

SOME PARTS OF CRIMES & THEIR PUNISHMENTS
PRODUCED BY COUNCIL OF ULAMA
AND PRESENTED TO THE BORNO STATE GOVERNMENT
ON 1ST DAY OF JUNE, 2001.

Contents:

I. [Introduction](#)

[What is Sharia](#)

[The Injunctions and Justice in the Divine Revelations](#)

[Allah is the Law Giver](#)

[Executive Functions Under the Sharia](#)

[The Difference Between Sharia and Any Other Law](#)

[The Aims of Sharia](#)

[Justice as Respect to the People](#)

[Al-Qadi \(the Judge\) and His Responsibilities Under Sharia](#)

II. [Criminal Law \(Al-Uqubat\), Punishment \(Al-Hudud\) & Ta'zirat](#)

[Al-Uqubat: Criminal Law](#)

[Hudud and Ta'zirat](#)

[Punishments For Crimes Can Be Divided into Four Broad Categories](#)

[Prevention of Hadd Punishment in Cases of Doubt](#)

[Hadd Punishments are Awarded in the Following Seven Cases](#)

[Ta'azir: Its Meaning and Application](#)

[Exceptions to Legal Responsibility](#)

[Criminal Liability](#)

[Discussion of Specific Crimes](#)

[Zina \(Adultery or Fornication\)](#)

[Liwat \(Sodomy\)](#)

[Lesbianism \(Al-Musabakah or Sihag\)](#)

[Bestiality \(Wad Ul-Bahimah\)](#)

[Sexual Intercourse With a Dead Person](#)

[Sexual Intercourse With a Sleeping Person \(Wad al-Naimah\)](#)

[Qadhf \(False Accusation of Zina\)](#)

[Theft \(Sariqah\)](#)

[Hirabah \(Highway Robbery\)](#)

[Shurbul-Khamar \(Drinking Alcoholic Drink\)](#)

[Receiving Stolen Property](#)

I.

INTRODUCTION

WHAT IS SHARIA

Sharia is an Arabic word meaning the path to be followed. Literally it means ‘the way to a watering place.’ It is the path not only leading to Allah, the Most High, but the believed by all Muslims to be the path shown by Allah, the Creator Himself through High Messenger, Prophet Mohammed (PBUH). In Islam, Allah alone is the sovereign and it is He who has the right to ordain a path for the guidance of mankind. Thus, it is only Sharia that liberates man from servitude to other than Allah. This is the only reason why Muslims are obliged to strive for the implementation of Sharia.

We made for you a law, so follow it, and not the fancies of those who have no knowledge. 65:18 Qur’an.

The absolute knowledge which is required to lay down a path for human life is not possessed by any group of people. In the words of Sayyid Qutb: “They are equipped with nothing but fancies and ignorance when they undertake the task which is no concern of theirs and does not properly belong to them. Their claim to one of the properties of divinity is a great sin and a great evil.”

THE INJUNCTIONS AND JUSTICE IN THE DIVINE REVELATIONS

There are a number of Qur’anic injunctions commanding Muslims to do justice. Right from the beginning, Allah sent with His apostles three gifts which aim at rendering justice and guiding entire human society to the path of peace. In Surah al-Hadid, the Qur’an says:

We sent aforetime our Apostles with clear signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice.

Three things are mentioned as a gifts of Allah. They are the Book, the Balance and Iron, which stand as emblems of three things which hold society together viz. – revelation, which commands good and forbids evils, justice, which give to each person his due, and the strong arm of the law, which maintains sanctions for evil-doers.

Allah commands justice, the doing of good and charity to kith and kin and He forbids all shameful deeds and injustice and rebellion; He instructs you that ye may receive admonition. Qur’an 16.90

Justice is a comprehensive term, and may include all the virtues of good behaviour. But the religion of Islam asks for something warmer and more human, the doing of good deeds even when perhaps they are not strictly demanded by justice, such as returning good for ill or obliging those who in worldly language “have no claim on you” and of course the fulfilling of the claims of those who claims are recognized in social life. Similarly, the opposites are to be avoided; everything that is recognized as shameful, and everything that is really unjust, and any inward rebellion against Allah’s law or our own conscience in its most sensitive form. The Prophet of Allah is asked to tell to people to do justice as the Creator, the nourisher and the cherisher of all has commanded it:

Say my Lord has commanded justice.

The command is repeated in Surah al-Nisa Qur'an 7:29:

Allah commanded you to render back your trusts to those to whom they are due and when you judge between man and man. That you judge with justice. Qur'an 4:58

The Prophet is asked to administer justice according to the *Kitab*-Allah (Book of Allah):

We have sent down to thee the Book in truth, that you might judge between men as guided by Allah; so be (used) as an advocate by those who betray their trust. Qur'an 4:105

The commentators explain this passage with reference to the case of Ta'imah ibn Ubairaq, who was nominally a Muslim, but in reality was a hypocrite, and given to sorts of wicked deeds. He was suspected of having stolen a set of armour, and when the trail was hot, he planted the stolen property into the house of Jew, where it was found. The Jew denied the charge and accused Ta'imah on account of his nominal profession of Islam. The case was brought to the Apostle, who acquitted the Jew according to the strict principle, as guided by Allah. Attempts were made to prejudice him and deceive him into using his authority to favour Ta'imah.

The general lesson is that the righteous man is faced with all sorts of subtle wiles; the wicked will try to appeal to his highest sympathies and most honourable motives to deceive him and use him as an instrument for defeating justice. He should be careful and cautious, and seek the help of Allah for protection against deception and for firmness in dealing the strictest justice without fear or favour. To do otherwise is to betray a sacred trust; the trustee must defeat all attempts made to mislead him. Justice must be done equally to all and sundry, even if it be done against ONE'S SELF, OR ONE'S PARENT OR RELATIVES. There must be no difference between rich and poor. All are servants of Allah, and must be judged according to the Book of Allah.

O ye who believe, stand out firmly for justice, as witness to GOD, even as against yourselves, or your parent, your kin, and whether it be (against) rich or poor. For God can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if you distort (justice) or decline to do justice. Verily Allah is well-acquainted with all that you do. Qur'an 4:135

Justice is Allah's attribute, and to stand firm for justice is to be a witness to Allah, even if it is detriment to our own interest, as we conceive them or the interest of those who are near and dear to us. According to the Latin saying, "Let justice be done though heaven should fall."

But Islamic justice is something higher than the formal justice of Roman law or any other human law. It is even more penetrative than the subtler justice in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of Allah, to whom all things, acts and motives are known.

Some people may be inclined to favour the rich, because they expect something from them. Some people may be inclined to favour the poor because they are generally helpless. Partiality in either cases is wrong. We are asked to be just, without fear or

favour. Both the rich and the poor are under Allah's protection as far as their legitimate interest are concerned, but they cannot expect to be favoured at the expense of others. Allah can protect the interests of all, far better than any man.

ALLAH IS THE LAW-GIVER

In the Sharia, there is an explicit emphasis on the fact that Allah is the law-giver and the whole *ummah*, the nation of Islam, is merely His trustee. It is because of this principle that the *ummah* enjoys a derivative rule-making power and not an absolute law-creating prerogative. The Islamic state, like the whole of what one might call Islamic political psychology, views the *Dar al-Islam* (Abode of Islam) as one vast homogenous commonwealth of people who have a common goal and common destiny and who are guided by a common ideology in all matters both spiritual and temporal. The entire Muslim *ummah* lives under the Sharia to which every member has to submit, with sovereignty belonging to Allah alone.

Every Muslim who is capable and qualified to give a sound opinion on matters of Sharia, is entitled to interpret the Law of Allah when such interpretation becomes necessary. In this sense Islamic policy is a democracy. But where an explicit command of Allah or his Prophet already exists, no Muslim leader or legislature, or any religious scholar can form an independent judgment; not even all the Muslims or world put together have the right to make the least alteration in it.

EXECUTIVE FUNCTIONS UNDER THE SHARIA

The executive function under the Sharia vests solely in the just ruler or a group of such people who appoints his delegates and is responsible only to the Sharia as represented by the Council of Jurists (*ulama* and *fuqaha*) in whom the legislative function of deriving laws from the Book of Allah and the Sunnah is vested. New laws according to the needs of the time and circumstances are only made by these men learned in the guiding principles of law, men chosen by the popular assembly from among the multitudes of those learned in the Sharia on account of their enlightenment and understanding of the need of the people.

But the fundamental principle on which rests the Islamic legal system is that the laws of Islam are not passed in a heated assembly by men who ardently desire the legislation in their interest, against men who ardently oppose it in their interest. The laws of Islam are firmly based upon the Sharia and are, therefore, in the interest of the people as a whole. They are not the work of warring politicians, but of sober jurists.

This is the reason why there is a great degree of stability in the Sharia mainly due to its Divine origin as compared to any other man-made secular legislation in the world.

THE DIFFERENCE BETWEEN SHARIA & ANY OTHER LAW

The difference between other legal systems and the Sharia is that under the Sharia its fountain head is the Qur'an and Sunnah, the *wahy al-jali* (the revelation per se) and the *wahy al-khafi* (the hidden revelation). The Qur'an and the Sunnah are the gift given to entire *ummah*. Therefore, the *ummah* as a whole is collectively responsible for the administration of justice. This is the reason why any legislative or consultative assembly

in any Muslim land has no power of encroachment on any legal right of the members of the *ummah* and those who live with them in peaceful co-existence.

The other important point in this regard is that in Sharia, justice is administered in the name of Allah, one of whose attributes is *Al-Adil* (the Just and the Giver of Justice). Any injustice or any tribal or racial consideration is nothing but a grave sin and disobedience to Allah. "To judge justly" is, therefore, a religious duty and a devotional act. Neither a king, nor a caliph or a sultan can ever claim his words are laws as was done by tyrant from Pharaoh to Louis XIV. They are not the fountains of justice even though some wrong-headed Muslim rulers might have posed as if they possessed such authority. With this in mind, we shall proceed to examine briefly the sources and the aims of Sharia.

THE AIMS OF SHARIA

The Sharia originated from the direct commandment of Allah, but there is the provision of power given to man in order to interpret and expand Divine commandment, by means of analogical deductions and through other processes. Unlike the Roman law which developed from the action, or English common law which developed from the writs, the very first source of Sharia is the Holy Qur'an. The second source is the Sunnah or the practice of Prophet Muhammad (SAW) who has rightly explained:

I leave two things for you. You will never go astray while holding them firmly.
The Book of Allah and the Sunnah of His Prophet.

The third source which may be classified as both *ijma*, consensus of opinion of *ulama*, and *qiyas*, analogical deductions, provided detailed understanding derived from the Qur'an and Sunnah, covering the myriads of problems that arise in the course of man's life. As a matter of fact, the ideal code of conduct or a pure way of life which is the Sharia, has much wider scope and purpose than an ordinary legal system in the Western sense of the term. The Sharia through this process aims at regulating the relationship of man with Allah and man with man. This is the reason why the Sharia law cannot be separated from Islamic ethics. The process of revelation of various injunctions (*ahkam*) of the Qur'an shows that the revelation came down when some social, moral or religious necessity arose, or when some Companions consulted the Prophet concerning some significant problems which had wide repercussion on the lives of Muslims.

The Qur'an therefore, is the best commentary (*tafsir*) of the Qur'an and the main sources of the Sharia.

The scholars of the Qur'an have enumerated varying number of verses of legal injunctions, but the number is approximately considered to be 500. They deal with marriage, polygamy, dower, maintenance, rights and obligations of the spouses, divorce and various models of dissolution of marriage, the period of retreat after divorce (*iddah*), fosterage, contracts, loans, deposits, weights and measures, removal of injury, oaths and vows, punishments for crime, wills, inheritance, equity, fraternity, liberty, justice to all, principles of an ideal state, fundamental human rights, law of war and peace, justice administration, etc.

The Qur'anic injunctions, from which is derived the Sharia, are further explained and translated into practice by the Sunnah of the Prophet. Sunnah literally means a way,

practice, rule of life, and refers to the exemplary conduct or the models behaviour of the Prophet in what he said, did or approved. Thus it became a very important source of the Sharia only second in authority after the Holy Qur'an.

Besides the Qur'an and the Sunnah, the consensus of the opinion of the learned men and jurists, known in Sharia terminology as the *ijma*, plays an important role in Islamic law since it provides a broad vehicle of progress and reconstruction. *Qiyas*, analogical deduction, is also recognized as the source of Islamic legal system since it gives an instrument to cope with the growing needs and requirements of society. But such analogical deduction is based on very strict, logical and systematic principles and is not to be misconstrued as mere fancies and imaginations of men. Alongside these four sources, the Sharia takes into consideration *istihsan* or jurist preference or equity of a jurist as against *qiyas* which helps in providing elasticity and adaptability to the entire Islamic legal system. The concept of *al-masalih al mursalib* (the matters which are in public interest and which are not specifically defined in the Sharia) was enunciated by Imam Malik ibn Anas (d. 795 A.D) and has also become a part of the Sharia system.

JUSTICE AS RESPECT TO PEOPLE

The central notion of justice in the Sharia is based on mutual respect of one human being by another. The just society in Islam means the society that secures and maintains respect for persons through various social arrangements that are in the common interests of all members. A man as *khalifat* Allah (vice-regent of Allah) on earth must be treated as an end in himself and never merely as a means. He is the cream of creation and hence the central theme of the Qur'an. What is required is the equal integrity of each person in the society and his loyalty to the country concerned which in turn will make it the duty of the society to provide equally for each person's pursuit of happiness. This is the reason why things unlawful (*haram*) for Muslims but lawful for non-Muslims will not be made forbidden for them in the Muslim state.

Politically, respect for persons was the motivating thought behind the *kalimah al-shahadah*, the creed confession of Islam, which neglected any other deity other than Allah who created all human beings as equal irrespective of their tribes or clans. It was this teaching which made the Quraishites, Prophet Muhammad's tribesmen, angry when he helped to liberate the slaves and destitutes like Bilal and Zaid and many others in the early days of Islam. It is a fact of history that all of Khadijah's wealth was spent after freeing the slaves; and before her death she, along with the Prophet, could hardly get a square meal a day. It was the same principle which guided the first city-state of Medina as shown in its charter which guaranteed individual rights irrespective of religious beliefs of the communities living in Medina.

Respect for persons in the Sharia is rooted in the divine injunctions of the Qur'an and the precepts of the Prophet. The bill of rights, suffrage, civil rights and the slogans for political equity as we know today are of a very recent origin and seem to be mere reflections of what the Sharia taught 1400 years ago from now. The treatment accorded by the Sharia made the aristocracies of birth, race, wealth and language, the features, which vary, from person to person, all suspect as disrespectful of persons. The criterion of respect was only the *taqwah*, the fear of Allah:

The best among you in the eyes of Allah are those who are stronger in *taqwah* (fear of Allah).

The Sharia, it should be noted, gives priority to human welfare over human liberty. Muslims as well as non-Muslims living in a Muslim state are duty bound not to exploit common resources to their own advantage, destroy good producing land, and ruin the potential harvest or encroach upon a neighbour's land. Since a man in Islam is not merely an economic animal, each person's equal right to life, and to a decent level of living, has priority over the called economic liberty.

Behind every legal, social or political institutions of Islam, there is a divine sanction which every believer is expected to reverence no matter where he lives. He cannot change his own whims into laws. There are the limits of Allah (*budud* Allah) which are imposed in order to curtail man's ambitions and devices. *Halal* (lawful) and *haram* (unlawful) are clearly mentioned and these are the boundaries which every Muslim as well-as non-Muslim living with them must respect. If he transgresses any of these limits, he is doing wrong or committing a crime. Even between these two boundaries of lawful and unlawful, there exist the things which are doubtful (*mushtabat*), which must be refrained from in order to avoid excesses. The hadith of the Prophet says:

That which is lawful is plain and that which is unlawful is plain and between the two of them are doubtful matters about which not many people know. Thus, he who avoids doubtful matters clears himself in regard to his religion and his honour, but he who falls into doubtful matters falls into that which is unlawful, like the shepherd who pastures around a sanctuary, all but grazing therein. Truly every kind has a sanctuary, and truly Allah's sanctuary is His prohibitions. Truly, in the body there is a morsel of flesh which, if it be whole, all the body is whole and which, if it be diseased, all of it is diseased. Truly, it is the heard. Related by Buhari & Muslim.

In reality, these limits provide safeguards of the rights of men and nations and give men sense of responsibility to Allah and hence to the entire mankind. These limits stop him from being inhuman, and make him respect the blood and property of another man, and give equality of treatment to all individuals, male and female before law. In commercial dealings, these limits provide for respect for contractual dealings and pledge words and the prohibition of many and gambling. In the case of individual conduct, these limits provide for the prohibition of intoxicants and not to do injustice to servants and give charity to poor relations and provide for the strict law governing inheritance. In the dealings with nations, these limits provide for respect for treaties, and give strict code of conduct for one's dealings with the fellowmen by not destroying even the enemy's means of sustenance, and show mercy to the surrendered enemy and show respect for non-combatants. In short, in every action of a man's dealings with fellow men there are limits (*budud*) imposed by Allah which are nothings but the sanctions of the divine Sharia.

Judicial power, according to Sharia, must always operate in conformity with equity, even to the benefit of an enemy and to the detriment of a relative. Sharia does not allow the slightest modification in the rule of perfect justice, or any form of arbitrary

procedure to replace it. It firmly establishes the rule of law, eliminating all differences between the high and low.

Qur'an asserts that all mankind, born of the same father and mother, forms one single family, that the God of men is unique, that the Creator has ordered men according to nations and tribes so that they may know, and assist one another, for the good of all.

In the administration of justice, therefore, a judge must be upright, sober, calm and cool. Nothing should ruffle his mind from the path of rectitude. If he does wrong, he is not only responsible to the people but also to God. The noble Prophet (SAW) advises: "No judge shall pass a judgment between two men while he is angry." Mishkat al Masabih 24:55. He must not feel kindness in executing the ordained sentences for the prescribed crimes. The Qur'an says, "Let not pity detain you in the matter of obedience to Allah if you believe in Allah and the Last Day and let a party of believers witness their sentences." Qur'an 24:2. He must decide disputes with as much speed and promptness as possible for delayed justice produces no appreciable good. He must not accept any present or bribery from the parties concerned. He must exert hard to arrive at a just conclusion. The Prophet said:

Verily Allah is with a judge so long as he is just. When he is (willingly) unjust, he goes off him and the devil keeps attached to him. Mishkat al Masabah 26:61.

To a judge, all are equal in the eye of the law. As God dispense justices among His subjects, so a judge should judge without any distinction whatsoever. The Prophet said, "The previous nations were destroyed, because they let off persons of high rank and punished the poor and the helpless." In the Sharia, a judge for every matter, civil, criminal and military, there is no separate judiciary for separate civil, criminal and military departments.

The basic principles of Sharia, therefore, can be summed up as follows:

- a. The larger interest of society takes precedence over the interest of the individual.
- b. Although relieving hardship and promoting benefit are both among the prime objectives of the Sharia the former takes precedence over the later.
- c. A bigger loss cannot be inflicted to relieve a smaller loss or a bigger benefit cannot be sacrificed for a smaller one. Conversely, a smaller harm can be inflicted to avoid a bigger harm or a smaller benefit can be sacrificed for a larger benefit.

AL-QADI (THE JUDGE) AND HIS RESPONSIBILITIES UNDER SHARIA

Qualification of a *qadi*:

As we have seen, Islam has given a great importance to justice which must be done at all cost. Those who perform the function of the *qadis* (judges) or *qadi al qudat* (chief justice) must be not only men of deep insight, profound knowledge of the Sharia, but they must also be Allah-fearing, forthright, honest, sincere men of integrity. The Holy Prophet (SAW) has said:

The messenger of Allah said: The *qadis* are of three types. One type will go to paradise and the remaining two will end up in the fire of hell. The person who will go to paradise is one who understood the truth and judged accordingly.

In Surah al-Hadid, the Qur'an says:

We sent aforesaid our Apostles with clear signs and sent down with them the Book and the Balance (of Right and Wrong), that men may stand forth in justice.

Three things are mentioned as gifts, the Book, the Balance and Iron, which stand as emblems of three things which hold society together, viz – revelation, which commands good and forbids evils; justice, which give to each person his due, and the strong arm of the law, which maintains sanctions for evil-doers.

Justice is a command of Allah and whosoever violates it faces grievous punishment.

Allah commands justice, the doing of good and charity to kith and kin and He forbids all shameful deeds and injustice and rebellion; He instructs you that ye may receive admonition. Qur'an 16:90.

Justice is a comprehensive term, and may include all the virtues of good behaviour. But the religion of Islam asks for something warmer and more human, the doing of good deeds even where perhaps they are not strictly demanded by justice, such as returning good for ill or obliging those who in worldly language "have no claim on you" and of course the fulfilling of the claims of those whose claims are recognized in social life. Similarly, the opposites are to be avoided, everything that is recognized as shameful, and everything that is really unjust, and any inward rebellion against Allah's law or our own conscience in its most sensitive form. The Prophet of Allah is asked to tell to people to do justice as the creator, the Nourisher and the Cherisher of all has commanded it:

Say My Lord has commanded justice.

The command is repeated in Surah al-Nisa Qur'an 7:29.

Allah commanded you to render back your trusts to those to whom they are due and when you judge between man and man. That you with justice. Qur'an 4:58

The Prophet is asked to administer justice according to the *Kitab*-Allah (Book of Allah):

We have sent down to thee the Book in truth, that you might judge between men as guided by Allah, so be used as an advocate by those who betray their trust. Qur'an 4:105.

The commentators explain the passage with reference to the case of Ta'imah ibn Ubairaq, who was nominally a Muslim, but in reality was a hypocrite, and given to sorts of wicked deeds. He was suspected of having stolen a set of armour, and when the trail was hot, he planted the stolen property into the house of Jew, where it was found. The Jew denied the charge and accused Ta'imah, but the sympathies of the Muslim community were with Ta'imah in account of his nominal profession of Islam. The case was brought to the Apostle, who acquitted the judge according to the strict principle, as

guided by Allah. Attempts were made to prejudice him and deceive him into using his authority to favour Ta'imah.

The general lesson is that the righteous man is faced with all sorts of subtle wiles; the wicked will try to appeal to his highest sympathies any most honourable motives to deceive him and use him as an instrument for defeating justice. He should be careful and cautious and seek the help of Allah for protection against deception and for firmness in dealing the strictest justice without fear or favour.

One who judged unjustly after understanding the truth, they will go to hell. Likewise, *qadi* who judged in ignorance also will go to hell. Abu Daud & Ibn Majah.

The above hadith shows how delicate and responsible job of *qadi* is in Islam. His knowledge of Qur'an and Sharia must be very deep and that he judge justly. Otherwise, it can really ruin a man's spiritual future in the next world. The life in this world is only for a limited period while the life in the next world is forever. Then why should one really undertake to be a judge when he does not have the required qualifications and character to be a judge? In another hadith, it is reported by Abu Hurairah that the Messenger of Allah said: "One who is made a *qadi* to administer justice among people is as if he is slaughtered without a knife."

Naturally, a man who is appointed as a *qadi* or a judge does not have an easy job to perform. If he becomes slightly irresponsible and unjust, he will be caught on the Day of Judgment. On the other hand, when he is just and administers justice according to the Book of Allah [and] Sunnah of the Prophet (SAW) he is taken as an enemy of high influential people in the society. The responsibility of *qadi* is like a double-edged sword, and one has to be extraordinary careful in fulfilling it. The following is the guidance from the Sunnah of the Prophet which every judge must follow in their task of administering justice:

- 1) Equality of all litigants: a Muslim judge must treat all his litigants equally whether he is a king or his page, a master or his servant, a rich man or a poor man, a relative or a stranger and a friend or a foe. It is reported by Ubadah bin al-Samit that the Messenger of Allah (SAW) said:

Let the *hadd* of Allah be applied equally on your relatives and the total strangers, you should not care a bit for the rapprochement of any critic whatsoever.

The Prophet (SAW) has also said:

It is reported by Aishah that the messenger of Allah said: "Forgive the shortcomings of highly respected people but certainly do not forgive them in awarding the hard punishment to them."

- 2) The defendant and appellant must appear before the *qadis*. Even though one is a highly placed person or a king or an emperor or an administrator of a country, he must not be exempted from appearing before the judge to answer the charges levelled against them. It is reported by Abdullah bin Zubair that the messenger of Allah said:

Both the parties in a dispute must be brought before the judge

- 3) The defendant should be given right to take an oath. Human being, being what he is, will keep on grumbling and blaming others for his own faults or in order to hide his faults and escape punishments. If everyone's claim is taken seriously there would appear so many claimants of people's life and property. The remedy is suggested by the Holy Prophet as follows:

It is reported by Abdullah bin Abbas that the Messenger of Allah (SAW) said: "If people were to be judged merely on account of their claims, there would appear claimants of the life and property of everyone (so that there would remain none whose life and property can remain safe) so, the defendant must be given right to take an oath (concerning the charge levelled against him)."

The above guidance of the Prophet will provide the defendants with an opportunity to get acquitted of the calumny put against them.

- 4) The judge must be careful in awarding *hadd* punishment. *Hadd* punishment is meant to be a deterrent so that people may not become complacent and commit crimes simply because they find punishment to be just nominal. But while awarding *hadd* punishment, the judge must make sure that the crime is definitely committed. If there is a slight doubt in establishing the crime, he should refrain from awarding hard punishment, the Prophet has said:

It is reported by Aishah that the Messenger of Allah (SAW) said: "As far as possible refrain from awarding *hadd* punishment to a Muslim, if there is found slight excuse (or doubt), leave him alone because it is better for the judge to err in acquitting the accused rather than erring in awarding him punishment."

II.

**CRIMINAL LAW (AL-UQUBAT), PUNISHMENT
(AL-HUDUD) & TA'ZIRAT**

AL-UQUBAT: CRIMINAL LAW

The penal or criminal law in Islam is called *al-uqubat* (singular, *al-'uqubah*) which covers both torts as well as crimes. There is very little difference between the two. The Sharia emphasizes on fulfilling the rights of all individuals as well as the public at large. The law that gives the remedy to the public is a crime and if it is given to the individual it is a tort. The *uqubat* applies to Muslims, as well as non-Muslims alike in a Muslim state. A Muslim will be punished for a crime committed even if it was done far away from the Islamic state. In an ultimate sense, it is a crime against Allah, and he will be punished once he came home or was brought back by the authorities of an Islamic state.

The *qadi* or a Sharia judge has to abide by the law prescribed in the case of *uqubat*, and hence he is forbidden to impose a penalty other than that fixed by the Divine law in conformity with the injunctions of the Qur'an and the Sunnah otherwise he will be an evildoer.

HUDUD AND TA'ZIRAT

Hadd punishment only given when there is a violation of people's rights. The word *hudud* is the plural or an Arabic word *hadd*, which means prevention, restraint or prohibition, and for this reason, it is a restrictive and preventive ordinance, or stature, of Allah concerning things lawful (*halal*) and things unlawful (*haram*).

Hudud of Allah are of two categories. Firstly, those statutes prescribed to mankind in respect of foods and drinks and marriages and divorce, etc., what are lawful thereof and what are unlawful, secondly, the punishments prescribed or appointed to be inflicted upon him who does that which he has been forbidden to do. In Islamic jurisprudence, the word *hudud* is limited to punishments for crimes mentioned by the Holy Qur'an or the Sunnah of the Prophet while other punishments are left to the discretion of the *qadi* of the rule which are called *ta'zir* (disgracing the criminal). The general word of punishment is *uqubah* derived from "*aqb*" which means one thing coming after another because punishment follows transgression of the limits set by Divine law. This is the reason why Islamic penal law is called *al-uqubat*. We should bear in mind that all the violations and breaches of Divine limits in a general sense are not punishable since the punishment is only inflicted in those cases in which there is violation of breach of other people's rights. As for example, if someone neglects to perform pilgrimage when he has the means, it is not punishable. But if one does not pay *zakat* or poor due, which is a charity as well as a tax from the rich to the poor, there will be punishment accorded to the defaulter. The Holy Prophet appointed officials to collect the *zakat*, which was received in the *bait al-mal* (public treasury), thus showing that its collection was a duty of the Muslim state. Islamic history records that when certain Arab tribes refused to pay *zakat*, Sayyaidna Abu Bukr sent out troops against them, because the withholding of *zakat* on the part of an entire tribe was tantamount to a rebellion against the Islamic state and the violation of the rights of the poor.

These crimes which are punishable in Sharia are ones which affect the society. The Holy Qur'an has enumerated them as murder (*qatl*), dacoity or highway robbery (*hirabah*), theft (*sariqah*), adultery or fornication (*zina*), and accusation of adultery (*qadhaf*). We shall discuss in detail these crimes and their punishments, but it should be understood that the Holy Qur'an lays down a general law for the punishment of offences in the following words:

And the recompense of injury (*sayyi'ah*) is punishment. (*sayyi'ah*) equal thereto, but who ever forgives and amends his reward is due from Allah for Allah loves not those who do wrong.

This golden principle is of very great importance and applied both to individual wrong done by one person to another and also to the offences committed against society. There are a number of Qur'anic injunctions concerning the punishment of offenders guiding the *ummah*. "And if you punish then punish with the life of that with which you were affected; but if you are patient, it will certainly be best for those who are patient." "And he who punishes evil with the like of that with which he has been afflicted and he has been oppressed Allah will certainly help him." "Whoever acts aggressively against you, inflict injury on him."

While in the verses quoted above and similar other verses, there is a rule laid down for the individual wronged, that he should in the first instance try to forgive the offender provided he amends by forgiveness. According to these verses, if punishment of evil is to be given, it should be proportionate to the evil committed. Every civilized code of penal laws is based on this principle. It is an interesting point to remember that the Holy Qur'an generally adopts the same word for punishment, as for the crime. Thus, in Chapter 42:40, both the evil and its punishment are called *sayyi'ah* (evil); in Chapter 16:120 and Chapter 22:60, the word used is a derivative of *uqubah* (punishment); and in Chapter 2:194, the word used is *itida* (aggression). The adoption of the same word evil for the crime and its punishment indicates that punishment itself, though justified by the circumstances, it truly speaking nothing but a necessary evil.

It is for this reason that the Muslims are asked to get their rights either on private or public through the due process of law taking the matter up to the competent *qadi's* (judge) court and not by taking law into their hands. Otherwise they will be among the wrong-doers (*zalimun*). In private defence too, they must be just in using the amount of force necessary. But in all cases, they must not seek a compensation greater than the injury suffered by them. The most they can do is to demand equal redress, i.e. the harm equivalent to the harm done to them and no more. But the ideal way is not to seek vengeance at all but reconciliation, forgiveness and maiming the offender aware of the gravity of his offence as long as it is not against the public and injurious to the entire society. In the latter case, the deterrent punishment will follow. The Qur'anic injunctions gives this gospel of goodness in the following words:

Nor can goodness and evil be equal. Repel evil with what is better than will be between whom and you was hatred as it where your friend and ultimate.

But such goodness will only be granted to those who exercise patience, forbearance and self-restraint, who are really persons of the greatest good fortune. They will be given their reward twice by Allah, their Creator, because they have persevered and have tried

to avert evil with good. In Surah 33, verse 96 Muslims are ordered specifically to repel evil with what is best.

Muslims are thus taught to be forbearant (*sabirin*), but they are equally asked to prevent repetition of crimes by taking steps and applying both physical and moral means. The best moral means is to turn hatred into friendship by forgiveness and love, as the Qur'an says: "But if a person forgives and makes reconciliation, his reward is due from Allah, for Allah loves not those who do wrong."

PUNISHMENTS FOR CRIMES CAN BE DIVIDED INTO FOUR BROAD CATEGORIES

- a) Physical punishment which includes death sentence, amputation of hand, flogging and stoning to death;
- b) Restriction of freedom which includes imprisonment or sending one on an exile;
- c) Imposition of fines;
- d) Warning given by the *qadi*.

Apart from these prescribed punishments for various crimes there are other ways of making the criminal feel that he has committed a great wrong. As for example, a man convicted of false accusation or fornication (*qadhf*) will be deprived of the right of giving a testimony (*shahadah*).

PREVENTION OF HADD PUNISHMENT IN CASES OF DOUBT

Prophet Muhammad has given the basic ruling in a hadith:

Prevent the application of *hadd* punishment as much as you can whenever any doubt persists.

Once this ruling was applied it reduced the number of *hadd* punishments in the Muslim countries like Saudi Arabia. When the benefit of doubt is resolved in favour of the accused supposing in case of theft (*sariqah*), a lesser punishment by *ta'azir* is given because the doubt relates to the criteria and not the conviction. In the case of adultery, if there is a little doubt, no *hadd* punishment will be given at all.

In case of theft the accused should not be given the *hadd* punishment all of a sudden. In a Muslim state, every individual is entitled to social security through the public treasury called *bait al-mal* where funds are collected from various sources including the obligatory collection of *zakat*. If a citizen is driven by force of circumstances since he could not earn his living for himself and his family due to lack of opportunity or was not taken care of through the funds of *bait al-mal*, the society will be considered at fault and know *hadd* punishment will be given to the accused. This is in keeping with the decision of Caliph 'Umar not to apply *hadd* to those accused of theft during the period of famine in Medina.

Even the very process of law under the Sharia curtails the number of *hadd* punishments. According to the Maliki school the accused in the case of theft, must be taken to the *qadi*.

Another factor in awarding *hadd* punishment is the stipulation of two matured and just male witnesses of high moral probity. It is not always easy to find such witnesses present at the scene of the crime. If the accused confesses the crime, the punishment will be accorded. Even in this regard, Imam Abu Yusuf of the Hanafi school and Imam Ahmad bin Hanbal say that two or even three sustained confessions are needed before conviction.

Apart from these measures, it must also be proved before giving *hadd* punishment that in the event of theft, the accused did force open or break into the house and actually entered it. It is required that money, gold, silver, ornaments, diamonds and pearls and other valuables must be kept securely locked in a strong box and stores must be guarded and houses must be locked so as not to tempt the potential thief. If one failed to take enough precaution then he gets part of the blame for negligence which brought about the theft. In such cases where these requirements are not satisfied, but there exists sufficient ground for conviction, *ta'azir* will be applied instead of *hadd* punishment. Besides, if the stolen property is food, fruit, grass or forest wood, *hadd* punishment will not be applied at all.

HADD PUNISHMENTS ARE AWARDED IN THE FOLLOWING SEVEN CASES

1. Penalties exacted for committing murder, manslaughter or bodily harm;
2. Punishment for theft by the amputation of a hand;
3. Punishment for fornication or adultery; 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. Punishment for inebriation by eighty lashes;
7. Punishment for highway robbery (*qata al-tariq*) by death; cutting off a leg and an arm from opposite direction or an exile according to the seriousness of the crime.

In the rest of the cases, *ta'azir* will be applied.

TA'AZIR: ITS MEANING AND APPLICATION

Ta'azir literally means disgracing the criminal for his shameful criminal act. In *ta'azir*, punishment has not been fixed by law, and the *qadi* is allowed discretion both as to the form in which such punishment is to be inflicted and its measure. This kind of punishment by discretion has been provided in special consideration of the various factors affecting social change in human civilization and which vary on the basis of varieties in the methods of commission or the kind of criminal conduct indictable under the law. Offences punishable by this method are those against human life, property, and public peace and tranquillity.

The general structure of the criminal law of the Muslims today (*al-siyasat al-shari'ah*) is based on the principles of *ta'azir*. In other words *ta'azir* forms discretionary penalties inflicted by the judge himself, either for an offence whose punishment is not determined, or for prejudice done to one's neighbour. The punishment can take the

form of lashes, imprisonment, fine, warning etc. To sum up, *ta'azir* can be defined as follows:

It is disciplinary punishment for a crime for which no specific *hadd* is prescribed for any form of expiation.

EXCEPTIONS TO LEGAL RESPONSIBILITY

Sayyidna 'Ali once said to Sayyidna 'Umar, "Do you know that no deed good or evil are recorded (for the following) and are not responsible for what they do:

1. An insane person till he becomes sane;
2. A child till he grows to the age of puberty;
3. A sleeping person till he awakes."

According to the above narration, we shall consider the legal liability or criminal responsibilities to Sharia.

The responsibility for the crime committed will be that of the criminal alone. His father, mother, brother or any other relative will not be made to undergo punishment for crime committed by him as happened during the *jahiliyyah* period before Islam. The Holy Qur'an says that nobody will bear the burden of another.

The only collective responsibility will be that of the family in respect of payments of blood money or damages resulting from a crime. In this case, the criminal as well as his relatives on his father's side will be collectively responsible for *diyyah* (blood money) or damages imposed for causing any physical injury.

The famous *wasiyah* or will left by Sayyidna 'Ali throws further light on this subject. When Sayyidna 'Ali sustained injury at the hands of Abdal-Rahman bin Muljim, he called his sons to his deathbed and said to them. "Do not kill anyone except him who killed me. But wait; if I die from his blow, revenge me with a blow for a blow, and don't mutilate the criminal, for I heard the messenger of Allah say: 'Beware of mutilation even if it were an ailing dog'."

CRIMINAL LIABILITY

A child will not be given *hadd* punishment for a crime committed by him. Since there is no legal responsibility of a minor, i.e. children of all ages until they reach the age of puberty, *qadi* will still have the right either to admonish the juvenile delinquent or impose on him some restrictions which will help to reform him and stop him from committing any future crime. According to Abu Zaid al-Qayrawani al-Maliki, there shall be no *hadd* punishment for minors even in respect of levelling a false accusation of unchastity (*qadhaf*) or in respect of committing fornication.

If a person has committed a crime in the state of insanity, he will not be punished, Imam Abu Yusuf says that "the *hadd* punishment can be imposed on the accused after his confession, unless it is made clear that he is not insane or mentally troubled." If he is free from such deficiency he should then be submitted to the legal punishment. It is therefore, most essential that the *qadi* (judge) assures himself of the sound mind of the criminal before he pronounces his verdict.

Sleep is considered to be a lesser death. If any crime is committed while still in sleep, one is not legally responsible for it provided it is ascertain that it was committed in a sleeping state. The case of Sayyidna ‘Umar’s son Ubaid Alah, who committed adultery with a sleeping woman, ‘Ubaid Allah was punished, the lady was acquitted.

The same principle will apply if one suffers from walking in sleep, although he looks aware, he is still sleeping and walking. If one commits a crime in that state, he will not be legally responsible.

If any crime is committed under force or duress, there will be no legal liability if it is proved that he did with a hadith which states “my community is excused for what it commits [sic]. The Holy Prophet has said: “My *ummah* will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness.” No punishment will be given for crimes committed under such a state of mind as negating responsibility for a criminal act.

[DISCUSSION OF SPECIFIC CRIMES]

ZINA (ADULTERY OR FORNICATION)

<i>Zina</i> defined	<i>Zina</i> is defined as: illegal relationship between a man and a women with a unique condition whether the offender is married or not
To <i>fuqaba</i>	<i>zina</i> is unlawful penetration. Also <i>zina</i> is sexual intercourse with a woman to whose sexual possession one has no lawful right.
Unlawful intercourse defined	This means hiding of glans or its similitude in a vagina, that means, anything outside this is not considered as <i>zina</i> .
<i>Ihsan</i> or <i>mushin</i>	The word <i>mushin</i> means a person who had married before. The punishment for such a person is stoning to death.
<i>Ghairu mushin</i>	This means a person who has never married before. The punishment is 100 lashes and imprisonment for one year, and for a slave half the punishment of a free man.

PROOF OF ZINA

- i. All jurists agree that proof for *zina* is by four witnesses.
- ii. Confession by an offender.
- iii. *Zuburil hamli lil biker* i.e. pregnancy without a legitimate father.

CONDITIONS OF THE PROOF OF ZINA

- I. Four witnesses with good character; if anything less than four testify their testimony cannot be accepted.
- II. All the witnesses must testify that they have seen the offenders in the actual act of *zina*. That is “the penis right inside the vagina.”
- III. That the witness must be direct. Hearsay evidence cannot be accepted e.g. if four witnesses testify that they have heard from four witnesses who saw the actual act of *zina*, such a testimony cannot be accepted.
- IV. All the four witnesses must testify all the same time and at the same place. One of the fundamental conditions of the acceptability is all the witnesses should testify at “same place” and at the “same time”.

BORNO STATE COUNCIL OF ULAMA: SOME PARTS OF CRIME AND THEIR PUNISHMENT

Testimony of a judge Punishment	The judge cannot be one of the witness The following conditions must be fulfilled before the <i>hadd</i> of stoning to death is applied: (i) The offender must be sane; (ii) He must be married; (iii) He must be matured; (iv) He must be a free man not slave.
<i>Zina</i> without <i>hadd</i> of stoning to death	The following marriages are null & void and the spouses, <i>ahwali</i> , <i>wakil</i> , witnesses & the imam who contracted such marriages are to be punished as follows: if it is with their knowledge and or consent: ₦20,000.00 fine or 12 lashes or imprisonment for one month The marriages are as follows: (i) Temporary marriage: <i>nikahul mutnuah</i> , that is marriage with conditions that it can be dissolved after a certain period. (ii) Exchange marriage: <i>shigar</i> – a marriage constituted based on arrangement that e.g. exchange of daughters or sisters in place of dowry; (iii) A marriage contracted to legalise a woman for her former husband in case of a woman given triple <i>talaq</i> . (iv) A marriage contracted without a marriage guardian (<i>wali</i>) and no witnesses.

LIWAT (SODOMY)

Definition Punishment	<i>Liwat</i> (sodomy or homosexuality) means anal sex between men. The punishment is <i>hadd</i> (stoning to death) whether the offender is married or not.
--------------------------	--

LESBIANISM (AL-MUSAHAKAH OR SHIAQ)

Definition:	Whosoever, being a woman engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another has committed the offence of lesbianism.
Punishment for Lesbianism	The punishment for lesbianism is imprisonment for not less than 6 months with 12 lashes.

BESTIALITY (WAD UL-BAHIMAH)

Definition:	If a person has carnal intercourse with any animal is said to have committed the offence of bestiality.
Punishment	The offender shall be given 10 lashes and the animal which was the subject of bestiality, should be tied on the neck of the offender and he should be made to go round the town or any public place with the animal on his neck.

SEXUAL INTERCOURSE WITH A DEAD PERSON

If a person has a carnal knowledge with a dead person, the punishment for such an offender is also by way of *hadd* (stoning to death) it is the same if the person is *muhsin* or *ghairu muhsin* i.e. married or not.

SEXUAL INTERCOURSE WITH A SLEEPING PERSON (WAD AL-NAIMAH)

There is no *hadd* on the sleeping person, but the offender should be punished accordingly i.e. if married 100 lashes and stoning to death if not married 100 lashes and one year imprisonment.

QADHF (FALSE ACCUSATION OF ZINA)

Qadhf defined

Whoever by words either spoken or reproduced by mechanical means accuses another person¹ of having unlawful sexual act in any form or expression and the accusation could not be established as true is said to have committed *Qadhf*. Also it is *Qadhf* if a person contests the paternity of another person.

Punishment for *Qadhf*

Punishment for *Qadhf* is eighty (80) lashes.

THEFT (SARIQAH)

Theft defined

If a person removes any property dishonestly and without consent takes any lawful property belonging to another out of its place or custody (*birz*) is said to have committed theft.

Provided that the property:

- (a) Have reach *nisab* 1/4 of *dinar*.
- (b) The person said to have stolen the property has no right of *shubaba*.
- (c) Is kept in a secured place.
- (d) The property is not entrusted to the person who was said to have committed the theft.
- (e) That the property is owned by someone.

The *hadd* of cutting the hands is applied after the following conditions are fulfilled:

- (i) The person who was said to have committed the theft must be sane.
- (ii) He must be an adult.
- (iii) He must not be compelled to commit theft.

¹ The person accused should be:

- | | |
|--------------|-----------------------------------|
| (i) Adult | (iv) Muslim |
| (ii) Free | (v) Potent |
| (iii) Decent | (vi) If a Lady, sexually capable. |

BORNO STATE COUNCIL OF ULAMA: SOME PARTS OF CRIME AND THEIR PUNISHMENT

Punishment for Theft	First offender: cutting off of the right hand from wrist Second offender: cutting off of the left feet from ankle Third offender: cutting off of the left hand from wrist Fourth offender: cutting off of the left feet from ankle The punishment is same i.e. by way of <i>hadd</i> if the offender is male or female, Muslim or non-Muslim. The only exception is: (i) A father who stole his son's property (ii) Slave who stole his master's property
----------------------	---

HIRABAH (HIGHWAY ROBBERY)

<i>Hirabah</i> defined:	<i>Fuqaha</i> (jurist) has resolved that <i>hirabah</i> is the use of arms on highway to rob people. According to Maliki law, even if the robbery was committed in town with the use of arms, it is considered as <i>hirabah</i> .
Punishment for robbery: (<i>al-hirabah</i>)	The court has a discretion to select the <i>hadd</i> and or it is for the court to consider the seriousness of the offence. According to Imam Maliki, once a person kills, he has to be killed, the court has no discretion over this. Once a robber kills, the discretion the court has is either to hang, execute or crucify him. But if the offender only robs without killing, the court cannot send him away from his home town, it can only crucify, execute or hang him. But if he puts his victim in fear the court has a discretion as to any of the punishments. The following punishments however have been prescribed for the offence of robbery depending on the nature and seriousness of the robbery committed thus: (i) If he robbed and killed: he can be executed and crucified, the court has no discretion (ii) If he kills but not robbed: he can be killed only. (iii) If he only robbed but did not kill, his right hand and left leg can be cut off. (iv) If he only puts his victim in fear, he can be sent away 40 miles from his home town or he can be imprisoned.
Proof of robbery	The offence of robbery can be proved by: (i) Admission or confession; (ii) Witness testifying to that effect; (iii) Victims testifying by themselves; (iv) Circumstantial evidence (<i>shahadatus simah</i>)
Condition for the award of <i>hadd</i> punishment	The robber(s) must be: (i) An adult (ii) Sane (iii) Male or female (iv) Slave or freeman (v) Armed – even if it is wood, stick or stone he uses, will be suffice.

BORNO STATE COUNCIL OF ULAMA: SOME PARTS OF CRIME AND THEIR PUNISHMENT

- As for the victim
- (i) He must be a Muslim or those whom we stay together i.e. (non-Muslim)
 - (ii) Lawful possession that is property lawfully owned.

SHURBUL-KHAMAR (DRINKING ALCOHOLIC DRINK)

Definition: Any fermented juice or grape, barley, dates, honey or any other thing which may make one intoxicated after drinking. It may also include any liquor or thing which has the same property e.g. Indian hemp, tablets, etc.

Punishment: Whoever drinks alcohols or any intoxicant voluntary, shall be punished with eighty (80) lashes no matter the quantity.

PROOF

- (i) Two witnesses with unquestionable characters testified that they saw the offender drinking alcohol or any intoxicant.
- (ii) If two witnesses testified that they smelt the odour of alcohol (wine) from the mouth of the person who was said to have drank alcohol.
- (iii) Confession by an offender.

The punishment for the following people is 15 lashes or imprisonment for six months:

- (1) Brewers (of alcohol)
- (2) Loaders
- (3) Sellers
- (4) Brewery owners

RECEIVING STOLEN PROPERTY

Defined Property, the possession whereof has been transferred by theft or by extortion or by *hirabah* and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is stolen property, whether the transfer has been made or the misappropriation or breach of trust has been committed within the state or elsewhere; but if such property subsequently come into possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

Punishment First offender(s) 5 years. Second offender(s) 5 years & 12 lashes.