

An Introduction to Islamic Criminal Justice

A Teaching and Learning Manual

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Introduction

Aims and Objectives

Over the years Islamic criminal law has attracted much media attention. 'In the West', writes Tariq Ramadan in *Western Muslims and the Future of Islam*, 'the idea of *Shari'a* calls up all the darkest images of Islam...It has reached the extent that many Muslim Intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all their work by the mere mention of the word'. This manual aims to equip the audience with the necessary tools to confidently challenge the misconceptions surrounding Islamic criminal law.

This teaching and learning manual has been developed with the aim of supporting teachers and students who have both an interest in Islamic Criminal Justice and a general interest in Islamic law. The content of this manual is equally educational, irrespective of whether the reader is part of a Muslim or non-Muslim jurisdiction. The present teaching manual is a part of an ongoing programme intended to make material available for a range of Islamic law modules. Accordingly, it is highly recommended that this be utilised with the companion *Sources of Islamic Law* manual, which provides a useful background to the origins and sources of Islamic law. Equally useful material is the *Glossary of Arabic Terms* which facilitates non-Arabic speakers in their understanding of some of the basic concepts of Islamic legal tradition. Finally *Approaches to Teaching and Learning Islamic Law* is an invaluable guide that should be read with this manual.

A course on the Islamic criminal justice system is important for a number of reasons. Firstly, similar to the conventional system, a crime is a public wrong and thereby brings laws relating thereto to the realm of the public. Islamic criminal law is therefore central to the entire Islamic legal system. Secondly, religio-political parties in a number of Muslim countries have increasingly been

advocating for the application of the Islamic criminal justice system within their respective jurisdictions. Countries such as Saudi Arabia, Iran, Sudan, Pakistan and Nigeria have demonstrated the application of the law in varying degrees. Thirdly, the use of the law has had wider implications. This is particularly so when one considers the compatibility of this law with international human rights treaties, to which the Muslim countries are party. These are but a few reasons as to why the Islamic criminal justice system has become an important, and arguably, the most discussed branch of Islamic law.

The central purpose of this module is to introduce students to the Islamic criminal justice system and initiates with preliminaries of Islamic criminal law. Students will be asked to consider the objectives of the law as well as criminal responsibility. The course reflects upon the *Qur'an*, *Hadith*, *Ijma*, *Ijtihad* and *Qiyas* as a means of providing an understanding of the Islamic legal tradition. Some crimes and the sentences imposed for the same have been criticised in the past and the module discusses specific crimes and the subsequent punishment imposed. The evidential law of crime and the interpretation of the same are examined through case studies involving Nigeria and Pakistan. Finally, the implications of the application of Islamic criminal law in the contemporary world are explored.

Teaching Methods

This manual is suggestive as to how a teacher may advance the course and has been tailored towards both the undergraduate and postgraduate level. The teaching and learning sessions are both indicative and flexible and allow for appropriate modification as to the assessment and teaching time. Accordingly, although this manual has been developed to fit into a half module to be run for ten lecture sessions in a term, this may be subject to appropriate change. It is also recommended that a two hour weekly lecture session coupled with a one hour seminar session every fortnight will be sufficient to

cover the course outline proposed. Furthermore, it is suggested that the seminars take the form of group work in order to advance the lectures.

The lectures should be used as a means of introducing the audience to various themes and issues that the seminars can expand upon. The students are encouraged to broaden their knowledge through reading and a comprehensive list of reading material has been provided for this purpose. This is particularly required when one considered the nature of the course. Islamic law comprises of law which has not been codified as it is in the west and this coupled with different interpretations of the primary texts leads to a divergence of opinions on similar topics. Students will need to familiarise themselves with these differences in order to reach their own conclusions in terms of the law. Generally, the discussions are mainly based on a classical Sunni interpretation of the law. However by way of critique, the last session examines the implications of the application of the law in the contemporary world. In order to develop understanding further, seminar questions have been introduced to enable lively discussion.

In order to maximise the understanding of this course, the glossary of Arabic terms should be used in conjunction with this manual. In order to both understand and remember key Arabic terms, it is recommended that the lecturer ask the audience to write down the relevant Arabic term before they are encouraged to repeat the word several times.

Course Outline

There are six topics which are considered to be an integral part of this manual. It is suggested that that these may be taught over a period of ten weeks, however this duration may be expanded or reduced at the discretion of the lecturer (see above).

1. Preliminaries and Sources of Islamic Law
2. Crimes and Punishments

3. Evidential Law of Crime (Proof)
4. Case Study One: Nigeria
5. Case Study Two: Pakistan
6. Implications of Applying Islamic Criminal Law

Assessment methods

For a course of one-term duration, it is recommended that the assessment take the form of either a two hour examination coupled with an assessed research piece of 2,500 words or a single supervised assessment of 5,000 words.

Materials

There is no single recommended text for this module but towards the end of each chapter, a recommended reading list for each chapter has been produced. It will be useful in practice to ensure that these texts are available in the library, or alternatively copies are incorporated into resource packs for the students. For a more detailed bibliography of Islamic criminal law publications, the companion manual *Islamic Law Bibliography* may be consulted.

Chapter One

Preliminaries and Sources of Islamic Law

Sessions One and Two

Objectives

- Identify the purpose of Islamic criminal Law
- Consider the different sources of Islamic criminal Law
- Understand the meaning of Islamic criminal responsibility and the exceptions available
- Critical analysis of criminal responsibility, sources of law and the interpretation of the same.

A discussion on the sources of Islamic law should be made part of the early topics to be introduced to students and detailed information on this subject can be found in the companion *Sources of Islamic Law* manual. It is recommended that this chapter is taught over two lectures and one seminar, further details of which are to be found in this chapter. The sessions should be tailored so as to accommodate students who potentially have varying degrees of exposure to Islam. It may be fair to assume that the majority students from non-Muslim Jurisdictions are more likely to have limited knowledge of the religion and little opportunity to develop Islamic thought. It is important that those students from Muslim jurisdictions consider whether the implementation of the laws they may be familiar with do in fact correspond with the spirit of the religion. A more detailed analysis of this area may be can be found in the companion *Course Manual on Sources of Islamic Law*.

1. Sources of Islamic Criminal Law

It is appropriate for the first lecture to begin with an introduction to the initial core sources of Islamic law: the Qur'an and the *Hadith*, before considering the secondary sources. It will be useful to discuss the Middle East prior to the Islamic period and the subsequent profound revelation to the Prophet Muhammad. It may be appropriate to discuss the timeframe involved for the revelation. The audience may be provided with information as to how the Qur'an came to be ordered following the death of the Prophet. The relevant verses of the Qur'an that lay down the foundations of Islamic law should be considered.

It may be appropriate at this juncture to discuss the respective roles of other key figures in early Islamic history and the subsequent emergence of Islamic law. The module should explore the differences between Sunni and Shia Muslims, which was based on an initial political difference between the two. The former sub-group evolved in terms of jurisprudence and consequently four major Sunni schools of law, namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* schools were created. The latter subsequently advanced three main schools of jurisprudence, namely *Athna Ashari'a*, *Zaidya* and *Ismailia*. It is vital that students appreciate that the evolution of Islamic jurisprudence has been heavily influenced by the understanding Sunni and Shia Muslims have of the sources of Islamic law.

It should be explained that the *Qur'an* directly provides for certain punishments such as murder and bodily injury (*Qisas*), theft, fornication, robbery and defamation (*Hudud*). It also provides for the prohibition of drinking alcohol. However, details of these offences and punishment for other capital offences such as adultery and drinking alcohol are provided by the *Hadith* as a second primary source. When discussing these sources, the lecturer should emphasise the supplementary relationship between the two. The audience may be asked to provide an example of where this might occur. A good way to illustrate this will be to mention that the *Qur'an* has prohibited and provided punishment for theft and it is the *Hadith* which provided the

conditions under which the punishment is to be carried out. It will be useful to make the audience aware that there are many translations and interpretations of the primary sources. It is therefore important to emphasise and highlight some of the on-going debates as to the significance of the *Sunna* of the Prophet and *Hadith*. An explanation as to the different types of *Hadith*, particularly in terms of era may be discussed.

The other sources to be considered are secondary ones. These include the consensus of opinion of Muslim jurists (*Ijma*), analogical deduction (*Qiyas*), independent reasoning (*Ijtihad*) and others. Why does Islam allow for the use of secondary sources? Quite simply, they provide a means of ensuring dynamism of the law since the primary sources are finite. In the area of discretionary punishments (*Ta'zir*) for instance, the offence could be an act criminalised through the consensus of jurists rather than any of the primary sources. How can this be illustrated? A good example to draw to the attention of the audience is that the punishment for drinking alcohol is in the form of 80 lashes. This is said to have been arrived at through analogical deduction by Ali, the fourth caliph. The secondary sources also tend to expand on the traditional offences.

An interesting scenario could be put to the following question to the audience in this regard: What would happen to a person found to be in possession of alcohol? Is this considered to be an offence under Islamic law and if so, what is the punishment? This point was considered by Abu Hanifa who reasoned that if such a man were to be punished, then a person may as well also be punished for adultery for simply possessing the sex organ.

2. Purpose of Islamic Criminal Law (*Maqasid*)

Joseph Schacht, an eminent scholar of Islamic jurisprudence once described Islamic criminal law as “the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself”. Furthermore, as an initial general observation, the attention of the audience

may be drawn to the similarity between the overall objective of an Islamic criminal justice system and other similar systems i.e., that is that both intend to build and maintain an orderly society.

Students may be asked at this stage to consider whether Islamic law can be divorced from Islam. It will be interesting to ask at the outset whether the audience thinks Islam has developed a unique approach towards the protection of life and property with the punishment it imposes for murder and theft. Do they feel that the methods are working? Types of punishments aside, can a comparison be made as to why punishment is imposed between an Islamic based and non-Islamic jurisdiction? What does the audience think are the main factors for punishment? Is it to act as deterrent to others or to punish the offender or are there any other reasons?

Another question that can be put at this stage is how the Islamic criminal justice system specifically seeks to protect Muslims and their faith by prohibiting apostasy. The students may be asked to consider whether Islam offers women protection under Islamic law. Final questions may be raised in relation to the reasons as to why students think alcohol is criminalised in Islam. An interesting point for consideration is that the British Medical Association states 'Alcohol misuse is associated with crime, violence and anti-social behaviour, and can impact significantly on family and community life.' This begs the question as to whether in light of such research; students have an appreciation as to why the consumption of alcohol is prohibited in Islam.

3. Criminal Responsibility

The lecture should now refer to the concept of criminal responsibility in accordance with the Islamic legal tradition. In order to engage the audience, they may be asked whether at this stage, they think that Islamic law would enable someone who had not committed a particular offence to somehow be responsible for it. What if this person was responsible for the one who committed the offence? Could liability be transferred in such circumstances? In this regard, an examination of the verses of the *Qur'an* which state that a

person shall be held responsible only for those criminal acts which he has personally committed is necessary.

Students may be asked to analyse and examine the implications of the following verses of the *Qur'an*:

- Say: "Shall I seek for (my) Lord other than Allah, whom He is the Cherisher of all things (that exist)? **Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another.** Your return in the end is towards Allah. He will tell you the truth of the things wherein ye disputed" (6:164).
- Who receiveth guidance, receiveth it for his own benefit: who goeth astray doth so to his own loss. **No bearer of burdens can bear the burden of another:** nor would We punish until We had sent down a messenger (to give warning) (17:15).
- **Nor can a bearer of burdens bear another's burdens.** If one heavily laden should call another to (bear) his load, not the least portion of it can be carried out (by the other), even though he be nearly related. Thou canst but warn such as fear their Lord unseen and establish regular Prayer. And whoever purifies himself does do for the benefit of his own soul: and the destination (of all) is to Allah (35:18).

Does the audience think that there are any exceptions to criminal responsibility? At what age must a person be held accountable for his actions according to Islamic tradition? In order to discuss this, reference to relevant verses of the *Qur'an* and traditions of Prophet Muhammad or his companions must be referred to. The audience may be asked to consider and discuss the fact that Ali, the fourth Caliph, once said "Do you know that no deeds good or evil are recorded (for the following) and are not responsible for what they do:

- An insane person till he becomes sane;
- A child till he grows to the age of puberty;
- A sleeping person till he awakes (Al-Bukhari).

How does Islam define an 'insane' person? Importantly, Islamic law protects those persons who fall within this category. An example that the audience can be provided with is that a guardian is usually appointed in order to protect the property of such an individual. Such a person is also not under an obligation to fulfil the five pillars of faith. Another interesting point that could be raised is that from a comparative perspective. It has been stated that the concept of 'not guilty by reason of insanity' was established at the time of the Prophet. It was approximately seven centuries later that the first acquittal of an individual based on mental state was recorded in the Western world (Pridmore & Pasha, 2004).

In terms of a child who reaches puberty being criminally responsible, do the Islamic schools of thought adopt an objective or subjective test? How does this test differ to the English jurisdiction?

An interesting discussion could take place in respect of the sleeping person. According to Islamic tradition, what should happen to the man who murders his wife whilst he is asleep? This is what happened in the British case involving the sleepwalker, Brian Thomas and this case could be referred to. It will be useful to see the similarity between Islamic criminal responsibility and the decision made by the prosecution to withdraw the case against the husband who suffered a long-standing sleep disorder.

What should happen to a person who is forced to utter words that may be construed as amounting to renouncement of religion? Is such a person criminally liable? It has been related that Ammar bin Yassir, together with his parents, was made to utter words which could be construed as recantation under duress. The Prophet confirmed that this does not amount to disbelief. Later verse 106 of chapter 16 of the *Qur'an* was revealed and this endorsed the prophet's judgement.

Seminars

This topic is such that the teaching of it can be covered in either one or two seminars. This may be determined by the familiarity the students have with Islam and its development. Students should be encouraged to critically assess the information provided in both the lectures and reading. Below are two suggested seminar structures.

Seminar One: The *Hadith* and the *Sunna*

1. What is the position of the *Qur'an* and *Hadith* as a primary source of law?
2. Define how the divine character of the *Qur'an* impacts on the development of the law.
3. When did the *Hadith* become a source of law during the development of Islamic law?
4. Describe and explain the relationship that exists between the *Qur'anic* provisions and *Hadith*.
5. Why are some *Hadith* and the contents of the same questioned amongst some circles?

The seminar should include:

- a discussion on the main points of difference between the four schools of Sunni juristic thought in Islam, with particular reference to their respective positions on *Hadith* as a source of Islamic law
- how Islamic law developed and key relevant figures in this regard
- an examination of certain European scholars on the nature, scope and legitimacy of *Hadith* as a source of Islamic law
- students should be asked to identify the key features of the classical and modern theory on *Hadith* literature

Seminar Two: Secondary Sources

1. What is *Ijma* and the legal basis for this?
2. What are the requirements for *Ijma*?
3. When *Ijma* is invoked, does it mean a new interpretation of an existing law or a new law altogether?
4. Does *Ijma* as a source of law have any boundaries, if so, what are these?
5. Define *Qiyas* and *Ijtihad* and the differences between the two
6. How has *Qiyas* and *Ijtihad* influenced the development of Islamic law, if at all?
7. It has been said that the gate of *Ijtihad* has been closed. What does this mean?

The seminar should include:

- How some areas of Islamic law have remained stagnant for centuries and in others has evolved significantly.
- When the majority of development occurred and the reasons for this.
- Whether Islamic law is likely to develop further and what is likely to encourage this development.
- Discussions on the 'closing of the gates of *Ijtihad*' which was forwarded by Joseph Schacht and Noel Coulson.

Assessment: Essay Question

1. Describe and evaluate the emergence of the four Sunni schools of Islamic law and their role in the evolution of Islamic law.

The essay should include:

- A discussion on the history of the schools of Islamic law and both their similarities and differences.
- An examination of how the four schools have evolved over the centuries and the contributions they have made towards the formation of Islamic law.
- An evaluation of the different schools as they stand today in different jurisdictions

2. Describe and evaluate the emergence of *Sunni* and *Shia* sects and the main similarities and differences between the same.

The essay should include:

- The key factors that have contributed towards the shaping of *Sunni* and *Shia* identity.
- A comparison of the interaction between these two communities in the pre-modern and medieval eras.
- An examination of the differences in the application of Islamic law in differing jurisdictions.

Reading

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N.J.Coulson, *A History of Islamic Law* (1964) Edinburgh: Edinburgh University Press
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W. B. Hallaq, "Ifta' and Ijtihad in Sunni Legal Theory: A Developmental Account" in
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Supplementary reading

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University Press pp. 1-39

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M.A.Mannan (ed.,) *D F Mulla's Principles of Mohammadan Law* (1995) Lahore: PLD
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Chapter Two

Crimes and Punishments

Sessions Three and Four

Objectives

- Acquaint students with different classes of offences
- Understand the major ingredients of the offences
- Consider the punishment for the offence and sources from which this has been derived
- Identify the purpose for these punishments

The practice of Islamic criminal law has often attracted fierce criticism and debate from across the globe. There appears to be an assumption, albeit arguably misguided, that punishments such as flogging and stoning to death are practices which Islam is ready to implement. It would be worth asking at the outset what the general consensus of the class is in this regard. Have their answer been influenced by the media? Has the interpretation of Islamic Law been distorted by leaders so as enable them political gain? Have the countries that have employed Islamic criminal law succeeded in terms of a reduced rate of crime? In order to address whether the critics of Islamic criminal law are justified in their claims or whether their arguments are flawed as a result of misconception, close examination of the law is required.

It is at this juncture that the lectures should delve into substantive Islamic criminal law. It will be useful to consult the 'table of offences' which can be found towards the very end of the manual. For purposes of clarity, it is recommended that the session discuss the three traditional Islamic classifications of offences which are as follows:

1. Law of Equality (*Qisas*)

Useful questions to put at the outset include whether the law of equality exists in Islam. If so, does the audience think the authority is derived from the primary or secondary sources? The attention of the audience could be drawn to the following verse from the *Qur'an*:

And therein we prescribe for them: a life for a life. An eye for an eye. A nose for a nose. An ear for an ear, a tooth for a tooth (5: 45).

Does this verse have a sense of familiarity? Can a comparison be drawn between this content of this verse and that of other major religions? What could the possible reasons have been behind this verse? It needs to be emphasised that the original purpose of the law of equality was to take care of the pre-Islamic custom of retaliation whereby the killing of one person, especially of a noble family or clan was often retaliated with the killing of many persons. Can this practice be adopted in all circumstances or are there any exceptions? It must be made apparent at the outset that the doctrine of equal punishment cannot be applied in all circumstances. There must be either a premeditated murder or an intended crime (with the exception of homicide). The loss of a limb or organ must be a result. The act of *qisas* must be proportionate to the injury to the victim and not excessive of it in any way.

(i) Intentional Killing or Homicide (*Qatl al-'amd*)

Does the *Qur'an* say anything about intentional killing? If so, what position does it take in respect of this? Homicide is prohibited because life is sacred and shall therefore not be taken as is provided by the law. *Qur'an* 6:151 may be referred to as follows:

Say: "Come, I will rehearse what Allah hath (really) prohibited you from": Join not anything with Him; be good to your parents; kill not your children on a plea of want, We provide sustenance for you and for them; come not nigh to indecent deeds, Whether open or secret; **take not life which Allah hath made sacred, except by way of justice and law**: thus doth He command you, that ye may learn wisdom. (6: 151)

Considering the act of retaliation must be proportionate, what would happen if the act went beyond that which the original injury inflicted? It would seem that the retaliator has also now broken the law. Must he also be subject to some form of punishment as a result? It would seem so.

Does the *Hadith* say anything of the law of equality? Does it also correspond with the *Qur'an* and also prohibit homicide and confirm the death penalty for the offence?

Ibn Mas'ud narrated that the prophet said: "The blood of a Muslim who testifies that 'there is no god but Allah and that I am Allah's Messenger' may not be lawfully shed but for one of three reasons: a married man who commits fornication; a life for life; and one who turns away from his religion and abandons the community (Bukhari & Muslim).

(ii) Killing by Mistake (*Qatl al-khat'a*)

Is the notion of an 'eye for an eye' equally applicable in circumstances where death resulted from some form of mistake? Can traces of the British mens rea have existed in an Islamic society fourteen centuries ago? It would seem that killing by mistake does not technically form part of *qisas* because it is not punishable with death. But it is still relevant because it touches on issues which border on the relationship between a Muslim state and a non-Muslim state. For this reason, the lecture should distinguish between whether the deceased belonged to:

- a. A Muslim state;
- b. A non-Muslim state at war with Muslims; and
- c. A state with which Muslims have a treaty of mutual alliance.

In cases a. and c., compensation (*diyyah* or blood-money) is payable to the family of the deceased, in addition to freeing a believing slave. The family are entitled to remit the compensation. In case b., freeing a believing slave is enough because increasing the resources of the enemy by payment of compensation is thought to be unwise. If the person who killed by mistake cannot afford freeing a slave or paying compensation, a fast for two consecutive months is prescribed. Qur'an 4:92 may be cited as authority for this position of the law:

“Never should a believer kill a believer, except by mistake. And whoever kills a believer by mistake, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to people at war with you, and he was a believer, the freeing of a believing slave is enough. If he belonged to people with whom you have a treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, a fast for two consecutive months is prescribed by way of repentance to Allah for Allah hath All knowledge and All wisdom.”

(iii) Killing of a Non-Muslim

It will be interesting to ask the audience what they think the Islamic position is in respect of this prior to discussing the law. It should then be explained that although invariably Muslims live together with non-Muslims, under classical Islamic law the two do not enjoy the same rights. The verses and Hadiths above on intentional and mistaken killing refer to situations where the deceased was a Muslim. Perhaps the starting point would be the general position of the law. This is that a Muslim is not killed for the killing of a non-Muslim who belonged to a state at war with the Islamic state. But what if the deceased non-Muslim belonged to a state which has entered into a covenant with the Islamic state (known as Mu'ahid)? It is commonly agreed by scholars that his Muslim killer shall be killed. Where the deceased non-Muslim is a dhimmi (a tax-paying non-Muslim living within the Islamic state and therefore under its protection) reference to the various views of Muslim scholars should be made. For instance, Shafi'i, Maliki and Hanbali schools opine that his Muslim killer shall not be killed in punishment whereas the Hanafi school opines that the Muslim must be executed.

These views are based on a number of Hadiths and reference to some of them would give a better understanding of the views. For instance, Ahmad,

Abu Da'ud and An-Nasa'i reported a Hadith from Ali wherein he said "the lives of all Muslims are equal; the lowliest of them can guarantee their protection, and they are one band against others. A Muslim should not be killed for a kafir [non-believer], nor should one who has been given a covenant be killed while his covenant holds."

On the other hand, Abdur-Rahman bin Al-Bailamani narrated that the Prophet killed a Muslim for a man who had made a covenant and said "I am the most worthy of those who guarantee their protection."

(iv) Bodily Injury

In order to engage the thought processes of the audience, an interesting exercise would be to consider the potential application of the law of equality in recent times. The supermodel Naomi Campbell has previously entered a guilty plea to an allegation of reckless assault. The victim was her housekeeper and it was alleged that she had thrown a mobile phone at her. The injury sustained as a result of the assault required four stitches. According to the rule of *qisas*, what punishment should have been given?

What would happen if the housekeeper did not wish to exercise her Islamic right of retaliation and instead opted for some form of compensation? Is this an acceptable practice within Islam? What do the primary sources say in this regard? This is an appropriate time to discuss the concept of blood money or *diyyah*, which may be applied in circumstances where certain unintentional injuries have been inflicted. Where the law of equality applies, the victim or his family are entitled to dispense with the physical punishment and accept blood money as an alternative. This has been specifically stipulated in the *Qur'an*:

O ye who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude, there is a concession and a Mercy from your Lord. After this whoever exceeds the limits shall be in grave chastisement (2: 178).

If the housekeeper chose to exercise her Islamic right to compensation, how much money is she entitled to? How is the amount a victim is entitled to calculated? According to one Hadith it seems that this is dependent upon both the location of the injury and the wealth of the accused. Abu Bakr bin Muhammad bin Amr bin Hazm narrated on his father's authority from his grandfather, that the Prophet wrote to the people of Yemen that if anyone kills a believer intentionally, retaliation is due unless the relatives of the deceased are willing to do otherwise; blood money for a life is hundred camels; full blood money must be paid for the complete cutting off of a nose, the eyes, the tongue, the lips, the penis, the testicles, and the backbone; for one foot half the blood money must be paid, for a wound in the head a third of the blood money, for a thrust which penetrates the body a third of the blood money, for a head wound which removes a bone fifteen camels, for each finger and toe ten camels, for a tooth five camels, and for a wound which lays bare the bone five camels; that a man may be killed in retaliation for a woman; and that those who have gold should pay a thousand dinars (Abu Da'ud).

Miss Campbell was sentenced to five days community service and ordered to attend an anger management course. She was further ordered to pay medical bills amounting to £185.00. In light of the sentence given, does the audience think the housekeeper may have been happier with an Islamic court dealing with this matter? Can the audience see how some people may opt for recourse in the Islamic courts if they had this opportunity available to them? If

the housekeeper was feeling particularly forgiving, she could of course have also pardoned the offender and not received any form of compensation.

2. Capital Offences (*Hudud*)

How does one begin to teach arguably one of the most controversial aspects of the Islamic criminal justice system? Let us start with a definition. The term *Hudud* (which is plural for hadd) means a restraint or prohibition. It refers to offences specified in the primary sources of the *Shari'a*, which comprises of the *Qur'an* and *Sunna* and their punishments are prescribed therein. Offences that fall within this category are considered to be offences against Allah or offences against public justice. These offences and their subsequent punishments have been clearly specified in the primary sources. It was intended that these be defined with such clarity so as to remove any trace of ambiguity, both in terms of the ingredients required for establishing the offence and the punishment allocated. Accordingly, once a *hudud* offence has been established and the conditions for applying the punishment satisfied, the court is divested of any discretion in the matter.

The audience may be informed of the types of offences that fall within this category. This includes defaming chaste women (*qazf*), highway robbery (*hiraba*) and apostasy (*ridda*). For the purposes of this manual however, three separate offences of adultery and fornication (*zina*), theft (*sariqa*) and drinking alcohol (*shurb al-khamr*) will be considered in further detail. The audience ought to be made aware that there is controversy as to whether drinking alcohol and apostasy forms part of *Hudud* (El-Awa 1982; Kamali 1998, 2008).

(i) Adultery and Fornication (*Zina*)

This topic may be of interest to students, particularly amongst those from non-Muslim jurisdictions where consensual intercourse between adults is not illegal. What is the definition *zina*? The point should be made from the onset that under the Islamic legal tradition, both adultery (involving married persons) and fornication (involving non-married persons) are referred to as *zina*. This is

the act of sexual intercourse between a male and a female who are not married to one another. Their consent is irrelevant. The audience should be made aware that actual physical penetration is an essential ingredient for the offence of zina and any act which falls short of this does not suffice. In accordance with both the Qur'an and the Hadith, men and women are to be equally punished for committing this offence.

The audience could be encouraged to think of why this is an offence within Islam. It should be stated that the purpose of criminalising zina is as a means of protection of people and their families. Authorities may be cited in this respect and may include the Qur'anic provision 17:32, which prohibits coming near to zina. According to the Hadiths, the Prophet Muhammad stated that there is no sin after associationism (shirk) greater in the eyes of Allah than a drop of semen which a man places in the womb which is not lawful for him (Al Bukhari, Kitab al- Hudud).

What are the ingredients for the offence of zina? What is the required standard of proof for an offence of zina? How does this compare with the English standard of 'beyond all reasonable doubt? The Islamic criminal standard of proof is by contrast far more stringent and requires solid proof beyond any shadow of doubt that the accused has committed zina. This is perhaps one of the most difficult standards ever to have been set in any jurisdiction. Why is this standard almost impossible to meet? Furthermore, how can one be so sure that an unlawful act has indeed taken place? Muslim jurists have unanimously agreed upon the following two means of proving zina:

- (a) A confession made by the accused which is clear in its entirety and made of his free will. This must be made four times and before a Judge (*Qadi*). Should the confession be subsequently withdrawn, then this is his entitlement and he must not be punished on the basis of this confession alone as there is no longer any proof that the prohibited act occurred.

How does this compare with a person whom, without legal representation at the police station confesses to committing an offence? His own evidence may be used against him despite any subsequent withdrawals of his confession and irrespective of the severity of the offence of which he is accused.

- (b) The testimony of four reliable Muslim male eye-witnesses and it is generally agreed that they all must have witnessed the actual intercourse at the same time.

What is the opinion of the audience now in terms of the general assumption that Islam readily wishes to find a person guilty of *zina*? Can the possibility of obtaining witness evidence be considered remote? What would happen if an accusation is made but cannot be proved? The *Qur'an* specifically deals with the issue of false accusations being made against chaste righteous women and whilst it offers women protection, it also stipulates that the punishment for those who make such false accusation is 80 stripes.

It is appropriate now to speak of the punishment for this type of offence and the sources from which this has been derived. In the case of fornication, the *Qur'an* (24:2) provides 100 stripes punishment and the *Hadith* has added that the guilty person also be exiled for one year. But from where does the act of stoning to death as a means of punishment originate from? Scholars submit that the punishment for adultery is not provided in the *Qur'an*. It is in fact found in the *Hadith* one of which was narrated by Ubada bin As-Samit that the Prophet said: "Take from me accept from me, undoubtedly Allah has now shown path for them (adulterers). For unmarried persons (guilty of fornication), the punishment is 100 lashes and an exile for one year. For married adulterers, it is 100 lashes and stoning to death" (Muslim).

In order to engage the audience it may be appropriate to bring to their attention the Turkish case of Medine Memi. This teenager was buried alive because of her alleged 'friendship' with boys. At the time of publication of this manual, the victim's father and grandfather were due to be tried in respect of

this 'honour killing'. The audience may be asked some pertinent questions at this point. Is it permissible in Islam to take the life of someone who has a 'friendship' with the opposite sex? It is acceptable that this killing is said to have been carried out by her relatives? Would the situation be different if, for the same reasons, she was killed by others? She was not accused of having a physical relationship with the boys, is this relevant? Does it matter how many people witnessed this 'friendship'? Does Islam allow for any circumstances where an individual may be buried alive?

The audience may be reminded that *zina* will be discussed in much greater detail later in the module.

(ii) Theft (Sariqa)

There is no dispute that the act of theft is strictly forbidden in Islam. The main purpose for which theft is prohibited is to protect property. There are specific *Qur'anic* and Prophetic provision in this regard and it is suggested that these should be discussed. The *Qur'an* states "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property" (2:188). The Prophet is said to have stated during his farewell pilgrimage in 632 A.D. that "your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection."

What are the strict conditions under which punishment is applied? The following is a useful guide:

- (i) British courts may take the value of the item stolen into consideration for the purpose of determining whether it is in the interest of the public to prosecute. Similarly, Islamic criminal law requires a minimum value (*nisab*) for the stolen goods. It is stipulated that this must at least be a quarter of a dinar or the equivalent. Aisha narrated that the prophet said: “A thief’s hand should not be cut off except for a quarter of dinar and upwards” (Bukhari & Muslim). Are the views of the different schools identical in this regard? The *Maliki* School relies on this *Hadith* for fixing the *nisab* at a quarter of *dinar* minimum. The Hanafi School on the other hand fixes the *nisab* at 10 dirhams and relies upon a *Hadith* reported by Ibn Abbas.
- (ii) The stolen property must be owned by someone and must be under care and punishment (*hirz*). Theft of government property does not attract the punishment because the thief is a part-owner. He could be punished by other means.
- (iii) The thief must have been reasonably provided for by the state. The second caliph, Umar bin Al-khattab, is said to have suspended the punishment for theft during a period of starvation.

The audience may be asked to consider several different scenarios. What would happen if a guest is invited into the home of the victim and from within it he steals an item that was on display? Some scholars are of the opinion that invited guests cannot be charged with an allegation of theft in this case. Is an accessory who handles stolen goods subject to punishment under *hadd*? It would seem that although this is an offence and is punishable, this does not fall within the *hadd* category. The consumption of both alcohol and pork is strictly forbidden in Islam. If either of these two items were stolen, can the accused be punished for an offence? It would appear not, as the only goods which can be subject to an act of theft are chattels that are capable of being

owned by a Muslim. What if a sister steals from her brother? It would seem she will escape punishment under *hadd* as the taking of property belonging to a near relative is an exemption.

The lecturer should not avoid the controversial aspect of the topic which is the punishment for theft. This takes the form of amputation of the hand and is provided in *Qur'an* 5:38. The discussion could even reiterate the point that the punishment is applied strictly by making reference to the *Hadith* narrated by Aisha. The Prophet, following a plea of mitigation to him on behalf of a thief woman from an influential clan (called Makhzumi), said: "Are you interceding regarding one of the punishments prescribed by Allah?" He then got up and gave an address saying: "O people, what destroyed your predecessors was just that when a person of rank among them committed theft, they left him alone; but when a weak person among them committed theft, they inflicted the prescribed punishment on him" (Bukhari & Muslim).

It is also important to draw the attention of the students to the various approaches of jurists towards the actual form of punishment. For instance, according to the Sunni schools, the form of punishment for theft is amputation of the right hand from the wrist, but the Shiites amputate the four fingers. Reference to the different opinions of jurists when theft is committed by a group of people would also be useful. According to Imam Malik for instance, if the value of the stolen property reaches *nisab*, the hand of each of them should be amputated. But with Imam Abu Hanifa the punishment applies if the property is divided amongst the thieves and each portion reaches the *nisab*.

(iii) Drinking Alcohol (*Shurb al- Khamr*)

Can Shakespeare shed some light as to one of the reasons why alcohol may be forbidden in Islam? It seems he can. 'O God, that men should put an enemy in their mouths to steal away their brains! That we should, with joy, pleasance, revel, and applause, transform ourselves into beasts!' William Shakespeare, *Othello*.

To include the offence of drinking alcohol amongst class discussions is important for a number of reasons. Firstly, the Prophet described it as “the mother of all vices” (*Umm al-Khaba’ith*) because its intoxication effect could potentially lead to the commission of further offences. In order to engage the audience, it may be useful to put relevant questions to them. Do they think that there is any truth in the belief that alcohol can lead to the commission of further offence? Were they aware that the British Medical Association advised an All Party Group of MPs that alcohol is a factor in 60-70% of homicides, 75% of stabbings, 70% of beatings and 50% of fights and domestic assaults (Alcohol and Crime: Breaking the Link. All-Party Group on Alcohol Misuse, July 1995).

Secondly, the prohibition of alcohol took a gradual approach which thereby indicates that Islamic law follows a tactical approach, especially in matters which are very sensitive. Accordingly, the lecture should discuss how the Qur’anic provision recognises that there is both sin and profit in drinking alcohol, though the sin is greater than the profit (2:219). This should be followed by a later Qur’anic verse which prohibited drinking alcohol at a time when its effects would affect one’s state of mind in prayers (4:43). Then finally to the point when the practice was prohibited completely (5:90-91).

By way of definition, it would be useful to refer to the *Hadith* which Ibn Umar narrated that the Prophet said: “Every intoxicant is khamr (wine) and every intoxicant is forbidden” (Muslim). Similarly, Jabir also narrated that the Prophet said: “if a large amount of anything causes intoxication, a small amount of it is prohibited” (Ahmad and Al-Arba’a).

What is the punishment for drinking alcohol? The lecture should state that generally, drinking alcohol is punishable with 80 lashes. It must be specifically mentioned however that this punishment is not provided for in the *Qur’an* but it is rather derived from a *Hadith*. Anas bin Malik narrated that a man who had drunk wine was brought before the Prophet and he gave command regarding him and the man was punished with about 40 stripes with two palm branches.

Anas said Abubakar also did that but Umar became the caliph, he consulted people and Abdur-Rahman bin Auf said “the mildest punishment (for drinking wine) is 80 (stripes)”. So Umar fixed that (Bukhari & Muslim). The *Maliki*, Hanafi, and Hanbali schools of thought all follow this tradition but the Shafi’i school limits the punishment to 80 stripes

3. Discretionary Punishments (*Ta’zir*)

A study of *ta’zir* is necessary because it is inconceivable that the *Qur’an* and *Hadith* will provide for all offences. Students should be made to understand that this category of offences is meant to accommodate minor offences. It is also with the view to giving corrective punishment at the discretion of the Judge. In particular, the lecture should cover the instances where *ta’zir* is applied and traditionally, these are as follows (Benmelha in Bassiouni 1982):

- (a) Acts that technically do not amount to either *qisas* or part of *hudud*. Examples include theft of an item, the value of which is below *nisab* and illicit sexual acts which do not amount to intercourse.
- (b) Offences which are normally punished under *hadd* but because of some doubts (*shubha*) or because of want of required proof, they cannot be so punished, although it is plausible that the accused person is guilty of the offence. An example to illustrate this point is that a man may be punished under *ta’zir* if it is established that he stayed with a prostitute in a secluded place for a long time. This is because it is probable but not certain, that he has committed the offence of *zina*.
- (c) Acts which are prohibited in the *Qur’an* or *Hadith* or are contrary to public welfare but which are not under *qisas* or *hudud*. Examples include the consumption of pork, usury, embezzlement or breach of trust by a public officer, false testimony and bribery. This list is not exhaustive.

- (d) Acts that violate Islamic norms such as obscenity, provocative dress or a wife's refusal to obey her husband.

The lecture should also briefly mention the forms of punishment allocated under *ta'zir*. The most common forms are flogging, imprisonment or banishment, public rebuke, exposure to public scorn (*tashhir*), or warning. It could even take the form of a death sentence when the offence involved is so serious. What constitutes a 'serious' offence? These include spying for the enemy, homosexual acts, spreading heresies or sorcery. The *Maliki* School amputates the right hand in the case of forgery of documents.

In the case of flogging, mention should be made of the varying juristic views on limits. For instance, the *Malikis* do not have a limit and the punishing authority determines the amount of times a person is to be lashed. Other schools opine that the number of lashes may not exceed those allocated for *hadd* offences. Because the schools differ on the number of lashes in the *hadd* offence of drinking alcohol (e.g. it is 40 lashes under Shafi'i), their maximum numbers also vary. Thus according to the *Shafi'is*, the maximum lashes should be 39. The Hanafi School too fixes 39 but on the basis that it is one less than the least *hadd* punishment for drinking alcohol (i.e. by a slave). Some Shafi'i and Hanbali scholars opine that *ta'zir* should not exceed 10 lashes based on the *Hadith* narrated by Abu Burda Al-Ansari which says "No more than 10 lashes are to be given except in the case of one of the punishments prescribed by Allah the Most High [i.e. *Hudud* crimes]" (Bukhari & Muslim).

Seminars

Seminar One: Offences

1. Discuss whether a Muslim may be killed for the killing of a non-Muslim and why.
2. Does the consumption of alcohol form part of *hudud* offences or *ta'zir*?
3. Discuss the conditions under which the punishment of theft is ordered under the Islamic criminal law.
4. What are the requirements for the establishment of the offence of *zina*?

The seminar should include:

- A discussion on the main points of murder with and without intention and killing of a Muslim and non-Muslim.
- An examination of blood money and compensation
- A definition of *hudud* and *ta'zir* offences and the differences between the two.
- A discussion on the punishments that are both stipulated and absent in the *Qur'an* and *Hadith* as well as the differences between the contents of *Hadith* in terms of punishments.
- A definition of theft and the standard of proof required.
- An examination of *hirz*, *nisab* and the prevailing economic situation as factors to be considered in the application of the punishment.
- A discussion to distinguish between the two types of *zina* (adultery and fornication) and the standard of proof required for the offence
- Examine the juristic views on pregnancy or childbirth out of wedlock as proof of *zina*

Seminar Two: Punishment and Provisions

1. It is commonly agreed that *Qisas* and *hudud* have not exhausted crimes under Islamic law. Although an act could be classified under *hudud*, it may not be so punished due to some technical shortcomings. However, no blameworthy act should be left unpunished.

What provision does Islamic law make in situations like these?

The seminar should include:

- A definition of *ta'zir* and examples of how it may be distinguished from *qisas* and *hudud*
- Identification of the offences which fall under *ta'zir*
- A brief discussion on the forms of *ta'zir* punishment

Assessment: Essay Question

1. Islamic law protects life through its (criminal) law of equality (*Qisas*) whereby life is generally taken for a life. However, this form of punishment depends not only on the accused person's *mens rea* but also on whom the deceased person was and what his/her relatives desire in terms of punishment.

Discuss *qisas* in relation to the above statement.

The essay should include:

- An examination of the law on killing a Muslim intentionally
- The role of the relatives of the deceased in respect of the punishment.

- The law surrounding the killing of a non-Muslim

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Chapter Three

Evidential Law of Crime (Proof)

Session 5

Objectives

- Inclusion of the procedural aspects of evidence
- Introduction of the standard of proof in criminal matters
- Comparison of the evidence of women and men
- Distinction between the different form of proof

1. Shahada

The lecture should first focus on *shahada*, which is the general rule of testimony and is the testimony of two male witnesses or one male and two female witnesses. From where does this rule originate? This is based on the provision 2:282 of the *Qur'an*. Discussions may be initiated on the two-female-equal-one-male principle as the general classical view for it is not as simple as it is often presented. Is this rule interpreted accurately? It is important to point out that jurists have generally agreed that the provision on testimony was revealed by way of instruction rather than binding legal precept. It may therefore be argued that it is not necessary to maintain the inequality (Al-Alwani 1996; Shah 2006).

Another point to consider is that although *Qur'an* 2:282 was revealed in the context of a financial transaction, it is the basis for general evidential requirements in other aspects of Islamic law, including crime. Students may also be encouraged to challenge the argument that the testimony of women is not admissible in *hudud* offences and especially that the view is not consistent with numerous verses of the *Qur'an* (Shah 2006).

The lecture should also do some comparative analysis between the evidential requirement in civil and criminal matters. For instance, while incomplete evidence (e.g. testimony of only one witness), is made good by taking an oath in civil matters, this is not the case in criminal matters. Similarly, a judge's personal knowledge is irrelevant although under Hanafi, Shafi'i and Shiite Schools it may be sufficient proof in other matters.

Can the audience think of any offences where there exists an exception to this general rule? The lecture should proceed to discuss the offence of *zina*. This requires the testimony of four (male) reliable witnesses who must have seen, at the same time, the **actual** act of sexual intercourse taking place.

Students may be asked to examine why the proof of *zina* has been made so rigid. By way of a guide, the students may be referred to *Qur'an* 4:15. This originally laid down the requirement of four witnesses in cases of *zina* and it may be useful to initiate discussions on this. They may also be referred to *Qur'an* 24:4, which deals with defamation of character and demonstrates the implication of failing to produce four reliable witnesses in charges of adultery. It may be added that the requirement of *zina* was so hard to satisfy that no case was established by means of witnesses throughout the lifetime of the Prophet. Although the Prophet had himself applied the punishment of stoning, this was always on the basis of confession.

2. Confession (*Iqrar*)

The other form of proof to be considered is *iqrar*, which is a confession. When applying punishment, a number of *Hadiths* may be referred to as authority for the reliance upon a voluntary confession.

Abu Huraira narrated that a Muslim came to the Prophet in the mosque and said “O Messenger of Allah, I have committed fornication.” The Prophet turned away from him and the man came round facing him and he repeated the confession. He turned away from him till he repeated it four times. Then the Prophet asked him “Are you mad?” He replied “No.” He asked “Are you married?” He replied “Yes.” The Prophet then said “Take him away and stone him to death” (Bukhari & Muslim).

Imran bin Husain also narrated a similar *Hadith* where a woman of Juhaina came with pregnancy to the Prophet and confessed conceiving it through adultery. The Prophet ordered that she be taken care of until after delivery. After she delivered, she was brought back to him and he ordered her to be stoned to death (reported by Muslim). Jabir bin Abdullah narrated a similar *Hadith* as it happened on a man from the tribe of Bani Aslam (reported by Muslim).

By analogy to the requirement of four witnesses in testimonial evidence, the Hanafi, Hanbali and Shiite Schools opine that a confession to *zina* must be repeated four times in court. What are the advantages and disadvantages of this?

Abu Umaiya Al-Makhzumi narrated that a thief who had made confession was brought to the Prophet but no goods were found with him. The prophet told him “I do not think you have stolen” and the man replied: “yes I did”. He repeated it for him twice or thrice, so he gave command regarding him and his hand was cut off (Abu Dawud and Ahmad and An-Nasa’i).

3. Circumstantial Evidence

There are other important issues which may be raised in respect of proof. One of them is circumstantial evidence (*Qara'in*). Students may be asked to investigate whether circumstantial evidence is admissible in proof of *hadd* or *qisas* offences. The audience may be asked to provide their opinion as to whether a person, whose breath smells of alcohol, ought to be punished. The differences of opinion among jurists may provide important materials with which to discuss the issue. For instance, according to Imam Abu Hanifa and Imam Shafi'i, the smell of wine from one's mouth is not sufficient proof to apply the punishment for drinking alcohol. They argue that the smell could be of something else which resembles wine. But the *Maliki* and Hanbali Schools accept the testimony of two witnesses to the effect that the accused person reeks of alcohol as proof of alcohol consumption. (Peters 2005: 15).

It may be pertinent to also ask specifically whether circumstantial evidence in a trial for *zina* is admissible. One could consider in particular, pregnancy or childbirth outside of wedlock and whether this is permissible. It should be noted that the majority of jurists do not consider pregnancy or childbirth of an unmarried woman as proof of *zina*. However the *Maliki* School does provided it is outside the *iddah* period. If she pleads that she was a victim of rape, she must corroborate her plea by producing circumstantial evidence such as screaming for help. But defences such as she was impregnated during her sleep and it was unknown to her, or that pregnancy resulted from petting without penetration are accepted without corroboration.

It may be relevant to cite case law from Nigeria, which is a *Maliki* jurisdiction, at this juncture. Safiya Hussein and Amina Lawal were sentenced in Sokoto and Katsina States respectively to stoning to death. This was a decision made by the lower courts and was based on the fact that they both had children outside of wedlock. This decision was made in light of the *Maliki* principle. Both sentences were however quashed as a result of subsequent appeals. In

addition to technical grounds, the appellate courts held that pregnancy simpliciter was no proof for *zina* because the maximum gestation period under *Maliki* law is five years (ibid).

Seminars

Seminar One: Confessions

1. Students may be invited to consider the matter of Sakineh Mohammadi Ashtiani. At the time of writing, Sakineh, an Iranian woman had been imprisoned for four years and was waiting for her sentence of death by stoning. Initially she was reported to have received 99 lashes for having an 'illicit' relationship with two men following the death of her husband. More recently and pursuant to global condemnation of the Iranian government, she appeared on a state-run television programme where she confessed to both adultery and involvement in the murder of her husband. Her lawyer is reported to have stated that she had been tortured for two days before the 'confession' was recorded.
 - (a) Should Sakineh have received the 99 lashes?
 - (b) Is this confession valid?
 - (c) If Sakineh was tortured, can her torturers be punished?
 - (d) Can Sakineh be sentenced to death by means other than stoning?
 - (e) What if it was a genuine confession and she later decided to retract it?

The seminar should include:

- A discussion on confessions and the grounds on which they are made.
- Confessions that are made under duress

- If the facts in this case are accurate, whether they are in accordance with Islamic law

Assessment: Essay Question

1. Some Islamic law scholars submit that they are against all types of capital punishment stipulated in the Arab, Islamic, Western and Eastern countries. The basis for this position is that they believe those jurisdictions which impose capital punishment do not achieve the Divine Justice that seeks the preservation of life by all possible means. Furthermore, they opine that trials involving the death penalty are bias and unfair.

Discuss the above statement in light of confessions by the accused, *shahada* and circumstantial evidence.

The essay should include:

- A comparison of the basis for capital punishment in different jurisdictions.
- Discussions on whether in cases where a sentence of capital punishment has been imposed for offences against Islam, the punishment was accurately prescribed.
- Whether the requirements of confessions, *shahada* and circumstantial evidence are accurately addressed, particularly for the more serious offences.

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Chapter Four

Case Study One: Nigeria

Sessions Six and Seven

Objectives

- Analysis of the application of substantive criminal law in Nigeria
- Analysis of practical situations in which the issue of proof has been applied in Nigeria

In light of the objectives of this aspect of the module, it is suggested that at least two case studies should be provided. Preferably, the two case studies should come from different parts of the world and Nigeria and Pakistan in Africa and Asia respectively have been selected. The course lecturer may decide to select some other countries. It is felt that each case study can be covered in two sessions and therefore sessions six and seven are devoted to Nigeria.

Background

Session six should start with introductory matters such as the country's majority Muslim population; its membership of the Organisation of Islamic Conference (OIC); and that Islamic law has been applied in various degrees at all times in the country. Such an application of Islamic law has however been limited to the predominately Muslim Northern part of the country. Although there have also been Muslims in the South, for historical reasons, the law has never been formally applied there.

The Usman Danfodio Islamic Revivalist Movement which established the Sokoto Empire under the *Shari'a* in the early 19th century was influential. It should be noted that Nigeria is a federal state and Islamic law generally falls within the legislative competence of either Regions or States.

The focus of the case study should be the current state of Islamic criminal law. However, it is suggested that an historical overview be given in order to place the discussions into a proper context. This could be done by briefly looking at the application of Islamic criminal law during three different times. It is recommended that this be before colonialism, during colonialism and after colonialism up to 1999.

1. Historical Overview

The lecture should state that Nigeria is a colonial creation consisting of different nationalities. It came into being when the British amalgamated the Southern and Northern Protectorates in 1914.

Prior to colonialism, the territories which came to constitute the Southern Protectorate were of varying nationalities and applied different customary laws. The territories which came to constitute the Northern Protectorate were under a theocracy which was established after an Islamic revivalist movement. This was spearheaded in 1804 by an Islamic scholar, Sheikh

Usman Danfodio. The movement saw the establishment of Islamic law and the consequences of this under the Sokoto caliphate. Islamic criminal law, in the form of *qisas*, *hudud* and *ta'zir* and its procedural counterpart was applied in full. The caliphate followed the *Maliki* School of law. The caliphate was ended by the British invasion. Because of the history of the Sokoto caliphate, the application of Islamic law in Nigeria generally refers to its application in the Northern part of the country.

The British adopted different systems of rule over the two Protectorates. In the North, it used the indirect rule system whereby people were ruled through the existing traditional institutions. However, with the exception of personal law matters, Islamic law was replaced with modern law. This was because the British felt it was archaic and incapable of coping with the dynamics of the colony.

According to the Supreme Court Ordinance No. 4 of 1876, native law and custom was to apply only when it was neither 'repugnant to natural justice, equity and good conscience nor incompatible with any colonial legislation'. These were the validity tests and the Islamic criminal law system was discharged. Accordingly, the newly established native courts outlawed the death penalty and other "inhuman" punishments such as amputation of the hand.

The Criminal Code was enacted for application in the Southern part of Nigeria. In the north however, the Penal Code was made applicable as a modified version of 'Islamic' penal law (e.g. drinking alcohol not for medicinal purpose was criminalised). At all times, there were provisions in various legislation on the validity tests. This position continued up to independence in 1960, despite several structural changes.

Federal and Regional (later State) legislation all replicated the colonial hybridity of laws and non-application of customary criminal laws. In fact, the 1979 Constitution under s. 33(12) clearly refused to recognise any unwritten

penal law; the written one being, by its interpretation, a law made by a legislative body in the exercise of law-making constitutional powers. Because classical Islamic penal law had been mainly derived from the *Qur'an* and *Hadith*, it clearly fell within the unwritten penal law category and accordingly, it was not recognised. Native courts have subsequently been renamed Area Courts in the North and they continue to apply the Penal Code in criminal matters.

Islamic criminal law continued to be inapplicable up until 1999. It was during this year that a new Constitution came into force and led in a democratic rule, after more than a decade of military interregnum. S. 36(12) of the 1999 Constitution replicated the provision of s. 33(12) of the 1979 Constitution which outlawed Islamic criminal law. The application of Islamic law was now limited to matters of personal status and included marriage, divorce, inheritance, custody of children and issues of *mu'amalat* (transactions). However, soon after the return to civil rule, Islamic criminal law was reintroduced in 12 states of Northern Nigeria.

2. The Reintroduction of Islamic Criminal Law

This part of the lecture should also give a brief introduction of how Islamic criminal law was reintroduced in Nigeria. It should discuss how the Zamfara State caused significant change barely two months after inauguration. The Governor of the State constituted an 18-member law review committee to examine and review all existing laws and edicts to make them conform to the traditions, culture, values and norms of the people of the state. The committee submitted its report and recommended that Islamic criminal law could be applied fully without offending any of the provisions of the 1999 Constitution.

In January 2000, the state enacted the *Shari'a* Penal Code Law by codifying the classical Islamic penal law derived from the *Qur'an* and *Hadith*. This was based on the *Maliki* School of jurisprudence. This meant that section 36(12) of

the 1999 Constitution, which required offences and punishments to be formally enacted by a legislative body had been complied with. The powers for such codification were derived from sections 4(7), 6(5) (k), 277 and 278 of the Constitution. The governor declared publicly that the state will henceforth apply the Islamic legal system in full.

Many other states in the North followed the Zamfara initiative at various times between 2000 and 2001. These were Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe. Each of these states, except Niger, codified the classical Islamic criminal law by enacting a *Shari'a* Penal Code Law which repealed the existing Penal Code. Bauchi, Jigawa, Kebbi, Sokoto and Yobe states merely adopted the Zamfara Penal Code Law. The Laws of all the states are substantially the same with the Law of Zamfara. The Niger State merely amended the existing Penal Code to make it compliant with classical Islamic criminal law.

Court Structure

Zamfara and most other states also enacted the *Shari'a* Courts Law and established *Shari'a* Courts and Upper *Shari'a* Courts. These replaced the Area Courts and Upper Area Courts. The Penal Code Laws were made applicable before the *Shari'a* Courts and to persons who profess “the Islamic faith and/or every other person who voluntarily consents to the jurisdiction of any of the *Shari'a* Courts” (section 3 of the Kano Law). The territorial jurisdiction of each *Shari'a* Court is specified and that of the Upper *Shari'a* Courts made unlimited. The Upper *Shari'a* Courts are given jurisdiction to try all offences under the *Shari'a* Penal Code Law and the *Shari'a* Courts are to try all offences except homicide, adultery and robbery. In terms of application, in Kano for instance, and as the title suggests, the Criminal Procedure Code (Amendment) Law 2000 made provision for Islamic criminal procedure.

The re-introduction of Islamic criminal law brought about the expansion of the jurisdiction of the *Shari'a* Court of Appeal. Previously, its purely appellate jurisdiction was confined to Islamic personal law matters. These emanated from either the Upper Area Courts exercising original jurisdiction or an appellate jurisdiction when the court of first instance happened to be an Area Court. The lower courts were empowered to entertain cases bordering on transactions (*mu'amalat*) and non-capital offences. This it meant that their jurisdiction was wider than that of the *Shari'a* Court of Appeal. Therefore appeals on those matters went to the State High Court Appellate Division, which constituted of two justices whom, in most cases, were Muslims though not necessarily trained in Islamic law.

Appeals now from the Upper *Shari'a* Courts in criminal and civil matters go to the *Shari'a* Court of Appeal leaving the (Appellate) High Court with appeals coming from the Magistrate Courts. It is the Upper *Shari'a* Court (Appellate Division constituting two judges) that entertains appeals from the *Shari'a* Courts. This expansion has however raised a practical problem. It is that the (Federal) Court of Appeal which normally hears appeals from the *Shari'a* Court of Appeal may not have jurisdiction to hear its criminal appeals because the Constitution limits appeals from the *Shari'a* Court of Appeal to the Court of Appeal applies only to cases on Islamic personal law.

(a) Crimes and Punishments

After the historical overview and the discussion of how Islamic criminal law was reintroduced in 1999, the lecture should proceed to examine the various provisions of the substantive law as codified by the Penal Codes. We suggest that this be covered in session seven. It would be better to look at the same crimes and punishments discussed under the classical Islamic criminal law in the previous sessions for the purposes of consistency.

It will be discovered that the various *Shari'a* Penal Code Laws substantially cover the classical Islamic criminal law areas of *qisas*, *hudud* and *ta'zir*. The provisions of the laws should be examined in these three areas. The provisions are either identical or one law is a reproduction of another. The discussions may focus on the earlier laws i.e. laws of Zamfara and Kano. The laws of Niger may occasionally be referred to because of its peculiar approach.

(i) Homicide (Qisas)

The provisions made in respect of homicide and hurt are substantially the same as the classical provisions. Students may be asked to examine the following:

- **Intentional homicide (*Qatl al-amd*)**

Section 199 of the Zamfara Code provides that “whoever being a *mukallaf* [a fully responsible person] in a state of anger causes the death of a human being;

- (a) with the intention of causing death in [sic] such bodily injury as is probable or likely to cause death with an object either sharp or heavy;
- or
- (b) with a light stick or whip or any other thing of that nature which is not intrinsically likely or probable to cause death, commits the offence of intentional homicide (*qatl al-amd*)”.

By way of comparison, students may be asked to look at the definition of intentional homicide in the 1960 Penal Code which the new Kano and Niger Laws adopted. It will be clear that the above definition is more categorical.

The lecture should proceed to look at the three alternative punishments for the offence of intentional homicide. These are as follows:

- **Death penalty**

The relatives of the deceased can remit this punishment.

- **Compensation (*Diyyah*)**

If the death penalty is remitted, the accused person is made to pay compensation (*diyyah*) as a second alternative punishment.

- **One hundred lashes and imprisonment for one year**

If the relatives remit the death penalty and the payment of *diyyah*, this form of punishment is given.

In circumstances where the homicide is a treacherous one (*gheelah* or the act of luring a person to a secluded place and killing him” [s. 50 Zamfara and Kano Codes]) or highway robbery (*hiraba*) the last two options are not available i.e. the punishment shall be death because the will of the relatives of the deceased becomes irrelevant (s. 200 (a), (b), (c) Zamfara Code). Under the Kano provision, the third alternative punishment varies. Instead of the hundred lashes and one year imprisonment, it is imprisonment for ten years (s. 143 (c) Kano Code).

It should however be noted that there are three circumstances under any of which intentional homicide is punishable with the payment of *diyyah* only and not with death. These are:

- (a) “where the offender is an ascendant of the victim or where the intention of the ascendant is clearly shown to be the correction or discipline of the victim; or

- (b) where the offender, being a public servant acting for the advancement of public justice or being a person aiding a public servant so acting exceeds the powers given to him by law and necessary for the due discharge of his duty as such public servant or for assisting such public servant in the due discharge of such duty and without ill will towards the person whose death is caused; or
- (c) where the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.”

Unintentional homicide is defined as a fully responsible person (*mukallaḥ*) causing the death of another person by mistake or accident. It is an offence punishable with the payment of *diyyah* only.

The law also covers cases where a relative of a deceased person (*waliyy al-damm*) causes the death of the person alleged to have killed the deceased. Such a killing is an offence under the following circumstances:

- (a) it is proved that the person whose death was caused was the one who killed the deceased, the offence is punishable with imprisonment for six months and caning which may extend to 50 lashes; or
- (b) it is not proved that the person whose death was caused was the one who killed the deceased or it is so proved but the killing was justifiable in law. The *waliyy al-damm* shall be deemed to have committed intentional homicide punishable accordingly.

- **Bodily Injury**

Voluntary bodily injury or hurt forms part of *qisas* and as such it is punishable by way of retaliation, as it is under the classical Islamic criminal law (“an eye for an eye”). The victim can however elect to take compensation (*diyyah*) instead. The compensation is fixed according to a schedule appended to the Penal Code. In addition to the compensation, the person convicted is punished by a maximum of 20 lashes and in Zamfara imprisonment for up to 6 months (z s. 126; k s. 163). The Niger Penal Code does not mention retaliation. It provides that in addition to the punishment contained in the Penal Code of 1960, the convict “shall pay a sum of no less than N10,000.00 as compensation to the victim” (s. 68A (2) [i]).

In the Katsina State, a case of bodily injury has been recorded. On 26 May, 2001, a court in Malumfashi ordered that the right eye of one Ahmed Tijjani be removed for blinding a man in an assault. It has been reported that the victim was allowed to choose between demanding retaliation (i.e. an eye for an eye) or compensation of 50 camels. It is not known whether the sentence has been carried out (Peters 2003).

- **Blood-money (*Diyyah*)**

As we have seen above, *diyyah* is a form of punishment under the law of homicide. Like it is under the classical Islamic criminal law, the Nigerian Penal Codes fix it at 1,000 *dinars*, 12,000 *dirhams*, or 100 camels (s. 59 Zamfara and Kano Codes). The Niger Penal Code fixes the amount in Nigerian currency. It fixes 4 million Naira (s. 68A (2) [f]).

(ii) Capital Offences (*Hudud*)

Although the Laws have covered all the classical *hudud* cases, discussions here should be limited to three of them i.e. adultery and fornication (*zina*), theft (*sariqa*) and drinking alcohol (*shrub al-khamr*). This is in order to make the discussions consistent with the previous lectures on the classical substantive law.

- **Adultery & Fornication (*Zina*)**

Zina has been defined as sexual intercourse by a man or woman fully responsible through the genital of a person over whom he/she has no sexual rights. This must be done in circumstances where no doubt exists as to the illegality of the act. Here too, *zina* could either be adultery or fornication. The former is when unlawful sexual intercourse is committed by married or previously married persons and it is punishable with stoning to death (*rajm*). The latter applies to persons yet to marry and the punishment is 100 lashes plus one year imprisonment (s. 127 Zamfara; s. 125 Kano; s. 68 [2] [c] Niger). In Kano, the one year imprisonment applies to men only while Zamfara law does not make such a stipulation. Niger does not provide for imprisonment at all.

It is important to point out to students that unlike the classical law, the Codes categorise sodomy under *hudud*. It is regarded as *zina* and punished as such (s. 130-131 Zamfara; s. 128-129 Kano). With the exception of Kano, rape is also put under this category and the term of imprisonment for the rapist is for life. Under Kano and Zamfara Codes, the rapist is also made to pay the victim compensation equal to a proper bride price (s. 128-129 Zamfara; s. 126-127 Kano).

It has been argued that assimilating rape to *zina* puts women at a disadvantage because both parties to *zina* are in principle liable to punishment. A woman who alleges that she has been raped must prove that she did not consent to the intercourse. If the alleged rapist does not confess, she would be guilty of *qadhaf* which is punishable with 80 lashes (Peters 2003).

An interesting issue which may emerge from the examination of the Codes is that a number of them have omitted to provide for proof. This is apparently because evidence is a matter which falls within the exclusive legislative list under the Constitution (i.e. only the federal legislature could legislate on it).

But Kano and Niger codes require either confession or four witnesses (four male witnesses or eight female witnesses) as the only proof for *zina* and rape (s. 127, Explanation, Kano; s. 396 Code of Criminal Procedure, Kano; s. 68A (3) [b] Niger).

The lecture should explore further and explain that the *Shari'a* Court laws stipulate that the applicable laws of the *Shari'a* Courts shall be based on the *Qur'anic* provisions and Prophetic traditions (*Hadiths*). The laws state that this should be coupled with the jurisprudence of the *Maliki* School of law. The implication of this is that classical evidential provisions have thereby been incorporated in circumstances where no proof provisions have been made. That has been a reason why the courts have in some cases relied upon the *Maliki* principle, which admits pregnancy outside wedlock as proof of *zina*. There are at least three cases in this respect and they are as follows:

Bariya Ibrahim Magazu

A pregnant seventeen year old girl was found guilty of premarital sexual intercourse by a court in Zamfara. Accordingly she was punished with 100 lashes in 2001.

Safiya Hussaini

A previously married lady was found to be pregnant outside of wedlock. A court in Sokoto thereby sentenced her to death by stoning in 2001. However the sentence was quashed on appeal on technical grounds. This was on the basis that the law under which she was sentenced was not applicable at the time the offence was committed.

Amina Lawal

A female from Katsina was also found guilty of adultery by a trial court based in Bakori because she bore a child outside wedlock. She was therefore sentenced to death by stoning. An Upper *Shari'a* Court in Funtua upheld the

sentence in 2002. However, on a later appeal to the *Shari'a* Court of Appeal, the sentence was quashed.

- **Theft (Sariqa)**

By way of definition, “The offence of theft shall be deemed to have been committed by a person who covertly, dishonestly and without consent takes any lawful and moveable property belonging to another, out of its place of custody (*hirz*) and valued not less than the minimum stipulated value (*nisab*) without any justification” (s. 144 Zamfara; s. 133 Kano).

The codes have not stipulated the *nisab*, namely the minimum value of property which if stolen, would attract *hadd* punishment (s. 46 Zamfara; s. 46 Kano). Recourse must therefore be had to the classical (*Maliki*) law which fixes the *nisab* at one quarter of a *dinar*. The punishment for a first-time thief is amputation of the right hand from the wrist. In the event of subsequent recidivism, the left foot, the left hand and the right foot will be amputated (s. 145 Zamfara; s. 134 Kano).

There are circumstances in which the *hadd* punishment for theft shall not be applied. The offender will in these cases be punished with imprisonment not exceeding one year and be given 50 lashes. The Niger code does not make such a provision. However it is found under s. 147 of the Zamfara Law which is similar to s. 135 of the Kano Law and is as follows:

“The penalty of *hadd* for theft shall be remitted in any of the following cases:-

1. Where the offence was committed by an ascendant against a descendant;
2. Where the offence was committed between spouses within their matrimonial home, provided the stolen property was not under the victim’s lock and key;

3. Where the offence was committed under circumstances of necessity and the offender did not take more than he ordinarily requires to satisfy his need or the need of his dependents;
4. Where the offender believes in good faith that he has a share (or a right or interest) in the said stolen property and the said stolen property does not exceed the share (or the right or interest) to the equivalent of the minimum value of the property (*nisab*);
5. Where the offender retracts his confession before execution of the penalty in cases where proof of guilt was based only on the confession of the offender;
6. Where the offender returns or restores the stolen property to the victim of the offence and repents before he was brought to trial and he is a first time offender;
7. Where the offender was permitted access to the place of custody (*hirz*) of the stolen property;
8. Where the victim of the offence is indebted to the offender and is unwilling to pay, and the debt was due to be discharged prior to the offence, and the value of the property stolen is equal to, or does not exceed the debt due to the offender to the extent of the *nisab*.”

Students should be referred to a number of cases where this new law of theft has been applied. A good illustration of this is as follows:

Bello Jangebe

This matter was recorded in the Zamfara State and arose when the accused was found guilty of stealing a cow. The court ordered his right hand to be amputated and the punishment was carried out in the state capital Gusau, in 2000.

Commissioner of Police vs. Danladi Dahiru

This matter was heard before the Upper *Shari'a* Court, in the Kano state. The accused was a 22 year old Muslim who was charged with the offence of theft, contrary to section 133 of the *Shari'a* Penal Code Law 2000. It was alleged that in 2001 he stole two sewing machines and some textile materials. The stolen items amounted to the value of N23, 400.00. Three witnesses (two of whom were the victims) testified for the prosecution and the accused subsequently confessed to the crime. The confession was said to have witnessed by three other witnesses. Later the same year, the court decided that the offence had been established and the accused was accordingly found guilty. The court ordered that his right hand be amputated in accordance with section 134(1) of the Law.

This matter was appealed by the defence and was heard before the *Shari'a* Court of Appeal Kano. The appeal was based on the following six grounds and included the following submissions:

1. The lower court had erred in *Shari'a* by relying on both the evidence of the three prosecution witnesses and the confession of the accused. This was because both were considered not to be reliable for the purposes of securing a conviction for the offence of theft.
2. The lower court failed to administer the concluding remarks (*izar*) to the accused person before the judgement.
3. The court misdirected itself when adopting “the common law” procedure of preferring charges after listening to the evidence of witnesses. The court was further misdirected when it asked for evidence of any previous convictions.

The appeal by the defence was successful. In its judgement in 2003, the *Shari'a* Court of Appeal found irregularities and non-compliance with the trial proceedings, contrary to the Criminal Procedure Code (Amendment) Law

2000. Thus pursuant to section 410 (2) of the Law, the Appeal court set the sentence aside ordered for a retrial before the Upper *Shari'a* Court, Rijiyar Lemo, Kano.

- **Drinking Alcohol (Shurb al-Khamr)**

Drinking alcohol is classified under *hudud* in Nigerian Islamic criminal law. The punishment for voluntarily drinking alcohol or any intoxicant is 80 lashes (s. 149 Zamfara; s. 136(1) Kano). In the Niger state, the punishment is either 80 or 40 lashes and the law does not stipulate as to when either of the number of lashes shall be applied (s. 68A (2) (e)).

Manufacturing, pressing, extracting or tapping, transporting, carrying or loading, storing or supplying or leasing out premises for storing, trading, etc. of alcohol is made punishable with caning which may extend to 40 lashes or imprisonment for a term which may extend to 6 months or both (s. 150 Zamfara; s. 137 Kano; s. 68A (2) [e] Niger).

Within the Kano state, “whoever takes or injects or inhales any substance for the purpose of intoxication shall be punished with caning which may extend to 80 lashes or with imprisonment which may extend to one year or both” (s. 136 [2]).

There are cases where the punishment for drinking alcohol has been ordered since the reintroduction of Islamic criminal law. This has been illustrated by the Upper *Shari'a* Court in Kano, which has tried several cases of alcohol consumption. Although Court records are unavailable, in each case, it was ordered that the offender be given 80 public lashes in accordance with s. 136(1) of the Law. One of these instances was in 2001 when both Nuhu Abdullahi and Sa'adu Aminu were caned 80 lashes publicly for the consumption of alcohol. Similarly, Umaru Bubeah was sentenced to 80 public lashes.

(iii) Discretionary Punishments (*Ta'azir*)

Provision has been made under the Penal Codes for offences which fall neither under *qisas* nor under *hadud* or which may have fallen under *hudud* but do not for a technical want. Offences such as criminal assault and kidnapping, abduction and forced labour, lesbianism etc. fall within this category and have for instance, been accommodated for by Chapter X of the Kano *Shari'a* Penal Code Law. The form of punishment to be ordered under *ta'zir* is dependent upon the discretion of the judge (*qadi*).

Seminars

Seminar One: Nigeria Case Study

- Examine and analyse the attitude of the courts in Nigeria to the newly reintroduced Islamic criminal justice system. How does this compare with the primary sources? Have the courts deviated from the primary sources and if so, to what extent?

Seminar Two: Nigeria Case Study

- It has been said that some Christians who are resident in those states where *Shari'a* law has been reinstated are concerned that their rights will not be equally protected before the *Shari'a* courts. They opine that the new laws create an atmosphere of intimidation.

Evaluate the above statement.

Assessment: Essay Question

- Human Rights organisations have made claims that *Shari'a* law in Nigeria cannot be interpreted in a manner that is in accordance with international human rights standards and the conventions of international law. They further stipulate that *sharia* law be interpreted so as to be in agreement with the same.

Critically assess the above statement.

Readings

Ogbu, O. (2005) "Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience" Vol. 9, No. 2, *The International Journal of Human Rights* .pp. 165-182.

Peters, R. (2003) *Islamic Criminal Law in Nigeria*, Spectrum, Ibadan.

Struensee, V.V. (Spring, 2005), "Stoning, *Shari'a*, and Human Rights Law in Nigeria", 11 *William and Mary Journal of Women and the Law* Spring, 2005, 405.

Weimann, G. J. (2007), Judicial Practice in Islamic Criminal Law in Nigeria: A Tentative Overview", *Islamic Law and Society*, Vol. 14 No. 2, pp. 240-286.

Chapter Five

Case Study Two: Pakistan

Sessions Eight and Nine

Objectives

- Brief overview of governance structures and legal system
- 1979 'Islamisation' of criminal laws
- 1984 changes to the law of evidence
- Study of Qur'anic verses of the relevant subject
- Evolution of the offence of *zina*, *qadfh* and *lia'n*
- Problems with how a 'divine' injunction, through human intervention, becomes part of state law
- Case law on the *hudood* law relating to the offence of *zina*
- Modification of the *hudood* law on *zina* with the adoption of the Women Protection Act 2006.

Background

Pakistan is a large South Asian country carved out of the Indian sub continent with the departure of the British in 1947. It has a population of approximately 160 million, the pre-dominant majority of which profess the Muslim faith making Pakistan the second largest Muslim country in the world. Under her constitution, Islam is the state religion and the guiding force and reason for of its existence. This has led to an on-going tension between the various legal norms forming the legal system including the constitution and statute law as well as customary norms. An important aspect of this case study is to explore the interplay of laws with divergent and multiple normative bases leading to a hybrid legal system which is neither fully based on religion nor entirely secular.

Islam and 'islamisation' has been employed by both political forces and military regimes. This has been in order to create support for their power and to seek allies within sections of society who believe that Pakistan ought to be run in accordance with principles of Islam and Islamic law. In actual fact though, the scope of Islamic law was confined very much to the domain of personal status law.

Until 1979, the criminal law was a field governed by codified laws of the colonial era such as the Pakistan Penal Code 1860 and the Code of Criminal Procedure 1898. In 1979, a set of 'Islamic' laws in the area of criminal justice known collectively as the *Hudood* Ordinances were promulgated by General Zia-ul-Haq. These laws included:

- i. Enforcement of *Hadd* (Prohibition) Order (IV of 1979)
- ii. Offences Against Property (Enforcement of *Hudood*) Ordinance (VI of 1979)
- iii. Offence of *Zina* (enforcement of *Hudood*) Ordinance (VI of 1979)
- iv. Offences of *Qazf* (Enforcement of *Hadd*) Ordinance (VIII of 1979)
- v. The Execution of Whipping Ordinance (IX of 1979).

The preamble to the *hudood* ordinances declared that the object was to modify the existing criminal law and to bring it into conformity with the injunctions of Islam, as set out in the *Qur'an* and *Sunna*. The ordinances divided punishment into the following two categories:

- *Hadd* is a punishment, the measure of which has been definitely fixed in the *Qur'an* or *sunna*
- *Tazir* is a punishment other than *hadd* where the court is allowed discretion both as to the form in which such punishment is to be inflicted and its measure.

Framers of the *hudood* laws claimed that these were derived directly from the primary sources, namely the *Qur'an* and *Hadith*. Critics however, point out the fact that some of the *hadd* offences included in these laws are not mentioned in the *Qur'an*. Likewise, the *Hadith* too, has more than one interpretation regarding *hudood* offences some of which are jurisprudentially considered to be of 'weak' authority.

At this point in the course, there is likely to emerge a discussion on the extent to which the divine will in the *Qur'an*, may faithfully be translated, through human intervention into legally binding law.

Criticisms of the Laws

A number of points of criticism have been levelled against the *hudood* laws and these are as follows:

1. It has been argued that the *Hudood* Ordinances depart from general Islamic jurisprudence by making provisions both for the form and measure of punishment.
2. These laws undermine and indeed contradict the over-arching constitutional norm of equality enshrined in the 1973 constitution on two important counts. Firstly, the evidentiary value of a woman and

non-Muslim is discounted. Secondly, as a result of this lower evidentiary value attached to the testimony of women and non-Muslims, rapists and/or thieves are liable to escape maximum punishment, even if the offence is proved beyond reasonable doubt. In this regard the audience may be asked to consider section 7 of The Offence against Property (Enforcement of *Hudood*) Ordinance 1979. This requires that proof of theft liable to *hadd* takes one of the following forms:

- (a) The accused pleads guilty of the commission of theft liable to *hadd* or
- (b) At least two Muslim adult male witnesses other than the victim of the theft, giving evidence as eye witnesses of the occurrence. The Court must be satisfied having regard to the requirements of *tazkia al-shuhood*, that they are both truthful persons and they abstain from major sins (*kabair*)

Likewise, section 8 of The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979 may be discussed. This stipulates that proof of *zina* or *zina bil jabr* liable to *hadd* may be submitted in one of the following two forms:

- (a) the accused makes a confession of the offence before a Court of competent jurisdiction or
- (b) at least four Muslim adult male witnesses giving evidence as eye witnesses to the act of penetration necessary to the offence. The Court must be satisfied that having regard to the requirements of *tazkia al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*).

Under the section 8(b) of the same law, proof of *zina* or *zina-bil-jabr* liable to *hadd* is the same and is as follows:

“at least four Muslim male adult witnesses about whom the Court is satisfied having regard to the requirements of ‘*tazkiyyah al-shuhood*’ that they are truthful persons and abstain from major sins (*kabair*), given evidence as eye witnesses of the act of penetration necessary to the offence.

If the accused is a non-Muslim the eye-witnesses may be non-Muslim.”

Inferences from the Laws

1. No distinction is drawn between the proof required for the offences of *zina* and *zina-bil-jabr*. Therefore, the presence of four adult male Muslims must be prepared to give testimony before a rapist is punished under *hadd*. If the required standard of proof for *hadd* is not met, the case may be tried under *tazir*, where the standard of proof is entirely a matter of discretion for the judge. Most rape trials in Pakistan since the promulgation of the *Hudood Ordinances* are tried under *tazir*, given the almost impossible standard of proof for *hadd* punishments.
2. A further hurdle that the complainant of rape faces is where the victim of rape is unable to prove the offence and the court finds that she consented to sexual intercourse. In such circumstances, the charge may be converted to *zina* (adultery or fornication) and the complainant herself becomes the accused. Furthermore, if the complainant becomes pregnant as a result of the rape, this is taken as proof that consensual sexual intercourse outside of marriage has taken place. In a number of cases the alleged rapist has been acquitted because of lack of conclusive evidence. The woman complaining of rape, by contrast, has been convicted of *zina*, for her failure to establish that her pregnancy was the consequence of the rape. If the only witnesses to a

rape or *zina* act are non-Muslims and the victim and offender Muslim, then such witnesses stand disqualified.

3. Framers of this law have confused the *Qur'anic* verses relating to *lian* or false accusations made by a husband against his wife and those relating to *qazfh* or imputation and have extended their application to the offence of rape as well. The purpose of the *Qur'anic* verses was to protect the honour and reputation of human beings in general and women in particular by requiring the stringent rule of producing four adult male Muslims before condemning a person as an adulterer or adulteress.
4. The *Zina* Ordinance has been controversial since the day it was promulgated. Its working has resulted in adverse implications for women on a number of counts. Before the *Zina* Ordinance was enforced, adultery was dealt with under the Pakistan Penal Code. Women could not be tried for *zina* as it was a crime coming in the preview of adultery. Complaints could only be made by the husband of the woman accused of the offence but women could not be punished under the law. The offence was bailable and compoundable and if the complainant chose to drop charges, or not to prosecute the offender, criminal proceedings against the accused were automatically dropped. Very few cases of adultery had been reported. This situation soon underwent a drastic change when women were included within the scope of punishment for the offence of adultery. Allegations of *zina* suddenly soared into thousands. The *Commission of Inquiry Report* states that:

“This clearly indicates that as long as it was only the male who could be punished for adultery, there was a reluctance to prosecute. The ordinance became a tool in the hands of those who wished to exploit women.”

5. It became clear in a fairly short period of time that the *Zina* Ordinance was being used for reasons other than to bring ‘immoral’ men and women to justice. The statement of appeals filed in the Federal *Shari’at* Court between 1980 and 1987 is an indicator of the exceptionally high rate of acquittal for women accused of *zina*.

The Historical Context of the Offence and Punishment for *Zina*: The *Qur’anic* Text

The *Qur’an* criminalises extramarital sexual relations starting from declaring it to be a transgression and punishable as *tazir* to making it a *hadd* offence (El-Awa 1993, 15). Verse 17:32 of the *Qur’an* prescribes thus: “And do not go near fornication (*Zina*) as it is immoral and an evil way”. It is interesting to note that no particular punishment is prescribed at this stage.

Chapter four of the *Qur’an* entitled *An-Nisa* (Women) declares that:

“If any of your women Are guilty of lewdness, Take the evidence of four (Reliable) witnesses from amongst you Against them; and if they testify, Confine them to houses until Death do claim them, Or Allah ordain them Some (other) way. The *Qur’an* 4:15

If two men among you Are guilty of lewdness, Punish them both. If they repent and amend, Leave them alone; for Allah Is Oft-Returning, Most Merciful. The *Qur’an* 4:16

Some writers on Islamic Criminal law have read the above verses as applicable to *zina* (namely the illegal sexual intercourse between a man and a woman) and as a precursor to the more strict *hadd* punishment.

Students may be required to read the above verses as well as their commentary to address the question of whether these verses deal with homosexuality or *zina*.

Chapter 24 of the *Qur'an* then goes on to create the *hadd* offence of *zina* and prescribes the punishment as follows:

“The woman and the man Guilty of adultery or fornication, - Flog each of them With a hundred stripes; Let not compassion move you In their case, in a matter Prescribed by Allah and the Last Day: And let a party Of the Believers Witness their punishment. The Qur'an 24:2

Let no man guilty of Adultery or fornication marry Any but a woman Similarly guilty, or an Unbeliever, Nor let any but such a man Or an unbeliever Marry such a woman: To the Believers such a thing Is forbidden.” The Qur'an 24:3

Commentary on the Qur'anic Text

Contrary to the punishment of stoning to death presently on the statute books of Pakistan, Saudi Arabia, Iran, Nigeria (only some states) and Sudan (and enforced by the Taliban in Afghanistan), flogging is the *Qur'anic* punishment for the offence of *zina*. Stoning to death is said to be prescribed under the *Sunna*. This extremely harsh penalty is subject to equally stringent and, it is submitted, virtually impossible evidentiary rules for establishing the offence of '*zina*' and inflicting the above punishment. (Hussein 2003, 38)

The establishment of guilt must be proved beyond *any* doubt (not simply *reasonable* doubt). Four male, adult, trustworthy Muslim witnesses must testify that they saw the two persons committing the act of adultery and that the man's organ was inside the woman. Nothing less than committing a public act of sexual intercourse such that four men would be standing close enough

to confirm the actual act, will constitute the offence of *zina* and attract the penalty mentioned above.

Commenting on the context of implementation of this law, Hussein states: “The presentation of this form of proof has not once occurred in the history of the application of the *Shari’a*.” (Hussein 2003, 38) The standard of proof for all *hudood* offences under Islamic law is very arduous and one which must be proved beyond any atom of doubt. This is based upon the tradition of the Prophet Muhammad which stated: “Avert the *Hudood* punishment in case of doubt . . . for error in clemency is better than error in imposing punishment” (Baderin 2003, 80). Baderin also cites the Islamic scholar Shalabi who pointed out that “the proof required makes the punishment for *Zina* applicable only to those who committed the offence openly without any consideration for public morality at all, and in a manner that is almost impossible and intolerable in any civilized society.” (Ibid)

As well as stringent evidentiary rules, the enforcement of *hudood* punishments is also subject to the pre-requisite that there must exist an ideal Islamic society. If the defence can make a case that the offender was a product of sociological problems of society, *Hudood* punishment may be mitigated. Therefore, despite the rigid and unquestionable prescription of *hudood* punishment, its application by the State is subject to sociological factors existing within the state (Baderin 2003, 83).

A further important sequence of producing evidence to substantiate the offence of *zina* is the hadd offence of qadfh or wrongful allegation/testimony implicating a person for *zina*. The following two verses of the *Qur’an* are useful to be discussed and state:

“And those who launch A charge against chaste women, And produce not four witnesses, (To support their allegation), - Flog them with eighty stripes; And reject their evidence Ever after: for such men Are wicked transgressors;- Unless they repent thereafter And mend (their conduct): For Allah is Oft- Forgiving, Most Merciful.” The Qur’an, 24:4-5.

“Those who slander chaste, indiscreet but believing women, are cursed in this life and in the hereafter: For them is grievous penalty. On the Day when their tongues, their hands, and their feet will bear witness against them as to their actions, on that day God will pay them back (all) their just dues, and they will realise that God is the (very) Truth, that makes all things manifest.” The Qur’an 24:23-25.

A contextual analysis of the Qur’anic text raises the question of what brought about the harsh statement towards extramarital sexual activity and more so to allegations and insinuations thereof? The above verses were revealed following the famous ‘Affair of the Necklace’, in which the Prophet Mohammad’s wife Aisha, was inadvertently left behind by a caravan in the desert as she went searching for her necklace that had gone missing. She was spotted by one of the young, single men in the Prophet’s entourage and brought back to Medina leading to widespread rumours about her time alone with this man. The subsequent weeks turned into a nightmare for Aisha as her honour and dignity had come under question and she was being suspected of inappropriate behaviour. The verse therefore in no uncertain language, silenced rumours against not only Aisha but for future generations of women. It also proceeded to prescribe very harsh punishment for a person or persons who attempt to slander a woman’s good name. See the *Qur’an* 24:13-19.

Read together and in light of the context in which the verses were revealed, it is evident that the focus of the pronouncements was to safeguard a woman's reputation and good name. It was not intended to flag up in the public gaze, extramarital relationships of people. In fact, the *Qur'anic* advice is to walk away from a place where rumour mongering or impropriety (of behaviour) is rife. The Qur'an 24:16-17

Few writers on Islamic Criminal justice have made the above-mentioned crucial connections. They 'read' the *Qur'anic* verses which declare *zina* as an offence and its punishment of the same as one autonomous concept. They interpret the false accusation of *zina (qadfh)* and punishment for this falsehood, as a separate offence. This has been demonstrated in the *Hudood* laws of Pakistan. Their individual worldview of crime and punishment, victim and wrongdoer informs 'reading' of the *Qur'anic* text on *zina*. In other words, the 'written word' of the *Qur'an* has over the centuries become 'overwritten' by interpretations formed by plural legal systems and varied perspectives.

The *Qur'anic* verses on *zina* must therefore be read together with the verses on *qadfh* and not as separate laws. Asifa Qureshi (1997) is one of the very few writers who can 'see' the connection in her 'reading' of the *Qur'anic* text on *zina*. She believes that *zina* and *qadfh* verses of the *Qur'an* cannot be read but as a composite whole; hence a legal formulation that separates the two sets of verses into two different statutes is unacceptable and amounts to a corruption of the religious text. She states that the main purpose of the *Qur'anic* verses on *zina* and the punishment it prescribes is to protect both the privacy of people and public morality. She further submits that this is linked with the strict evidentiary threshold as well as protecting women's honour. However, G. Hussein and Baderin in their work do not appear to include or read this interpretation in their reflections on the *Qur'anic* text on *zina*.

To summarise this discussion it is important to allow students to present their understandings of the context of the *Qur'anic* offences and punishments as well as offer a critique of the law on the statute books of Pakistan.

Trend and Issues in the Application of Islamic Criminal law: Some lessons from the field.

In plural legal systems such as Pakistan, laws derived from religious text operate alongside constitutional provisions, secular civil and criminal law, customary practices and more recently, international human rights law.

Since the promulgation of the *Hudood* Ordinances in Pakistan in 1979, a number of studies have referred to the indiscriminate use of this law for implicating women and men and to confine them to long prison sentences and to subject them to the social stigma. (Jehangir & Jilani 1990; Mehdi 1994; Government of Pakistan 1997; National Commission on the Status of Women 2003)

These studies have highlighted personal vengeance, socio-economic compulsions or simply social control of women as reasons for increased cases under the *zina* laws. Patriarchal and misogynistic trends reflected in the judgments too have been the subject of discussion. I propose to draw upon one of my recent researches on *hudood* laws of *zina* based on an analysis of judgments in these cases in the superior courts of Pakistan. S. S. Ali, 'Interpretative Strategies for Women's Human Rights in a Plural Legal Framework: Exploring Judicial and State Responses to *Hudood* laws in Pakistan' in Anne Hellum, Shaheen Sardar Ali, Julie Stewart & Amy Tsanga (eds.) *Human Rights, Plural Legalities and Gendered Realities: Paths are Made by Walking*. (2006) Harare: Weaver Books. Chapter 15

This review suggests that the superior judiciary in Pakistan appeared to be uncomfortable with the application of the *hadd* punishments. The acquittal rate of more than 90% is evidence of this approach. The main findings of this study provide an opportunity for students to apply their analytical skills to case law on Islamic Criminal justice in contemporary Muslim jurisdictions:

1. Islamic Criminal Law of *Hudood* is widely used as an Instrument of Personal Vengeance.

Mrs. Humaira Mehmood vs. The State

This is an interesting case to put to the audience as it relates to allegations of *zina* and *abduction*.

Humaira, a 30 year old woman lawfully married Mehmood Butt, against the wishes of her parents. Humaira's father was a sitting member of the Provincial Legislature. Subsequent to the marriage, her father filed a case of *zina* implicating Humaira and Mr. Butt. This was despite the fact that at the time he made the complaint, he was aware that his daughter and the accused were lawfully married. In apprehension of their lives and in order to avoid arrest, the couple fled from their home and sought refuge in the Edhi Centre. Humaira's brother was in pursuit of the couple and he filed a first information report (FIR). This stated that following a disagreement with her mother, Humaira had left home and he required her 'possession'. There was no mention at this stage of the alleged abduction by her husband, Mr. Butt. Nor indeed was there any mention of Humaira's marriage to any other person, which was later alleged to have taken place prior to her 'kidnap' by Mr. Butt. This application was successful.

With the support of human rights activists, the case was eventually listed before the High Court of Lahore and invoked the writ jurisdiction under the constitution of Pakistan (Article 199). The judgment made by the Honourable Justice Jilani is a landmark decision and important in more ways than one. It draws strength from a combination of Islamic law, the constitution of Pakistan and international human rights instruments. The decision emanates both from the UN human rights regime and comparable documents from Islamic forums. The complimentary manner in which these three differing frameworks are intertwined has been crucial towards the development of a women-friendly

and indeed human friendly interpretive strategy for securing human rights. (Pages 512 –513 of the judgment sum up this argument and approach rather well.)

Mrs. Zafran Bibi vs. The State

This is another landmark case where the Federal *Shari'at* Court took suo moto notice of a stoning to death sentence of a married woman Mrs. Zafran Bibi. During the course of examination of the convicted woman (who was originally a complainant) and her husband, it transpired that she had been pressurised to accuse a person of *zina bil jabr*. This was in order to protect the younger brother of her husband (who according to her statement used to commit *zina bil jabr* with her). Zafran Bibi, who was sentenced to stoning to death by the trial court, was acquitted by Federal *Shari'at* Court on the basis of erroneous reasoning by the trial judge. This case which initiated in the Kohat region of the North West frontier province of Pakistan hit the headlines when Zafran Bibi was sentenced by the court of first instance. The public outrage and wide support for her resulted in the superior courts hearing the appeal and acquitting her of the offence of *zina*.

2. Divergence between Trial Court Decisions and Appellate/Superior Courts.

A finding from a review of the sample revealed the fact that there appears to be a huge divergence between the approach, reasoning and decisions of the subordinate courts and that of the superior judiciary in *hudood* cases. The registration of cases under *hudood* offences, especially *zina* and *zina bil jabr*, and their subsequent investigation and trial in subordinate courts appears to be conducted arbitrarily. The cursory manner in which legal and Islamic law knowledge is applied is painfully apparent in almost all such cases. This has resulted in acquittals and the quashing of conviction orders of subordinate courts by the superior judiciary. But what is most unsatisfactory is the fact that despite consistent pattern of reversals and admonishment by the appellate courts, the trend continues unabated as does the human suffering it entails.

Complete disregard for basic human rights and the social implications for the accused is a repetitive trend emerging from this research. There is a constant stream of appeal cases where the woman's reputation is forever tarnished for being implicated in *zina*. This is made all the more stark where the male co-accused is acquitted for want of evidence while the woman is convicted for her pregnancy. In the case of Zafran Bibi cited above, the Additional Sessions Judge sentenced Zafran Bibi to be stoned to death. She was a married woman, who had accused a person of *zina bil jabr*. She was found to be pregnant, and despite her pregnancy antedating the alleged offence, the trial court found her pregnancy a conclusive proof of her guilt (her husband was in jail at the time of occurrence). The accused was, however, acquitted for want of evidence. Upon appeal, the Federal *Shari'at* Court found the reasoning of trial judge erroneous and held that the pregnancy of a complainant could not be proof of her guilt. This was especially so in the instant case, where it was antedated and the legitimacy of the child was accepted by her husband. Zafran Bibi was acquitted by the Federal *Shari'at* Court.

3. The Negative and Unsatisfactory Role of Prosecution and Investigative Institutions.

Substantive and procedural inadequacies coupled with the partisan nature of officers have often been referred to in judgments made by the superior courts. Furthermore, specific reference is often made in respect of the incompetency of the trial judges. It is pertinent to make the point here that despite these almost persistent lapses in the cases reviewed, it was only in the following case that a superior court specifically took to task 'delinquent' investigation officers.

Muhammad Siddique vs. The State

The court noted that the police and subordinate courts failed to act in a lawful and timely manner that may have prevented a triple-murder honour killing.

Abdul Zahir and other vs. The State

The Court found that records were tampered with and false succession documents were prepared by the accused and other parties. This was in an attempt to obstruct the rights of a woman (wife of deceased).

Zarina Bibi vs. The State

This case represents an instance in which one of the strongest judicial comments was against the mis-application of *hudood* laws by both the investigation officers and the lower courts.

The court found that the application of *hudood* was predominately arbitrary and that the lower courts seem to have a tendency to want to convict. The court considered this presumption of guilt to be against the principles of Islam.

The Court further criticised the conduct of the trial judge for he was found to have failed to have performed his obligations. Additionally, the court was critical of the police and it was said that they considered “the poor and the minorities their fief”. The collection of evidence and the investigation was both partisan and arbitrary.

The Court further observed that “The controversy around the applicability of *hudood* laws in Pakistan is related more to the erroneous application of these laws in the country, rather than the laws per se.”

4. Element of *qadfh* ignored.

Our review invoking Islamic criminal laws on *hudood*, on *zina* and *zina bil jabr*, suggests that courts have failed to take the *Qur’anic* law to its logical conclusion. The *Qur’anic* law on *qadfh* requires persons who give false evidence and bring false cases which implicate women of illegal sexual relations to be whipped. Additionally, their evidence must be forever disregarded.

One way to ensure the effective enforcement of *qadfh* law is by the suo moto powers of courts. The Federal *Shari'at* Court believes that legislature must amend the *qadfh* ordinance so as to empower courts to take people to task for falsely implicating people in offences of *zina* and others of a similar nature. This, the court holds, would undermine the tendencies of achieving personal ends and ulterior motives through false cases of *hudood* against enemies or 'runaway' females of family.

The Protection of Women (Criminal) Amendment Act 2006

After almost three decades of campaigning and advocacy, the Pakistan Parliament has succeeded in addressing some of the weaknesses and unjust sections of the *hudood* law on *zina*. This was achieved through the adoption of The Protection of Women (Criminal) Amendment Act 2006, under which a person filing a case of *zina* must produce four witnesses otherwise a case will not be registered. Where witnesses do not meet the evidentiary requirements, the rules of *qadfh* will come into operation.

It is too early to ascertain the impact of the Women Protection Act. However, as a result of some preliminary research which has been conducted, it is evident that no matter how apparently just and equitable a law, it is the application that determines both the implications and outcome for women.

Seminars

Seminar One: Pakistan Case Study

1. Are the *hudood* laws a faithful reflection of the Divine Will as expressed in the *Qur'an*. If not, why has it found such ready acceptance in its use?
2. Is the *hudood* law on *zina* essentially a faulty piece of legislation and the 'positive' inclinations of the appeal courts a damage-containment exercise?

Seminar Two: Pakistan Case Study

1. Why and how does one explain the disparity between the judgments of the trial and superior courts?
2. The *hudood* laws of Pakistan are considered to be an example of the use and abuse of religion in order to advance political agendas.

Discuss the above statement.

Assessment Essay Question

1. The judges of the superior courts in Pakistan have had more exposure to a progressive, liberal interpretation of the law and religion and are also aware of international human rights laws and willing to use them in their judgments.

Evaluate the above statement.

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Chapter Six

Implications of Applying Islamic Criminal Law

Session Ten

Objectives

- Understanding trial difficulties in plural legal systems
- A comprehension of the application of case law
- Consideration of the inconsistencies with national constitutions and international Human Rights

As pointed out earlier, Islamic criminal law falls within the realm of public law. The application of it therefore is inevitably bound to raise issues of both national and international concern. This is mainly because Muslim countries which apply the law have either plural legal systems, due to the legacy of colonial rule, or are modern states amongst a comity of nations with international obligations, or both. Moreover, there are hardly any such countries which do not have a Muslim population. It is therefore suggested that session ten be devoted to an examination of the implications of the application of Islamic criminal law.

The lecture should try to explain to students that in plural legal systems, practical trial problems may be inevitable. In Nigeria for instance, homicide cases or other capital offences under Islamic criminal law are tried only by Upper *Shari'a* Courts on charges prepared by state counsel. Preparing these charges normally take some time due to the bureaucracy between the police and the Ministry of Justice. The cases are normally initiated by the police. By the constitution, the police cannot detain suspects for longer than 48 hours without charging them to court. So they simply have the accused arraigned before the Magistrate Courts on the First Information Report (FIR). The Magistrate Courts do not have jurisdiction to try Islamic law matters and for this reason, they simply remand the suspects in prison custody. The police do not arraign the suspects before the *Shari'a* Courts because they do not prosecute there. When charges are finally filed before the Upper *Shari'a* Courts by the state counsel, attendance of the suspects for trial (which is necessary) becomes difficult. This is because prison authorities can only produce the suspects based on production warrants issued by the remanding Magistrates. In this situation, justice is delayed if not denied.

Real cases may be referred to. For example, the case of State vs. Ibrahim Garba & Anr in Kano State may be cited. In it, a charge of armed robbery contrary to section 140(b) of the *Shari'a* Penal Code Law of Kano State was filed before the Upper *Shari'a* Court, Yankaba, long after the accused persons had been remanded in prison by a Gyadi-Gyadi Magistrate Court. The trial was delayed because they were not physically before the Upper *Shari'a* Court nor could the Magistrate Court try them for lack of jurisdiction. The case of State vs. Shehu Labaran, where the accused person was charged with the offence of rape contrary to section 126 of the Kano Law before the Upper *Shari'a* Court, Shahuci, after being arraigned before the Chief Magistrate Court 19, Nomansland, suffered the same problem.

The application of Islamic criminal law also poses constitutional dilemmas. On the one hand, Islamic law is meant to be a holistic legal system. As such, its

penal system must cover all the 'traditional' crimes. One of these crimes is apostasy (*ridda*). In fact it is classified under *hudud* offences. However, jurists argue that apostasy simpliciter without fighting Islam does not amount to an offence. On the other hand, modern secular constitutions guarantee the freedom of religion or belief as a fundamental human right of all citizens. This right entails the freedom to change one's religion. Criminalising change of religion therefore would conflict with the constitution, and traditionally, constitutions take precedence over any other (local) law. This is exactly the dilemma in Nigeria. Section 38 of the 1999 Constitution guarantees freedom of religion or belief. Islamic criminal law cannot criminalise conversion from Islam to any religion without being in conflict with the constitution. The fear of such conflict is perhaps what explains the conspicuous absence of apostasy on the list of offences in the Shari'a Penal Code Laws in Nigeria.

Applying Islamic criminal law would not only conflict with national constitutions but with international human rights instruments as well. Interestingly, the applying Muslim countries are bound by these instruments. In addition to the change of religion issue which the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) clearly sanction, Islamic criminal law appears to be incompatible with international human rights law in many respects. For instance, punishments such as stoning to death and amputation of the arm which it prescribes for adultery and theft respectively may not be incompatible with liberal human rights enunciations which frown at 'inhuman and degrading treatment' or any punishment which violates the right to human dignity. It is based on constraints of this nature that the cases of stoning and cutting off of the hand handed down by the *Shari'a* courts in Nigeria came under so much criticism locally and internationally.

Similarly, as was pointed out earlier, Islamic criminal law does not equate Muslims with non-Muslims especially when the latter are from an enemy state, a Muslim may not be killed for the killing of non-Muslim. Its evidential law does not also equate Muslims with non-Muslims and males with females and the

testimony of a non-Muslim is not admissible against a Muslim and two females equal one male in testimonial capacity. These provisions appear to be incompatible with the United Nations Charter, UDHR and ICCPR provisions on equality of all human beings before the law as well the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It is for these and other reasons that Islamic public law is seen as needing reform before it could be applicable in the contemporary world (An-Na'im 1990). However, it has been argued that although there are some differences of scope and application between Islamic law and human rights, that does not create a general state of dissonance between them (Baderin 2003). A contextual interpretation of the Qur'an, it is suggested, would lead to a greater compatibility (Shah 2006).

While practical problems in the application of the law may not be difficult to handle if there is will, the inconsistency (with national constitutions and international human rights instruments) hurdle seems difficult, if not impossible, to cross.

Seminar

Seminar One: Application and Implications of Islamic Criminal law

1. Is it possible to harmonise Islamic criminal law with certain provisions of the Constitution and international law instruments?

Discuss the above statement in light of the provisions dealing with equality of all citizens before the law, the right to freedom of religion and the prohibition of inhumane and degrading treatments.

Assessment: Essay Question

1. The criticisms of Islamic law is said to be as a result of unnecessary focus on the development of it and the theories behind it. More notice should be given to studying the consequences of its application and the practice of it in contemporary societies.

Critically analyse the above statement.

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Appendix A: Table of Offences

	Qur'an	Hadith	Nigeria	Pakistan	Evidential law of Crime
Intentional Killing/homicide	Law of equality or blood money offender or pardoned	Law of equality	Death penalty or compensation or 50-100 lashes and 6 months-10 years imprisonment		
Killing by Mistake	Compensation and/or freeing a believing slave or fast for 2 months		Compensation		
Bodily Injury	Equal injury or compensation		Equal injury or compensation and/or 20 lashes max		
Adultery	Confession or 4 adult Muslim males giving eye witness evidence 100 stripes	100 lashes and stoning to death	Stoning to death		Confession or 4 adult Muslim males giving eye witness evidence
Fornication	Confession or 4 adult Muslim males giving eye witness evidence 100 stripes	100 lashes and 1 year exile	100 lashes and/or 1 year imprisonment		Confession or 4 adult Muslim males giving eye witness evidence
Rape					Confession or 4 adult Muslim males giving eye witness evidence
False Accusation (of wife by husband)	Confession or 4 adult Muslim males giving eye witness evidence Flog with 80 stripes unless repent				
Theft	Amputation of the right hand		Amputation of the right hand or 1 year imprisonment max and 50 lashes max		Guilty plea or 2 adult male witnesses other than victim giving eyewitness evidence
Drinking Alcohol	Punishment not provided??	80 stripes	40-80 lashes and/or imprisonment 1 year max		