COMPARATIVE APPRAISAL OF OFFENCE CLASSIFICATIONS AND STANDARD OF PROOF UNDER NIGERIAN CRIMINAL LAW AND SHARI'AH JURISPRUDENCE

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Abstract

Involvement in crimes has become universal phenomenon. The need to have legal instruments for deterring people from crimes becomes a necessity. The law thus continues to play its role of social control vide criminal justice administration. The familiar legal regime of crime control in Nigeria is the Nigerian criminal law. However, there is little exposition to the Shari'ah criminal jurisprudence since very few States have taste of it. Most legal practitioners versed in the law, practices and procedures of Nigerian criminal law usually mixed up them up with that Shari'ah criminal law and procedures. To address this problem, this paper discusses the topical issues of classification of offences and the standard required for proof of crimes in criminal cases by comparative appraisal of the Nigerian criminal law and Shari'ah criminal procedures. Vide reliance on the legal research doctrinal method, this paper comparatively appraises the classification of offences and the standard required for proof of crimes in criminal cases under the Nigerian criminal law as well as Shari'ah criminal jurisprudence. The paper thus orchestrates the areas of similarities and dissimilarities between the Nigerian criminal law and Shari'ah criminal procedures with respect to the areas of offence classification and the standard required for proof of crimes in criminal cases. This paper recommends shifting of interest to Shari'ah criminal jurisprudence for mastery of the legal system.

Keywords: *Standard, Proof, Classification, Criminal Law, Shari'ah, Criminal Jurisprudence*

1.0 Introduction

One of the instruments of social control is law especially in the field of criminal administration of justice. This is because behaviour of man towards criminal tendency is universal. Hence, virtually all the legal systems in the world over play pivotal roles in social control vide criminalisation of unlawful acts. The Nigerian criminal law and Shari'ah criminal jurisprudence are not exceptions as the two legal systems extensively deal with criminal administration of justice with a view to control social behaviour. Hence, great mastery of law, practices and procedures under the Nigerian criminal law and Shari'ah criminal jurisprudence remains the main driving force towards administering justice with respect to control of anti-social behaviours.

The extant problem is that not all legal practitioners are versed in the notion of crimes and punishments under the Nigerian criminal law vis-a-vis that of Shari'ah criminal jurisprudence. Whereas in the real sense, the two legal systems have distinct notions of what constitute offences and punishments though with certain areas of semblance. The paper hypothesises that in-depth knowledge of the difference between the Nigerian and Shari'ah criminal jurisprudence will definitely solve the extant problem being faced amongst most legal practitioners. Against this

backdrop, this paper thus aims to focuses its discussions on the classification of offences and standard of proof in criminal cases vide comparative analysis under the Nigerian criminal law and Shari'ah criminal jurisprudence.

2.0 Conceptual Clarifications

Offences are certain acts criminalised by the law.[174] Universally, criminal law is not blind when it comes to what constitutes offences.[175] The culprit arrested and charged for having committed one offence or the other must have realised that the act which he engaged in culminating into the offence he is arraigned for and standing trial has been duly criminalised under the law.[176] Invariably, any act which the law has made unlawful becomes an offence if engaged in by any person.[177] Under the Nigerian criminal law, the trite position is that offences are certain criminal acts against the public or the State.[178] Thus, for any act to constitute offence, it must have been expressly defined in a written law and punishments already prescribed for them.[179] Despite classifications of offence under the Nigerian criminal law, what is of utmost importance is that the accused person has engaged in a particular act criminalised under the law notwithstanding the gravity of the act since the matter of gravity of an offence is only the matter for its consequential punishments.[180]

Shari'ah criminal jurisprudence perceives offences as Allah's prohibitions the violation of which thus attract wrath of Allah by way of punishments which may come in form of *Hadd*, *Qisas* or *Taa'zir.*[181]In the same token, offences are therefore certain acts which have already been prohibited by Allah (SWT) the contravention of which attracts punishment.[182] It is important to note that all offences under Shari'ah criminal jurisprudence are well defined in the primary sources of the law though not all of them have their punishments prescribed.[183] In the case of offences categorised as *Hudud*, their punishments are fixed in the Qur'an and Sunnah.[184] The same position with *Qisas* offences which enjoy punishments prescription in the Qur'an though not fixed as in the case of *Hudud;* the purpose of which is to give the victims and relatives of the victims (as the case may be) opportunity to choose from the three (3) options prescribed by Allah (SWT).[185]

Proof is *sine qua non* to convictions and imposition of punishments under criminal law.[186] The criminal law in this sense refers to the Nigerian criminal law and the Shari'ah criminal jurisprudence. According to the Nigerian criminal law, the burden is placed on the prosecution to

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[174] Sowmyya T (2014) 'Crime: A Conceptual Understanding' Indian Journal of Applied Research 4(3) 196-198

[175] Moore HM *et al*, (1988) 'Crime and Policing' Perspective on Policing, 1-12

[176]ibid

[177]ibid

[178]Isiaka AA and Okaphor EF (2018) 'Concept of Crime in the Administration of Penal Justice in Nigeria: An Appraisal' NAUJILJ 9(1) 246-251

[179]See the case of Aoko v Fagbemi (1961) 1 ALL NLR 400

[180]Sowmyya (n 1)

[181]Isiaka and Okaphor (n 5)

[182]Bambale YY (2016) *Crimes and Punishments under Islamic Law,* (Malthouse Press Ltd, Lagos) 1

[183]This is because the definitions of *Hudud*, *Qisas* and *Ta'azir* offences are embedded in the primary sources of Shari'ah. However, with respect to their punishments, it is only the punishments for *Hudud* and *Qisas* that are captured in the Qur'an and Sunnah while the punishments for *Ta'azir* offences are left to the discretion of *Qadi* (Judge)

[184]Doi AI *Shari'ah: The Islamic Law,* (Al-Yassai Publishers, Kano, Nigeria, 2007) 236-267

[185]ibid, at 221

[186]Bundy A *et al*, (2005) 'What is Proof?' Philosophical Transactions of the Royal Society 2377-2391

prove its case to the trial Court's satisfaction.[187] The position of Shari'ah criminal jurisprudence is not different as the law requires proof before imposition of punishments.[188] Thus, under the Nigerian law and Shari'ah criminal jurisprudence, the notion of proof revolves around concrete and credible evidence which the prosecutions must adduce before the court to substantiate their allegations of crime against the culprit.

Nigerian criminal law is the body of the entire legislations in Nigerian bothering on criminal cases.[189] This may be found in laws made at the federal, state and local government levels.[190] The feature of Nigerian criminal law is such that their purposes are to criminalise unlawful acts and prescribe punishments against anyone who contravenes the law. The overall objective of Nigerian criminal law is to punish offenders and to deter others from committing or contravening the law.[191] In the same vein, Shari'ah criminal jurisprudence as to do with body of Shari'ah which prescribes certain acts prohibited by Allah (SWT) the violation of which culminates into punishments of *Hadd*, *Qisas* or *Ta'azir.*[192] The Shari'ah criminal jurisprudence is derived from the Qur'an and Sunnah which are primarily, the foundational sources of the divine legislation. The law prescribes that punishments of the convicted culprits must be carried out in the public.[193] This is to serve as deterrence. Thus, as the case under the Nigerian criminal law, the offences under the Shari'ah criminal jurisprudence are committed against the public or the state[194]*KhalifatuLlah* (vicegerent of Allah SWT) on earth.

3.0 Offence Classifications under Nigerian Criminal Law

In the criminal law administrative system, offences are classified in order of their seriousness.[195] This classification does have a number of implications especially when it comes to nature of the offences and their prescribed punishments. As far as Nigerian criminal law is concerned, there exist three (3) major classifications of offences into felonies, misdemeanours and simple offences.[196]

A. Offences Classified as Felonies

Offences classified as felonies are any offence(s) which have been declared by the relevant criminal law to be felonies. For this category of offences, the law enjoins that they are punishable by way of death sentence or by way of imprisoning the convict for at least three

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[187]Nwanyanwu CA and Ajie CO (2018) 'Proof of Crime under the Nigerian Criminal Jurisprudence: An Appraisal' *Port Harcourt Law Journal,* 7(1) 468-475

[188]Hussin N (2018) 'Revisiting Islamic Punishment and its Implementation in the Contemporary World' International Conference on humanity, Law and Sharia, November 14-15

[189]Atsegbua L *et al,* (2021) *Criminal Law in Nigeria: A Modern Approach,* (Malthouse Press Ltd, Lagos,) 1-296

[190]Such as Economic and Financial crimes Commission Act, Independent Corrupt Practices Commission Act, Criminal Code Act, Criminal Code Law, Penal Code Act, Penal Code Law etc.

[191]Olonisakin TT *et al,* (2017) 'The Nigerian Criminal Justice System and its Effectiveness in Criminal Behaviour Control: A Social-Psychological Analysis' IOSR Journal of Humanity and Social Science, 22(2) 33-48

[192]Bambale (n 9)

[193]See Quran Chapter 24 verse 2

[194]Except in *Qisas* cases the rights of individual are dominant.

[195]Supra note 5

[196]Chukwuemeka SM (2024) 'Classifications of Offences: 3 Major Classifications of Offences' <https://bschorlar.com/classifacations-of-offences/> accessed 14 September 2024

years.[197] They are also such offences that are punishable without proof of previous convictions.[198]Invariably, felonies are offences of more serious nature because their punishments range from offence death sentence, life imprisonment, three years' imprisonment and beyond.
From historical realm, it is a fact that at common law, felony offence is an offence that can lead to total forfeiture of either land or goods and in similar vein capital punishment might be imposed pursuant to the degree of the guilt of the culprit.[199]Thus, at the earliest time, common law views felony offences as very serious offences in the perception of the Royal court whose convictions include forfeiture of life, limb, chattel and the likes.

B. Offences Classified as Misdemeanours

The category of offences within the classification of misdemeanours is offences which are indeed lower than felony in terms of nature, seriousness and punishments. Offences within this classification are generally punishable with fines, forfeiture or imprisonment as the case may be.[200]In the classical definition of misdemeanours, it is not disputed that they are offences whose punishments upon convictions include term of imprisonment exceeding six months but below three years jail term.[201]

C. Offences Classified as Simple Offences

Classification of offences into simple offences implicates that, such offences in term of seriousness and punishment, are lower than felony and misdemeanours.[202] Their punishments are usually include mere caution, discharge, fine, forfeiture and imprisonment wise, it is very rarely with term of imprisonment not more than 6 months.[203]

4.0 Standard of Proof under the Nigerian Criminal Law

Standard required for Proof and the legal burden required for proof are usually confused by novice. Thus, standard of proof entails the great length at which a particular party is required to go as a matter of must to convince the court to dance to his tune in a given particular case.[204] On the other hand, burden required for proof is the responsibility placed on a particular litigant or party to discharge with respect to a case at hand.[205]
Under the Nigerian criminal law, the prosecutions have a lot to do. The reason being that the standard required for proof of crimes in criminal cases from the prosecution is proof beyond reasonable doubt. Hence, the prosecution is mandatorily required to discharge such legal burden in establishing the guilt of the accused person to the satisfaction of the court. The foregoing contention is the purport of section 135(1) of the Evidence Act, 2011.
The genesis of the foregoing is traceable to the principle of common law laid down by the House of Lords[206] in a number of cases one of which was Woolmington v DPP.[207] It is thus important to

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[197] Dada AA (2015) 'Criminal Justice System: The Nigerian Scenario' International Journal of Social Science and Humanities Research 3(3) 437-444
[198]ibid
[199]Hessick CB (2019) 'The Myth of Common Law Crimes' Virginia Law Review, 105(5) 965-1024
[200]Dada (n 24)
[201] ibid
[202] Filani AO and Omoleye BO (2023) 'Corporal Punishment in Nigeria: An Overview' International Journal of Education and Research 11(5) 45-56
[203]ibid
[204]Clermount KM (2009) 'Standard of Proof Revisited' Vermount Law Review 33, 469-487
[205]Zendeli AB (2024) 'Conceptual Definition of the Burden of Proof and Other Related Terms'<http://pf.ukim.edu.mk/wp-content/uploads/2020/05/4.-Arta-Bilali-Zendeli.pdf> accessed 14 September 2024
[206]ibid

note that the phrase 'beyond reasonable doubt' does not translate to proof with all certainty. His Lordship, Denning (MR), held in Miller v Minister of Pensions[208] thus:

> *It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflate the cause of justice. If the evidence is strong against a man as to leave only a remote possibility, in his favour, which can be dismissal with the sentence - of course, it is possible but not in the least probable - the case is proved beyond reasonable doubt but nothing short of this will suffice.*[209]

Oputa JSC threaded the same vein when in the case of Bakare v State[210] propounds that the satisfaction by the court that the culprit is guilty of the offence in question is what proof beyond reasonable doubt implicates. The legal luminary puts it thus:

> *Proof beyond reasonable doubt stems out of the competing [sic] presumption of innocence; inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt, not beyond the shadow of doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including administration of criminal justice. Proof beyond reasonable doubt means what it says. It does not admit of plausible and fanciful possibilities but it does admit of a high degree of cogency consistent with an equally high degree of probabilities.*[211]

It is worthy of note that the implication of the standard of proof under the Nigerian criminal law is that there is mandatory *onus* on prosecution to discharge it otherwise the verdict of acquittal held in favour of the accused person. It is trite law that if there exists any iota of doubt in the prosecution's case, the implication is that the resolution of such by the court would be in favour of the accused person.

5.0 Offence Classifications under Shari'ah Jurisprudence

Shari'ah criminal jurisprudence derives its validity from the gamut of Shari'ah.[212] In strict sense, Shari'ah criminal jurisprudence has no distinct corpus of 'criminal law' as was the case under the Nigerian criminal law. The criminal jurisprudence of Shari'ah, however, categorises criminal offences into three (3) categories[213] having regards to the nature of the offences. Certain group of offences are classified as *Hudud*[214] whose punishments are fixed in the relevant provisions of the Holy Qur'an and Ahdith contained in the Sunnah of Prophet of Islam, Muhammad (PBUH).

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[207] (1953) AC 462
[208] (1947) 2 ALL ER 372
[209] ibid
[210] (1987) 1 NWLR 579
[211] ibid
[212] Ladan MT (2024) "The Development of and Application of Sharia in Northern Nigeria: Issues and Challenges" <https://library.fes.de/pdf-files/beuros/nigeria/50282.pdf> Accessed 14 September 2024
[213] Tariq T (2024) 'Islamic Criminal Law' <https://www.academia.edu/38971307/Islamic_Criminal_Law> accessed 14 September 2024
[214] They are crimes against Allah (SWT)

Some offences are also classified as *Qisas*[215] whose punishments include retaliation, payment of *Diyyah* and forgiveness as the case may be as orchestrated in certain injunctions of the Holy Qur'an and Ahdith of the Prophet (PBUH). The last classification of criminal offences under Shari'ah criminal jurisprudence is *Ta'azir*.[216] These are crimes that do not enjoy fixed or specified punishments in the Holy Qur'an and Sunnah. The punishment regime is left to the discretionary power and competence of the *Qadi* (Judge).[217]

A. Offences Classified as *Hudud*

The jurisprudence of Shari'ah criminal law divides crimes into offences against the interest of Allah and those against the interest of man. *Hudud* offences come under the category of the former i.e. against Allah. The definitions and punishments of these *Hudud* offences are expressly provided and fixed respectively in the Qur'an and by extension in the Ahdith of the noble of Islam Prophet (PBUH). The *Hudud* offences are seven in number including *Zina*[218] (adultery or fornication), *Qadhf*[219] (unproven allegation of *Zina*), *Shurubul Khamr*[220] (consuming intoxicants), *Hirabah*[221] (highway robbery), *Sarqah*[222] (theft), *Riddah*[223] (apostasy) *Baghy*[224](rebellion). Punishments of *Hudud* come in different variances ranging from public lashing, amputation of hands, and crucifixion to publicly stoning to death.[225] *Hudud* crimes are neither pardonable by the victim nor compoundable by the state except prior to arrest and report to the authority.[226] By implication, once reported and the culprits found guilty, punishments must be publicly carried out as specified in Shari'ah jurisprudence.[227] It is however important to note that the evidentiary standard of proof in *Hudud* are often impossibly high.[228] This is to ensure that innocent is not punished unjustly. A case in point is the proof in the cases of *Zina* and *Sarqah* because satisfying the requirements for unlawful sexual intercourse (*zina*) and theft (*sarqah*) was virtually impossible without a confession. More so, such confession could also be invalidated by a retraction by the culprit. The *hadd* punishments are meant to serve the purpose of deterrence and to clarify the gravity of heinous crimes against Allah. Little wonder the Prophet (PBUH) warns that *Hadd* punishments should be averted in the event of ambiguities (*Shubuhat*) doubts.[229]

B. Offences Classified as *Qisas*

Qisas offences are offences in which the victims or the relatives of the victims can seek or demand for punishment of retaliation.[230] The examples of offences falling within this category are usually murder and grievous bodily hurt. Allah said in the Holy Qur'an:

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[215] They are crimes against an individual or family

[216] They are usually referred to as lesser offences or offences that are neither *Hudud* nor *Qisas*

[217] It is important to note that some scholars added the fourth category of *Siyasah* (crimes against government), while others consider it as part of either *Hadd* or *Ta'azir* crimes.

[218]See Qur'an Chapter 24 verse 2

[219]See Qur'an Chapter 24 verse 4

[220]See Qur'an Chapter 2 verse 219; Qur'an Chapter 4 verse 45; and Qur'an Chapter 5 verse 93-94

[221]See Qur'an Chapter 5 verse 33

[222]See Qur'an Chapter 5 verse 38

[223]See Qur'an Chapter 16 verse 106

[224]See Qur'an Chapter 49 verse 9

[225]Bambale (n 9) at 5-105

[226]ibid, at 32

[227] See Qur'an Chapter 24 verse 2

[228]The Shari'ah criminal jurisprudence imposes proof of absolute certainty (*yakeen)* in cases of *Hudud. See* See Qur'an Chapter 24 verse 13.

[229]Bambale (n 9) at 32

[230]Doi (n 11) at 229-234

> *And We prescribed to them in it that 'a life for a life, and an eye for an eye, and a nose for a nose, and an ear for an ear, and a tooth for a tooth, and for wounds retaliation;' but whoso remits it, it is an expiation for him, but he whoso will not judge by what God has revealed, these be the unjust.*[231]

Thus, in the jurisprudence of Shari'ah criminal law, the offences of intentional murder attract retaliation even though the family of the victims reserves the right to demand for payment of *Diyyah* (blood money) or even showcase unconditional forgiveness towards the culprit. In the same token, the offences of unintentional murder attract payment of *Diyyah* (blood money) with the third option of unconditional forgiveness still available at the discretion of the family of the victims.

It is worthy of note that where payment of *Diyyah* (blood money) is resorted to in the case of murder, either of its two types could be imposed depending on the circumstances. That is, the jurists recommend *Diyyyah Mughaladha* (Stringent payment) in the case of intentional murder while *Diyyah Mukhaffafah* (easier payment) is recommended in the case of unintentional murder.[232] In the case of grievous bodily hurt, Shari'ah criminal jurisprudence empowers the victims to demand for retaliation of payment of blood money as well as unconditional pardoning.

C. Offences Classified as *Ta'azir*

In Shari'ah criminal jurisprudence, *Ta'azir* offences include any crime that are neither *Hudud* nor *Qisas* having no fixed or recommended punishments in the Qur'an or Sunnah.[233] It is thus important to note that *Ta'azir* offences are defined in the Qur'an and Sunnah which are the foundational primary sources upon which Shari'ah is founded. It is only their punishments that are not specified.[234] It is thus not at the discretion of a *Qadi* to define what will be *Ta'azir* offences. The only discretion enjoyed by *Qadi* (Judge) is with respect to the affixing of punishments for *Ta'azir* offences.[235] *Ta'azir* offences are thus usually defined in Shari'ah jurisprudence as offences whose punishments are at the discretion of the presiding Judge (*Qadi*) for actions considered sinful but which actions can neither be punished by way of *Hadd* or *Qisas* under Shari'ah criminal jurisprudence.

Under Shari'ah criminal jurisprudence, the punishment regime for *Ta'azir* offences includes *tahdi* (threat), *tawbikh* (reprimand), *wa'iz* (admonition) *hajr* (boycott), *habs* (imprisonment), *gharramah* (fines), *musadarah* (forfeiture), *jald* (canning) *ta'azirbil-qatl* (death sentence).[236] From these punishments, it would be clear that offences involving *Ta'azir* need not be simple offences. The nature of the offences could be as serious as those of *Hudud* and *Qisas*. The bottom line therefore is that those offences cannot be adequately dealt with under the *Hudud* and *Qisas* punishment regimes thereby paving way for *Ta'azir* punishments. It is equally of important to note that cases where certainty of proof could not be achieved under *Hudud* cases usually fall under the ambit of *Ta'azir* so that such cases do not suffer the consequences of striking out by allowing *Ta'azir* punishments to take charge depending on the discretion of the *Qadi* (Judge).

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[231] Qur'an Chapter 5 verse 45

[232] Bambale (n 9) at 110-112

[233] Hakeem FB (2024) 'The Concept of Punishment under Sharia' <https://www.researchgate.net/publication/292936214_The_Concept_of_Punishment_Under_Sharia> accessed 15 September 2024

[234] ibid

[235] Bambale (n 9) at 120-121

[236] ibid, at 121-126

6.0 Standard of Proof under the Shari'ah Criminal Jurisprudence

The notion of standard required for proof and burden required for proof is not dissimilar to the perception under the Nigerian criminal law. Thus, standard proof under the Shari'ah criminal jurisprudence implicates the great length at which the prosecution has to go to convince the *Qadi* (Judge) that the culprit is guilty of the allegation of crime against him.[237] In the same vein, the burden of proof signifies the legal and onerous responsibility placed on the prosecution to support his allegation with concrete evidence with a view to proving the guilt of the culprit.[238]

It is worthy of mention that the genesis of standard and burden of proof under the Shari'ah criminal jurisprudence is traceable to numerous verses of the Holy Qur'an one of which is in Qur'an Chapter 21 verse 24 which provides thus:

> *And yet, they choose to worship deities instead of Him! Say (O Muhammad): Produce an evidence for what you are claiming...*[239]

In the same token, under Islamic criminal jurisprudence, the Prophet (PBUH) was reported to have said that '*evidence is on the accuser and oath is on the accused.*'[240] The reason is that everybody under Islamic criminal law enjoys presumption of innocence until he has been proven guilty. Thus, a culprit is presumed innocent and free from liability or punishment unless his guilt has been proven.[241]The reason behind this principle is deducible from the maxim that states:

> *The purpose of evidence is to prove what is contrary to the apparent fact. The purpose of the oath is to ensure the continuation of the original state.*[242]

No wonder the Prophet stated that:

> *If peoples' claims were accepted on their face value, some persons will claim other peoples' blood and properties, but oath is on the person who denies.*[243]

The standard required for proof under Shari'ah law is classified generally into two. The first one is proof of certainty (*yakeen*) i.e. proving the guilt of culprit in a manner that is devoid of any doubt whatsoever.[244] The second one is proof beyond reasonable doubt.[245] The nature, type and classification of the offences in question will determine which standard of proof must be met. As regards the standard of proof requiring proof of certainty (*yakeen*), it is resorted to only in *Hudud*

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[237]Haneef SSS, *et al*, (2019) 'Shariah Criminal Mode of Adjudication: Distinctive Features Vis-a-vis Modern System' Journal of Education and Social Sciences 13(1) 129-136

[238]ibid

[239]ibid

[240]Haneef (n 64)

[241] This derived from the legal maxim *al-aslubaraat al-dhimmah*.

[242]Mishkah A (2013) *Al-Qawaa'id Al-Fiqhiyyah* (Islamic University of North America, USA) 1-125

[243]Bassiouni MC (2024) "Introduction to Islam" <https://www.mei.edu/bassiouni/intro-to-islam> accessed 15 September 2024

[244]Imran (2024) "Burden of Proof and Standard of Proof in Islamic Cases" <https://www.studocu.com/my/document/international-islamic-university-malaysia/evidence-law-2/burden-of-proof-and-standard-of-proof-in-islamic-cases-imram/11104223> accessed 15 September 2024

[245] ibid

cases.[246] This is as result of the nature of the punishments involved in such cases. The punishments in *Hudud* cases are by their very nature harsh purposely to deter mankind from trespassing the boundaries set by Allah (SWT).[247]In view of the foregoing, to satisfy the condition of proof of certainty, the onus is on the prosecution to provide concrete evidence to support his allegation of crime against the culprit. Any allegation that is not supported by any concrete evidences to the certainty of the *Qadi* (Judge) will, therefore, be rejected thereby averting *hadd* punishments. This is the position for all *Hudud* cases position.

Thus, under Shari'ah criminal jurisprudence with respect to proof of certainty, any person who alleges against to the certain or apparent fact (*zahir*) must provide a concrete proof or material to support his allegation to the certainty of the presiding *Qadi* (Judge) because what he alleges is not in line with the general presumption i.e. original state (*al-Asl*). This signifies proof beyond all shadow of doubt. This standard of proof requires absolute certainty in the prosecutions' case and it is the standard required in *Hudud* cases. Thus, by this analogy, if X accuses Y for committing *Zina*, X must prove his allegation because what he alleges is contrary to the apparent fact (*zahir*) because the original state (*asl*) is that Y is presumed innocent of the offence of *Zina*. The harshness of the punishments in *Hudud* cases makes its standard of proof to require absolute certainty. It is on this note that the Prophet (PBUH) warns that *hadd* punishments should be averted in cases of doubts or ambiguities.

For other criminal cases other than *Hudud*, the standard of proof under Islamic criminal jurisprudence is beyond reasonable doubt (*zan al-ghalib*).[248] This standard is required in criminal cases such as *Qisas* and *Ta'szir* cases. The implication is that under *Qisas* and *Ta'azir* cases, the prosecution has minimal burden compared to certainty of proof expected in *Hudud* cases. It is on this note that most failed cases of *Hudud,* that is, *Hudud* cases marred by doubts or ambiguities later attract *Ta'azir* punishments because before *Qisas* and *Ta'azir* punishments could be meted on the culprit, the standard required for proof is proof beyond reasonable doubt (*zan al-ghalib*). That is why of course the Shari'ah criminal jurisprudence places some sort of discretion on *Qadi* (Judge) to ascertain which punishment is appropriate for the culprit in the case of *Ta'azir*.[249] Likewise in the case of *Qisas*, the families or relatives of the slain victim (i.e. the deceased) in murder cases or the injured victims in grievous bodily hurt cases have discretion to choose between *qisas* (retaliation), payment of blood money (*diyyah*) and unconditional forgiveness (*afw*).[250]

7.0 Comparative Appraisal under Nigerian Criminal Law and Shari'ah Jurisprudence

A. Classification of Offences

There exists similarity between the Nigerian criminal law and Shari'ah jurisprudence with respect to the number of offences classification. This is because, the prominent classification of offences under the Nigerian criminal law are three (3) which are felonies, misdemeanours and

[246] ibid
[247] ibid
[248] ibid
[249]Bambale (n 9) at 117-120
[250] See Quran Chapter 5 verse 45

simple offences.[251] The classification of offences under Shari'ah criminal jurisprudence follow suit by classifying offences into three(s) which are the *Hudud*, *Qisas* and *Ta'azir*.[252]

It is pertinent to note that the yard stick for classification of offences under the Nigerian criminal law is based on how serious the offences are as well as the severity of the punishments involved.[253] Thus, the felonies appear to be the more serious offences under the Nigerian criminal law because they attract terms of imprisonment of three (3) year and above including death sentence; the misdemeanours are not as serious as felonies because they attract terms of imprisonment exceeding six months but below three years jail term; and the simple offences, as their names imply, are the simplest in rank because they attract term of imprisonment not more than 6 months with mere caution, fines and the likes. However, under Shari'ah criminal jurisprudence, the yard stick for classification of offences is not based on the seriousness of the offences and degree of the punishment. The classification is based on whose right is involved; whether there is possibility of demanding retaliation; and whether there exists no stipulated punishment offences.[254] That is why *Hudud* offences which involve right of Allah are classified as *hudud*; the *Qisas* offences which involve right of individuals i.e. the victims or their relatives are classified as *Qisas* because they can exercise right to demand for retaliation, or collect payment of *Diyyah* or even forgive the culprits; and the *Ta'azir* offences having no stipulated punishment in the Qur'an and Sunnah (i.e. the foundational sources of Shari'ah) are classified *Ta'azir* because the *Qadi* (Judge) enjoys discretion to imposed valid punishments on the culprits.

It is worthy of note at this juncture that under the Nigerian criminal law, the highest punishment is the death sentence which is why felony offences are the most serious offences and other classifications follow the radar down the line.[255]This, however, is not the case under the Shari'ah criminal jurisprudence because the highest sentence of death is obtainable in all the three (3) calcifications of the offences. Thus, *hudud* offences such as *Zina*, *Riddah*, *Hirabah*, *Baghy* could attract death sentence upon the proof of certainty of the offences. Likewise, *Qisas* offences involving murder could attract death sentence by option of retaliation from the relatives of the victims. So also, *Ta'azir* offences based on the discretion of the *Qadi* could attract maximum death sentence especially in the offences of homosexuality and bestiality and the likes.[256]

Also, there exists some sort of difference between the Nigerian criminal law and Shari'ah criminal jurisprudence with respect to discretion of Judges in affixing punishments. Apart from murder and manslaughter that the judge can only impose death sentence and life imprisonment respectively, the punishment regimes under the Nigerian criminal law give Judges' discretion to impose between the minimum and maximum sentence for a particular offence at hand.[257] This style of discretion is not available under Shari'ah criminal jurisprudence. In *Hudud* offences for

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[251]Chukwuemeka (n 23)
[252]Tariq (n 40)
[253]Isiaka and Okaphor (n 5)
[254]Tariq (n 40)
[255] Dada (n 24)
[256]"The Shari'ah gives the ruler or the court considerable discretion in the affliction of *ta'zir* punishments, which range in gravity from a warning to death taking into account the seriousness of the offence, the circumstance of the criminal, his record, and other mitigating or aggravating factors." See Hussin (n 15); see also, Siddiqi MI (1985) *The Penal Law of Islam,* (2nd Edition, Lahore: Kazi Publication) 165
[257]Idem UJ and Udofia NE (2018) 'Sentencing and the Administration of Criminal Justice in Nigeria' Donnish Journal of Law and Conflict Resolution 4(1) 001-010

instance, the *Qadi* cannot decrease or increase the fixed punishments; thus, the regime of minimum and maximum sentences is out of the place.[258]

In the same vein, the punishment regime under Shari'ah criminal jurisprudence showcases instances where offences are defined in the law but the punishments to be affixed are left to the discretion of the Judges. This is the case in *Ta'azir* offences.[259] This situation is however strange to the Nigerian criminal law because for there to be offences properly so-called such act culminating into the offence must have been defined in the written law and punishment expressly specified.[260]

More so, *Qisas* offence under Shari'ah offers opportunity to the victims or the relatives of the deceased who are the worst hit in this type of offences to decide the type of punishment to be meted out on the culprits.[261] The Shari'ah criminal jurisprudence puts this in place so that the most concerned party in such cases would be satisfied with the court's final verdict owing to their involvement in determining the way and manner the culprit is to be punished. This is because, in certain situation, *diyyah* (blood money) would be desirable to fill the vacuum created by the death of deceased rather than the verdict of death sentence. This however achievable due to the opportunity given to the relatives of the deceased to choose the option that best suits them out of retaliation, *diyyah* (blood money) and forgiveness. It is worthy of note that this arrangement is not applicable under the Nigerian criminal law. The reason being that, upon the conviction of the culprit, what the court either does is to sentence to death or impose life imprisonment.[262]

B. Standard of Proof in Criminal Cases

The meeting point of the Nigerian criminal law and Shari'ah criminal jurisprudence with respect to the standard required for proof of crimes is evident in the legal burden required for the proof of crimes. The principle under the Nigerian criminal law is that the onus is on the prosecuting party to discharge the standard required for proof criminal allegations as the mandatory requirement of law. This onus placed on the prosecution under the Nigerian criminal law is always on the prosecution throughout the gamut of the criminal proceedings which never shifted to the defence side. The foregoing position equally holds sway under the Shari'ah criminal jurisprudence by the principle: *al-bayyinah 'alaa al-Mudaa'i* i.e. he who asserts must prove. By implication, the legal burden under the Islamic criminal law is, therefore, placed on the prosecution to prove the guilt of the culprit in compliance with the mandatory standard required for proof of the criminal case in question.

However, with respect to the standard required for proof which is to be discharged by the prosecuting party in criminal cases, the positions of the Nigerian criminal law and Shari'ah criminal jurisprudence differ. In the realm of the latter, the law stipulates two types of standard of proof for criminal cases. Thus, nature of the criminal case before the Court determines which standard of proof to be complied with. Thus, Shari'ah criminal jurisprudence recognises standard

[258] Doi (n 11) at 221
[259] ibid, at 226
[260] Footnote 6
[261] See Qur'an Chapter 5 verse 45
[262] Siddiqi (n 83)

of absolute certainty (*yakeen*) being stipulated for criminal cases involving *Hudud* while the standard of proof of *zan al-ghalib* i.e. beyond reasonable doubt is stipulated for criminal cases other than *Hudud* such as *Qisas* and *Ta'azir.*[263] This position is thus different from what is applicable under the Nigerian criminal law. This is because the law stipulates only one standard of proof which is proof beyond reasonable doubt for all criminal allegations be it felony, misdemeanour or simple offence.[264] So, while the Shari'ah criminal jurisprudence adopts dual approach for standards of proof which are proof of absolute certainty and proof of guilt beyond reasonable doubt; the Nigerian criminal jurisprudence adopts singular approach for standard of proof which is proof beyond reasonable doubt.

Another area of disagreement between the Nigerian criminal law and Shari'ah criminal jurisprudence is the implication of the failure to prove beyond reasonable doubt. Under the Nigerian criminal law, the trite position is that should the prosecution fails to prove its case beyond reasonable doubt, it implicates that the accused person is entitled to the verdict of discharge and acquittal as the case may be.[265] This is however not the position under the Shari'ah criminal jurisprudence. The Prophetic admonitions that: 'avert *hadd* punishments in cases of doubt'[266] does not implicate discharge and acquittal. In any *Hudud* case in which doubt surfaces in the case of the prosecution, the *Hadd* punishment would not be meted out on the culprit. This does not however mean that the room is given to culprit to go unchecked or punished (i.e. scot-free). The implication is that the culprit would have to face *Ta'azir* punishment in consequence based on the discretion of the *Qadi* (Judge). Thus, inherent doubt in the cases of the prosecution in *Hudud* offences cannot lead to discharge and acquittal but *Ta'azir* punishments.[267]

8.0 Conclusion and Recommendation

The paper examines the comparison of classification of offences and standard required for proof crimes in criminal cases under the Nigerian criminal law vis-a-vis Shari'ah criminal jurisprudence. The paper found that both Nigerian Criminal law and Shari'ah criminal jurisprudence classified offences into three (3) different nomenclatures. While the offences under the Nigerian criminal law are classified into felony, misdemeanour and simple offences, Shari'ah criminal jurisprudence classified offences into *Hudud*, *Qisas* and *Ta'azir* offences. As per the standard of proof in cases involving criminal allegations, the Nigerian criminal law places evidentiary burden on the prosecuting party to prove the guilt of the culprit beyond reasonable doubt. Shari'ah criminal jurisprudence equally follows suit but with slight difference. While the Shari'ah criminal jurisprudence places evidentiary burden of proof on the prosecuting party in cases involving criminal allegations, the standard required to prove the guilt of the accused person is in two folds. For *Hudud* offences, the standard required for proof is proof of absolute

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[263] Imran (n 71)

[264] See section 135(1) of the Evidence Act, 2011

[265] Wodage WY (2014) 'Burdens of proof, Presumptions and Standards of Proof in Criminal Cases' Mizan Law Review 8(1) 252-270

[266] Al-Shawkani M (1973) *Nayl al-AwtarSharhMuntaqa al-Akhbar* (Vol. 7, Beirut: Dar al-Jayl) 7. See also, Hussin N and Zawawi M (2023) 'The Application of the Rule of "Avoiding Hudud due to Shubha" as a Mechanism for Ensuring Justice in the Determination of Punishment in Islamic Criminal Law' <http://irep.iium.edu.my/34400/1/ISLAC_2013_final_paper-_Dr.Nasimah_%26_Dr.Majdah_%28UIAM%2...> accessed on 26 September 2023.

[267] For instance, in the case of *Sarqah*, if the quantum of the item stolen is not up to *Nisaab*, the thief will not be amputated; rather *Ta'azir* punishment based on the discretion of the *Qadi* would be meted on him. The thief would therefore not go scot-free.

certainty (*yakeen*) but for other criminal cases other than *Hudud* i.e. *Qisas* and *Ta'azir* offences, the standard of proof required is proof beyond reasonable doubt (*zan al-ghalib*).

The comparative analysis done in this paper shows that the Nigerian criminal law and Shari'ah criminal jurisprudence share certain things in common in the areas of offence classification and standard required for proof in criminal cases, it is however found that there are avalanche of arena where the two legal regimes were not on all fours. Thus, this paper orchestrated the importance of the study of the Nigerian criminal law vis-a-vis the Shari'ah criminal jurisprudence for better understanding of the criminal administration of justice. The foregoing will go a long way in providing platform for clarification of Shari'ah and Nigerian criminal law jurisprudence by preventing further mixing up the criminal procedures in the two systems of law. It is therefore not gain-said that there is need for legal practitioners to shift attention to the mastery of Shari'ah criminal jurisprudence for the mastery of the legal system.

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