision prohibiting the taking or consumption of wine drinking. Where, even a mention of it is made, is in relation of a person committing a criminal offence in a state of intoxication. It provides a defence to an accused, where in the state of intoxication, commits a criminal offence. The accused, is either discharged or regarded as insane.[18]

The Penal Code punishes the mere consumption of wine by a Muslim, where the consumption is intentional and not for medicinal value.[19] (This is a dormant provision,because it is now not invoked). That is why in another provision, a person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated.[20] (This is a situation where the intoxication is voluntary. Where the intoxication is involuntary any offence committed in that state excuses the offender of such crime from punishment. The offender is accorded the same protection as person of unsound mind.[21]

5.1.1 Proving the Guilt of Wine Drinking

The crime of wine drinking under Islamic Law is established by either of the following means, namely:-

a) The testimony or evidence of two reliable witnesses who saw him drink, or who had smell the liquor, or one witness saw him drinks and the other smells it.[22]

This method, is the ordinary judicial means of proof. It is enshrined in Islamic Law so as not to leave the means of evidence to prove a case (whether civil or criminal) into the whims an caprices of Mankind. This is in line with what the Holy Prophet

Muhammad (S.A.W) said thus:-

> "If people should be granted their claims (without verification) some people would have claimed life and property of others (unjustly)."[23]

b) The admission or confession of the accused. The admission of the accused is only valid when it is free from any coercion or suspicion. This is considered as the strongest means of proof. where the admission is not voluntary, it is not accepted in evidence for the sake of convicting the accused for wine drinking.[24]

c) Ibn Mas'ud, Caliph Umar, Maliki and Hanbli Schools added another method of proof. That is the crime of wine drinking can be established or proved by the smell of the mouth or vomitting.[25]

Under the Penal Code, one is required to prove that the accused drank something containing alcohol, and that he did so intentionally. also, that the accused drank the alcohol not for a medicinal purpose and that he is a Muslim.[26]

Looking at the proof under the Penal Code, it shows that even if one is a Muslim and can prove that he took wine for medicinal purpose, he has a defence. This is in contra-distinction with the position under Islamic Law, where it is stated that wine does not serve as a medicine, instead it is a disease.[27]

5.1.2 Punishment for Wine Drinking

The Holy Qur'an does not prescribe a specific punishment for wine drinking. The Holy Prophet Muhammad (S.A.W) did not also specify any number of strokes. During the time of the Holy Prophet Muhammad (S.A.W) in almost all cases of wine drinking, the sentence was beating with shoes, sticks and hands without specifying the number of lashes. This is evidenced in the following:-

> "A man was brought to the Holy Prophet Muhammad (S.A.W) on a charge of drunkenness. So, He (the Holy Prophet) ordered all the men present in the house, to beat him. So all of them beat him, (and I was also one of them who beat him) with shoes."[28]

In another narration it is stated thus:

> "The Holy Prophet Muhammad (S.A.W) beat a drunkard with palm-leaf stalks and shoes."[29]

This practice continued up to the time of Abubakar, the first Caliph, who ordered the punishment for drunkards as 40 lashes. It was narrated by Anas bin Malik that the Holy Prophet Muhammad (S.A.W) used to beat a drunkard with palm-leaf stalks and shoes, and Abubakar gave (such a sinner) fourty lashes.[30] It also continued throughout the reign of Caliph Abubakar to the first half of Umar's time as a Caliph. It was narrated by As-Sa'ib bin Yazid thus:

> "We used to strike the drunkards with our hands, shoes, clothes (by twisting it into the shape of lashes) during the life-time of the Holy Prophet Muhammad (S.A.W) . But during Abubakar and the first half of Umar's period, they use to give the drunkard 40 lashes."[31]

When the number of drunkards increased unprecendently, Caliph Umar consulted the Prophet's

companions at Madina about the matter. Ali suggested that the punishment for drinking should be parallel with the punishment for slander.[32]

Some jurists are of the view that the Hadd punishment here is 40 lashes with another 40 lashes as Ta'azir. While other jurists, consider the Hadd to be 80 lashes, supporting their view by claiming that this number resulted from consensus (Ijma).[33]

The 80 lashes is the highest and maximum number of strokes inflicted for a drunkard. Ali, based his judgement on analogical deduction, viewing that he who defames a Muslim is punished by 80 strokes. He concluded that if one drinks any intoxicant he raves and whenever he raves he defames and a slanderer deserves 80 lashes.[34]

> "We think that you flog him for it with 80 lashes. Because when he drinks, he becomes intoxicated, and when he becomes intoxicated, he talks confusedly, and when he talks confusedly, he lies."[35]

Caliph Umar, from then ordered 80 lashes for drinking wine. All the schools of thought do consider wine

drinking a crime for which a Hadd punishment is prescribed. As to the number of lashes to be inflicted is where they disagree. Hannafi, Maliki and some jurists of the Hanbali schools are of the view that the punishment for wine drinking is 80 lashes.[36]

Zahiri and Zaydi Schools, are of the view that the Punishment is only 40 lashes.[37]

After, the punishment for the first time, the second, third, fourth up to whatever number the offender commits the crime of wine drinking is met by the same number of strokes, 80 lashes each time.[38]

As to whether or not a Dhimmi (non-Muslim living in an Islamic state) is to be punished for wine drinking, there are two views on it. The majority view, is that the Dhimmi is not liable for the punishment of the Hadd of wine drinking. This view is subscribed by the Hannafi, Maliki and Shafi'i Schools.[39] But, a minority view which is attributed to Hanbali School, has two conflicting views namely:-

i) The first view says the Dhimmi is punishable for wine drinking.

ii) The second view is that the Dhimmi is not punishable if it is a small quantity which does not intoxicates him. But, if he takes a large quantity which intoxicates, then he is punishable with Hadd.[40]

Under, the Penal Code, the punishment for wine drinking is one month imprisonment or fine or with both. This type of punishment will not limit the rate of wine consumption or make people abstain from it. Since wine drinking is regarded as the mother of all evils, indulgence in its consumption, produces harmful and resultant effects which no punishment other than the one prescribed by Islamic Law can serve to stop it. The effects include the following:-

a) It brings harmful effects on ones mind and health. A researcher in this area has rightly stated that:

> "Mankind has not suffered any greater calamity than that brought about by the use of alcohol. If statistics were collected worldwide of all the patients in hospitals who, due to alcohol, are suffering from mental discrders, delirium tremens, nervous breakdowns, and ailments of the digestive tract, to which are added the statistics of suicides, homicides,

bankruptcies, sales of properties, and broken homes related to the consumption of alcohol, the number of such cases would be so staggering that, in comparison to it, all exhortation and preaching against drinking would seem too little."[41]

b) It brings about constant rivalry and friction between the opposing groups in a society which ultimately lead to its destruction.

> "Almost all the crimes, such as fighting, murder, rape etc., are committed while they are under the influence of alcohol. According to the record of the criminal courts, a large number of those who are punished with capital punishment have committed crime when they were under the influence of alcohol."[42]

c) It brings about the neglect of ones religion, work and family needs thereby not fulfilling one's obligations as the head of the family towards his family. A distinguishing factor between a man and animal, is that, a man is endowed with conscience that enables him to distinguish between what is right and wrong and the will power with the help of which he chooses a right course of action and avoids the

wrong one. Alcohol consumption destroys these good qualities of a man.[43]

d) It encourages extravagance, wastefulness and luxurious living among the people. Extravagance consists of exceeding the limits of what is beneficial in the use of the Halal - (lawful). Luxurious living has an element of pride in it, and pride is the intention to look superior and above others. And Allah does not love any proud boaster. Allah Has prohibited wastefulness and extravagant spending thus:-

> "O children of Adam, wear your beautiful apparel to every place of worship, and eat and drink but do not be wasteful; indeed, He does not like the wasteful."[44]

One of the ways of wasting wealth is to spend it, in large or small amounts, on what Allah Has prohibited like alcohol consumption.

Apart from the inadequacies and shortcomings of the law in Nigeria to curb the incidence and effect of wine drinking, in a way the government is to blame for

encouraging it. This can be seen by government giving out licences to individuals and organizations to set up breweries.

In some breweries, the government even have management control in it. Naturally, we should expect an increase in crimes as a result of wine or alcoholic consumption. It is then a belated effort for the government to now come up with a law to regulate the manufacture and sale of intoxicating liquor. A good example, on this, is the liquor Law Cap. 90, The Laws of Kaduna State of Nigeria 1991 for the sole purpose of regulating the manufacture and sale of intoxicating liquor.

Under the law, a Governor of a state is to appoint a board for the purpose of issuing out licences for the manufacture and sale of wines. The board is to grant licences to individuals and corporate bodies.[45]

It is pertinent to note that there is apparent contradiction in a situation where government allows the manufacture and sale of wine through issuance of licences, but at the same time punishes individuals who commits

crime as a result of intoxication.

The Supreme Court of Nigeria upheld the conviction of an accused who committed culpable homicide while in a state of intoxication. it disregarded the defence of intoxication as under S.44 of the Penal Code. This holding was in the case of

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The appellant was convicted of the offence of culpable homicide contrary to Section 221(a) P.C. and sentenced to death. He had killed his father whose wine he had drunk, when he was still under the influence of drink. It appeared he was reprimanded by his father for drinking his wine. The appellant took objection to this, took out his knife and stabbed him on the abdomen. the father died almost instantaneously. In his defence,the appellant admitted being drunk and that his father was annoyed with him, he said he threatened his father with a knife, but he is unable to say how the knife killed him. The learned Judge believed the evidence of witnesses who were present as well as the confession the appellant made to his mother who arrived on the scene soon after the incident and before the appellant ran away. It was argued

before the learned Judge that cause of death was not proved. We are in agreement with his views that in cases of this nature where a man was attacked with a lethal weapon and died on the spot it is hardly necessary to prove cause of death. It can properly be inferred that the wound inflicted caused the death. As for condition of the accused (appellant) when he committed the offence, it will be enough to state that drunkenness is no defence. Section 44 of the Penal Code provides that "a person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated." There was no substance in the appeal and it was dismissed.

From the the above, it shows that wine drinking leads to other evils and it is better to prevent such an evil before it actually materializes, hence the prohibition of wine drinking in Islam. The prohibition of wine drinking serves as a preventive measures which blocks the means that lead to the commission of other crimes. Thus, since Islam adopts preventive measures so that this evil of wine drinking may not happen at all and then there should be no occasion for punishment.[47]

5.2 AL-BAGHYY (Rebellion or Treason)

Al-Baghyy is one of the major crimes that is subject to Hadd punishment. It is basically an act of rebellion against the Islamic state and it is a collective action by a group of Muslims. It has been variously defined by the Schools.

Hannafi School, defines al-Baghyy as a refusal to pay allegiance to the state.[48]

Maliki School, on the other hand, defines al-Baghyy as denial of loyalty to the leader i.e. the state, whose authority is legitimately established by taking over state power and constituting political supremacy. It warned that the loyalty to the state should not be in violation of the sharia.[49]

Shafi'i School, defines al-Baghyy as a rebellious act of group of Muslims against the authority of the state and in which the Bughat i.e. rebels, proved to have power to reckon with and to be seen acting under the guidance of an authoritative leader.[50]

While, Hanbali School, defines al-Baghyy as a

- collective activity of a group called Bughat i.e. rebels, in a rebellion against the constituted authority of the state under an unjust leader.[51]

From the various definitions above, there is a consensus among them, that al-Baghyy is basically an act of rebellion against the state by a collective action of a group of Muslims.

The Nigerian position is that, treason is a criminal offence, for which the punishment is a capital one i.e. death penalty. This is the position under the Criminal and Penal Codes.

Under the Penal Code, Treason is regarded as levelling a war against the sovereign or the state in order to intimidate or overthrow the head.

It also includes inciting mutiny or disaffection in the armed forces.[52]

Under the Criminal Code, the same definition obtains as to what constitute treason.[53]

The positions under the two codes have been transferred to Treason and other offences (special Military Tribunal) Act 1986, Cap 444 laws of the Federation of Nigeria Vol.23. The Act empowered the Armed Forces Ruling Council to constitute a Special Military Tribunal to try any person, whether or not a member of the Armed forces, who, in connection with any act of rebellion against the Federal Government has committed the offence of Treason under Nigerian Law.

5.2.1 Legal Basis for the Prohibition of Al-Baghyy

The following Qur'anic verses and Sunnah of the Holy Prophet Muhammad (S.A.W) prohibits the crime of al-Baghyy.

1. "Allah forbids all shameful deeds, and injustice and rebellion."[54]

2. "If two parties among the Believers fall into a quarrel, make ye peace between them. But if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies, then make peace between them with justice, and be fair: For Allah loves those who are fair (and just)."[55]

3. The Holy Prophet Muhammad (S.A.W) is

reported to have said thus:-

> "Cut off the head of any man who goes out and causes division among my people."[56]

The above tradition resolves the issue, in case of conflict among the muslims, in case peaceful resolution could not be achieved.

In Nigeria, the basis for the prohibition of Treason is found in the constitution,where no person or group of persons shall take control of the Government of Nigeria or any part thereof, except in accordance with the constitution.[57] But the position is varied under the constitution (suspension and modification) Decree (Otherwise known as Decree No.1 of 1984); which allows the take-over of the government of Nigeria other than by the constitution. To further affirm the supremacy of the military decrees in Nigeria, Decree No.13 of 1984 was promulgated in order to effectively ousted the competence and jurisdiction of the courts from enquiring into the legality and validity of the Military Government in Nigeria.

5.2.2 Conditions

The crime of al-Baghyy has the following ingredients,[58] namely:-

a) There should be the use of force,

b) Thee should be the criminal intention,

c) It must aim at the disposition of the leader or Head of

State.

d) The rebels must owe its power and grandeur from their followers and supporters.

In Nigeria, the position does not stop at the conditions stated above, but extends to attempts to commit treason and concealment of treason. In otherwords, mere attempt and concealment of treason is punishable under both the criminal and Penal Codes.[59]

5.2.3 Rights and Liabilities of the Rebels

Under Islamic Law, in a case of treason, once a rebellion sets in and disorder flares up, it becomes incumbent upon the leader or the Head of State to wage war against the rebels in order to subjugate them. Such an operation is carried out not to kill or exterminate them. The leader or the Head of state is to fight only those rebels who come out to combat the forces of the Islamic

State. He is to take into consideration those who are driven away or who withdraw, so as to spare them. Also, to be spared are the wounded,the captives and those who lay down arms. since,the intention of fighting the rebels is to bring them back to the community.[60]

Hannafi School, is of the view that should expediency demand, the captives must be killed.[61] This is a minority view and should not be preferred.

But Maliki, Shafi'i and Hanbali schools are of the view that the captives should not be killed.[62]

Generally, the captives or the rebels are not deprived of their belongings. Also, their women and children are not to be captured. The rebels that are captured, are not to be abused (their dignity is still inviolable), their properties are not to be destroyed. The wounded among them are to be treated. The state is not to seek the cooperation of non Muslims against the rebels, and they are not to be forced into a treaty to pay money in return for peace.[63]

The property of the rebels that has been seized or

taken during the rebellion is to be returned when the hostilities have ceased and the vindictive passion on either side might have cooled down.[64]

Also, if any property of the rebels is destroyed after the cessation of hostilities, the person(s) responsible for the loss thereof must be made to pay indemnity for it.[65]

But, the property destroyed by the rebels during the rebellion is to be treated as wasted. Where, the destruction is after the cessation of the hostilities, the rebels will be held liable for such a loss and will pay indemnity for it.[66]

An opposing view is that the rebels shall pay indemnity for the entire loss, because any right or indemnity incurred is not nullified by a sinful act.[67]

Despite, the above, the position generally is thus, as to whom is responsible for the loss of lives and damage to property during a rebellion; a form of Ijtihad is formulated thus:-

a) If the reason for the rebellion is on a justifiable

ground i.e. because of a peculiar understanding of the religion based on a certain interpretation, the rebels are not liable for any damage caused during the rebellion.[68]

b) But where, the rebellion is not based on any ideological reason i.e. the rebels refused to pay Zakat or do not want the leader etc., then there is no reasonable ground to forgive them for any damage they caused. Consequently, they will be liable to pay damages for property and Qisas for lives destroyed.[69]

In Nigeria, criminals or offenders of Treason and treasonable felonies i.e. coup plotters, are treated with levity, maltreated and dehumanized, to such an extent that they are adjudged guilty without even the trial commencing. This is contrary to the position under Islamic Law as discussed above.

5.2.4 Proof of al-Baghyy

There is no provision in any of the classical juristic works prescribing proof for al-Baghyy. The justification for this, is from the very nature of the

crime. That is, it involves a wide scale of rebellion in which the criminals participated openly. It serves as an exception to the procedure required in other Hudud crimes, that it is mandatory to prove how the accused is guilty.[70]

In Nigeria, the burden of proof is placed on the prosecution to establish the fact of the accused committing Treason. Most coup trials were conducted in secrets and this negates the constitutional provision that the proceedings of a court or Tribunal shall be held in public. One will not be in a position to assess whether the due process of law is observed. Moreso, when the army are the investigators, prosecutors, adjudicators, appellate judges and choice of counsel is denied to coup plotters.

5.2.5 Punishment

The rebels are to be invited to repent and join the community. If they do so, their repentance is accepted and become free from liability. This is the position under the Holy Qur'an.[71]

The Holy Qur'an prescribed that there should be reconciliation between the fighting groups and any group

rejecting the reconciliation is to be fought until he comes back to the community.

Accordingly, Caliph Abubakar fought those who refuse to pay Zakat. Caliph Ali also, fought certain rebellious groups.[72]

In otherwords, the punishment for al-Baghyy is death sentence.[73] The death sentence as a punishment for al-Baghyy will only be inflicted where the leader or the Head of State is a just leader.[74]

In Nigeria, the punishment for Treason is also death sentence, but can be substituted for the punishment of imprisonment. This is evident from the recent happenings, when the death sentence passed on coup plotters were commuted to imprisonment or granted pardon.[75]

5.3. RIDDAH - Apostasy

Islam recognizes freedom of thought and religion. It is in view of that, no single case in the history of Islam where force is used to convert people to Islam. Also, it is a recognized principle to protect the Islamic state from sabotage and transgression. Thus, any person who

freely and willingly accepts Islam, is not allowed to commit Apostasy.[76]

Apostasy is regarded or classified among the seven destructive crimes, that may be committed by any Muslim.[77] One basic aim and objective of the Shari'ah behind the punishment of Apostasy is the preservation of the Islamic faith, because the whole bedrock of Islam and the Shari'ah rests on faith. By committing the crime of Riddah (Apostasy) a lot of issues are involved. There is the withdrawal from the dominion of Allah (S.W.T); blasphemy; heresy and mockery to the Islamic Community. Viewing all these, the crime of Riddah (Apostasy) is made punishable so as to close all doors that will debase the sacred notions of the Islamic religion.[78]

In Nigeria, it must be emphasized from the onset that this crime i.e. Apostasy has no place in either of the codes i.e. Penal Code and Criminal Code. In short, it is not an offence at all. The Nigerian constitution has given it the legal backing, that there is the right to freedom of thought, conscience and religion. The relevant portion reads thus:-

"Every person shall be

> entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief..."[79]

The above provisions makes Nigeria secular state and that every Nigerian is free to change his religious belief to another without committing any offence, let alone to warrant the infliction of the severest punishment i.e. death sentence, for apostating. Therefore, it is out of place to make any comparison of the islamic position on apostasy and that of Nigeria, it is hoped that discussion on apostasy under Islamic law will find a place and eventually applicable in Nigeria, at least for the sake of muslims living in the country.

The arabic equivalent for Apostasy is `Riddah' or `Irtidad' derived from the root `Radd', which inter alia, means to retreat,' `to retire,' 'to withdraw from or pull back from.[80]

From the legal perspective, Riddah is the renunciation or abandonment of the Islamic faith by one

who profess it, to any other religion. The person who forsakes Islam for unbelief, or for another religion is called a Murtadd.[81]

The crime of Apostasy is committed with reference to belief, words or deeds, or even failure to observe certain obligatory practices or the tenets of Islam.[82] Some examples are the following:-

a) The saying of words in contradiction or denying openly the fundamental teachings of Islam i.e. the five pillars of Islam.

b) Throwing the Holy Qur'an in a filth.

c) Abuse or say Holy Prophet Muhammad (SAW) is not the last Prophet or abuse other Prophets of Allah before Muhammad.

d) To utter the unlawful to be lawful like Zina (adultery or fornication), wine drinking, or eating of pork meat etc.

e) To allege being a prophet of Allah,or of receiving revelation from Allah etc.[83]

The crime of Riddah is established and the person is condemned as an apostate, if the following conditions are satisfied.[84]

i) The culprit must be an adult.

ii) The culprit must be sane or in full possession of his or her senses.

iii) The culprit must have acted voluntarily. Thus, if a person commits apostasy under compulsion, is not liable to Hadd punishment. This is corroborated by an incident that occurred during the time of the Holy Prophet (S.A.W). One of his companions, namely Ammar Ibn Yasir was made to utter words of unbelief under compulsion. Despite that, Allah (S.W.T) revealed the following Qur'anic verse to confirm Ammar's faith in Islam.

> "Whoever rejects faith in Allah after believing in Him, excepting under compulsion while his heart remains firm in faith - but such as open their breast to unbelief, on them is wrath from Allah and theirs will be a dreadful penalty.[85]

5.3.1 Apostasy in the Holy Qur'an

There are so many Qur'anic verses in the Holy Qur'an which mentioned Apostasy as an offence. But, did not spell out the punishment to be carried out in this world.

On the contrary, all the Qur'anic verses contain only an assurance that the apostate will be punished in the Hereafter.

The following Qur'anic verses will attest to this fact.

1. "Whoever rejects faith in Allah after believing in Him, excepting under compulsion while his heart remains firm in faith - but such as open their breast to unbelief, on them is wrath from Allah and theirs will be a dreadful penalty.[86]

2. "And whoever of you turns from his religion and dies disbelieving, their works have failed in this world and the next. Those are the inhabitants of fire: therein they shall dwell

forever.[87]

These and many other verses have expressly or by import mentioned Riddah as a serious crime. And since no where in the Holy Qur'an, is the punishment of it mentioned. Then, the punishment is to be found in the Sunnah of the Holy Prophet Muhammad (S.A.W).

5.3.2 Apostasy in the Sunnah of the Holy Prophet Muhammad (S.A.W)

The death penalty prescribed as a Hadd punishment is prescribed in the Hadith. The principal Hadith on which the case for death sentence for apostasy is built upon is the one narrated by Ibn Abbas thus:-

> "Whosoever changes his religion, kill him."[88]

The same Hadith is also traced to Hadhrat A'ishah thus:-

> "Whosoever changes his religion kill him. Verily Allah does not accept repentance from His servant who has adopted disbelief after having accepted Islam."[89]

Another Hadith that is commonly used in discussing Apostasy is the one transmitted by Bukhari, Muslim and Abu Dawud, thus:-

> "The life of a Muslim may be taken only in three cases; the married adulterer; life for life; and the one who abandoned the religion (i.e. Islam)."[90]

It is on the strength of this last Hadith that the jurists maintain that the Holy Prophet (S.A.W) allowed the death penalty for a Muslim who apostates.

5.3.3 Reconciling Freedom of Thought and Religion with the Death Punishment for Riddah Under Islamic Law

There is the Qur'anic verse which proclaims thus:-

> "There is no compulsion in religion."[91]

This verse is an important one because it contains a charter of freedom of conscience unparalleled in the religious annals of Mankind. Islam recognizes freedom of thought and religion. There has never been any instance

- in the history of Islam, in which people were forcefully converted to Islam.

It is a well known principle, that Islam recognizes that no one can be forced to accept Islam against his will. But, the moment one accepts Islam willingly and freely i.e. voluntarily, then the Sharia makes it binding upon such a person to observe the rules and regulations of the religion properly. It is even obligatory that the faith of Islam should be protected from the hostile and destructive elements within the ranks of the Muslims. It means that it is not intended to convert people to Islam by force, but to protect the integrity of the Muslim Community and the religion itself. Thus, no one after joining the religion of Islam voluntarily, will be allowed to leave the sacred fold, but will be compelled to recant if he commits apostasy. If he refuses to recant, he is put to death.[92]

In reconciling the Qur'anic verse "NO compulsion in religion' and the punishment for Riddah i.e. death sentence,it shows that the verse, relates to people who accepts Islam willingly and convincingly (and this shows the freedom of thought enjoined by the religion); that

they cannot leave the religion, thereafter.[93]

On this issue, six different opinions were proffered thus:-

1. There is an opinion that the verse 'No compulsion in religion' is abrogated.

   The ground for this opinion is that the Holy Prophet (S.A.W) fought some people who insisted in rejecting Islam. it means that the verse is being abrogated by another verse. This opinion is being held by Ibn Mas'ud and many commentators of the Holy Qur'an.[94]

2. Another opinion is that the verse 'No compulsion in religion' is not abrogated.

   It refers only to ahl al-kitab (PEOPLE OF THE BOOK), who have been given the freedom to remain in their religions by the authority of the verse, provided they are willing to pay Jizya (tax payable by non-Muslims). On the other hand, idol worshippers are bound to either accept Islam or leave the Islamic state. This opinion is supported by Shabi Qatadah; al-Hassan and al-Dahaq. They relied on one instance in which Umar (during the Holy Prophet's time) met a christian old lady and said to her 'Oh ye Old woman,

join Islam so that you will live peacefully, know that Allah sent Muhammad with truth.' She said, `I am an old woman who is approaching death.' Umar, invoked the name of Allah that he has delivered the message but she rejected and recited the verse `No compulsion in religion.'[95]

3. Abu Dawud, reported that Ibn Abbas said, the verse, `No compulsion in religion' was revealed with reference to some of the Ansars (helpers) in Madinah. There was a custom whereby any woman whose children died one after the other do make a vow to Allah that she would make her surviving child a Jew. When the Holy Prophet (S.A.W) expelled the Jewish tribe of Banu Nadir from Madinah, they insisted to go with their children of Ansars who were made Jews because of the custom. The verse, `No compulsion in religion' was revealed at this instance, so that the Holy Prophet (S.A.W) do not force the children to leave their jewish guardians and remain in Madinah to accept Islam, the religion of their parents. some scholars, say it was not because of the custom that the children remained with their jewish women at an early age, but for the sake of breastfeeding.[96]

4. Another opinion, is reported that the verse 'No compulsion in religion' was revealed in reference to two young men who went to Sham for business and were converted to christianity. The Muslim father reported to the Holy Prophet (S.A.W) and requested some one to bring them back. Then, the verse 'No compulsion in religion' was revealed. Accordingly, the Holy Prophet (S.A.W) was restrained from sending any one to bring them back.[97]

5. Another opinion is that literally, the verse, 'No compulsion in religion', is a guidance or an instruction to Muslims that they should not consider conversion to Islam as a consequence of force.[98]

6. The last opinion which is a weak authority is saying that it refers to captives who are adults and ahl-al-Kitab (people of the book). They should not be forced to accept Islam. But, if they are kids or idol worshippers irrespective of age, they can be forced to accept Islam.[99]

5.3.4 Proof of Apostasy

In Riddah, the mental element i.e. state of mind of an accused is essential to establish the crime. It is then not lawful to attribute apostasy to a person, where he still believes himself to be a Muslim. It is in line with this, Maliki School, holds that if ninety nine percent of one's practices and statements indicate disbelief, while one percent of it shows belief in Islam, he should still be regarded as a Muslim.[100]

The crime of Apostasy is proved by the evidence of two competent witnesses who must be explicit and precise showing that the accused apostates by such and such a declaration, or doing so and so.[101]

The other method of proof is by the confession of the accused himself, which has to be voluntary. Even, where witnesses testify that the accused did not said something amounting to apostasy., the accused will be called upon to corroborate it, where he did, the case is dismissed. But, where he said the contrary i.e. he said something amounting to apostasy; it will be regarded as confession and punishment will be carried out accordingly.[102]

5.3.5 Punishment

The punishment of Apostasy is Death Sentence. Since Apostasy is basically a state of mind, the culprit will be given an opportunity to reconsider his position and repent to Allah. He should be given a chance to make repentance within a period three days. If he mends his ways within this period, he will be asked to pronounce the Kalimah i.e. There is no God but Allah, and Muhammad is His Messenger."[103]

The other sections of Shafi'i and Hanbali Schools and Hassan al-Basri do not insist on the three days' respite.[104]

It is the opinion of Ibn Qudamah in his book al-Mughni, that the respite of 3 days is the right of the apostate for this might reform him.[105] The three days's respite according to al-Sarakhsi, a Hannafi jurist is based on the analogy of Khiyar - option of rejection in a sale transaction within three days. The analogy is by no means helpful, for a conversion or reversion to a creed, being a matter of conscience.[106]

There are two views on the punishment of death sentence for apostasy.

The first view, which is that of the classical scholars in which there is unanimity of views, is that the punishment for apostasy is death. It is only Hannafi jurists are saying that a woman apostate is not to be put to death but imprisoned.[107] They relied on the following authorities:-

1. They relied on the two famous traditions of the Holy Prophet (S.A.W) thus:-
   a) 'Whosoever changes his religion, kill him.'
   b) 'Not permissible to kill a Muslim except for three causes, of which apostasy is one of the three.'
2. There is a consensus (Ijma) of Jurists on it.
3. Caliph Abubakar fought apostates during his time.
4. Historically, there was an evidence of a leader who punished an accused with death sentence for apostasy.
5. There is the powerful argument that Islam is not a religion but a system of life (Din wa daula).

So, to them, whoever commits Apostasy constitutes a threat not only against the religion but against the security of the Islamic state. It is therefore, the duty

of the leader to punish whoever commits apostasy.[108]

The Second View, which is the minority view and being upheld mostly by the contemporary Islamic Jurists is that the apostate is not to be put to death.[109]

They relied on the following:-

1. That no single Qur'anic verse providing death sentence against apostasy. Instead,the Holy Qur'an made an express provision that no compulsion in the religion.

   In response to this view, it was argued that the verse "No compulsion in the religion' is revealed with specific reference to ahl al-Dhimma who were part of the people of the Book. It means the verse permits the Ahl -al-Dhimma to retain their religion as far as they complied with the supremacy of the Shari'a in the Islamic State. So, the verse is not an authority for permitting people to leave Islam after accepting it.

2. The two famous traditions of the Holy Prophet (S.A.W) are not of general application, because they refer to

apostates who would be capable of fighting against the Islamic state. That is why Hannafi School excluded women from the punishment out of the appreciation that they will not constitute threat to the Islamic State.

In response to this view, it was argued that the talk about fighting the Islamic State, is being referred to Hirabah in which a person is punished irrespective of his religion and whether a Muslim or not.

3. It is very possible that the Holy Prophet (S.A.W) made those specific references to the Arabs living in Arabian Peninsular during His time because in another tradition He said that `two different religions cannot be allowed to co-exist side by side with Islam in the Arabian peninsular after Islam.'

In response to this view, it was argued that the companions of the Holy Prophet (S.A.W) did not interprete the two famous traditions as having specific application only to the Arabs. The authority is that Abu Musa al-Ash'ari punished a Jew in Yemen who left Islam for Judaism. The Jew was not an Arab.

The two views discussed above on whether Apostasy is an offence that attracts death penalty or not, is a subj- matter of commentary and can be summed up in the following five points.[110]

1. There is confusion in understanding the two terms applicable to the question of Riddah. It has to be explained thus:-

   a) Huruj Minal Islam i.e. leaving Islam and joining another religion simpliciter.

   b) Huruj alal Islam i.e. leaving Islam and joining another religion in addition to fighting Islam.

   After reviewing all the two views above, no such distinction exists. It is opined that the two terms are different and the permissibility of leaving Islam and to join another religion is in line with the Qur'anic verse `No compulsion in Islam,' whereas leaving Islam in the second sense, and then fighting it should be punished in the interest of the Muslim Ummah without any conflict with the Qur'anic verse - "No compulsion in Islam.' But, it is our view that

such distinction should not exist. Leaving Islam simpliciter or leaving it and then fighting it are to be treated the same. That is, it should attract the same punishment.

2. The jurists did not appreciate the distinction between the two terms namely:-

   a) Tahrim i.e. making a particular act Haram (prohibited), and

   b) Tajrim i.e. making a particular act prohibited and punishable crime.

It is argued that an act may be prohibited and punishable under Islamic Criminal Law at the same time e.g. Zina is not only Haram (prohibited) but punishable also.

Also, an act may be prohibited i.e. made Haram (prohibited) not necessarily punishable under Islamic Criminal Law e.g. eating Pork. As far as the Holy Qur'an is concerned, Apostasy is disapproved and declared prohibited in various verses, but no where is it made punishable by the state.

3. It is to be noted that there are jurists who maintain that apostasy is punishable, but still do not consider it as part of the Hudud. This means, it has to be part of Ta'azir. The rule is that whatever is a Ta'azir punishment changes from time to time depending on what the leader may decide in the light of the existing circumstances.

4. The fact that the Holy Qur'an did not provide for punishment on Riddah should not be taken lightly. The Holy Qur'an, mentioned Riddah and disapproved it strongly without mentioning any worldly punishment for it. Even though the Sunnah sometimes supplement the Holy Qur'an, there is no where such a serious matter like death punishment for Riddah is left for the Sunnah.

5. The two famous traditions on Riddah are regarded as ahad hadith not Mutawatir. It is not normal under Islamic jurisprudence to maintain serious issues like death sentence for Riddah on the basis of such type of tradition. That is why even if the two traditions are to be accepted, it should be so, only as punishment intended to protect the state against

Treason. This is also the position of Ibn Qayyim.[111]

5.3.6 Other Punishments Other than Killing

The change of faith on the part of a Muslim to another faith, entail changes in his civil status as to the rights of property or marital status etc. and declares all his actions to be null and void.[112]

The other punishments are as follows:-

1. As soon as one apostates, his/her marriage is annuled forthwith. They can only re-unite when he recants back to Islam, with a new marriage contract, Wali (guardian), Sadaq (dowry), witnesses etc.[113]

2. The Murtad can no longer be a marriage guardian for his daughter(s) unless he comes back to Islam.[114]

3. As to inheritance, the general position is that it is a double-edged sword. The Murtad will not inherit from any of his relatives and they will not inherit him also. Hannafi School, is of the view that the property of the Apostate should be regarded as Ghanima (spoils) to be kept as apart of the Baitul mal (public treasury) in the interest of the Muslim

Community.[115]

A disciple of Imam Abu Hanifa, Muhammad as-Shayani, is of the view that the estate of the Murtad should be distributed among his heirs as inheritance.[116] But Maliki, Shafi'i and Hanbali Schools are of the view that the property of the Murtad cannot be inherited by the heirs nor regarded as spoils due for public treasury.[117]

This last view has been changed to a position that if the Murtad is a freeman the property goes to the Baitul mal (public treasury). But, if he is a slave the property goes to his master.[118]

5.3.7 The Position of the Child of an Apostate

The child of an apostate (major or minor) still remains a Muslim in law. If the child shows anti-Islamic tendencies, he is brought back by force into the fold of Islam; and if he reaches majority and does not recant, he is put to death.[119]

5.3.8 Analysis of Apostasy in Nigeria

The case of Apostasy that vividly come to mind, is the case of Maitatsine in Kano State. Muhammad Marwa

Maitatsine hailed form Cameroun Republic, and was known to be a learned Islamic Scholar, with a lot of followers. His preaching career started as far back as 1962. He claimed to be not only a prophet but above Prophet Muhammad (S.A.W). This fact of claiming prophethood was confirmed by his wife, Aishah. He indoctrinated his followers to proclaim allegiance to him alone and not to any other person in this world. He regarded any body who does not belong to his group as infidel, and that those who are fighting him were the bastard children of Prophet Ibrahim (A.S). The army detachment in Kano were drifted to contain his excesses. His people were trained by Ex-Chadian soldiers in urban and guerilla warfare for 10 months before the disturbance. They were well trained and in possession of arms and ammunition with the aim of capturing the Central Mosque, Emir's Place, NEPA Station, Murtala Muhammad Hospital and Fagge, Quarters. Marwa did not however, succeed in spreading his claims, for he died as a result of wound he sustained during the encounter.

Even though, there is no court in Nigeria that will try Marwa and to declare him an apostate, if he was caught alive, still he would be regarded as such. The reason, being that he claimed to be a Prophet and even higher in

rank than the Holy Prophet Muhammad (S.A.W).[120]

CHAPTER FIVE
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6.0 CONCLUSION

This chapter is the concluding remark and a summary of the previous chapters. It will discuss some observations, on how the Islamic Criminal Justice System especially the Hudud have been vilified and mis-represented as being archaic, harsh, inhuman and ossified body of law that has no bearing with the present. And finally, some suggestions will be offered with a view to clear the misconceptions surrounding it, and the relevance of its application today, than at any time of human history. This is so, at a time when crimes and vices have virtually forced our society to its knees.

6.1 SUMMARY

Having the above conclusion in mind, we may provide a summary of the research as a whole. In the first chapter, the three (3) limbs of the Islamic Criminal Law i.e. the Hadd, Qisas, and Ta'azir are discussed. We have also analyzed the Hudud offences under Islamic Law, as applicable to seven crimes only. They are Zina (adultery or fornication); al-Qadhf (false accusation relating to Zina or bastardy); Shurb ul-Khamr (wine drinking); al-Sariqa (Theft); al-Riddah (Apostasy); al-Hirabah (Highway

Robbery or Brigandage) and al-Baghyy (treason or Rebellion). Also, discussed, are the forms of punishments under the Hadd i.e. death by stoning or crucifixion; amputation of a limb or limbs; or flogging by one hundred (100) or eighty (80) strikes.

In the second chapter,the concept of crime under Islamic Law and its noble features which are distinct from any legal system are discussed. The salient characteristic features of the Hudud offences, and factors that vacate criminal responsibility for their commission (i.e. Hudud) are also discussed.

These may be due to factors like the absence of intention, mental defect, infancy or minority, insanity, coercion, self defence etc.

But in the third chapter, crimes committed against the human person i.e. Zina and Qadhf are discussed. These two Hudud offences are such, that failure to establish the crime of Zina, will lead to the commission and infliction of Qadhf. The standard of proof for Zina is made so high (i.e. four male, adult, sane and Muslim witnesses who must have testified voluntarily) so as to protect the society

by bringing about peace and tranquility. The punishment of Zina is such that seems very severe and harsh in its nature, but is rarely practiced. The punishment differs not to waive but to vary the punishment because of the marital status of the parties concerned. One hundred lashes plus one (1) year in exile is the punishment for unmarried adulterers. While stoning to death is the punishment for the married adulterers. Homosexuality and lesbianism are related sexual offences that are also discussed. Under the criminal code, adultery is not a criminal offence, let alone to warrant punishment for its commission. But under the Penal Code, adultery is a criminal offence which attracts the punishment of two years with or without fine only.

Qadhf is a criminal offence which attracts the punishment of Eighty (80) lashes, after it has been established by the testimony of two competent witnesses or by confession. The areas covered by this crime under Islamic Law is restricted to situations where there is accusation of committing Zina or when the status or paternity of a person is challenged. Any other accusation is a criminal offence, but it does not attract the punishment of eighty (80) lashes instead Ta'azir applies.

The areas covered by the Criminal and Penal Codes as it relates to Defamation are wider; and the punishment ranges from one year, two years, to seven years with or without fine or with both. The punishments under the two codes do not really satisfy the public interest.

The fourth chapter discusses crimes committed against property under Islamic Law i.e. Sariqa (Theft) and Hiraba (Robbery or Brigandage). The reason being that property is one of the three things which Almighty Allah Has declared inviolable; and therefore its protection is guaranteed against any violation. Theft is a criminal act involving the unlawful possession of another's property from where it has been safely kept in custody and without the knowledge of the owner of such property. It is only punishable by cutting the hand or limb, when all conditions relating to the thief and the stolen property are satisfied. Some of which, are that the thief must be an adult, sane and must have committed the theft voluntarily. Whereas, as to the stolen property, it must not only be lawful, kept in a proper place of custody, but must have reach the Nisab among others. The burden of proof is by the evidence of two witnesses or confession of the thief. These features, are lacking under the Criminal

imprisonment to death sentence where death or wounds is involved. The position of the law under the two codes have been undertaken by the Robbery and Firearms (Special Provisions) Act of 1970, making robbery a capital offence. With the various amendments, the Act now vests the powers to try armed robbers only in the Robbery and Firearms Tribunals established by each state.

In chapter five, crimes against the state i.e. Shurbul Khamr (wine drinking), Riddah (Apostasy) and Baghyy (Rebellion or Treason) are discussed.

Wine drinking is regarded as the mother of all evils, because it leads to the commission of other crimes. Anything that intoxicates is regarded as wine, and wine of whatever kind is prohibited. In includes bear, drugs, like cocaine, marijuana, opium, heroine, hashish e.t.c. The effects provided by wine are such that affects the mental and physical health of a person, apart from the economic and social effects it produces. Once the crime of wine drinking is established by the evidence of two witnesses or confession; the punishment of eighty (80) lashes must be meted out on the drunkard. This position, is not what, obtained in other laws.

In the criminal Code,the mere consumption of wine (even if it is voluntary) does not attract any punishment. But, while in a state of intoxication, if one commits a crime is liable. This is also the position under the Penal Code. The only difference is that if the wine is consumed by a Muslim other than for a medicinal purpose is punished by one month imprisonment or fine or with both, or by Haddi lashing which may not exceed 12 strokes. The contradiction exists in the two Codes by the issuance of licences for the purpose of manufacture and sale of wine.

Apostasy is another crime which attracts death penalty for the renunciation of the Islamic faith to another. This seems to be in conflict with the Qur'anic verse that `let there be no compulsion in religion,' as canvassed by apologists and non-muslims. The paradoxical aspect is that one who genuinely accepts Islam freely without any element of compulsion, is not free to leave it for whatever reason. What is even criminal, is not only leaving the religion but fighting it. It is this circumstance that the Qur'anic verse `let there be no compulsion in the religion' will not be applicable, and instead the apostate would be killed; as emphatically

stated in the Hadith that `whoever changes his religion kill him.' This crime is not available in any of the two codes; and the constitution ensures the secular nature of Nigeria.

While Rebellion or Treason is also another crime committed against the state. It is more of a political crime and takes place in extra-ordinary situation i.e. state of civil war. It is committed when there is denial of loyalty to the state or leader. there is hardly no provision prescribing proof for this crime, because of its very nature in which wide scale rebellion takes place openly. The Rebels are treated with humane because the idea is not to exterminate them, but to subjugate and bring them back to the community. The rebels are punished only when the rebellion is not justified. Even then, before the punishment the rebels are invited to repent and join the community. If they refused, only then, they are fought and killed. Treason in this sense, is by no means the same with treason as understood in Nigerian context.

6.2 OBSERVATIONS

It is obvious that from the course of the research, that Islamic Criminal Law is based on the primary sources

i.e. Holy Qur'an and the Sunnah, and the juristic opinions of the various schools of thought. The jurists are unanimous in their opinions on certain cases, while in others they differ. The reason for the difference is that there is no express or explicit rules concerning such matters in the primary sources. Also, that their difference arose not because of their personal desire or sectarian motive, but out of necessity in an attempt to understand and identify the intention of the texts i.e. Holy Qur'an and Sunnah, through the process of Ijtihad.[1]

Therefore, the following observations are made:-

6.2.1 Misconception Regarding the Islamic Concept of Crime and Punishment

It is observed that there are those who have not studied the reality of the Islamic concept of crime and punishment that they consider the punishments prescribed by Islam to be too severe, cruel, inhuman, barbarous and degrading in human dignity. It is wrongly imagined that punishments of flogging, hand cutting and stoning etc will be inflicted on daily basis. But the fact is that such deterrent punishments have been executed very rarely. Also, before prescribing punishment, Islam tries, in the

first place, to wipe out all circumstances and motives that may lead to crime. Even after a crime is committed, Islam tries to waive the execution of punishment if there is any doubt about it. Some of the basic philosophies underlying any punishment must be that it should be just and commensurate with the crime committed, uphold law and order, inculcate respect for law in the society and above all, deter potential delinquents from undertaking criminal activity. With this in mind, it may be said that Islam makes an improvement on the primitive penal systems, which either prescribed severe and inhuman punishments, or the form of application and enforcement of such punishments was cruel.

But the punishments laid down by Islam can be justified and no known system can match the justice of Islam in the respects discussed above.[2]

It is better stated that, Islam neither prescribes punishments haphazardly nor execute these without due consideration. It holds the balance of justice in the right manner and insists on examining all conditions and circumstances connected with the offence. In studying a crime, Islam takes into account two considerations, at the

same time; the view point of the criminal and that of the community against which aggression took place. In the light of such considerations, Islam prescribes a fair punishment which is in accordance with the dictates of sound logic and wise reasoning.

6.2.2 Opposition of the Application of Sharia

It is noted that there are people, who oppose the application of the Sharia especially the ones relative to crimes without any justification for the opposition.

The only observation we can infer is that those who oppose its application are afraid because they are criminals by nature and persist in committing crimes which lack all justification. If Islamic Law relating to crimes is applied, they will be brought to book.

Another reason for the opposition is that such punishments under Islamic Law have no practical significance. This is not true. These punishments were prescribed in order to deter and frighten those individuals who have no reasonable motive for crime yet feel a strong desire for committing crimes. However, strong their motives may be, the punishment will surely

It is widely recognized that the government of any state and its security forces, regardless of how effective, inevitably fall short of deterring all violations of law in that society, since they are incapable of preventing all offences by exerting external control over individual conduct.

However, if the element of religious restraint is added, each person becomes in effect his own judge, with his faith in God preventing him from indulging in forbidden pursuits and doing injury to the rights of others.

One of the remarkable attributes of the Islamic Criminal Law that is worth considered, is its religious and moral character. This is one distinguishing factor of the Islamic Criminal Law with other contemporary peal systems. In those penal systems, there has been significant polarization on the extent to which criminal law should intervene in protecting moral values and punishing immoral conduct. A similar schism never existed in Islamic Criminal Law, because of the integral relationship between religion and morality in Islam.

The relationship between Islamic religious doctrines and Islamic legal principles is clear. Both rules are replete with measures designed to protect the moral values of the Muslim Society. The Sharia justifies the prohibition of certain acts on the bases of their moral consequences and their power to sanctify and purify souls. This will instil upright character and moral behavior in the Muslim Society.

For example, concerning wine - drinking and gambling etc, the Holy Qur'an states thus:

> "O ye who believe! Intoxicants and gambling, (Dedication of) stones, and (divination by) arrows, are an abomination, of Satan's handiwork: Eschew such (abomination), that ye may prosper. Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer: will ye not then abstain?"[4]
>
> "Nor come nigh to adultery:

For it is a shameful (deed)
and an evil, opening the
road (to other evils)."[5]

Accordingly, the Islamic Legal system has been aptly described as the law of moral precepts.[6]

Therefore, the preservation of moral principles by the Islamic Penal System is not simply a doctrinal deduction. Rather it forms an integral part of the Islamic lawmaking, as confirmed by the Hadith of the Holy Prophet Muhammad (S.A.W) thus:-

"I was sent to perfect moral
goodness."[7]

Thus, there is no dichotomy in the Islamic legal system between criminal law and moral principles. The former, is always used to confirm, protect and enforce respect for the latter, with its origin in divinely inspired tests simultaneously governing religious, moral and judicial principles.

6.2.4 Harmonizing and Balancing the Rights of the Accused with Those of the Society

The system of the criminal evidence in Islamic Law

seeks to harmonize and balance the rights of the accused with those of the Society. If the public interest lies in eradicating vices from the society, and deterring, rehabilitating and reforming the criminals; it is also in the interest of the individual and the community that no innocent person should be punished. For those reasons the islamic rules of criminal evidence take great care to require consistency between these sometimes contradictory concerns. The right of a person not to be judged guilty of a crime unless there is proof of evidence that is both conclusive and certain; confirms the individual's right to presumption of innocence, dignity and good reputation.

In other words, the principle that the accused is presumed innocent is fundamental in Islamic Criminal Law. This shows that whoever claims otherwise must prove it. This position is embodied in a number of qur'anic verses and traditions of the Holy Prophet Muhammad (S.A.W).

For example, in the Holy Qur'an, it is stated thus:

> "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with

> eighty stripes; and reject their evidence even after; for such men are wicked transgressors."[8]

The same position obtains in the Hadith, where it is stated thus:

> "If the people were to be granted what they claim, they would claim the lives of persons and their properties unjustly."[9]

The above fundamental principles is important in Islamic Criminal Law as it protects the accused persons.

The presumption of innocence is a necessary component in every legal system in order to protect individual freedoms from the threat of procedural abuse or other injustice.

The presumption of innocence is the foundation of the rule requiring that Hudud, be nullified in cases of doubt, and in this respect contemporary legal systems are not different from the Islamic system. Thus, the conclusions reached by Islamic Criminal Law in applying the principle of the abrogation of Hudud by doubt are

virtually identical to those reached by the contemporary systems in applying the two procedural rules of the presumption of innocence and resolving doubtful propositions generally in favour of the accused.

The fundamental difference, between the position of Islamic system and other contemporary system on the presumption of innocence lies in the scope of its application.

Under Islamic Law, the presumption of innocence and resolving doubtful propositions in favour of the accused applied only to Hudud and Qisas cases. By contrast, under contemporary legal systems, the presumption of innocence and resolving doubtful propositions in favour of the accused applies to all classification of crimes.

6.2.5 The Infliction of the Severest Punishment in Hudud Safeguards the Society by its Deterrent Effect

The severity of the Hudud punishments safeguards the peace, honour, life and property etc in the Society by its deterrent effect.

Punishment is necessary to maintain the peace, security and stability of any society. All Societies, have penal laws, regardless of their level of development. Its main purpose is for retribution, reformation and deterrence. The more effective the punishment is, in fulfilling that purpose, the more successful it becomes in combating serious crimes like the Hudud offences. The wisdom for enforcing severe punishments for the more serious and dangerous crimes is to prevent the recurrence of similar offences in future.

Therefore, the distinguishing line between Hudud from crimes in other systems is their great effectiveness in combating serious crimes, because of their tangible effects. The punishments in Hudud are more fearsome to offenders. But, it is worthy to note, that Hudud punishments are not meant to frighten Muslims but to prevent the growth of a climate favourable to the existence and spread of crimes. They are only intended to deter those who have a tendency to commit crime, or those who are easily tempted. In the majority of cases, such people will not be restrained except by very severe punishments.

In short, the deterrent effect serves two dual impact. The first is the general deterrence, that is the preventive effect of a penal system (or a particular aspect of it) on criminality in the population at large. It is achieved by giving the actual punishment, when it is inflicted, the widest possible publicity.[10] The second, is the individual deterrence i.e. the inhibitive effect of the punishment of an individual. It comes into play when an offender suffers the penalty. It makes the offender reluctant to offend again rendering it difficult to distinguish it from reformation which is suppose to achieve the same result.[11]

For any punishment to have the fullest deterrent effect, it should be carried out publicly. It is stated in the Holy Qur'an thus:-

> "Let not compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the Last Day: and let a party of believers witness their punishment."[12]

The Hudud punishments are exemplary so as to deter potential criminals from adopting criminal behaviour,

save beginners in crime form becoming hardened criminals. It is also to serve as a social degradation on the criminal, and a warning to the entire members of the public, so that, anyone intending to commit a crime, when remembering the torture that awaits him, would certainly abstain from realizing that evil tendency.

In this context, the Holy Qur'an says thus:

> "That is their disgrace in this world, and a heavy punishment is theirs in the Hereafter."[13]

Also, it is stated that:-

> "As to the thief, male or female, cut off his or her hands: a punishment by way of example from Allah for their crime and Allah is exalted in power."[14]

By way or example, stoning to death (Rajm) is the punishment for committing Zina i.e. adultery for one who is married. The punishment of stoning to death, is a solution to the increase rate of abductions, adultery, debauchery, and indiscriminate criminal and indecent

assaults on the females. The measure seems to be the most severe, but the evil is also the most heinous creating a great disturbance in the society. It has been found that lenient dealings with criminals of this sort give more encouragement for doing these misdeeds. No measure short of extreme penalty can stop these offenders. A lesser punishment on this, shows indeed a very low standard of sexual moral sense of the people.

The commission of adultery shows there is a breach of the greatest trust imposed in a man or a woman, the breach which ruins families, destroys household peace, deprives innocent children of their loving parents, a beloved husband of his dear wife etc. This is not looked upon as seriously as the breach of trust of a few Naira.

This lack of sexual morality give a sense of too much severity in the Islamic sentencing policies in the minds of the modern educated muslims and non-muslims.

Taking the case of theft as another example, will reveal in the light of the present day civilization, that the punishment of cutting the hand, is not only harsh, but, barbarous and cruel. Because, of this notion,the

record of thieves are growing in number and no amount of police vigilance can check the crimes of thefts and burglaries etc. It is satisfactory to note that owing to the extremity of the punishments, there is practically a stop to these crimes in countries governed by Islamic Law especially in Saudi Arabia. A stranger from yemen visited Madina few days after the Battle of Badr and saw Muslims observing Zuhr prayer. They left their shops full of rich wares of trade, jeweleries and other ornaments in gold and silver open and unattended. There were no watchmen or guard dogs around to protect the properties. Knowing about the prevailing insecurity of live and properties in Arabia, at the time, the stranger was surprised to see such property left unattended and said:-

> "Is this Yathrib (name of Madina before Hijra)? vacated by its inhabitants? Leaving their properties for any one interested in helping himself to whatever he likes. Is this their new religion? And there is nobody around to watch over their shops."[15]

In countries, where Shari'ah or Islamic Law is not

applied, people do not feel safe or secured for their properties, and live etc. The reason for this is reflected in their conception of crime and punishment. The criminals are pitied more instead of the victims. This posture is due to the corrupted circumstances, psychological complexes and nervous disorders etc, which such countries could not overcome. Therefore, such countries are inclined to reduce the punishments, especially in morally related offences. This trend will continue until such crimes are no longer regarded as punishable. This lenient attitude of dealing with criminals only aggravated the situation.

6.2.6 Withdrawal of Confession to the Commission of a Crime Under Hudud

This is a unique feature of the Islamic Criminal Law, which is absent in other legal systems worldwide.

Under Islamic Law, an accused who has confessed to the commission of a crime especially under Hudud, has the right to withdraw his confession at any time prior to the execution of sentence. It is even recommended that the possibility to withdraw the confession should be suggested to the accused.

For example, if a man who is accused of adultery retracts his confession prior to execution of punishment, the execution is to be stopped. It is said of the Holy Prophet Muhammad (S.A.W) with respect to Ma'iz Ibn Malik, that when Ma'iz confessed to Him that he had committed adultery,the Holy Prophet Muhammad (S.A.W) gave him the chance to retract his confession by saying:

> "Perhaps you have kissed, or touched, or looked at her?"[16]

Also, a man was brought before the Holy Prophet Muhammad (S.A.W) for committing theft. The property stolen was not found on him, so the Holy Prophet Muhammad (S.A.W) asked thus:

> "Did you steal? I do not think you did."[17]

Under, the criminal procedure code, where there is an admission to the commission of an offence and no sufficient cause is shown why there should be no conviction, an accused is convicted.[18] The code did not contain any provision for the retraction of such

admission.

6.2.7 The Principle of Equality Before the Law Under Islam is Manifest in its System of Criminal Justice

There should be no discrimination in applying the Hudud punishments to all members of the public, irrespective of rank, caste or creed etc. Once a crime is sufficiently proved, the prescribed punishment must be inflicted. There should be no discrimination between the accused persons in inflicting the punishments. This is reflected in the following Qur'anic verse thus:

> "O you who believe; stand out firmly for justice as witnesses to Allah, even as against yourselves or your parents, or your kin, and whether it be against rich or poor: For Allah can best protect both follow not the lust of your hearts, lest you swerve, and if you distort justice,or decline to do justice. Verily, Allah is well acquainted with all that you do."[19]

The Holy Prophet Muhammad (S.A.W) warned against

discrimination in applying Hudud punishments in these words:

> "O people! the nations before you went astray because if a noble person committed theft, they used to leave him; but if a weak person among them committed theft, they used to inflict the legal punishment on him. By Allah, if Fatima, the daughter of Muhammad committed theft, Muhammad will cut off her hand."[20]

Based on the above Qur'anic verse and tradition of the Holy Prophet Muhammad (S.A.W), any society that do not treat its people with equality and justice is doomed.

This unique feature is lacking in the contemporary criminal law, and that is why in such societies there is the need of applying the law uniformly to all who violate it, if the law is to successfully achieve its goal, without discrimination on economic, political or social grounds.

6.2.8 There is Proportion Between Crimes and

6.2.8 **There is Proportion Between Crimes and Punishments Under Hudud**

Another unique feature of the Hudud that punishment is inflicted upon the offenders in proportion to the crimes committed.

The punishment is proportionate only when the prescribed punishment is inflicted upon the offender. For example, in the Holy Qur'an the Punishment prescribed for slander is 80 lashes. It means where 80 lashes is awarded for slander, the punishment is then proportionate to the crime committed. But, where it is inflicted in excess say 100 lashes that amounts to transgressing beyond the limits set by Allah. In contemporary system, the concept of proportionality is lacking and that is why Montesquieu holds that proportion between crimes and punishment is necessary.[21]

To buttress our point further, that is why Bentham have this to say:-

> "The proportion between crimes and punishments cannot be mathematically followed. Something of exact proportion may be sacrificed to render the

> punishment more fit to inspire the people with a sentiment of aversion to such vices as prepare the way for crimes."[22]

A look at our laws, in Nigeria, for example, the Penal Code, discusses punishments for crimes by saying 'the punishment may extend to ..' or shall not exceed;' pointing to the fact that punishments are not proportionate to the crimes committed.

6.2.9 The Prevailing Economic, Social and Moral Conditions Contribute to the Commission of the Hudud Offences

The present economic, social and moral conditions contribute to the commission of some of the Hudud offences. There may be some truth in this statement. But when Islam is truly applied, there will be no maddening, poverty, crazy temptations which lead the Muslims to adultery, theft etc.

The policy adopted by Islam in prescribing punishment is such that it tries, in the first place to purify the society from circumstances that may lead to

the commission of a crime.

After taking such precautions, Islam prescribes a preventive and just punishment which may be inflicted upon persons who have no reasonable justification for their crimes.

Where the community is unable to preclude circumstances which may lead to crime or where there is some doubt regarding the crime,the punishment will not be inflicted and the offender is either set free or inflicted on him a light or lesser punishment in proportion to the extent of his responsibility.

Islam, also strives by various means to ensure a fair and equitable distribution of wealth. It even managed to wipe out all poverty during the caliphate of Umar Ibn Abd-al Aziz. The Islamic State is responsible for the support of every citizen, regardless of his religion, race, language, colour or social status. It is also the responsibility of the state to ensure decent work for all citizens, and where work is not available or an individual is incapable of working, to aid him from the public treasury.

Islam recognizes the strength and importunity of sex but it tries to satisfy the sexual instinct through legal means i.e. marriage. That is why early marriage is being advocated and aids whoever wants to marry yet cannot afford to do so. The society is being purified from temptations which excite the passions and it is preferred that leisure time be spent in remembrance of Allah etc.

It is only when all the above are observed that people may be called on to be virtuous and they can be virtuous. In such circumstances, punishments may be inflicted on offenders because they have no excuse or justification for their actions.

6.3 SUGGESTIONS

In the light of the above observations, we proffer the following suggestions.

6.3.1 The Application of Islamic Legal System in its Entirety

There should be the application of the Sharia in its entirety

is no known effective means of combating crimes. The unceremonious ouster of the application of Hudud in our legal system is an unfortunate situation and it was hell let loose. The common law procedure and evidence are so elastic that criminals simply got off the hook because of the error in procedure. But, in societies where Islamic Law is applied in its entirety, such societies are virtually crime free, from such serious and heinous crimes. Therefore, it should be the concern of every muslim in the society that the application of Hudud is an obligatory act of worship which must be discharged religiously.

6.3.2 To Educate people on the Importance of the Application of Hudud

Enlightenment campaign should be intensified by our leaders, scholars,Judges etc by embarking on workshops and seminars etc, whereby criticism, that application of Hudud is harsh, cruel and barbaric will be shown to be a misrepresentation, and therefore unfounded, unjustifiable, baseless, and above all an ignorant way of thinking. This is so if it is to be ever imagined that a thief's hand is being amputated or an adulterer is stoned to death without conditions attached to and the wisdom

behind these rules. In fact, the Hudud provides the most humane and most realistic approach in dealing with crimes, which no other criminal system can match. This is in addition to safety, peace, security it provides to every member of the society.

6.3.3 The Original Sources of Sharia Should be Made Accessible to the Muslim Community.

A lot of materials on sharia are in Arabic language and there is the need to make the original sources of Sharia accessible to the people. A greater part of the Muslim population could not have access to these original sources because of language barrier. Therefore, it is recommended that these original sources be translated into languages understood by the various communities by dedicated muslims. This can be more relevant today than at any time of human history when there is the increasing demand for the application of Sharia (especially the Islamic Criminal Law) to govern the affairs of the Muslims worldwide. If this is done, it will bring to an end a lot of prejudices, misconception and mis-informations surrounding the application the Islamic Criminal Law i.e. the Hudud.

6.3.4 Islamic Criminal Law should be Included in Schools Syllabi

Instructions on Islamic Criminal Law should begin from the level of primary school to the University. This will afford the opportunity of fully understanding the philosophy underlying crimes and punishments under Islamic Law; consequently dispel the notion that Islamic criminal justice system is an intellectually sterile body of knowledge that belongs to distant history rather than the present and the future.

6.3.5 The Concept of Sadd al-Dhara'i Should be Vigorously Invoked as a Means of Curbing the Incidence of Crime

Since the whole concept of Sadd al-dhara'i is founded in the idea of preventing an evil before it actually materializes. The concept should be used as a means of curbing the commission of crimes in our society. For example, Khalwah or illicit privacy, free intermingling of both sexes, etc are unlawful because they constitute a means to Zina. Therefore, all sexual overtures which are expected to lead to Zina should similarly be forbidden by virtue of the certainty of likelihood that the conduct in question would lead to

Zina. Also, the selling of grapes, grains etc to a manufacturer of wine, issuance of licences to manufacture wine or to operate a hotel for the purpose of selling wine or investing in the wine manufacturing etc, should be prohibited so as to block all avenues leading to wine drinking which is regarded as the mother of all evils.

6.3.6 Zakat as an Institution of Social Welfarism Should be Revamp

The institution of Zakat is and should be used as a means of social welfarism, so that it can cater for the economic and social problems of the society which contribute in the commission of crimes like Zina, theft and robbery. If the institution can alleviate or wipe out poverty in our society it will ensure a fair and even distribution of wealth. This will encourage people to marry, engage in meaningful work, thereby bringing about the enhancement of the society.

6.3.7 The Concept of Equality Before the Law Should be Strictly Adhered to

It is recommended that the concept of maintaining equality of people before the law should be strictly adhered to. This will make the law achieve its goal

successfully, as confidence will be repose on it by the community. For example, Ali Ibn Abi Talib, as Caliph stood before a Judge to resolve a dispute between himself and a Jew as to the ownership of a shield which allegedly missed when he went out to fight Mu'awiyya.

In other legal systems, even though they claim equality before the law, but in reality there is no such equality for the simple reason that the leaders cannot bow down and make themselves subservient to the law.

6.3.8 Avoidance of Sympathetic and Lenient Dealing of Offenders in Inflicting Hudud Punishment

The severity of the punishments in Hudud, should not be responsible for the adoption of sympathetic and lenient postures to the offenders. Instead, the punishments prescribed for the Hudud offences should be inflicted without any fear or favour. This is in consonance with the Qur'anic verse that:-

> "Let no compassion move you in their case, in a matter prescribed by Allah, if you believe in Allah and the last Day."[23]

Otherwise, where undue sympathy and leniency is adopted on the offenders, such society is spell doom.

6.3.9 Moral Instructions

There should be the moral instructions at all levels of human endeavour that will inculcate in minds of Muslims the fear of Allah and the sense of accountability. It is by virtue of such instructions that the limits ordained by Allah as embodied in Hudud offences and the like will be observed. This proves more effective in curbing and suppressing crimes and consequently bring about security, peace and tranquility in the society.

CHAPTER SIX

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