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# PORT HARCOURT LAW JOURNAL

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| Name                                                 | Articles                                                                                                                                             | Page No. |
|------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Prof. OVC Okene<br>and GG Otuturu                    | An Appraisal of Collective Bargaining<br>Law and Practice in Nigeria                                                                                 | 1        |
| Dr. Z. Adangor                                       | Role of Women in the Anti-Corruption<br>War in Nigeria under the Administration<br>of Criminal Justice Act, 2015 and the<br>Corresponding State Laws | 12       |
| David Tarh-Akong Eyongndi<br>and Chi. Johnny Okongwu | The Effect of Party Autonomy on Competence-<br>Competence in Arbitral Proceedings under<br>the Nigerian Arbitration and Conciliation Act             | 25       |
| Nwadei H. Nally Ph.D                                 | Rhetorics on Fight against Corruption:<br>The Challenges of Secularity and<br>Heterogeneity in Nigeria.                                              | 35       |
| Dr Ulihan Mogbitse Ogisi                             | International Consumer Protection;<br>Alternative Platform for the Protection<br>Of The Customer.                                                    | 43       |
| Nweke Prince Nweke                                   | Incidences of Oil Spillage in Nigeria:<br>Effect on Human Health And<br>The Environment                                                              | 55       |
| A. Y. Abdullahi                                      | Whistleblowing as a Means of Enforcing<br>Corporate Governance in Nigerian Banks                                                                     | 70       |
| Dr Evelyn Omolara Aluta                              | Water Security in National Security:<br>Synchronism of Women's Rights To<br>Water in Nigeria                                                         | 86       |
| Dr. Sylvanus Abila, Ph.D                             | Environmental Protection Law and Policy<br>In Nigeria: Challenges and Impact On<br>The Global Environment                                            | 92       |
| M. E. Idahosa<br>& M.I Oni                           | The Tort of Passing Off, it's Impact On<br>Intellectual Property: An Appraisal.                                                                      | 110      |
| Franklin-Orike, Wolu Minicent                        | Requirement of Corroboration in Rape<br>Cases under Contemporary International<br>Criminal Law: An Appraisal                                         | 133      |
| Millicent O. Onwuta                                  | An Overview of Women's Rights In Nigeria                                                                                                             | 144      |

|                                                |                                                                                                              |     |
|------------------------------------------------|--------------------------------------------------------------------------------------------------------------|-----|
| <i>Kejeh, Nneka Lesley</i>                     | The Concept Of Sexual Reproductive Rights in Nigeria: An Appraisal                                           | 150 |
| <i>Mezieuzor Uwakornudi</i>                    | The Law And Prisoners' Human Rights in Nigeria                                                               | 157 |
| <i>Ajie, C.O<br/>&amp; Dr. C. A. Nwanyanwu</i> | Sustainable National Development: Need For Every Institution to be Active                                    | 171 |
| <i>Dr Chidi E. Halliday</i>                    | The Aftermath of Company's Inability to Pay Its Debt in Nigeria: An Appraisal                                | 178 |
| <i>Adebayo, Akintunde Abidemi</i>              | A Review of Plea Bargain Concept In The Anti- Corruption War in Nigeria                                      | 187 |
| <i>Igwe, Obidinma.</i>                         | The Critical Issues in the Nigerian Petroleum Industry: An Appraisal                                         | 200 |
| <i>Jessica A. Ajonumah</i>                     | Women's Rights Are Environmental Rights: A Reproductive Health Concern Analysis.                             | 207 |
| <i>Lucy Bariara Benson</i>                     | Foreign Investment Law: Balancing State Power and Investors' Rights.                                         | 220 |
| <i>Daniel, Beauty Echem W.</i>                 | An Analysis of the Legal Framework on The Crime of Rape in Contemporary Nigeria                              | 232 |
| <i>Ehule Priscilla Karinate</i>                | Institutional Framework for the Protection Of Detainees and Prisoners' Rights In Nigeria: An Appraisal       | 244 |
| <i>M. O. I. Nwabuoku</i>                       | The Paradox Of Local Government Autonomy in Nigeria And The Legal Implications                               | 257 |
| <i>Dr. Junaidu Bello Marshall</i>              | Convergence of Corporate Governance Principles in Nigeria within the Context of International Best Practices | 272 |
| <i>Omasikachukwu Elekwachi</i>                 | An Analysis Of The Legal Framework For The Protection of Rights of Women Prisoners in Nigeria                | 286 |
| <i>Nnubia, Okemdi Chukwuma</i>                 | Violations Of Women's Human Rights in Nigeria: A Critique                                                    | 294 |
| <i>Izimah Ogoma</i>                            | Incidents of Environmental Degradation in Nigeria: An Appraisal                                              | 305 |
| <i>Nneka .S. Ezenwanne</i>                     | The Legal Framework for the Protection of Women's Rights in Nigeria: It's Application in Nigeria             | 320 |

|                                       |                                                                                                                                        |     |
|---------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|-----|
| Benstowe Francisca                    | Need For National Register on Child Sex Offenders as Further Deterrent Against The Crime                                               | 331 |
| Agbara Chinyeru                       | The Principles And Practice Of Extradition Under International Law: An Appraisal                                                       | 338 |
| Alaba Ibrinke Kekere                  | A Sexual Rights Approach to Addressing Sexual Violence in Nigerian Prisons                                                             | 357 |
| Ebiki, Letinah I.                     | The Role of Law in Enhancing Women's Political Participation and Representation in Nigeria: An Appraisal                               | 368 |
| Magaji Mamman Shuwa & Beatrice Shuwa  | Prohibited Degrees of Consanguinity, Affinity and Fosterage as Impediments to Marriage under Islamic Law                               | 380 |
| Jennifer N. B. Igwela (CLN)           | Women and Political Participation: The Case of Nigeria since 1999                                                                      | 397 |
| Brave Wobo                            | A Critical Evaluation Of Effective Corporate Governance in the Nigerian Banking Sector: A Case Study of Oceanic Bank International Plc | 403 |
| Jumbo Mielanyeofori Sunny             | Environmental Impact Assessment under Nigerian Law and Practice: Problems and Prospects                                                | 412 |
| Briggs, Krakrase Kemuel Nelson        | Comparative Analysis of the Law on Formation of Companies in Nigeria, South Africa and the United Kingdom                              | 426 |
| Dr. Chris Wigwe & Igonibo F. George   | Customary Land and Real Estate Ownership in Nigeria: An Appraisal                                                                      | 442 |
| Dr. (Mrs) B.O. Alloh                  | Sharia Law and Its Repressive Acts against Women in Nigeria                                                                            | 451 |
| ✓ Dr Olagunju-Ibrahim, Ridwan Olawale | Debasing the Calumnious Allegation of Cruelty against Islamic Penal Laws: Case Law and Statute as Necessary Tools.                     | 458 |
| Dr. C. A. Nwanyanwu and C. O. Ajie    | Proof of Crime under the Nigerian Criminal Jurisprudence: An Appraisal                                                                 | 468 |

# DEBASING THE CALUMNIOUS ALLEGATION OF CRUELTY AGAINST ISLAMIC PENAL LAWS: CASE LAW AND STATUTE AS NECESSARY TOOLS.

by  
Dr Olagunju-Ibrahim, Ridwan Olawale\*

## Abstract

*Crime perpetration is ubiquitous as hardly will any country boast of freedom from its shackles and woes. Crime is a perceived wrongdoing in the society, depicting an act or omission by an individual which tends to conflict with any portion of an approved way of living in a community. Because of the far-reaching danger and hazard which crime poses to the development trends of Nigeria, a number of legal and institutional frameworks have evolved over the years and same have always been resorted to with a view to putting an end to, or at least bringing down the rate of this crime scourge in the country. But rather than solving the problem and heaving a sigh of relief, crime continues here and there and in leaps and bounds. This raises questions as to the effectiveness of some punishments which the laws on ground (Nigerian criminal laws) prescribe for certain offences. A most convenient alternative in this wise is to factor some penal options of the Islamic law into the country's applicable laws. The fact of relatively low crime rate in the early classical Islamic periods and in some contemporary Islamic law jurisdictions such as Saudi-Arabia is a propelling factor for this way-out. However, the unfounded allegation of cruelty in some quarters against some Islamic law provisions in this regard continues to constitute stumbling block to the favourable consideration of this alternative. Thus, to allay the fear being entertained around Islamic criminal law, the mindset in this paper is to discuss the general features of Islamic criminal justice system and use the case law and statute to clear the much touted allegation of cruelty against Islamic Penal laws. The benefit in this for the society at large resides in the facilitation of public reception for the application of the ever effective penal provisions of Islamic law upon being factored into our laws in Nigeria. With this, crime perpetration is bound to be reduced in rate and intensity in our midst. This, in the end, will surely breed peaceful co-existence amongst all and sundry.*

## Introduction

The previous 1979 Constitution of the Federal Republic of Nigeria was clear and emphatic on its favourable position to the *Hadi* lashing punishment of the Islamic Criminal law. This is clear from the Constitution's shrouding of the particular punishment as an exemption<sup>1</sup> from what could constitute torture or inhuman and degrading treatment on a person. This constitutional position ( of 1979) has even had to be given wider spectrum of interpretation in a 1998 judicial authority<sup>2</sup> where death penalty per se, as severe as it is, was said to be incapable of amounting to torture, inhuman or degrading treatment. However, the noticeable omission of the fact of this exemption from what constitutes torture in the 1999 Constitution (current grundnorm) seems to serve, among others, as the basis of orchestrated resentment against accommodation of severe penal provisions of Islamic law in Nigeria. Whereas, a post 1999 judicial authority<sup>3</sup> has firmly established that the earlier position in the 1979 Constitution

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<sup>1</sup> See S.30(1) 1979 Constitution.

<sup>2</sup> Onuaha Kalu V. the State (1998) 13, NWLR (Pt. 583) p. 531

<sup>3</sup> Adeniji V. the State (2000) 2, NWLR p. 354

remains the law on the issue at hand despite the conspicuous omission of the *Hadi* lashing exemption in the current Constitution.

Admittedly, some of the penal provisions of Islamic law may be severe; the severity more often than not can be justified on the factor of gravity of the particular crimes involved in certain circumstances. Aside this, the overall benefit of abstinence from crime or at least, reduction in the crime rate which lies ahead as the direct result from the application of Islamic penal law should be a sufficient factor of positive disposition to this divine law. This paper discusses all these issues and other things ancillary thereto such as the general characteristics of Islamic criminal justice system which feature in the beginning of the paper. The motive behind the exercise is to allay the imaginary fear of some around the penal provisions of Islamic law being factored into the Nigerian law for application.

### **Features of Islamic Criminal Law**

A detailed study of the *Shariah* penal system reveals a few more salient characteristics of it which make the system a unique one indeed. One can come at the many blessings of Islamic law while glancing through literatures of Islamic history. A few basic qualities of Islamic system shows a marked difference from the European legal system.

These features are many and have been subject matters of discussion in a number of works. For instance, Bambale mentions<sup>4</sup> intention, offenders sole responsibility, proportionality of punishment to the crime committed and equality before the law as some of them.

For intention, the present researcher does not see the need to discuss the point under features of crime in Islamic law. This is for a purpose. The word 'feature', in its popular usage, denotes what is present in a given thing, which is absent in another thing. It is submitted that intention (*mens rea*) is also applicable to the features of crime under the European English Law. To that extent, it is not an exclusive preserve of Islamic law alone. Hence, the present researcher's decision to dump it at this juncture.

On the offender's sole responsibility for his crime as a feature, this holds water to an extent. This is so because crime codes under the English law type too do not approve of punishment transfer from the offender to a non-offender. To this end, one may say that the feature is peculiar to the two legal systems and, thus, not an exclusive preserve of Islamic Law also. However, with respect to a particular practice of some members of the Nigeria Police Force, one can say that the point at hand, offenders sole responsibility, is a feature exclusively peculiar to Islamic law of Crime. The practice referred to is the arrest by the Police of any matured member of the accused family instead of the accused where the latter is at large. Such an alternative person, upon arrest, would be put in police custody till the accused himself surfaces. Though this does not appear to be supported by any provision in the Nigeria Police Act, it is the convention in some situations.

The point being driven home here is the unfairness associated with this Police practice. It is called 'practice' because resort to it by the Police is a matter of mere improvisation. It seems not supported by any provision from the Police Act<sup>5</sup> nor any other<sup>6</sup> Code or Act<sup>7</sup> relating to crime in Nigeria. This Police practice (convention) is unfair because the person alternatively arrested and detained would have been made to go through some sufferings while under the

<sup>4</sup> Bambale Y.Y., *Crimes and Punishments under Islamic law* (2<sup>nd</sup> ed., Malthouse press limited, Lagos, Nigeria, 2003), pp. 6-12.

<sup>5</sup> (Cap. P.19), LFN, 2004

<sup>6</sup> Criminal Procedure Code applicable in the Northern Nigeria.

<sup>7</sup> Criminal Procedure Act applicable in the Southern Nigeria.

Police net. His freedom of movement would have been curtailed. The Police prison environment where he is restricted would have exposed him to nasty experience and unpalatable odours. There is also every possibility that such a person would have become psychologically disturbed by this ugly condition wherein he finds himself. Allowing an innocent person to go through all these inconveniences is tantamount to making him partly responsible for criminal acts not committed by him. This Police practice is not available at all in Islamic law of crime.

For 'equality before the law' as another feature in this respect, this is absolutely an issue of peculiarity to Islamic law. A section<sup>8</sup> of the Nigerian Constitution<sup>9</sup> makes it so. The section precludes institution of civil or criminal proceedings against a person holding the office of President or Vice President, Governor or Deputy Governor.

Though the constitutional license against criminal proceeding institution as stated above is for a period of time,<sup>10</sup> the said license during the period of time covered is nothing but a manifestation of injustice and double standard operation. The present researcher is aware of plethora of reasons canvassed in support of this constitutional philosophy (executive immunity). However, it is submitted that none of the reasons is as strong as to debase the need to adhere to equality which can only be satisfied by phasing out the said immunity.

On the first reason adduced in favour of immunity, it touches the need for some differences to exist between the leaders and the led. Enjoyment of immunity clause is believed to be one of these differences<sup>11</sup>. The second reason has to do with the fact that principles of natural law should impact on the national government and that immunity is one of these principles<sup>12</sup>. The third reason is to preclude enemies of the government from initiating frivolous court cases against the beneficiaries of immunity<sup>13</sup>.

As said earlier, it does not seem to me that any of the above reasons is convincing enough to warrant retention of the philosophy of executive immunity in our Constitution. The need for a wide range of differences between the ruler and the ruled is uncalled for. Where it ever exists, it is against fairness and justice. This same stretch of argument is useful in debunking Ogunleye's argument<sup>14</sup> in which reference is made to an English Book<sup>15</sup> on the rules of adjudication. Ogunleye's stand is in support of immunity. His reliance on the book is to present the doctrine of immunity as one of the basic principles of natural law. Whereas, if these principles of law are at all natural in the strict sense of the word, it is doubtful if a rule contrary to the spirit of equity and justice will ever be linked to them. Where there is such a linkage, it is an abnormality and the need for its review arises. This is because God is behind the nature, and the same God is fair and just.

Further, on the issue of retaining immunity to allow the rulers ample time for composure to face their rigorous official assignments, this assertion, in my opinion, lacks merit. Though the opponents (of any sitting government) may be on the look-out for opportunities to destabilize the government, this feat will be difficult or even impossible to achieve with an ever serious and committed government. But where a leader is perfidious, tyrannical, self seeking and a traitor interested in deflating the national economy, such a person is not entitled to

<sup>8</sup> S. 308

<sup>9</sup> Constitution of the Federal Republic of Nigeria (1999)

<sup>10</sup> During the Pendency of their tenure in office.

<sup>11</sup> The Guardian Newspaper (March 25, 2008) pp. 99 and 101

<sup>12</sup> *Ibid*

<sup>13</sup> *Ibid*

<sup>14</sup> In the Guardian Newspaper of 13<sup>th</sup> May, 2008, p.82

<sup>15</sup> Elegido, J.M., *Jurisprudence* (Ibadan, 1994)

Debasement of the leadership position in the first instance let alone the immunity. Another relevant point in the circumstance is the possibility of standing in for the immune in any court of law by any one out of the pool of lawyers in the government's employment. This is more so that the rule is that legal representation in court of law is as valid as if the client is personally in court. With this, the saying that engaging the immune in litigation distracts their focus from their assignments becomes unfounded.

From the above, it is clear that equality before the law is peculiar only to Islam as a feature of Islamic Criminal Legal System. A Qur'anic verse attests to the need to stand out firmly for justice (equality) when it says:

*O you who believe! Stand out firmly for justice (equality), as witnesses to Allah, even though it be against yourselves, or your parents or your kin, be the rich or poor, Allah is a better protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is ever well-acquainted with what you do<sup>16</sup>.*

In support of the above verse is a prophetic saying also on the emphasis which Islam places on 'equality before the law'. The Hadith goes thus:<sup>17</sup>

*From Abu al-walid, from Laith, from the son of Shihab, from Urwah, from Aishah, that Usamah spoke to the prophet (SAW) about a lady, and he the prophet said: the people before you were destroyed because of their partiality; they only carried out hadd punishment on the low people, forgoing the privileged of the same punishment. By Allah in whose hand my soul resides, if Fatimah, my daughter, happens to do that (i.e. commit theft), I would have her hand cut off.*

In order to avoid any discrimination between the rich and the poor, Islamic law enjoins similar treatment to all in the event of crimes of social and moral nature. The divine law does not prescribe monetary punishments for the wealthy people as they would easily get rid of such punishments after paying the required sum as fine. This can promote criminal mentality among the wealthy sections of the society. This equality before the law in Islam has deterred even the rich people from indulging in crimes. Western society today suffers from the same deficiency. The provisions of their legal system have given the rich in the society a licence for crime.<sup>18</sup>

With the above, 'equality before the law' as a feature of Islamic criminal law has been analysed. Same is the case with other similar features earlier mentioned and discussed. It must be stressed that few other points<sup>19</sup> still exist on the theme of criminal features in Islam. It is however the researcher's decision at this juncture not to delve into them for the fact that they are seemingly understandable at mere mention.<sup>20</sup>

The above is a discourse on the striking characteristics of Islamic criminal justice system. A critical look at these features as already discussed will easily debase the wide spread allegations of cruelty and harshness leveled here and there against Islam. More often than not, the antipathy harboured against Islam mainly by intolerant non-Muslims in the West is responsible for these allegations. Some nominal Muslims out of ignorance at times also fall prey

<sup>16</sup> Qur'an Chap. 4, verse 135

<sup>17</sup> Al-asqalani A.H., Fath al-Bari : Sharh Sahih al-Bukhari (New edition, vol.12 (No 6787) Dar al- Bayan al- 'Arabi, Cairo, Egypt, ND) p.99.

<sup>18</sup> [http://saif\\_w.tripod.com/explore/crime/ismalic\\_criminal\\_law.htm](http://saif_w.tripod.com/explore/crime/ismalic_criminal_law.htm) accessed on 12/5/2013, p. 1 of 4.

<sup>19</sup> Such as voluntariness of confession and averting of punishment on occasions of doubt.

<sup>20</sup> Avoidance of verbosity is another reason the researcher chooses to neglect explanation of other Islamic criminal law features.

into the pit of this image bastardization. Cruelty is indeed outside the features of Islamic criminal justice system. To establish this point better, it is not out of place to discuss the particular allegation as it is being peddled so as to see why it should not be identified with Islamic law of crime.

### Allegation of Cruelty against Islamic Penal Laws

To start with, the crux of the allegation against Islam on the issue at hand is the West's denunciation of the harshness of the punishments prescribed for *hadd* crimes in Islamic law. Legal penalties are specified in the Qur'anic texts for murder<sup>21</sup>, theft<sup>22</sup>, adultery<sup>23</sup>, calumnious accusation of adultery<sup>24</sup> and highway robbery (*Hirabah*)<sup>25</sup>.

It does not appear that apology is needed for execution being the Islamic law penalty for premeditated murder. The fact that this punishment is severe makes it a deterrent, especially if one considers how simple and expeditious the judicious machinery is in Islam and how beneficial its effects are for social tranquility and protection of human lives. Further, the death punishment for murder is not unbendingly absolute. *Shariah* entertains an option of monetary compensation (*Diyah*/blood money) in place of life termination in some instances<sup>26</sup>. There is even an allowance for total forgiveness and overlooking where relatives of the slain so consent.<sup>27</sup>

For the offence of *Hirabah*, the laid down punishment in *Shariah* is also death or amputation of hands and imprisonment. Theft is punishable with cutting off of hand. For adultery, flogging is prescribed for unmarried, while stoning to death is the punishment in the case of married persons. These punishments, especially those prescribed for theft and adultery, have been severally condemned by the West who tend to be confused as to the applicability or workability of these punishments in the present day 21<sup>st</sup> century. The West see the punishments as barbarous, same having been introduced since far back 7<sup>th</sup> century. They thus conclude that it will be undignifying of the modern day man to be subjected to such alleged cruel and harsh penalties when he falls prey to any of the paraphrased offences.<sup>28</sup>

Obviously, the gist of the allegations above can be said to stem from the western self styled conception of human dignity which evokes unnecessary sympathy for criminals without considering the gravity of their deeds, their impacts on the immediate victims and on the society at large.

The end result is suggestion of light punishments with all politeness. Islamic law, contrary to this, imposes a rigid code of punishment for the microscopic minority of criminals and ensures an atmosphere of peace and security for the rest of the society. This is in a bid to create an ideal society which Islam longs for through the jurisprudential doctrine of *Maqasid as-shariah* i.e. objectives of *shariah*<sup>29</sup>.

To debunk the reasoning of the critics of Islamic penal provisions, one needs to say, in the first instance, that the amputation of hand is the maximum punishment for theft. It is not to be imposed if theft involves a subject-matter which is less than *Nisab*. It is also not to be inflicted

<sup>21</sup> Qur'an Chap. 5, verse 38

<sup>22</sup> Qur'an Chap. 5, verse 38

<sup>23</sup> Qur'an Chap. 24, verse 2

<sup>24</sup> Qur'an Chap. 24, verse 4

<sup>25</sup> Qur'an Chap. 5, verse 33

<sup>26</sup> As-San'ani, *Bulugh al-maram Min Adillah al-ahkam* (2<sup>nd</sup> ed., No. 1009, Darussalam Publishers and Distributors, Riyadh, Saudi-Arabia, 2002), pp. 378 - 379

<sup>27</sup> *Ibid*

<sup>28</sup> Scuh as Zina, theft, *Hirabah*, etc.

<sup>29</sup> Abu Zahrah M., *Usul al Fiqh* (1958) pp. 364-372

where the property is stolen so as to quench one's burning hunger. Equally, amputation punishment will not be carried out where the object stolen is not kept in safe custody<sup>30</sup>. Although a lesser punishment among the *Ta'zir* variants will be resorted to as substitute in the circumstance.

The above apart, the *Shariah* imposed punishments are only applicable where a proper Islamic state exists. Further, the Islamic state strives to ensure fair distribution of wealth among the citizens. This is done in order to tame the criminal instinct of man.<sup>31</sup> Even in the very rare occasions where these *Shariah* punishments are carried out, the tendency of their deterrent effects leading to over all public good is not considered at all by the cynics and the critics. Severity of punishments, the like of which is being attributed to Islam, is not to be looked at in isolation. The positive effect of such punishments on reducing the crime rate in a given society should also be looked at. Where the two are considered and the finding suggests that the interest of the larger society would be better served with infliction of severe punishments, the fact of severity then becomes jettisoned and neglected<sup>32</sup>. Jurisprudence experts<sup>33</sup> from the shades of Common law also agree to this. Gordon Gaskell must have been prompted by this notion when he said:

*Foreigners consider this a horrible punishment but even they admit that it has made Saudi Arabia the country with the lowest crime rate in the world.*<sup>34</sup>

Putting the same notion above in another form,<sup>35</sup> another writer<sup>36</sup> says:

*The Islamic world presents a peaceful and much cleaner society. When we cast a glance at the Muslim countries where Shariah is applied, crime rate has become negligible to the extent that Saudi Arabia reported just one murder in one year. This can wholly be attributed to the deterrent punishments of Islam. Turning a blind eye to these facts, the west is solely guided in its criticism by the superficial understanding of Islamic code.*<sup>37</sup>

It is possibly with a view to achieving peaceful and clean society that some states<sup>38</sup> of Northern Nigeria, as explained above, resorted to re-introduction of the Islamic criminal justice system upon return of the country to democratic rule from 1999. Governors of the concerned states remoulded<sup>39</sup> laws of their states to accommodate the *Shariah* penal laws at least to an extent.

The pioneer state on this model is Zamfara<sup>40</sup> under the governorship of Alhaji Sani Ahmad Yerima Bakura. As put by Nasiru Ahmad, it is clear that remoulding laws of the concerned

<sup>30</sup> Siddiqui M.I., *The Penal Law of Islam* (Adam Publishers & Distributors, New Delhi, India, 2010).

<sup>31</sup> *Ibid*, p. 26

<sup>32</sup> *Ibid*, pp. 26-27

<sup>33</sup> Such as Salmond

<sup>34</sup> Gaskell G., *Readers' Digest* (February, 1967)

<sup>35</sup> While writing on the title: 'Islamic Criminal Law'

<sup>36</sup> Name not mentioned but the article (four pages) is available at (Explore Islam) Interfaith Dialogue – [http://saif\\_w.tripod.com/explore/crime](http://saif_w.tripod.com/explore/crime)

<sup>37</sup> p. 1 of 4

<sup>38</sup> Zamfara, Kano, Kebbi, Sokoto, Borno, Bauchi, Gombe, Jigawa, Kaduna, Katsina, Niger and Yobe.

<sup>39</sup> The starting point was the Zamfara State Government's Constitution of an 18 member law Reform Committee on 12<sup>th</sup> Day of July, 1999 with detailed terms of reference to see, in the main, to the enthronement of the Islamic penal law application. The Committee submitted its report to the Governor on the 4<sup>th</sup> of October, 1999.

<sup>40</sup> The State worked in line with the Committee's submission and enacted these laws; 1. the *Shariah Courts Law*, No. 5 of 1999; ii. The *Shariah Penal Code Law*, No. 13 of 2000 and iii. The *Shariah Court of Appeal Law* No. 6 of 2000.

states in the north epitomize the fundamental basis for the adoption and enforcement of full time Islamic criminal law in several states of the Northern Nigeria.<sup>41</sup> It is this full-fledged application of Islamic criminal law that can bail us all out from crimes tendencies in Nigeria.

### Re-Introduction of the Shariah Penal Code in the Northern Nigeria

The Shariah penal codes now applicable in the Northern parts of the country<sup>42</sup> falls short of the pure Islamic law standard in this respect. Although these codes contain some useful provisions against economic and financial crimes in various relevant states<sup>43</sup>, their aspects of economic crimes' enumeration and specific mention of punishments to be imposed upon commission of these crimes put the codes at a manifest distance from the pure Islamic law approach. Thus, the anti-economic crimes' antidotes in the Shariah Penal Codes may not be useful while recommending for what can holistically curb the menace of crimes generally in Nigeria.

Showing some defective portions in the said Northern Nigerian Shariah Penal Codes (by reason of which the codes should not be seen as a substitute for the pure Islamic law option against crimes), reference may be made to how the economic crimes of theft and taking of gratification by public servants in respect of official acts have been captured in sections 144 and 288 of the Zamfara State pioneer code law which commenced in January, 2000<sup>44</sup>.

On the economic crime of theft, the way its concept appears in the code under reference is too restrictive to suggest that other unlawful acts which are seemingly akin to the crime of theft in perpetration and structure are adequately taken care of by the same S. 144 of the Zamfara Penal Code. These other unlawful acts which are similar to theft include *Ikhtilas* or taking something at an opportunity or at unawares<sup>45</sup> and *Intihab* or forceful taking away of what belongs to another person who is overpowered by the criminal<sup>46</sup>. The implication of these other acts being outside the purview of S.144 and even S.146 of this code is to shut the door permanently against arraignment and trial of any suspect of the said unbecoming acts on the strength of S. 36(12) of the 1999 Constitution as per principle of legality. Whereas, under the pure Islamic law position, which this work recommends, instead of the current Northern Shariah penal codes, to be factored into the Nigeria Criminal law, such unbecoming acts would never be spared nor overlooked. Their perpetrators will be tried under Ta'azir<sup>47</sup> as earlier explained.

On the economic crime of public servants taking gratification in respect of official act, the punishment for it as can be found in S. 288(c)(i) of the same Zamfara Shariah Penal Code is a term of imprisonment which may extend to five years and caning which may extend to thirty lashes. The shortcoming in this penal prescriptions is the fact of their specific predetermination. The particular offence (taking gratification) surely falls under Ta'zir also under the pure Islamic law. But the choice of what form of Ta'zir punishment to be meted on an accused person in deserving cases is, in Islamic legal regime, left for the appropriate authority to make in Islamic law jurisdictions.

<sup>41</sup> Ahmad N.A., *Administration of Islamic Criminal Law under the Nigerian Constitutional Democracy* (Ahmadu Bello University Press Limited, Zaria, Nigeria, 2011), p.10

<sup>42</sup> Starting with the Zamfara State Code which commenced application in year 2000

<sup>43</sup> Northern States

<sup>44</sup> <http://www.f-law.net/law/threads/37487-Shariah-Penal-Code-Law-Zamfara-State-of-Nigeria-January-2000>

<sup>45</sup> Lane E.W., p.784

<sup>46</sup> Zuhaili W., *Al-Fiqh al-Islami Wa Adillatuhu* (4<sup>th</sup> ed., Vol. 7, Dar al-Fikr Press, Suriyah, Damascus, Undated) p.360

<sup>47</sup> Al-Jaziri A., *Al-Fiqh 'Alal-Madhahib al-Arba'ah* (1<sup>st</sup> ed., vol 5, Dar-al-Fajr Lit-turath, Cairo, Egypt, 2000)p.371

In practice, such an appropriate authority will conclude on the choice of the punishment when the Ta'zir offence has been committed. The authority makes this choice after having considered the situation and conditions in life of the criminal and the general surrounding circumstances at the period. The outcome of the assessment of these situations often helps the appropriate authority in arriving at an appropriate choice of Ta'zir punishment for a given crime. All these opportunities would surely elude the authority faced with similar situation in Zamfara State using the Shariah Penal Code thereat.

The hue and cry<sup>48</sup> in some quarters in Nigeria about the Islamic criminal justice system being inhuman and degrading especially at the face of the provision of s. 34(1)<sup>49</sup> of the 1999 Constitution appears to be lacking in merit and substance. The 1998 Supreme Court case of *Onuaha Kalu v. The State*<sup>50</sup> is one authority among many others<sup>51</sup> on this position. Giving the hints of the *Onuaha Kalu's* case and the legal import of same, Nasiru<sup>52</sup> says:

*In the case, the appellant was convicted of murder by the Lagos State High Court and was accordingly sentenced to death under the terms of section 367(1) of Lagos State Criminal Code. After affirming the conviction by the Court of Appeal, a further appeal was made to the Supreme Court. At the Supreme Court, it was argued, among other things, that death punishment (by hanging) was unconstitutional as it amounted to inhuman and degrading treatment under section 30(1) (a) of the 1979 Constitution (which has the same readings with section 34(1) (a) of the 1999 Constitution). The seven justices of the Supreme Court unanimously dismissed the claim and held that death punishment did not impinge the constitutional prohibitions of inhuman or degrading treatment.<sup>53</sup>*

Quoting the language of the court on the above, the dicta herein below reproduced are of paramount importance:

*Death penalty per se... cannot under any circumstance amount to torture, inhuman or degrading treatment which is what was prohibited under section 30(1). The manner of its execution by hanging cannot also constitute cruel or inhuman treatment.<sup>54</sup>*

The provision of s. 34(1) of 1999 Constitution is a reproduction of s. 30(1) (a) of the 1979 Constitution with slight difference. While the earlier provision in the 1979 Constitution specifically exempted 'Hadi lashing' under the Islamic criminal law from what could constitute torture or inhuman and degrading treatment on a person, such an exemption is left out in the provision of S. 34(1) of the current 1999 Constitution.

It must be stated that though the omission of the exemption referred to has the proclivity to stir an impression that *hadd* lashing and by extension, other similar penal provisions of Islamic law have been invalidated by the current 1999 Constitution for being degrading, this line of thought has however been negated by a post 1999 case<sup>55</sup> on the issue, which affirms the judgment as laid down in the 1998 case of *Onuaha Kalu vs. The State* decided then on the strength of the 1979 Constitution. Commenting on the omission of the Islamic penal

<sup>48</sup> By some people such as Prof. Mwabueze who maintains that *Shariah* punishments can hardly stand the test of constitutionality under s. 34(1), 1999 Constitution.

<sup>49</sup> The section provides for an individual's entitlement to respect for his dignity and lack of torture.

<sup>50</sup> (1998) 13, NWLR (pt. 583) p. 531

<sup>51</sup> Such as the case of *Adeniji v. The State* (2000) 2, NWLR, 35.

<sup>52</sup> Nasir Abdulkadir Ahmad, Now Professor, BUK, Kano.

<sup>53</sup> Ahmad N.A., pp. 42-43.

<sup>54</sup> Per Ogwuegbu, JSC in *Onuaha Kalu v. The State* p. 531 at 629.

<sup>55</sup> *Adeniji v. The State* (2000) 2, NWLR, 354

provisions exception from the 1999 Constitution in a way that shows they are no longer accommodated, Akande writes:

*The above (S. 34(1) of the 1999 Constitution) now covers the former provisions on inhuman treatment, slavery and forced labour. Besides, previously validated customary punishments as have existed since before the Constitution of 1960, for example, Hadi lashing, has now been omitted<sup>56</sup>*

The strong point at hand which debunks the above impression given by Akande is the availability of a post 1998 case (*Adeniji v. the State*) reiterating the earlier judgment in *Onuaha Kalu v. The State*. Ladan has earlier maintained this position.<sup>57</sup> However, sole reliance by the learned professor (Ladan) on the *Onuaha Kalu's* case being the authority on this position leaves much to be desired. Ladan states:

*It should be noted that death penalty or sentence might be carried out either by hanging or shooting or electrocution or by lethal injection or by stoning to death. By whatever mode of execution and irrespective of the code prescribing for it in Nigeria, the supreme court of Nigeria in the case of *Onuaha Kalu vs. The State* seemed to have reached the conclusion that there is nothing in the Constitution of Nigeria that renders the death penalty unconstitutional.<sup>58</sup>*

The *Onuaha Kalu v. The State* case relied upon by the learned Professor in the above quotation was decided when the 1979 Constitution, which approved of the Islamic penal provisions, was in operation. With the amendment of this Constitution (1979), by the current Constitution (1999), wherein approval of the Islamic penal provisions is omitted, continuous reliance on the earlier case alone (*Onuaha Kalu v. The State*) seems improper. It does appear that another case to be decided on the strength of the 1999 Constitution, reaffirming judgment of the earlier case, should rather be relied upon. This brings the case of *Adeniji vs. The State*, which was decided in the year 2000, to fore. With this argument, it appears that an aspect of Ladan's contribution in this respect, which Nasiru quotes in his work<sup>59</sup> as being succinct, does not seem to debunk Akande's comment on S.34 (1) of the 1999 Constitution earlier quoted.

From the above analysis, the constitutionality of applying Islamic penal laws in certain states of the Northern Nigeria is established. These States<sup>60</sup> have put in place the required legal frameworks<sup>61</sup> for the adoption and administration of Islamic penal laws in their domains. It is good if Muslims in the remaining states of the country join hands to pressurize their various governments to review their states' laws towards accommodating the Islamic penal provisions.

Once more, the entire Nigerian Government at the central level is implored to enrich our national penal laws by borrowing leaves from the time tested Islamic penal laws. It is enough on the side of the federal government if it encourages the National Assembly to engage in such. There is much to be gained therefrom by the entire Nigerian populace. People's fear around the whole doctrine has already been allayed somewhere above.

It has also been stated that severity of Islamic penal punishments should not be considered in isolation. The benefits to be derived therefrom must always be considered too.

<sup>56</sup> Akande J.O., *The Constitution of the Federal Republic of Nigeria* (MIJ Professional Publishers Limited, 2000) p.75

<sup>57</sup> Ladan M.T., 'Contending Perspectives on Death Penalty in Nigeria' in Ezeilo, J. (ed) (Human Right Protection in Administration of Shariah Justice System, Chenglo Limited, Enugu, 2005) p.35

<sup>58</sup> *Ibid.*, p.43

<sup>59</sup> *Administration of Islamic Criminal Law under the Nigerian Constitutional Democracy* (2011), p.43

<sup>60</sup> Zamfara, Kano, Kebbi, Sokoto, Borno, Bauchi, Gombe, Jigawa, Kaduna, Katsina, Niger and Yobe.

<sup>61</sup> i.e. enactment of laws such as; The Shariah Courts Law, The Shariah Penal Code Law and the Shariah Court of Appeal Law. Arrangement for courts where these laws shall be applied is another constituent of these frameworks

What more! Some of the punishments provided by the Western countries, especially England, were no less severe than those of Islam till early 19<sup>th</sup> century. A scholar captures this platitude when he writes:

*But what were the punishments provided by the Western countries? To take as an example the case of one of them, that is England, up to early nineteenth century, there were two hundred and twenty three offences, the penalty for which was death. These included theft when the value of stolen property was more than one shilling, rioting, destroying banks, bridges, or floodgates, offences against public revenue, rape, forcible abduction and other sexual offences. Treason was severely punishable. Even now in the case of treason, the sovereign can order that the head of the convict be cut off while he is still alive... Even at the present time, there are countries where punishments are much rigorous than those prescribed by the Shariah. In Soviet Russia for instance, there is death penalty by shooting for some categories of theft, professional counterfeiting, aggravated forms of rape and acceptance of bribe<sup>62</sup>*

With the above being the situation on the nature of western punishments for certain offences in some given circumstances, one should no longer tarry to conclude on the baselessness of the west's attachment of cruelty to some Islamic penal provision.

## Conclusion

The divine benefit derivable from the penal provisions of Islamic law has been the driving force behind the major recommendation in this paper. The fact that Islamic law is a product of Allah, the Lord Almighty, will always explain the reason for the remarkable difference between the law made by ordinary mortals (with limited reasoning) and that made by Allah who has the knowledge of certitude and who creates mankind and knows how best to stop them from perpetrating vices.

It has been submitted in the paper that application of Islamic penal laws is not frowned at both in the 1979 and the current 1999 Constitutions. The relevant case law to support the submission under reference has been cited and analyzed. The paper therefore calls for a rethink on the negative impression of some people against this divine law. This has necessitated dwelling in detail into a discourse on the features of Islamic Criminal law. Heeding the recommendation in this article would surely make us forge ahead in our collective efforts to reduce the crime rate within our midst in Nigeria.

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<sup>62</sup> Siddique, M.I., pp. 33-34.