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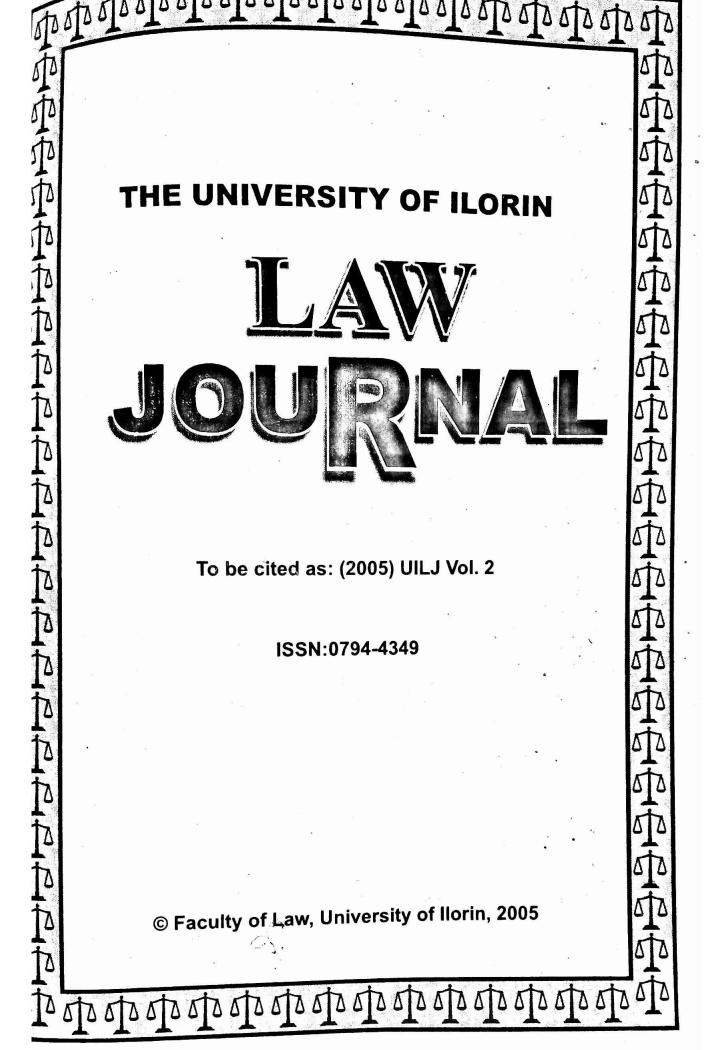
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THE JURISPRUDENCE OF CRIMINAL PUNISHMENT IN ISLAMIC LAW: A RE-CLASSIFICATION OF AL-HUDUD BY OLATOYE, K. A.

INTRODUCTION 1.0

One of the major controversial aspects of Islamic Law in Nigeria today is the area of criminal punishment. Sharia is almost always erroneously construed to be synonymous with punishment. The introduction of Sharia in Nigeria recently, was so scary in some quarters due to the age long impressions that Sharia connotes the cutting off of hands or the stoning to death. Of course these are punishments for the offences of stealing and adultery as fixed in the Quran and Sunna respectively but they are just a part of Islamic criminal justice system and in some cases even afford of some exceptions.

Another dimension to the controversy on the Islamic criminal justice system is the effective classification of offences of Hudud to which fixed punishments are applicable and on which various scholars weild different opinions either in terms of categorization or in term of nature and extent of application of such punishments. This work seeks to conduct a survey of the offences of Hudud (attracting fixed punishment) in Islamic law as well as the various views of scholars on their application with a view to determining the true nature of fixed punishment (Hudud) in Islamic Law.

2.0 DEFINITION AND CLASSIFICATION OF AL-HUDUD

In grammatical sense, Hadd (The singular of an Arabic word Hudud) means prevention, restraint or prohibition¹. In the Islamic legal perspective, Hudud means punishments which are prescribed by the law maker (God)² in the revealed Quran or the Sunna³ and which punishments can neither be lightened nor made heavier. Once an offence in this category is reported to the judge and sufficiently proven

Abdrahman, I Dol, Shariah the Islamic law, London, Ta Ha Publisher, 1984, P 221. see also

God is regarded as primary law maker under Islamic law

Sunna is the saying, practices and silent approvals of the holy prophet Muhammed (SAW)

against the accused person, the convict cannot be pardoned by the judge neither can he be pardoned by the victim of the crime nor can any prerogative of mercy be exercised by any political authority⁴. Various jurists and scholars have classified the offence of hudud in different ways. For instance AbdRahman 1. Doi has put hudud into seven categories as follows:

- 1. Penalties for committing murder, manslaughter or bodily harm;
- 2. Punishment for theft by the amputation of a hand
- 3. Punishment for fornication or adultery by stoning for a married person and one hundred lashes for an unmarried person.
- 4. Punishment for slander by eighty lashes.
- 5. Punishment for apostasy by death
- 6. Punishments for inebriation by eighty lashes
- 7. Punishment for highway robbery by death, cutting off a leg and an arm from opposite direction or an exile according to the seriousness of the crime⁵

Contrary to the foregoing, Mohammed S. El Awa puts the categorization of hudud at only four. In his words, "taking into consideration that a hadd punishment is a punishment defined by God in the Quran or the Sunna it appears to me that only four offences can be classified as offence of hudud.. apostasy and alcohol drinking cannot be so classified since neither of them warrants a punishment which has been strictly defined in the words of the Quran or the Sunna"5b

Traditionally however, majority of jurists categorise hudud into six offences namely theft, illegal sexual relations, armed robbery, alcohol drinking, apostasy and slanderous accusation of unchastity.

Mohammed S. El - Awa, Punishment in Islamic law, Indiannapolis, American Trust

lublications, 1998, p. 2

Uda, Al-Tashri al Jina'i al-Islam, Cairo, vol. 1. 1959 P.79; see also Quran chapter 2 verse 229

Abdrahman I. Do, Op, cit, P. 225. According to the author any other offence that does not fall under the foregoing will attract the punishment of the Taazir (i.e. a discretionary

Be that as it may, an important element that must always be taken into consideration in categorizing an offence as one of hudud is the requirement to establish that the punishment for such an offence is determined in fixed terms in the Quran and the Sunna.

2.1 OFFENCE OF AL-HIRABA (ARMED ROBBERY) AS ONE OF AL-HUDUD

Punishment for the offence of armed robbery is prescribed in the Quran as either that the convict be killed or crucified or have his hands and feet cut off on alternate sides or is expelled from the lands. The jurists are agreeable on the classification of this offence as one of hudud and the punishment could be applied depending on the severity of the case. However, there is disparity of views of jurists and academic scholars regarding inter alia, the method of execution of these punishments and the effect of crime jurisdiction on the execution of the prescribed punishment.

As per the latter controversy, while the Maliki, Shaffi and Zahiri schools posit that the hadd punishment is applicable wherever the offence of armed robbery is committed, the Hanafi school opines that the hadd punishment is only applicable if the armed robbery is committed on the highway but not where the crime is committed in a town where the victim can be helped by the inhabitants. Nevertheless, it appears that a valid conclusion could be drawn in support of the Maliki school, which is predominantly applied in Nigeria, given the nature of the offence of armed robbery. The offence involves the use of guns in most cases, so when an armed robber shoots into the air, all armiess inhabitants of the town or village around run for their dear lives and so, there remains no one to help the victim. Consequently, wherever the offence is committed, the hadd punishment should be applicable.

The methodology of carrying out of the punishments prescribed for armed robbery is another controversial one. The Quran prescribes four

Quran chapter 5 verse 33 - 34

Gnazali Al-Wajiz, Cairo (n.d.) vol. ii, P 179; Hasani, Tatimmat al Rawd, vol. V, Pp, 30 – 31; Ibn Rushd, E.Jayat al Mujtahid, vol. ii, P. 493

Sharakhsi, Al-Mabsut, Cairo Vol. ix. 1342 A.H., P. 195

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punishments namely: death, crucifixion, cutting off of hands and feet on the opposite sides and banishment. Some jurists believe that an armed the opposite sides and banishment. On the other hand some jurists the opposite should be crucified alive. On the other hand some jurists robbery convict should first be executed and then his dead robbery that the convict should first be executed and then his dead pontificate that the crucified to serve as deterrence to others.

considering the text of the Quran on this matter it appears that the considering the text of the Quran on this matter it appears that the punishments are prescribed as alternatives. The punishment of Ceath is punishment from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former. The different from crucifixion although the latter results into the former.

Nonetheless, the Hanbali and Shaffi schools posits that the choice by the judge should be dependent on the manner in which the crime was committed. In other words an armed robber who killed his victim gets death sentence but if he merely stole the money of his victim then his right hand and left foot get cut off¹¹.

2.2 OFFENCE OF AL-QADHF (SLANDEROUS ACCUSATION OF UNCHASTITY) AS ONE OF AL-HUDUD

Al-Qahdf is an offence committed when there is false accusation of unchastity against an innocent person. In other words it is an unproved allegation that an individual has committed fornication/adultery(zina). This offence is one of hudud because it is prescribed in the Quran as an offence attracting the punishment of flogging with eighty stripes and rejection of the convict's subsequent testimony¹². However before such accusation can become an offence, there must be absence of justification. In order words the falsely alleged person must be chaste and the accused must be a sane person¹³.

This view is held by Hanafi school and some of the Maliki school

This is the position of Hambali and Safil schools as well as some of Maliki school, see Ibn

Rushd, Bidayat Al-Mujtahid, Cairo 1966 Vol.II. p 494
Shafil Kitab al-Umm, Cairo, vol. Vi Pp. 140; Mardawi, Al-insaf, P. 292 – 295. This satisfies the rule of avoidance of double jeopardy

Quaran chapter 24 verses 4 – 5 and 11 - 12 Uda, Op.cit; Vol.II. p473

According to Hanafi, Shafii and Hambali schools, before this offence can be said to have been committed and for hadd punishment to be applicable, the accuser must have used an unequivocal word against the alleged. Maliki school however opines that the offence is committed as long as the words used by the accuser is capable of implying zina (adultery or fornication) on the part of the falsely alleged individual 14.

The former view represents the majority opinion of scholars which instead recommends liability to a Ta'zir punishment for the accuser rather than hadd punishment¹⁵.

There is divergence of opinion as regards the question of whether this offence is one which concerns private interest (haqq Adami) or is one which borders on public interest (haqq Allah). To hold that it concerns private interest connotes that infliction of punishment is dependent on the request of the accused16 while to hold otherwise is to say the opposite.

While the Shaffi and Hambali schools of thought regard the punishment for the offence of false accusation (gadhf) as falling within the realm of private interest (haga adami)¹⁷, the Hanafi school regards the offence as that pertaining to public interest (haga Allah)¹⁸.

The Maliki school's position¹⁹ which seems to be preponderantly embraced by jurists is such that makes distinction between prearraignment and post arraignment of the offender before a judge. Before the offender is charged to court the punishment is still in the realm of private interest in which case the punishment of the offender is still dependent on the demand of the defamed but after he has been legally charged to court and the offence is proved then it becomes a public interest (haqq Allah)20. This last

Siyaghi (Sharaf al Din), Al-Rawd al-Nadir (zd), a commentary on Nigeria's al-figh al-kabir by Imam Zayd, Damascus, vol. iv, 1968 p. 493

Ta'zir is a discretionary punishment that a judge himself initiates, rather than the hadd punishment. see 'Amer" Al-Tazir fil Sharia, 3rd ed, Cairo, 1957, p.161 Kasani Baddai, Ala al – Din, Cairo, vol. Vii 1910, P. 52

Sharwani Abd al-Hamid, commentary on Haytami's Tuhfat al-muhtaj, Cairo, vol IV, 1938,

¹⁸ Kasani op. cit; p. 56 19

Maliki school is predominant in West Africa and Nigeria in particular

Mawwaq, Muhammad b.Yusufu, a commentary on Mukhta sat khalil, Cairo, vol Vii 1329 A.H.

position has support in the authority of the prophet's tradition encouraging forgiveness of trespasses as well as in the fact that when the prophet imposed the punishment upon those who were quilty of qadhf against Alsha, her consent or request was not sought before inflicting punishment upon the convicts.

OFFENCE OF AL-SARIQA (THEFT) AS ONE OF AL-HUDUD 2.3

The punishment for the crime of theft is prescribed in the holy Quran²¹ consequently it is hadd punishment. According to chapter 5 verse 38, the hands of convicts are to be cut off²².

However before this punishment can be inflicted on a thief the property stolen must not be less than the minimum value prescribed under the law²³.

Nevertheless, there is no unanimity amongst the school of Islamic jurisprudence in respect of what constitutes the minimum value capable of being stolen.

The Maliki, Shafii and Hambali schools put the minimum value of stolen property at three dirhams or a fourth of a dinar²⁴. The Hanafi school jurists put the value at ten dirhams. Their position, they claim, is based on ijma and hadith that "no amputation is due unless for ten dirhams²⁵. The question that is pertinent at this juncture however is whether this requirement of minimum value (Nasab al sariqa) should be applied strictu sensu across the globe or should be applied mutatis mutandis. I seem to hold in favour of the latter option for the following reasons; First, the consideration of the minimum value seems to be based on public interest²⁶ which varies from country to country. Second the variation of

See Quran 24 verse 4 -5 and 11 - 12; see also Ibn Khathir, Tafsir, Cairo, vol, v (n.d.), P.67 21

Quran 5 verse 38; For such express prescription, it is hadd punishment and it can not be 22

This value is called Nisab al-Sariqa and where the stolen property is less in value than this minimum then the judge can not order the hands to be cut off. He can only impose another 23 discretionary punishment (tazir) e.g fine, imprisonment, etc.

²⁴ Shafii, al-umm, Op. cit; P. 134

Ibn Abdin, Muhammad Amin, Al-Hashiya, Cairo, vol v, 1966, P. 83 25

Shatibi, Al Muwafaqat, fil usul al-Sharia, Cairo, Vol. iv (n.d) P.149.

currency and value of money due to inflationary trend from one society to another is another strong factor.

Moreover, the legal discretionary nature of the minimum value determination can be deduced from the pontification of Ibn al Qayyim that the reason for considering one quarter of dinar as the minimum value was that the amount was sufficient for the daily maintenance of an average man in the prophetic community²⁷. Also, the currency or money in use varies from epoch to epoch. It is based on the foregoing that I posit that the modern day parliament is better with the duty of determining the minimum value in respect of which the punishment of hand cutting is applicable. This position is not at variance with Sharia.

In the event that the value of property stolen is up to the minimum value (Nisab) and the accused is found guilty, the right hand of the convict is liable to be cut off from the wrist in the case of a first offender. While there is unanimity of positions of jurists on the foregoing, there is no unanimity in respect of punishment to be inflicted on subsequent offenders.

As for Maliki, Hanbali and Shafii schools, the second theft attracts the cutting off of the left foot, the third theft attracts the cutting off of the left hand from the wrist while the fourth theft attracts the cutting off of right

According Ibn Hazm²⁹, the Quranic verse on this subject does not afford of any further interpretation than the amputation of the thieft's hands. Consequently he opined that for the second theft, the left hand should be cut off while for the third and other subsequent thefts the judge cannot inflict amputation but can inflict tazir (discretionary) punishment. As for the Hanafi school if there is a second and other subsequent thefts the judge can not inflict the punishment of amputation but he can only punish the offender by ta'zir³⁰. This last position is usually supported by the verse of the Quran, "And your lord was never forgetful³¹. As Shalabi³² puts

²⁷ Ibn Qayyim, I'lam al-Muwaqq in, Cairo, Vol, 11, 1955, P. 64. 28

Ibn Qudama, Al-Mughni, Cairo, al Manar Ed vol, viii 1969, P. 264 29

See Ibn Hazm, Al-Muhalla, Beirut, vol, Xi, (n.d) Pp. 356-357 30

Shu'rani, Abd al Wahhab Ahmad, Mizan, Cairo, Vol ii, 1318 A.H. P. 134 Quran chapter 19 verse 64; This position perhaps is supported by the expressio unis rule of 32

Shalabi, Tahlil al-ahkam, Cairo, Alhazar University press, 1940, P. 307-322

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it, since the aim of penal sanction is deterrence, the aim can be achieved by amputation of only one hand and no more.

2.4 OFFENCE OF AL-ZINA (ILLICIT SEXUAL RELATION) AS ONE OF AL-

Illicit sexual relations, under Islamic law is a very serious offence. The punishment for this offence if committed by unmarried couples (Ghaer – Muhsan), i.e. fornication, is prescribed in the holy Quran as flogging with hundred stripes³³ while if committed by married couples (Muhsan), i.e. adultery, the punishment is prescribed in the hadith as stoning to death³⁴. Consequently this crime falls under the hudud offences and the punishment is hadd punishment.

It is reported in almost all major books of hadith³⁵ that the prophet once received a revelation (a Wahy) and related same to his companion that by a new piece of legislation, a married male and female should be given one hundred lashes and then be stoned to death (for adultery) while an unmarried male and female should be liable to one hundred lashes and then banishment for one year (for fornication).

The controversy trailing the forgoing is whether indeed the punishment of stoning to death for adultery actually needs to be preceded by flogging. Another is whether this prescription of stoning to death is still valid and if it is valid is it applicable to married parties only or it can validly extend to parties who had respectively divorced as at the time of commission of the offence. In fact there is another dimension added by professor shalabi who posited that in view of the stringent requirement of proof³⁶ in this case, the "punishment is prescribed in fact for those who committed the crime openly with no consideration for the law or for the feeling of the community³⁷.

Shalabi, Al-fiqh al-Islami, Alexandria, 1960, P.201

Su Quran chapter 24 verse 2

Muslim, Kitab al-Sahih, Istanbul, Vol. v (n.d) P. 115

i.e. Bukhari, Muslim, Al-Nasai, Al-Bayhaqi, Al-Tirmidhi, Ibn Majah and Abu Dawud.
The methods of proof is either the offender's own confession or the testimony of four adult male. Muslims who have actually witnessed the act of sexual intercourse.

It is also still controversial whether, for the offence of fornication (between unmarried parties), the offender would still have to be banished for one year after flogging with one hundred stripes. While there seems to be unanimity on the punishment of stoning to death for adultery based on sunna and hundred strokes for fornication based on Quran, there is no agreement on other collateral issues. For example, it has been asserted that when prophet ordered the punishment of stoning to death to be carried out, he did not order flogging to preceed it³⁸.

The opponent of stoning to death are quick to point out that there is possibility that this punishment was prescribed by the Quran or meant to be in the Quran but that it became

abrogated eventually. For example Umar was reported to have asked the prophet to allow him to write this Wahy (Revealed Legislation) but the prophet refused. To these scholars, this incident is an evidence of possible abrogation (Naskh)³⁹.

The point however isthat the foregoing still remains in the realm of conjecture because it is difficulty to conclude that the Sunna penal provision has been abrogated especially since the companions of the prophet also practiced this Sunna after him.

3.0 THE OFFENCE OF RIDAA (APOSTASY) AS ONE OF AL-HUDUD

Any person who forsakes Islam for another religion or for unbelief is said to have committed apostasy. A survey of the holy Quran shows that there are plethora of provisions in the Quran⁴⁰ concerning this offence of apostasy but there is no concrete punishment fixed in any of them thereby affording of interpretation that the punishment thereto is in the

³⁸ Al Mughni, Vol, vii, P. 160

Jbn Hazim, Al-Muhalla, Beirut, Vol. Xi, (n.d.), P.235

See Quran 2 verse 217; Quran 3 verse 86 – 91; Quran 5 verse 54; Quran 16 verse 106

hereafter⁴¹. This is further buttressed by the provision of Quran that there is "no compulsion in religion"42.

The prevalent view amongst the scholars of the schools of thought based on Hadith however, is that punishment for apostasy is dealth sentence thereby rendering it a hadd punishment. They often cite the Hadith (Prophetic saying) that "The life of a muslim may be taken only in three cases i.e. in the case of a married adulterer, one who has killed a human being, one who forsakes his religion and separates himself from his community⁴³.

Nonetheless, Abu Dawud reports that the prophet had interpreted the forgoing to mean a person (an apostate) who went out (from the community of Islam) to fight against God

and His prophet⁴⁴. On the premise of this interpretation perhaps, the Hanafi School posits that a female apostate is not liable to death penalty because she is not in any position to fight against Islam⁴⁵.

According to Shafii, Hanafi and Zahiri schools, the death penalty for apostates is a hadd punishment. But to some Maliki jurists, apostasy is "a sin for which there is no hadd punishment but which can be punished only by Tazir punishment⁴⁶.

THE OFFENCE OF DRINKING ALCOHOL (SHURB AL - KHAMR) AS ONE 3.1 OF HUDUD

The prescription of punishment for alcohol is not expressly stated in the Quran. However, majority of the schools of thought consider the penalty for alcohol drinking to be hadd punishment. Nonetheless, the schools are not unanimous as to the quantum of punishment. For instance while the

See Encyclopedia of Islam vol.iii, p. 736, where it is stated thus "In the Quran the apostate 41 is threatened with punishment in the next world only".

⁴² Quran 2 verse 256

See Muslim, Sahih, vol xi, with the commentary of Nawawi pp. 89 - 90

Al-Suman the commentary on Bukhari, Muslim and Abu Dawud, vol. iv p.223 It has earlier been stated that the view of some scholars is that death penalty is imposed not

apostasy but for the apostate's fighting against Islam. see Sarakhsi, for simple

Mabsut, vol x p. 108 - 110 Baji's commentary on Al – muwatta vol. V. p. 282 46

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Hanafi school posits that the punishment for drinking is eighty lashes⁴⁷, the shafii school opines that the punishment is forty lashes⁴⁸.

Historical account puts it that the prophet only ordered persons guilty of this offence to be beaten but without a specified number of strokes. In some cases he made the offenders to be reprimanded. And when the offender, were beaten, sometimes they were with articles of clothing, palm branches or sticks.

Also amongst the companions, there were varying number of lashes applied. While Abu Bakr imposed forty lashes based or guesses of some other companions⁴⁹, Umar bn al-khatab imposed eighty lashes as a result of increase in the number of offenders. All these show that there was no fixed punishment for alcohol drinking both in Quran and hadith thereby making some jurists conclude that it attracts tazir punishment⁵⁰ even though the majority of the Islamic schools still hold it is hadd punishment.

CONCLUSION

By this piece I have just conducted a survey of the type of punishment in Islamic justice system referred to as Hadd punishment. By the definition of this type of punishment it must be prescribed by God (the primary law maker) and or the hadith where the prophet makes it absolutely clear that he was acting upon a why (divine revelation).

Traditionally, as has been pointed out in this essay, jurists have hitherto, with varying degree of emphasis, categorized hadd punish into six or seven. However, research has shown that if the definition of what constitutes a hadd punishment is anything to go by, some of the punishment so categorized would rather be more appropriately categorized as tazir punishment. Good examples of tazir punishment but hitherto treated as hudud are the punishment for apostasy and that for Alcohol drinking⁵¹.

Mohamed S.El-Awa, op,cit. p.2

lbn al – Humam, faith al Qadir, vol.vi p. 183

Nawawi, Minhaj al – Talibin, vol iv, p. 174
Abu – Dawud, Al-Sunan, vol 4, p.284

⁵⁰ Shawkani, Nayl al – Awtar, vol vii pp. 138 - 143

The exercise is, however, not to posit that the offences are not punishable but to put in proper perspective the nomenclature attributable to the punishment which exercise further points to the dynamism of the Islamic criminal justice system.