DOI: https://doi.org/10.67203/abulj.2006.7.2.a.06

LAW LIBRARY
ABU ZARIA

THE JUDICIARY UNDER THE SOKOTO CALIPHATE WITH PARTICULAR REFERENCE TO THE VIEWS OF ABDULLAHI b. FODIO

DR. Ibrahim S. SADA, Esq.

INTRODUCTION

The Sokoto Jihad leaders following the footsteps of earlier jurists not only advocated for a strong and free judiciary but insisted that in its operation the Islamic ideal of Maslahah (public interests) must be the guiding principle. Abdullahi, the jurist, the ideologue and the scholar discussed, particularly, in his Diya al-Hukkam, the importance of the judiciary, the qualifications of the judges and the other officials, the laws and procedure on which to operate and finally the occasions under which the demand for siyasa can warrant disregard of the rigid application of the law to achieve the desired overall welfare of the society.

Justice in the sense of putting things where they properly belong and thereby ensuring harmony of the State has, more than any other subject occupied the thinking of the Shehu, Abdullahi and Bello from the beginning of the establishment of the Sokoto Caliphate. Evidence for this was found not only in the importance they assigned to justice among their political and governmental values but also in the extensive treatment of the idea and problem of justice-in-society in the Shehu's *Bayani and Najm al-Ikhwan,* Bello's *Usul al-Siyasa* and *Gaith al Wabl* and Abdullahi's *Diya al-Hakkam* and *Diya al-waliyat*. The three of them, of course, realised that the objective of ensuring justice could be achieved only when steps were taken to create the machinery to enforce law, especially its *hudud* provisions and administer general justice in such a way that it could be available to the generality of the populace. *Diya al-Hukkam's* provisions, explanations and instructions and the actions taken by Shehu and Bello in creating judicial and law enforcement offices and deploying the requisite manpower are clear evidence of their undertaking in this regard.

Abdullahi following al-Qarafi's[1] definition, saw the true meaning of the judicial function as "either establishing an obligation or obtaining a release from one". Where a judge decides in favour of payment of an allowance he was establishing an obligation. But if he decided in favour of abrogating the right of ownership....he was annulling an obligation.[2] With this definition of the judicial function, Abdullahi proceeded to explain why it was necessary at all to have a machinery for the administration of justice. On the role of the judiciary, he pointed out that,

> "The Judicial function is a collective obligation which is binding on any individual person who is

> fully qualified for it, provided that there is no other person with similar qualification in the town. The wisdom behind the formation of a judiciary lies in its usefulness in serving as a deterrent to quarrels and assaults. It suppressed the unjust, and helps the oppressed. It helps to end disputes. It enjoins right and prohibits wrong".[3]

Abdullahi went further to differentiate between the work and role of the Judiciary with that of the executive. Following al-Qarafi he pointed out that,

> "The sole functions of a judge is to pronounce judgement; that is to establish a decision on a given issue. But the implementation of his decision is an extra duty which may possibly be included under his jurisdiction. On the other hand it may not be included under his jurisdiction, especially if he has a weak control over mighty kings, in which case he may pronounce the judgement against them, but he cannot enforce it on them".[4]

This brand of separation of powers clearly showed that the judge did not have a policy making role which was the preserve of the legislature and executive. This was because Abdullahi went further to say that,

> "The judge may not pronounce on general policy with regard to such matters as the distribution of spoils of war, allocating funds from the treasury for various projects of public interest, executing prescribed punishments, organising the armed forces, fighting rebels, distribution of lands for agriculture or for (the exploitation of) mineral resources..... Such policy making is not permissible to anyone except with the permission of the Imam."[5]

Perhaps for the purpose of preserving a balance and to present an alternative opinion, Abdullahi at the same time quoted the enabling opinion of Ibn Farhun who said "the statement mentioned to have prohibited the judge to act as a policy maker cannot be binding under all circumstances. He has the right to supervise policies. The whole issue depends on customs and practices".[6] To further buttress his argument, Abdullahi quoted a Hanbali jurist, Imam Muhammad Ibn Qayyim who said,

> "The nature of public offices whether they have general or limited powers is derived from the words (used to describe them) as well as from circumstances and customs. The Sharia does not set specific limits to such offices. Certain functions which come under the jurisdiction of the War office may, in some places and at a certain time, be included under the jurisdiction of the judiciary. These functions may in some localities and at a certain time be confined to the Sharia alone, hence the definition of the judicial function in each country depends on the prevailing practice and custom.....[7]

Looking at the role of the judiciary in Islamic constitutional theory, it appeared from the views presented by Abdullahi that there is a core area of judicial functions which only those appointed as *Qadis* are expected to perform. However, it also appeared that Islamic Law did not enjoin the chief executive to scrupulously avoid a direct judicial role. This further suggested that Islamic law did not enjoin separation of powers between the three arms of government. From the philosophical and historical point of view, it seemed that in the operation of the Sokoto Caliphate such scrupulous separation of powers was not practiced. However, as regards the role and involvement of the judiciary in policy making, it appeared that there were areas of policy from which judicial officials were almost always excluded depending on the circumstances of the society and the way functions were distributed within the governmental organs. There did not, on the other hand, seem to be any mention of restrictions in involvement with judicial work by the executive arm of government as long as the Caliph, Wazir or governor has the required knowledge and he is just. Infact, Abdullahi categorically mentioned that "the supreme Imam, or his Wazir or his Amir to whom full authority has been delegated has jurisdiction like that of a judge. Therefore, these people are also judges".[8]

Appointment of Judges

According to Islamic constitutional theory, the Caliph, Amir, or Imam was the chief executive of the State. All state officials in whatever capacity, executive, legislative or judicial owe their appointment to the chief executive and are responsible to him. The judge is mentioned as one of the most important 'ministers' of the state, and one of the first offices to be filled. In his *Kitab al-Farq*, the Shehu states that the foundations of the Islamic government were four. He mentioned the judge as the second minister after the wazir.[9] Abdullahi

mentioned the judge as one the four deputies of the *Imam*. The others are the Wazir and the governors and their deputies.[10] The appointment of the judge, therefore, rested squarely on the Imam. However, in view of the insistence of the Sharia on the Imam acting on consultation with the *Majlis al-Shura* (consultative or legislative assembly) we may safely conclude that, the judges will be appointed by him after due consultation with the *ahl al-hal wal aqd* (the group that bind and loose).

Tenure of Office

The Sharia did not stipulate any time limit for the tenure of the judges in the same way that it did not fix any time limit for the office of the Amir. Under Islamic Law, it seemed that one can hold office as long as he does not lose any of the essential qualities or personalities that made him fit for that office. It also seemed that the Sharia will not frown at setting a time limit for holding offices as long as that is done to achieve a certain *Maslahah* (public interest). Be that as it may, the leaders of the Sokoto jihad in both their writings and practice did not stipulate any time limit for the tenure of judges. This seemed to be in line with the practice of the earlier Sunni jurists before them.

Removal from Office

Removal from office was done in the same way the appointment was made. The Amir or Imam dismisses the judge whenever a genuine cause for his removal was established. The genuine causes include the loss of some or all the qualities that warranted his appointment or where complaint of corruption and abuse of office were made and established against the judge after due inquiry and investigation was conducted by the Imam.[11] Here, again the Sharia was silent on any specific procedure. It is very clear that the Islamic State can come up with a procedure that suits its circumstances and time.

Qualification of Judges

The fact that the Judiciary had to be appropriately staffed so as to maintain people's confidence in the system, Abdullahi devoted a large section of his *Diya al-Hukkam* on the important issue of the type of persons who should be appointed as judges and their qualifications and qualities. He was of the view that unjust people even if they were learned should be warned against seeking this noble office. So, also were "ignorant persons" to desist from getting involved in the work of the judiciary. It was only the man who knows what is right and bases his judgement on it, and who, in his loyalty to Allah, has no fear of criticism, and who does not look for gifts or anything of self-interest that should hold the office of a judge. In that case, his action would be "one of the

greatest virtues in the eyes of Allah".[12] However, Abdullahi added that "such judges are few".

Abdullahi listed ten conditions which must be fulfilled before the judge's pronouncement and appointment become valid. These are, Islam, malehood, freedom, sexual maturity, social justice, knowledge of the Sharia, ability to hear, ability to see, ability to speak and working alone.[13] After stating that two judges cannot sit together over the same matter, he proceeded to disagree with the view that an ignorant man can be a judge and lamented over the then situation in the *Bilad as-Sudan* where knowledge has indeed gone and ignorance is in abundance and ignorant persons being put at the helm of affairs. Among the conditions which facilitate perfection of judgeship are piety, intelligence and patience. The judge, he said,

> Must be pious, intelligent, venerable and forbearing. He must be in the habit of seeking the advance of scholars and be free from bad company. He must be an indigene (of the area under his jurisdiction) and must not be too cunning. He must not be a person who has ever been subjected to a prescribed punishment, nor of a doubtful lineage. He must neither be poor; nor weak, nor unlettered nor old. He must always be stern but not angry and humble but not weak. He must be well versed in Islamic law and hadith".[14]

For practical purposes, Abdullahi agreed with the view that where a person was qualified but was poor, he could be appointed provided that the government made him rich, and paid all his debts. This, he argued was because extreme poverty could make him humble himself before the rich and wealthy in the society. Abdullahi hastened to add that it was not easy to find all the qualifying conditions in one single person. He, therefore advocated that where two of the qualities, namely knowledge and piety were found in the person, he could be appointed.

As part of the code of conduct of a judge, Abdullahi insisted that the judge must, .

> "Strive to correct himself first by impressing upon his mind the ethics of the Sharia, by preserving mainly qualities and high aspirations and avoiding what may be religiously disgraceful. He must not accept gifts from anyone except from his close relatives.... Witnesses are also not permitted to accept gifts from any of the disputants so long as

> the dispute remains between them. Gifts may be donated ... provided that it is without personal motive; otherwise it is a bribe".[15]

Abdullahi concluded this part by saying that where a complaint was lodged against the judge an enquiry should be conducted and if it was found to be baseless, the Imam should retain the judge, otherwise he should be dismissed.[16]

The Essential Elements of the Judiciary

According to Abdullahi, the judiciary has six essential elements. These are the judge, the law to be applied, the person in whose favour judgement is passed, the person against whom judgement is passed, jurisdiction of the court and the legal procedure to be followed. Since we have already considered the qualifying conditions of the judge, we shall proceed to look at Abdullahi's view on the other five.

The Applicable Law

The second element essential in the judiciary is the applicable law. According to Abdullahi, the law which is the authority upon which judgements are based is to be derived from the Qur'an, the Sunna and the consensus of the Prophet's community. If the judge cannot find a decision about an incident (nazila) in anyone of these three legal sources, he will then have to base his judgement on his assessment and independent reasoning (Ijitihad). After consulting the scholars. If he is not a man who is qualified to exercise Ijtihad (Mujtahid), he will then have to use the most widely accepted opinion in his decision, after consulting the scholars. If he cannot find the most widely accepted opinion, then he must compare various opinions with a view to finding the soundest one. He must not submit to his personal whims nor base his judgement on an opinion because he likes it.[17]

To emphasize the unique position of the Qur'an and Sunna, Abdullahi added two other sources, Ijmah and Qiyas and opined that if a decision contradicts any of the four in order of priority, that decision must be revoked either by the judge himself or by another judge who may be taking over his place. The details of the applicable law based on the sources enumerated by Abdullahi are to be found in the various legal (fiqh) works by the Muslim jurists.

The Person in whose favour Judgement is Passed

The third element in the administration of justice, according to Abdullahi, is the person in whose favour judgement is passed.[18] Abdullahi is of

the view that a judge cannot pronounce judgement in favour of his blood relations, neither can he pass judgement in his own favour. Where the judge has a claim against someone or someone has a claim against him, the case must be taken to another judge.[19]

In other words, Abdullahi was saying that a person cannot be a judge in his own cause. In a dispute between two people one of them must be on the right and he is the one in whose favour judgement must be passed.

The Person Against whom Judgement is Passed

The fourth essential element in the judiciary, according to Abdullahi, is the person against whom judgement is passed. This is the person against whom an obligation is established either through, (a) his confession; or (b) testimony given against him after his failure to refute the evidence set against him (daf') and after making sure he has no longer any further evidence in his favour having been given time to produce one (l'zar) before a judgement is passed; or (c) a testimony given against him together with an oath sworn by two witnesses confirming the innocence of the dead or absent person (yamin al-Istibra) if his claim is against such person; or (d) on account of his violent behaviour in court and his absence from the court coupled with the evidence adduced against him; or (e) on account of testimony given against him and his tendency to withhold answers to questions connected with the claim. A judge must not base his decision on his personal knowledge of the case, but only on "manifest matters"properly adduced before him.[20] The person discussed by Abdullahi in this part is the party who loses a case before the court as a result of one of the five reasons given above.

Jurisdiction of the Court

The fifth element essential in the administration of justice is the jurisdiction of the court. According to Abdullahi this include all legal rights with the exception of such matters as touch on policy making which are within the preserve of the chief executive. The judge has an exclusive authority over the following,

> "matters connected with wills, relationship between freed slave and the former master (which is likened by the Prophet to blood relationship), trust estate, judgement connected with the majority of the individual (and consequently the individual's legal competence to take charge of own affairs), judgement connected with declaring someone deficient in judgement, distribution of

legacies, appointment of guardians for the orphans, property owned by absentees, cases of lineage, cases of injuries and bloodshed...."[21]

In Abdullahi's view jurisdiction refers to not only the court but also the judge. A judge under Islamic law has an unlimited jurisdiction. Hierarchy of courts each with specified powers is unknown to Islamic Law. This however does not mean that the Islamic State cannot specify powers and jurisdiction in a hierarchical order. The Sharia is merely silent on the issue. Nothing stops a modern Islamic State from inventing hierarchy of courts and judges if the circumstances and time so demand.

The Legal Procedure

The last essential element in the administration of justice, according to Abdullahi is the legal procedure, whose knowledge is founded upon the ability to distinguish between the plaintiff and the defendant, the understanding of the complaints and their categories and the categories of response in the form of confession, denial and refusal. In addition, its mastery is dependant upon the knowledge of the application of al-Idhar (asking litigants for extenuating circumstances), al-ta'jil (period of respite granted by a judge to a litigant within which to produce evidence in his favour); and al-ta'jiz (when to pronounce final judgement). It also pertains to the appreciation of when to withhold an article the ownership of which is in dispute.

Finally, skill in procedure depends on the knowledge of oath, its manner, time and place as well as when to impose a more exacting form of it, and all other rules connected with the administration of oath. Also it depends on the knowledge of evidence, their categories, their conditions and types; as well as the conduct of the judges and their reports.[22]

The Judiciary Under Sokoto Caliphate: A Historical Perspective

The Shehu stipulated in *Bayan Wujul al-Hijra*, that the Qadi is the second pillar of the kingdom and made him in *Kitab al-Farq* one of the four Ministers of an Islamic government. He also detailed the functions of a judge in both *Bayan Wujub al-Hijra* and *Najm al-Ikhwan*. He said in the former that there can be several qadis. He also quotes Khalil as saying in *Mukhtasar* that "it is allowed to appoint more than one Qadi, either to supervise all matters or for a particular place or for a particular branch of jurisdiction.[23] Bello also discussed, in *Gaith al-Wabl*, the conditions without which no one can be eligible for appointment to the office of a judge and listed seven things which a person appointed to dispense justice has to look after.[24] The seven things he listed are:

(1) Settlement of disputes either by mutual agreement between the parties or by giving judgement in favour of one of them after following the due process of law and its procedure.

(2) Restoration of right of ownership to the rightful owner after taking it away from the one to whom it does not belong.

(3) Supervision of the property of the orphans, the insane and minors and appointing guardians over them if they have no guardians and supervising the guardians where they exist.

(4) Supervision of *Waqf* (public endowments).

(5) Execution of *Wasiyya* (wills) in accordance with the intention of the *wasiyya* (testator).

(6) Giving widows in marriage to their social equal if they lack guardians and they are sought in marriage.

(7) Enforcement of the *hudud* (prescribed punishment) and stopping assaults on the roads.

However, none of the three leaders gave details about various judicial offices outside the *Qada*, *hisba* and *wilayat al-Mazalim*. Abdullahi discussed a number of issues connected with a judge's right to appoint deputies in accordance with permission given to him by the Imam. He also mentioned the judge's freedom to appoint them in distant areas or when he is sick. At the same time he examined the powers and competence of judicial deputies and implied the existence of a category of deputies other than those a judge appointed with the permission or approval of the Imam.[25] Also, quoting Ibn Farhun, he specifically mentioned deputies such as registrar in charge of marriage and divorce, arbitrators with delegated authority, an umpire in charge of reconciling disputants in a land case, distributors of estates, evaluators, scribes, witnesses, assessors and translators.[26]

It seems that even before the Shehu's community exercised itself from the then existing state system of Hausaland, the Islamic obligation to appoint judges and the fundamental importance of the Sharia and necessitated the designation of some of the Shehu's companions as judges. On the initial and earlier picture of the events in the Sokoto Caliphate and the subject of appointment of judges in particular, Murray last has this to say,

> "Some of the judges listed also acted in that capacity before the Jihad whether at Degel or in a local village. The judges in Sokoto were numerous, but being drawn from among the scholars of the early community they formed a closely knit group. Muhammad Sambo, the Chief Judge and Imam.... had died at Tsuntsua. At Sifawa, the Chief Judge was Abu Bakr Ladan Rame, but he died there in office. Biali was a judge

and later became chief judge; he died between 1837 and 1842. Other judges include Muhammad b. Muhammad Binduwa... Another judge, Sambo b. Gabinda, was the son of a distinguished scholar. The judges Muhammad b. Agage, Ahmad and al-Hassan b. Ahmad are also listed as Sheikhs of Muhammad Bello, and probably had lived in Kadaye before the jihad, ..."[27]

Sultan Muhammad Bello was credited with the creation of the judicial office of *Alkalin Kuka* which was charged with responsibility for civil suits in such matters as divorce, inheritance or debt arising in the capital (i.e. Sokoto). The office of *Alkalin Daji* was also created by Bello. It had responsibility, according to Waziri Junaidu, for all issues involving claims to land, compound sites and occupancy in rural towns and districts throughout Sokoto.

Though Bello may not have instituted the office of *Wali al-Mazalim*, he sought to ensure that the law was correctly administered by reviewing the more important or controversial decisions of the Alkalin Sokoto. He infact acted as the *Nazir* (inspector) during the Shehu's lifetime and as Caliph he was helped in this appellate function by two *Muftai* (assessors) independent of his work in the executive council. The Law Courts at Wurno where Bello spent most of his life as Caliph were presided over by *Muftai* who decided civil suits which entailed no punishment.[28] And as the supreme Imam, the Caliph was obliged to receive appeals and prepare *Fatwas* on specific legal questions in response to enquiries from the provinces.

It is worth noting that in addition to creating and filling judicial offices throughout a substantial part of the State, Bello had also created law enforcement agencies. Last reported that he had two chiefs of police or sheriffs *(Sarkin Yari)* nine other police officials *(amir al-Hudud)* and three guards (haras).[29] These are most likely to be in addition to the law enforcement elements in his palace. It should also be borne in mind that the organisations established in Sokoto were replicated in the provinces.

as-Siyasa ash-Shariyya

Beside laying down the principles which should govern the creation and operation of the judicial and law enforcement agencies and suggesting some of the judicial offices and their deputies. Abdullahi devotes the fifth chapter of his *Diya al-Hukkam* to the political and policy aspects of justice and its administration. His sensitive approach to administrative rules and cautious acceptance of the necessity for principled and legitimized violence by public authorities against offending and recalcitrant members of society demonstrates the tension between respect for the human person and the claims of society against its members. Abdullahi's conception of "Sharia policies" (*al-Siyasat al-*

Shariyya) is in itself instructive. He divides it into "the unjust policy (siyasa) which is forbidden by the Sharia and the just policy (siyasa) which extracts a right from the oppressor, redresses the wrongs and suppresses the corrupt people".[30] At the same time too close a following of the letter of the law rather than its spirit may "open doors for injustice, the shedding of blood, and seizure of property without any legal right".[31] This is a dilemma which all governments face. The responsible ones avoid either extreme. They resort to "political justice" when, but only if, it is necessary.

And when the Sharia and public interest demand its use, they do not shirk that duty. According to Abdullahi, these are the governments which are supported by "a section of the scholars (who) choose a middle course; they combine the Sharia and Siyasa; through this they suppress falsehood and help the truth".[31]

Abdullahi's position on *Siyasa al-Shar'iyya* seems to be that of an intelligent and sparing application of laws combined with a judicious bending of the rules so as to protect essential and large demands of the public interest and to facilitate care for "the welfare of the people and (the) repelling of corruption by means of exposing the wrongs through methods which show the truth".[32] Among the methods which can be used to get to "the truth" and the extra judicial means that may be taken are:

> "Passing judgement on the basis of circumstantial evidence, without confession or witnesses, punishing the evil doers on the basis of doubt; threatening a suspect and beating him, if it is obvious that he is not telling the truth; seeking information by tricky questions or method and ignoring the testimony of competent witnesses (if the judge suspected that their testimony was not in accordance with the truth)."[33]

According to Abdullahi, the justification for and legitimacy of *Siyasa al-Shar'iyya* is "that Allah has decreed Laws for purposes, some of which are known to us while some are hidden from us", and it is only through Siyasa that "the interest of the people"and repelling 'corruption' can be achieved.[34] He went further to categorize the entire Law (Sharia) governing human life into five categories; the law relating to worship, the law relating to the preservation of human life; the law relating to satisfying "the natural wants, like trading and all social transactions; the law relating to good conducts; and the law relating to "the application of *Siyasa* and repelling of evil through the Sharia".[35] He further divided the *Siyasa* policy as covering six broad areas, the preservation of life, honour, lineage, protection of property, sanity and the policy that relate to putting "restraint to the acts of disobedience".[36]

As the basis for Siyasa, Abdullahi relied on the Prophet's and Caliph Ali's actions. Examples of the methods, tricks and procedures which can be

used to get at the truth but which are certainly inadmissible in conventional adjudication included threatening a suspect, punishing a man until he confess and refusing to give oath to a person notorious for corruption.[37] It is also permissible to use circumstantial evidence in handling disputes and claims.

The above methods put forward by Abdullahi have a number of purposes. One could be the provision of ready means, unencumbered by the finer rules of regular Sharia tenets, to give or restore harmony to social relations and avoid *fitna*. Another is to give those charged with responsibility for the security of society the means to apprehend wayward and dangerous persons who, if left to go through the normal 'due process' of the law will escape and perpetrate more harm on the generality of the people. There is also the 'reason of state' and intelligence gathering type of requirement which may justify extra-legal actions against individuals. These considerations will certainly arise especially in connection with the protection of national security and preservation of independence in the face of real and present danger.

On the whole, what the Sokoto Caliphate leaders', especially Abdullahi, have done was to lay down the principles and parameters which could place justice within reach of disputants and litigants in both the urban and rural areas of the Caliphate. Secondly, they suggested though on a modest but flexible scale, the machinery through which this could be reasonably achieved. They also created the essential offices and filled them so that they could give content and life to the formulations. Finally, Abdullahi suggested procedures, methods and examples which would, in extreme circumstances, enable society to protect itself through *Siyasa al-Shar'iyya*, from those of its members who are determined to go beyond the bounds of acceptable norms to achieve their selfish purposes.

To conclude this paper, it is important to mention that the Islamic constitutional theory is very explicit on the principle of limitation of the power of the state under the rule of law. The Islamic state is, accordingly, bound to administer and uphold the Sharia. There is no place in Islam for arbitrary rule by a single individual or group. The basis of all decisions and actions in an Islamic polity is the Sharia. To indicate the high priority that Islam accords to the rule of Law that it frees the citizen of the duty to obey political authority if the authority violates the law.[38] However, the Sharia does not advocate a rigid approach to the principles of the rule of law particularly the principle of legality that suggests that a person may be punished only in pursuance of a statute which prescribes a penalty and the crime (or offence) precisely described in the law code. Sharia employs three different methods for implementing the principle of legality in criminal law. For those crimes that pose serious and major threat to society the Sharia, specifies both the offence and the punishment - hudud and Qisas. For

those offences which pass, relatively, a lesser threat to public safety, the Sharia does not specify the penalty but only defines the offence and provides general guidelines about the punishment. These are the Ta'zir offences where the judge is empowered to select the type and quantum of punishment as he deem most suitable out of a range of approved penalties. It is not for the judge to define the offence. He can only specify punishment for the conduct, the criminality of which, has already been determined by a legal text. The ta'zir offences generally fall under what the Sharia calls ma'asiyya (reprehensible acts) such as consumption of forbidden substances, breach of trust, cheating in weights and measures, perjury, usury, obscenity, insult, bribery, unlawful entry into private dwellings, espionage etc. In all the above examples, the Qur'an and Sunnah provides the textual authorities which render such conducts into *ma'asiyya* (reprehensible). Abd al-Qadir Audah, is of the view that the judge has only a power to select an approved penalty ranging from warning to fines and imprisonment in dealing with *Ta'zir* offences. The judge has only the *sultah al-Ikhtiyar* (power to select) as opposed to sultah al-tahakkum (power to legislate). This is because in the Islamic constitutional theory, neither the judge nor any other organ of government enjoys unlimited powers of legislation.[39] Moreover, as regards *ta'azir* offences which violate public interest, the Sharia does not specify the nature of the office, it only provides general guidelines on the type of conducts it deemed harmful to society. In any case, based on the authority of the Sunnah, the Muslim jurists have further added a *proviso* that ta'azir, in general, must operate at a level below the severity of the prescribed penalties (*hudud*).[40]

NOTES AND REFERENCES

Senior Lecturer, Faculty of Law, Ahmadu Bello University, Zaria.

- Ahmad b. Idris al-Qarafi (1228-1280) was born in Egypt where he grew up and died. He was the author of valuable books on the Judiciary.
- Abdullahi Fodio, Diya al-Hukkam, pp. 49-50., 1975 Yamusa's Translation in The Political Ideas of the Jihad Leaders, unpublished M.A. (Islamic Studies) Thesis ABC/ABU Kano.
- Ibid, p. 50.
- Ibid, p. 51.
- Ibid, p. 51
- Ibid, p. 52.
- Ibid, p. 52-53.
- Ibid, p. 69.
- Shehu Usman, Kitab al-Farq, p. 570. (Hiskett's Translation) in Hiskett, M. (1973) The Sword of Truth, Oxford University Press, New York.

0. Abdullahi Fodio, Diya al-Hukkam, p. 36.
1. Ibid, p.65.
2. Ibid, p. 50.
3. Ibid, p. 54.
4. Ibid, p. 57.
5. Ibid, p. 58-9.
6. Ibid, p. 66.
7. Ibid, p. 65.
8. Ibid, p. 54.
9. Ibid, p. 67.
0. Ibid, p. 71.
1. Ibid, p. 69.
2. Ibid, p. 72-3.
3. Shehu, Usman, Bayan Wujub al-Hijrah, chapter 9, p. 67 (al-Masri's Translation) in al-Masri F.H. (1978) Bayan Wujub al-Hijrah alal ibad Oxford University Press.
4. Bello, M. Gaith al-Wabl, p. 279. (Umar Bello's Translation) in Bello, O. (1983) The Political Thought of Muhammad Bello (1781-1837) as revealed in His Arabic writing, more especially al-Ghayth al-Wabl fi sirat al-Imam al-Adl. Unpublished Ph.D. Thesis, London.
- Abdullahi, Diya al-Hukkam, op. cit. pp. 61-3.
- Ibid, p.63.
- Last, M. (1967) The Sokoto Caliphate, Longman's, London, p. 49.

Tukur, M. (1977) - Values and Public Affairs: The Relevance of the Sokoto Caliphate Experience to the Transformation of the Nigerian Polity, Ph.D Thesis, A.B.U., Zaria.
Last, M. (1967) The Sokoto Caliphate, Longman's, London, p.172.
Ibid, p.172.
Ibid, p. 172.
Ibid, p. 173.
Ibid, p. 174.
Ibid, p. 174.
Ibid, p. 174.
Ibid, p. 175.
Ibid, p. 175-8.
Ibid, pp. 178-183.
Enayat, H. (1982) Modern Islamic Political Thought, The Macmillan Press, London, p. 128
Audah, A. 1403/1938, Al-tashri al Jina'i al-Islam, Dar al-Fikr, Beirut, pp.138-149.

LAW LIBRARY
BU ZARIA