

## Chapter 5 Part II

### On Islamic Criminal Procedure

from the

#### FINAL REPORT OF THE COMMITTEE SET UP TO ADVISE THE STATE GOVERNMENT ON THE IMPLEMENTATION OF SHARIA IN SOKOTO STATE

Submitted to  
His Excellency, Alhaji Attahiru Dalhatu Bafarawa (Garkuwan Sokoto)  
Governor of Sokoto State

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#### 2.0 [Specific Recommendations]

The Committee carefully reviewed the reports of its sub-committees, State Elders Consultative and Advisory Consultative Committees and unanimously recommended the following to the State Government for adoption:

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##### c. Islamic Criminal Law Procedure

The Islamic Criminal Law Procedure was carefully drafted and recommended by the committee to the State Government for adoption. Refer to Annex B for detailed procedure.

##### d. *Ta'aziratu* (Correctional Punishments)

Islamic Law has identified some offences that require correctional punishment, which were carefully reviewed by the committee and recommended to the State Government for adoption. Refer to Annex C for detail.

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### Annex B

#### Procedure on Islamic Criminal Law Offences under Islamic Law

The position of Islamic law on enforcement of punishment [is] aimed at preventing the accused from committing further or similar offence and deterring others from drawing near such offence. Islamic law legalises the punishment of an offender for an offence to which no defined or standard punishment had been prescribed. This is known as *ta'azir* (correctional punishment). Under this type of punishment a judge is allowed to use his discretion in awarding appropriate punishment where the offence does not warrant *hadd* punishment.

**Rationale behind *badd* punishment:** The reason behind *badd* punishment is to prevent the vandalisation or destroying all those things recognised by all revealed religions on the need to protect them such as lives, religion, sanity, wealth and property.

The following are the essence of *badd* punishment:

- (a) Revenge execution of death sentence, prevent occurrence of homicide and bodily injuries.
- (b) Amputation of a thief's hand is a protection of wealth of others.
- (c) Stoning to death or caning adulterer purifies affinity.
- (d) The punishment for an alcoholic protects sanity.
- (e) Punishment for defamation is a protection of integrity.
- (f) Punishment for apostasy guards against religious abuse.

### **Offences and the Procedure to be Followed in Proving their Commission**

There are seven types of criminal offences under Islamic law (Sharia) and each has a procedure to be followed in proving its commission before sentence.

#### **1. *Qisas*<sup>82</sup>**

##### **a. Homicide<sup>83</sup>**

The rule is that a person shall not be sentenced to death unless under the following circumstances.

i. There must be two reliable male witnesses: evidence of a single male and two females are not sufficient to convict in homicide cases. But such evidence is enough in payment of compensation provided there is no contradiction in the evidence of the two witnesses as to how the killing occurred.

#### Example:

Where one of the witnesses said "I saw him burn him" and the other witness said "I saw him slaughter him" if the suspect denies this, the punishment cannot be carried out provided the representatives of the person killed have accepted the evidence of the two witnesses above.

But where the representatives accept the evidence of only one of the two witnesses, then they will swear (*qasama* oath) and the suspect will be executed. This is because both the suspect and the complainants did not accept the evidence of one of the witnesses.

But where the accused confessed that he had slaughtered the deceased but the complainants are convinced on the evidence that said the deceased was burnt, if in the opinion of the judge the evidence carried weight, they will be asked to swear and based on this evidence the accused will be burnt in accordance with the view that

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<sup>82</sup> Spelled 'kisas' in the report here reproduced.

<sup>83</sup> There is no subsection *b*: perhaps it would have covered the subject of hurts or woundings, the other main subdivision of the law of *qisas*.

*qisas* can be carried out on a person by way of burning him if the death he caused was by fire.

Where however, the other evidence that said the deceased was slaughtered corroborated with the confession of the accused, then he will be asked to swear and will then be slaughtered.

ii. Where the accused person confessed the commission of the offence provided he is sane, and not an infant, then the sentence will be carried out.

iii. By way of *qasama* oaths:

- (a) Where the deceased made a dying declaration (*lausi*) i.e. where the accused [sic: deceased] before his death named somebody as the one who killed him.
- (b) Where there is one witness who witnessed the killing of the deceased by the accused.
- (c) Where there are two witnesses who testified that the accused caused injury that resulted to the death of the deceased.

In all these circumstances the accused will be killed.

#### **Procedure for *qasama* oaths**

This oath (*qasama*) is initiated where the person wounded made a dying declaration before his death. There are seven conditions to be satisfied before an accused can be sentenced to death under this procedure.

1. That the complainant alleges that it is the accused that killed the deceased with convincing evidence of one witness where the accused did not confess.
2. That the person killed is not a slave.
3. That the person killed is a Muslim.
4. That the complainants allege killing not injury.
5. That the complainants allege intentional killing.
6. That all the complainants have attained puberty.
7. That they are all sane.
8. That all complainants demand the revenge of the death of the deceased.
9. There should not be less than two complainants alleging intentional killing.
10. That along [with] their allegation there are other things to support their allegation such as evidence of one reliable person who saw when the deceased was killed or saw the deceased lying in a pool of blood while the suspect was still near him with an indication that he indeed did the killing.
11. That the complainant(s) must swear fifty (50) times before retaliation. It's the same oath if they are asking for compensation on an unintentional killing.

#### **Exception**

*Qasama* oaths cannot be administered in the following cases:

- (a) Where retaliation of injury is demanded if there are two witnesses on intentional injury, in this case retaliation is allowed.

If it is unintentional then compensation is allowed. But where there is only one witness, the complainant(s) should swear to qualify to receive compensation

if the cause of the injury occurred by mistake. But where it is intentional, *qasama* oath will be administered and revenge effected.

- (b) There shall be no *qasama* oaths for a slave and a non-Muslim.
- (c) There shall also be no *qasama* oaths where the deceased is found in between two congregations, one of Muslims and the other for non-Muslims and the killer not identified.

### **Prove**

To secure conviction the following must be proved:

- (a) That the accused is sane and not an infant.
- (b) That he is not an enemy of war.
- (c) He is not a slave.
- (d) He is a Muslim.
- (e) He indeed beat the deceased to whom he was not father.
- (f) That deceased is not the one who is legally permitted to be killed.

### **2. Robbery (*birabah*)**

This is to mount a roadblock in order to forcefully confiscate the wealth of others, in such a way that it will be difficult for:

- (a) A victim to escape;
- (b) Or to use anything that will terrify a person for the purposes of taking away his belongings;
- (c) Or to deceive an infant by taking him to a strange place to kill him in order to take away what he possesses;
- (d) Or to stay in the night or day time in a hidden place for the purposes of confiscating other people's wealth forcefully or killing another person instantly without his knowledge. The punishment for any of these is that the accused should be killed.

But where the accused did not kill his victim, the judge has discretion to order for any of the following:

- (a) To kill him; or
- (b) To kill him and then crucify him;
- (c) Or to amputate his hand and leg diagonally in order to restrain him;
- (d) To banish him.

### **3. Adultery**

The offence of adultery can only be established:

- (a) Where the accused confessed the commission of the offence and did not retract up to the time he is to be executed.
- (b) Presentation of four reliable witnesses that witnessed the penetration of a male organ (penis) into the female organ (vagina) at one act. Where three out of the four witnesses testified the above but the other one witness did not, the three witnesses will be subjected to punishment for defamation.

- (c) The existence of pregnancy on an unmarried woman will subject her to *hadd* punishment even if she alleges that she was compelled unless if:
- (i) she produces at least one reliable witness who testified that he saw somebody forcefully carrying her away;
  - (ii) or that he saw her crying holding whosoever she alleges had sexual intercourse with her; or
  - (iii) he saw her bleeding (from her private part).

In all these 3 circumstances she will not be subjected to *hadd* punishment for adultery.

#### **Conditions to prove adultery**

The punishment for adultery can only be enforced if the following conditions are satisfied:

- (1) That the accused is a matured person.
- (2) He is sane.
- (3) He is a Muslim.
- (4) That the offence is voluntarily committed.
- (5) That the offence was committed on or with a human being not an animal.
- (6) That the female co-accused is up to the recognised age for such cohabitation.
- (7) That the male co-accused must not have any claim or right over the female he was accused with or that he knows that the sexual relationship with her is prohibited.
- (8) That the female is not an enemy to the accused or a trusted unbeliever (under a treaty).
- (9) That the female with whom the offence was committed must not be dead.

#### **4. Stealing (*sariqab*)**

Dishonestly taking away the property of another without his knowledge with intention of depriving him of it.

##### **a. Punishment of stealing**

The punishment for stealing is *hadd* punishment by way of amputating the hand of the accused from the wrist, if the following conditions are satisfied. Amputation for stealing can only take place if:

- (i) That the accused is sane.
- (ii) That he has attained puberty or reached the age of 18.
- (iii) He is not a slave of the person he steals from.
- (iv) He is not a father to the person he steals from.
- (v) The stealing must not be out of necessity such as hunger.
- (vi) That the property must be the type that can be lawfully sold.
- (vii) That the property stolen must not be in possession of the accused such as stealing his mortgaged property or stealing something equivalent to his due for a service rendered to his employer.
- (viii) That the property stolen must be up to the measure of  $\frac{1}{4}$  of dinar or 3 dirhams or their naira equivalent.

- (ix) That the property stolen is kept in a place suitable for its custody such as a house, shop or on an animal or ship. It must not be placed where custom does not permit.
- (x) The property must have been removed from its original place of custody.
- (xi) The property must be stolen not confiscated.

**b. Justification for carrying out the punishment**

- (i) Right of Allah (SWT). It's a divine injunction that a thief's hand be amputated from the wrist of the right hand. If he repeats, the left leg will be amputated. If he repeats further his left hand will be amputated. If he commits it further, his right leg will be amputated. If he repeats further he will be beaten and detained.
- (ii) Right of individual. It is the right of the individual whose property was stolen to be compensated.

**c. Conditions to prove stealing**

- (i) Confession by the accused; or
- (ii) Presentation of two reliable male witnesses where a male and two females are presented or only one witness and oath, they are sufficient for payment of compensation.

**5. Intoxication**

Voluntary consumption of a substance by a Muslim, which leads to the loss of senses.

**i. Prove for the offence of intoxication**

(a) Presentation of witnesses that saw the accused while drinking alcohol or that smelled it. The witness must be one who knows what is alcohol. Evidence of one witness is sufficient.

(b) Confession by the drinker.

**ii. Punishment**

He will receive 80 strokes of cane if he is not a slave. If he is a slave he will receive 40 lashes.

**iii. Conditions for proof**

There are seven conditions to be satisfied before the punishment can be carried out on a drinker:

- (a) He must have attained puberty or reached the age of 18.
- (b) He must be a Muslim.
- (c) He must be sane.
- (d) That the drinking was not for any reason or condition.
- (e) He knows what he drunk was alcohol.
- (f) That the drinking was voluntary.

**iv. Procedure for punishing a drunken person**

The lashing is done with a moderate cane that is neither soft nor hard. The accused will kneel down and will not be tied. He will be beaten on his back and shoulder but if he refuses to stay at one place, he can be tied up so that he can feel the effect of the beating.

Woman can be beaten on a wrapper that will not prevent her from feeling the pains of the beating.

A drunkard will not be caned until he regained his senses so also a sick person until he recovered. Similarly, lashing cannot be effected during a hot or a seriously cold weather for fear of the life of the accused.

The executioner must hold his fingers tied leaving second to the last and last fingers free (not stretched them) advancing his right leg and suspending his left leg then bend his forefinger up to the palm and then place his thumb on the cane to hold it while beating.

The cane described by Sheikh Jazuli should be made from single leather not two and should be soft.

**6. Apostasy (*ridda*)**

This is renunciation of Islam by a Muslim. The punishment is execution by death after the accused had been given 3 days to re-embrace Islam and he refused. He will be killed as unbeliever, with no funeral or bath and will not be buried in a Muslim's burial ground.

**7. Defamation (*qadhf*)**

This is to attribute to a person regarded as a complete gentleman, Muslim, adult or a virgin of marriageable age that they are adulterers or that they have no affinity or that they are a product of adultery, etc.

There are certain conditions that a person defamed should satisfy:

- (i) That he is a Muslim.
- (ii) That he is not a bastard and not a slave.
- (iii) If the defamation suggests the denial of affinity he must prove that he is an adult, sane, of good behaviour and possesses male organ, if the defamation is to the effect that he is an adulterer.

**Punishment**

If these conditions are satisfied, or proved by way of evidence, the defamer will be given eighty strokes of cane.

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**Annex C**

***Ta'aziratu* (Correctional Punishments)**

Under Islamic law, there are no specific provisions regarding *ta'azir* punishment. It has not limited the extent of punishment to be awarded to an accused person, unlike *hadd* punishment for intentional murder or payment of compensation.

Example:

- Islamic law has prescribed as punishment for alcoholism, 80 strokes of cane.
- The killing of one who kills another intentionally and a revenge where injuries are inflicted, provided it did not amount to killing the accused.
- Islamic law has also stipulated how the payment of compensation is done.

On the other hand, Islamic law had identified certain offences that require correctional punishment and had vested powers to prevent or deter the commission of certain acts or to enforce the performance of certain things on the leaders for the purpose of protecting the rights of others and the right to live in peace etc.

*Provided that* those things prevented or enforced are not those that are prohibited or mandatory under Islamic law or renown aspect of it or a principle of Islamic law.

The rule is that punishments are classified according to offence. It starts punishment from a lesser to a most grave punishment and vested in the judge the discretion to punish the offender commensurate to his offence.

This rule does not apply where there exists a limit on the discretion of a judge to choose the type of punishment to be awarded on the offence or that the judge suggests a punishment which in his opinion is the type of punishment for what he perceived as an offence. A judge can only be permitted to enforce the punishment where the offence is established or where there has been prescribed, for every offence some punishments from which the judge will choose one and punish the offence based on it

There is also nothing that prevents *ulul-amr* (Muslim leaders) from prescribing punishment of lesser magnitude while prescribing, which the judge must follow in awarding punishment.

#### **REFERENCES**<sup>84</sup>

*Fawakihud Dawani* commentary on *Risala*  
*Mawahibul Jalili* commentary on *Mukhtasar Khalil*  
*Mawahibul Khallaq* commentary on *Lamiyyat al-Zaqqaq*  
*Al-Tashri'u al-Jana'i al-Islami* vols. 1-2  
*Qawaninal Fiqhiyyah* by Ibn Juzayy  
*Al-Abkam al-Sultaniyyah* by Abi Ya'la  
*Al-Abkam al-Sultaniyyah* [by Mawardi]  
*Ihkamul Abkam* commentary on *Tuhfa*

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<sup>84</sup> For further information on the works listed here see the "Bibliography of Islamic Authorities", Part IV of Chapter 6 of this work. The short titles given here are as in the bibliography.