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To: "ikenga oraegbunam" <ikengaken@yahoo.com>
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Bnar

From: ikenga oraegbunam [ikengaken@yahoo.com]
Sent: 10 December 2012 16:22
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Dear Bnar, you indicated that you would be publishing my paper in the December edition of your JISPIL. May i know if you had done so. Dr Ikenga Oraegbunam.

Sent from my Nokia Phone

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To: "ikenga oraegbunam" <ikengaken@yahoo.com>
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Dear Dr Ikenga,

Many thanks. No, there is no need to send a hard copy, this electronic copy will suffice.

Best

Bnar Shekhani

On 24 Nov 2012, at 14:49, "ikenga oraegbunam" <ikengaken@yahoo.com> wrote:

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> Dr Ikenga Oraegbunam
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Journal of Islamic State Practices in International Law

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Guidelines for Authors

Aims of the Journal

Journal of Islamic State Practices in International Law (JISPIL) is a peer-reviewed Journal published by electronicpublications.org. The aim of this Journal is to focus on issues concerning and involving Islamic States from the perspective of International Law. In this context all States members of the Organisation of Islamic Cooperation (formerly the Organisation of Islamic Conference) are considered as being 'Islamic' States. In addition to the practices of individual Islamic States, the Journal will focus on multilateral co-operation involving Islamic States, in particular the Organisation of Islamic Conference. The Journal also covers legal issues which may be of general interest to the Islamic world; these issues may have arisen in 'non-Islamic' States or those States which are not members of the Organisation of Islamic Conference. The Journal will present coverage of important international legal issues addressed by the Islamic world, including treaty arrangements. It will also report on national and international cases involving Islamic States and multilateral organisations.

Guidelines for Authors

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Editorial Comments

We are very pleased to write the editorial comment for this issue of Journal of Islamic State Practices in International Law (JISPIL). It is a measure of success of this journal and growing reputation that we are able to attract three excellent articles, one recent development section and two book reviews in the present volume.

The first paper is presented by Dr Pennell (University of Melbourne, Australia), titled '*The Perils of Home - Personal Protection and the Representation of Personal Identity in Legal Cases in London (2006 – 2010)*'. Dr Pennell's paper examines the course and outcomes of international cross-cultural criminal trials involving courts in Muslim countries and Muslim defendants in English courts. Pennell argues that legal identities and recognitions of jurisdiction are negotiated out of considerations of immediate advantage rather than deeper cultural configurations.

The second paper published in the current issue is entitled *'Penal Jurisprudence under Islamic Criminal Justice: Implications for the Right to Human Dignity in Nigerian Constitution'* by Ikenga K.E. Oraegbunam (Nnamdi Azikiwe University, Nigeria). Ikenga analyses the nature of punishment in Islamic legal system with particular reference to Nigeria. It focuses specifically on punishment for adultery as a case study. The study is however juxtaposed with the jurisprudence of punishment in general and with the implications of *Shariah* penal system on the right to human dignity in Nigeria. This enquiry is prefaced with a critical examination of the constitutionality or otherwise of *Shariah* criminal law in Nigeria. Hermeneutical and critical analysis forms the methodology employed by the study.

Dr Anwar and Mulia Saputra, in their paper *'The Empowerment of Zakat According to Islamic Law'*, consider it necessary to discuss the empowerment of *Zakat* productive Programme from Islamic perspective. The authors seek to answer how productive *Zakat* can be used to improve the economic wellbeing of the individuals as well as to reduce poverty in the perspective of empowerment charity Islamic law can be justified.

The short paper, published in the present Journal is written by David Warren (University of Manchester). It examines the recent developments evolving out of the Tunisian Constitution in light of the Ennahda party's proposal to retain the Personal Status Act enacted by the former regime.

This issue is also enlightened with two book reviews. Tahrat N. Shahid (University of Oxford) examines the status of women in shari'a-guided personal laws in *Women Under Islam: Gender, Justice and the Politics of Islamic Law* by Christina Jones-Pauly and Abir Dajani Tuqan. While, Mushtaq Ul Haq Ahmad Sikander (Kashmir University) assesses *Islamic Radicalism and Multicultural Politics: The British Experience* by Tahir Abbas.

The editors are thankful to the authors for their contribution to the present issue. The editors would also wish to remind the readers that the JISPIL is available on the Hein-on-line legal database.

The Editors,

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Prof. Shaheen Sardar Ali
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Dr. Ayesha Shahid

Assistant Editor

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Penal Jurisprudence under Islamic Criminal Justice: Implications for the Right to Human Dignity in Nigerian Constitution

Ikenga K. E. Oraegbunam*

This paper examines the nature of punishment in Islamic legal system with particular reference to Nigeria. It focuses specifically on punishment for adultery as a case study. The study is juxtaposed with the jurisprudence of punishment in general and with the implications of *Shariah* penal system on the right to human dignity in Nigeria. This enquiry is prefaced with a critical examination of the constitutionality or otherwise of *Shariah* criminal law. The paper recommends legal reform, avoidance of fundamentalism, respect for the rule of law, and constitutionalism, among other factors, as the panacea. Hermeneutical and critical analysis forms the methodology employed by the study.

1. Introduction

The nature of punishment under Islamic law is one serious factor that evokes somewhat conflicting attitudes to *Shariah* legal system. The fact that the gravity of the crimes for which these punishments were prescribed, often in Koran and other sources, merely mirror the historical circumstances and milieux in which the crimes were created adds another fillip to much controversy about *Shariah* criminal justice system. Hence, while some scholars hold that *Shariah* penal system is a panacea to the mosaic of many socio-ethical ills that are banal to integral human and national growth, yet it is often strongly argued by some others that *Shariah* punishments are much less in tandem with humane treatment. More so, the effect on the convict seems to amount to a denial of his right to human dignity.[1] It may therefore be helpful to critically examine, first and foremost, the place of *Shariah* in the Constitution of the Federal Republic of Nigeria 1999. The nature of *Shariah* punishments in the light of the jurisprudence of punishment in general would constitute the jurisprudential framework. Much focus would then be placed on how *Shariah* punishments in

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[1] Human dignity as understood in the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Nigeria can be made to wear a humane garb and thus be in tune with genuine tenets of modernity and respect for human dignity.

2. *Shariah* and Nigerian Constitution 1999

The introduction of Islamic Penal Codes by a number of states[2] in Northern Nigeria is one of the many controversies confronting Nigerian democracy today. Hence, the period from 1999 to date witnesses a dramatic turn of events in the enforcement of Islamic law in Nigeria. Following a new interpretation of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, most northern states led by Zamfara made certain laws, repealed some and amended some others. By these they established *Shariah* courts and vested them with not only the entirety of civil but also criminal jurisdictions. Zamfara State, for instance, arrived at these by way of five laws. They include:

a). *Shariah* Court (Administration of Justice and Certain Consequential Changes) Law No. 5, 1999.
b). *Shariah* Court of Appeal (Amendment) Law No. 6, 2000.
c). Area Courts (Repeal) Law No. 13, 2000.
d). *Shariah* Penal Code Law 1999.
e). *Shariah* Criminal Procedure Code Law No. 18, 2000.

In the above order, the first law provides for the establishment, composition and jurisdiction/grades of *Shariah* courts, and makes general provision for the administration and implementation of Islamic law in the state. The second provides for the jurisdiction of *Shariah* Court of Appeal of the state to hear and entertain appeals from the decisions of the *Shariah* courts in both civil and criminal matters decided on Islamic law. The third legislation repealed the Area Courts Law in the state and makes transitional provisions for the take-off of *Shariah* courts. The fourth makes provision for the substantive *Shariah* Penal Law and the criminal law to be applied in the state. In other words, the law codifies the offences in their classifications along with the punishments stipulated therefor. The last one provides for the rules of practice and procedure to be followed and applied by the *Shariah*

[2] These states are Zamfara, Jigawa, Kaduna, Kano, Katsina, Sokoto, Kebbi, Niger, Bauchi, Borno, Yobe, and Gombe.

courts established in the state in their exercise of criminal jurisdictions and in the enforcement of *Shariah* Penal Code Law. It is also noteworthy that some other eleven northern states have long since followed suit in imitation of Zamfara State, and many of which have copied almost word for word the Zamfara laws. Despite the controversies generated by this application of Islamic criminal law, the justice system has continued to operate in most of Northern Nigeria. Punishments such as amputation, lapidation, stoning to death and crucifixion still attach to *Shariah* offences in the North. Today in Nigeria, in spite of the possibility of combination of various factors, the *Boko Haram* insurgence that mainly destroys the lives and property of good number of citizens is originally and fundamentally *Shariah* motivated, whether misguided or not.

Since its inception, adoption of full *Shariah* law has been criticized as unconstitutional. The political stage has witnessed varying passionate arguments for and against its continued existence in a multi-cultural and diverse nation like Nigeria. The inability of the government to tactfully resolve the issue has led to many violent clashes between adherents of rival religions. Thousands of lives have been lost as a result, and huge amount of property have been destroyed. Against this backdrop, many have continued to ask the questions. Is there any legal or constitutional foundation for the enactment of *Shariah* law in Nigeria? Does the House of Assembly of any state in the federation have the legislative competence to make such a law? And if the answer to the latter is no, then what ought to become of a law so passed? This research argues that the *Shariah* codes enacted in northern states are unconstitutional and should, by their very nature, be null and void.

So much has been debated on the constitutional justification for the legal enforcement of the Islamic Legal code in Nigeria. On the one hand, proponents of the *Shariah* claim that the 1999 Constitution of the Federal Republic of Nigeria provides the legal foundation for its introduction. They aver that such inference complies with the wordings of Section 38 (1) & Section 275 (1) regarding the right and freedom to "manifest and propagate one's religious beliefs, teachings, practices, and observances." They further argue that these sections of the constitution grant any state of the federation exclusive discretion in establishing a *Shariah* Court of Appeal. Most

of their critics strongly disagree, albeit with little recourse to the constitution, the ground norm of our legal system.

Because the above issue borders on the legitimacy of a law passed by the House of assembly of a state, it is important to explore the subject of the supremacy of the Constitution, the document from which all 36 states of the Federation derive their powers. Section 1(1) of the Constitution declares the supremacy of the 1999 Federal Constitution, stating, in no equivocal terms, that its supremacy is over and above all persons and authorities. In subsection (3) of the same section, the Constitution emphasizes the effect of any law found to be inconsistent with the provisions of the Constitution, warning that: "...that other law shall, to the extent of the inconsistency, be void." Therefore, the joint effect of Section 1(1) and Section 1(3) is to render void and of no legal effect, any law that contradicts the spirit and intent of the Constitution. But when, and how can a law like the *Shariah* code which was passed by a competent legislature, be annulled to keep with the spirit of the constitution?

A law can be *ultra vires* (literally, beyond the law) and also a nullity by virtue of either its content or by the procedure of its passage. In the case of the former, it is called substantive *ultra vires* while in the latter case, it is procedural *ultra vires*. Procedural *ultra vires* occurs when a bill being deliberated upon by the National Assembly or by the House of Assembly of a state is declared null and void by the court because the procedure stipulated for the successful passage of the bill is ignored. The court could also take such actions even after the bill has been passed into law and the court is satisfied that the procedure of its passage is not in accordance with the law. In the same vein, a bill already passed into law may be impugned based on its content. In that case, the court, after finding that such a law is *in pari materia* with relevant provisions of the Constitution or other enabling law, declares it null and void (substantive *ultra vires*). It therefore behooves the legislative arm, which under a democratic milieu is responsible for making laws, to discharge that function with the utmost diligence and care without recourse to any ancillary considerations.

On the question of the constitutionality of the *Shariah*, it should be pointed out that *Shariah* is given some recognition in the Constitution. Section 6 which defines judicial powers also establishes *Shariah* Courts of Appeal among other courts of the

federation. By this provision, it bares mention that there cannot be a *Shariah* Court of Appeal (an appellate court) without *Shariah* courts, at the state level from which appeals might rise to the former. Following this logic, therefore, it is safe to say that the Constitution, by creating the *Shariah* Court of Appeal, has, though not explicitly, reserved a discretion for states to create their own *Shariah* courts since the appellate court lacks original jurisdiction to hear most of the cases to be brought before it, and also because the cases are of such a nature that they cannot be entertained in a regular court (Magistrate or High Courts). Thus on the face, the Constitution upholds the application of the Islamic legal Code. But to what extent?

Section 6(5) (f) & (g) (replicated in section 260, 275, 262, and 277) of the Constitution states in clear and unambiguous terms the jurisdiction of the *Shariah* Court of Appeal, which by implication applies to all state *Shariah* Courts. A close study of Section 277(2) (a) – (e) reveals that *Shariah* courts shall be competent to decide only questions of Islamic personal law which cases were extensively enumerated in paragraphs (a) through (e) to include, among other things, marriage, guardianship of infants and persons of unsound mind, founding, *wakf*, gift, will, and succession. However, Section 277 (2) (e) requires that for that provision to apply, the parties must be Muslims and they must have requested the court at first instance to determine their case in accordance with Islamic personal law. The inference to be drawn from this is that the ultimate question of jurisdiction and application rests with the parties who must first determine whether or not they intend their trial to be by *Shariah*. Interestingly, nothing in the above section or the accompanying subsections suggests that members of other faiths are mandated to appear before a *Shariah* court (the only exception is when such a party, in spite of his religious beliefs, voluntarily opts to be tried under *Shariah* law). Nor is a Muslim so obligated if he or she indicated to the contrary.

Furthermore, the constitution provides for the creation of a Customary Court of Appeal for any state that so desires (the definition of "states" here also includes the Federal Capital Territory). The effect of this is to equate *Shariah* Courts of Appeal with Customary Courts of Appeal. Since the jurisdiction of the *Shariah* Court of Appeal is limited to Islamic personal law – religious and moral laws which guide the

social relations of Muslims – it becomes clear that *Shariah* courts are to Muslims what customary courts are to non-Muslims. Their jurisdictions are limited to civil matters, to the social and customary aspects of the lives of the disputing parties.

It is contestable, therefore, for the House of Assembly of a state to ascribe criminal jurisdictions to its *Shariah* courts. This is a clear act of affront on the Federal Constitution and cannot even be justified by the opening words of Section 277 (1): "The *Shariah* Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state....exercise such appellate and supervisory jurisdiction in civil procedures....." It is submitted that it is false to assert that the constitution empowers the states to expand the jurisdiction of their respective *Shariah* Courts beyond and above that ascribed to them in civil matters to include criminal matters. It also bares mention that the "other jurisdiction" to be so conferred must be such that could be exercised in proceedings regarding Islamic personal law which the court is competent to adjudicate in the first place in accordance with subsection (2) of Section 277. Evidently, subsection (1) does not extend the jurisdiction of the *Shariah* courts beyond the limits of subsection (2). The wording of Section 277 is clear, unequivocal, and ought to be given a literal interpretation. An important rule of constitutional interpretation states that wherever particular words are accompanied by general words, the general words (in this case "*in addition to*") must be limited to the same kind as the particular or enumerated words. The legal maxim for this principle is *ejusdem generis* (of the same kind or nature). Thus when the constitution says, "...in addition to such other jurisdiction", it refers to the particular, original jurisdiction conferred on the *Shariah* courts in matters enumerated in subsection (2). Since all the enumerated cases are civil in nature, by implication *Shariah* courts are exempt from criminal proceedings and incompetent to hear any criminal suit.

The legality of *Shariah* courts to adjudicate over criminal matters could also be evaluated from the stand-point of the principle of federalism. Federalism is a system that upholds and recognizes the legislative supremacy of the National Assembly over the House of Assembly of the respective states, ensuring the smooth running of the various governments in the polity and also preventing conflicts that may arise between federal and state legislatures. The latter is achieved through the provision of

two legislative lists known under the constitution as the *exclusive* and *concurrent legislative lists*. The position of the constitution on a law that may be the subject of conflict between the two legislative bodies is very clear. Section 4(5) provides: "If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency by void. "Such a law therefore, will have the same effect as one made contrary to Section 4 (7) (c). that is to say, matters with respect to which a House of Assembly is not empowered to legislate in accordance with the provisions of the constitution.

Additionally, under federalism, legislative practice is guided by the doctrine of *covering the field*. Under this doctrine, where the federal legislature makes a law whose wording is so wide as to be construed as covering an entire subject, it should be understood that the legislative body intends to "cover the whole field", that is extending its power to all matters incidental and supplemental to the subject in question, and this precludes any state House of Assembly from legislating on the same subject. It is thus important to note that where this is breached, Section 4(5) will apply, rendering such a law null and void. However, if the law by a state House of Assembly is merely repeating the provision of an earlier law passed by the National Assembly, the former shall be suspended and will cease to be of any legal effect as both laws cannot operate concurrently.

In the states that the *Shariah* Code is being enforced today, there appears to be an obvious conflict between the Penal Code and the *Shariah* Penal Code. Since the *Shariah* Code acknowledges the free will of non-Muslim parties to resent the application of *Shariah* in the course of their trial, it goes without saying that the Penal Code, which was in operation long before the *Shariah* came into force, is still applicable. As a result, there are two separate sets of laws for the residents of those states. While it is applauded that non-Muslims can exercise their free will in this regard, it would be better appreciated if the same right is extended to Muslims who are, by virtue of their religious affiliations, compelled to trials by *Shariah*. This obvious discrimination runs contrary to both the intent and spirit of the constitution

and certainly in contradistinction with a major tenet of federalism – *equality before the law*.

Additionally, many have argued that Section 38 (1) which provides for freedom of thought, conscience, and religion clearly justifies the enactment of the *Shariah* Penal Code. According to those supporting this claim, since the constitution gives some latitude to an individual to freely practice his religion, it is right for the same individual to elect to be guided by the *Shariah* code because true Islamic virtues can only be attained through the *Shariah*. This reasoning has led them to criticize Section 10 which they say contradicts Section 38 (1). The present researcher humbly disagrees with this view.

Section (10) which prohibits state religion is designed to prevent the imposition of one religion or religious belief on the adherents of other religions. A breach of this section would necessarily deny the spirit and intent of Section 38 (1). Additionally, Section 38 (1) seeks to promote freedom of worship, and this includes the freedom to change one's religion or belief, either alone or in community with others. This is the true meaning of section 38 (1) and no contradiction should be read into section 10 as a result. Based on the above inconsistencies with the Constitution, it is safe to conclude that the *Shariah* legal code is, by virtue of section 1 (3) of the Constitution, null and void.

A kindred matter to the issue of constitutionality is that of jurisdiction. Jurisdiction is the authority that a court has to exercise judicial powers. While the judicial powers within the scheme of the doctrine of separation of powers are vested on the courts generally, the authority to exercise such powers by an individual court is a matter of jurisdiction. Not all courts are vested with jurisdiction on all matters. Different courts have jurisdiction on different subject matters, different persons, and within different geographical confines. Jurisdiction of a court is vested either by the constitution or by the law that established the court to the extent allowed by the constitution. Jurisdiction is so fundamental that if a court assumes jurisdiction on a matter in which it lacks

jurisdiction then no matter how well conducted, its proceedings would come to naught[3] and which issue can be raised for the first time even at the Supreme Court.

There is no doubt that state legislatures can establish courts and vest them with jurisdiction via the establishment laws.[4] Hence, Zamfara and other northern states are constitutionally empowered to establish *Shariah* courts and clothe them with jurisdictions. But the real point of controversy is whether the power to give or add jurisdictions can be exercised in a manner that would be contrary to the secular spirit and philosophy of the constitution. The constitution limits the jurisdiction of *Shariah* Court of Appeal to "questions of Islamic personal law" within civil proceedings. It states:

> *The Shariah Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in according with the provisions of subsection (2) of this section.*[5]

Subsection (2) contains issues on validity or dissolution of marriage, guardianship of infants, family relationship, gift, will, succession, matters concerning infants, prodigal or person of unsound mind who is a Muslim, and so on. However, Zamfara State, for instance, depended on the expression"... in addition to such other jurisdiction as may be conferred upon it by the law of the state..." to add criminal jurisdiction to the jurisdiction of her *Shariah* Court of Appeal and vest same among other things to her newly created *Shariah* courts.[6] It is this singular factor that continues to raise dust

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[3] See *Mobil Prod. (Nig) Untld v. LASEPA* (2002) 18 NWLR (pt. 798) 1; *Ndaeyo v. Ogunnaya* (1977) 1, 1MSLR 300; *N.B.N. & anor v. Shoyeye & anor* (1977) NSCC (Vol.11) 301; *Ebhodaghe v. Okoye* (2004) fs NWLR (pt. 905) 472; *ANPP v. BSIEC* (2006) 11 NWLR (pt. 992) 585; *Odukwe v. Achebe* (2008) INWLR (pt. 1067)40. *S.P.D.C (Nig) Ltd. v. Sirpi-Alusted Const. Ltd.* (2008) 1 NWLR (pt. 1067) 128; *Zabusky v. Israeli Aircraft Ind.* (2008)2 NWLR (pt. 1070)109; *Christaben Group Ltd. v. Oni* (2008)11 NWLR (pt. 1097)84; *SPDCN Ltd. v. Goodluck* (2008)14 NWLR (pt. 1107)294; *Benue State v. Umar* (2008) 1 NWLR (pt 1068) 311; See generally O. F. Ogbuinya, *Understanding the Concept of Jurisdiction in the Nigeria Legal System* (Enugu: Snaap Press Ltd, 2008).

[4] Constitution of the Federal Republic of Nigeria (CFRN) 1999, sections 4 (7), 6(4), 277.

[5] *Ibid.*; section 277 (1).

[6] Zamfara State *Shariah* Court Law, sections 42 & 43.

over the recent practice of Islam in Nigeria today. Nwabueze argues that if the state's power to add or invest jurisdiction to courts include the investment or addition of criminal jurisdiction, then the principle of state secularity in section 10 of the constitution in rendered nugatory.[7] This is all the more reinforced by the fact that crime unlike civil wrong is an offence against and punishable by the state.[8] So the enforcement of *Shariah* criminal justice would invariably mean enforcement of an Islamic offence against the state whose citizenry is comprised of not only Muslims but also Christians and members of other religions no matter their percentage. It is surely the need to avoid this anomaly that informs the jurisprudence of the 1999 Constitution in restricting the jurisdiction of *Shariah* Court of Appeal and Customary Court of Appeal to questions of civil proceedings. We are sure this would also apply to Christian canonical courts if they were enshrined in the constitution. It would thus be needless to clothe the courts of first instance with criminal jurisdiction if the immediate appellate courts lack jurisdiction to entertain the appeal.

There is no doubt that the above controversy over the validity or constitutionality of the adoption of *Shariah* criminal law is partly based on the time-honoured fight between natural law and positivism. In spite of all the rapport between naturalism and religious ethos and mores, positivism is still relevant in pluralistic societies like ours in which there are not only multi-ethnic but also multi-religious sensibilities and opinions. It is therefore to engender harmony, peaceful co-existence and peace that the constitution is couched the way it is.

Despite several recent Islamic attempts to widen the scope of *Shariah* application and consequently the jurisdiction of *Shariah* Courts in Nigeria, the 1999 constitution has confined it only to limited aspects. Outlining the constitutional courts, section 6 (5) of the constitution mentions, *inter alia,* the *Shariah* Court of Appeal of the Federal Capital Territory, Abuja[9] and *Shariah* Court of Appeal of a State[10] respectively.

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[7] B. O. Nwabueze, "Freedom of Religion: the Religious Neutrality of the State under the Constitution and the *Shariah* Controversy", (2002) 13 *Bulletin of Ecumenical Theology* 109.

[8] A.O. Obilade, *The Nigerian Legal System* (Ibadan: Spectrum Books Ltd., 2002), p.5.

[9] Paragraph f (n. 4).

[10] Paragraph g (n. 4).

Again, sections 260 and 275 of the constitution provides for the establishment of the above respective *Shariah* Courts of Appeal. The constitution is equally explicit in delineating the jurisdiction of the *Shariah* Courts of Appeal. Hence, in very similar wording, both sections 262 (2) and 277 (2) provide for the jurisdiction thus:

> ...the *Shariah* Court of Appeal shall be competent to decide –
>
> (a) any question of Islamic personal law regarding marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant ;
>
> (b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
>
> (c) any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim,
>
> (d) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

This jurisdiction is however set out for the purpose of subjection 1 of section 262 and 277 respectively. The subsection states:

> *The Shariah Court of Appeal of the Federal Capital Territory (or of a state) shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly (or a law of the state), exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.*[11]

The implication of the above provisions is that the jurisdiction granted to the *Shariah* Courts of Appeal by the constitution is restricted not only to civil justice but further to its personal aspects such as matters of marriage, divorce, inheritance, gift, custody of infants, etc. The whole realm of criminal and penal justice is therefore excluded.

It is again needless to argue that the entire gamut of the provisions must be read together with section 10 which provides that "the Government of the Federation or of a state shall not adopt any religion as state religion". Hence, the clause, "in addition to such other jurisdiction as may be conferred upon by Act of the National Assembly or law of a state", as the case may be, must be so read. Otherwise, according to Nwabueze, "if the meaning is such that the state can at random add to the jurisdiction of the *Shariah* Courts of Appeal without any restriction, then the provision in section 10 would virtually be rendered nugatory."[12]

Moreover, Nwabueze observes that the words in subjection 2 of both sections 262 and 277 to the effect that "for the purpose of subjection 1 of the sections the *Shariah* Court of Appeal shall be competent to decide" only those matters from (a) to (e) constitutes a further limitation of jurisdiction.[13] However, it has been argued that pursuant to the doctrine of *existing laws* as provided for under section 315 (3) of the constitution, other aspects of Islamic civil law may be entertained by the *Shariah* Courts of Appeal, but certainly not criminal justice which practice have long since been abolished in Nigeria in relation to *Shariah* and Customary jurisprudence.[14]

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[11] Constitution 1999, sections 262(1) & 277(1).

[12] Nwabueze (n. 7)110.

[13] *Ibid.*

[14] C. O. Okonkwo, *Criminal Law in Nigeria*, 2nd edn. (Ibadan: Spectrum Books Ltd., 2002) p. 8.

This means that any legislative body that adds the criminal and penal aspects to the jurisdiction of the *Shariah* Court of Appeal of its enclave is clearly acting *ultra vires*, and that legislative act is bound to be unconstitutional, and consequently null and void. Yet in 1999, Zamfara State of Nigeria in contravention of this constitutional provision extended the jurisdiction of its *Shariah* Courts and *Shariah* Court of Appeal to include criminal proceedings.[15] And by virtue of section 1 (3) of the 1999 constitution, the *Shariah Courts Law of Zamfara State 1999* ought to be declared unconstitutional, null and void to the extent of its inconsistency with the constitution. Instead, the courts have declined their function of judicial review in this regard, which irresponsibility has led to many other Northern Nigerian States joining the *Shariah* chorus. The *domino* effect is that such penal practices as amputation of hands, *haddi* lashes, stoning to death, often meted to Muslim women, as a consequence of criminal proceedings in Zamfara and some other Northern States constitute a menace to Nigerian constitutionalism.

3. Punishment and Islamic Law

3.1. Jurisprudence of Punishment in General

Before going into the idea of punishment under Islamic law and its import on human dignity in Nigeria today, it may be appropriate to preface it with the philosophy of punishment in general. The word "punishment" is an abstract derivative of the verb 'to punish' evolving from old French "*puniss*" which in turn is an extended form of the stem of "*punir*" meaning "to punish". "Punishment" is also traceable to the Latin verb "*punire*" or its earlier version '*poenire*' which means to "inflict a penalty on, or cause pain for some offences". It is from this Latin verb that its substantive noun '*poena*' takes its root.[16] It will certainly not be surprising that there is here a mutual linguistic symbiosis among the Latin, French and English connotations of the word "punishment" as they belong to the same language family. The most common applications of punishment take place in legal and similarly regulated contexts, being "the infliction of some kind of pain or loss upon a person

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[15] Sections 5 (1) (b), 42 & 43 of *Shariah Courts Law* No. 5 of 1999 of Zamfara State of Nigeria.

[16] D. P. Simpson, *Cassell's New Latin – English English – Latin Dictionary* (London: Cassell and Company Ltd., 1959)

for transgressing a law or command (including prohibitions) given by some authority."[17] Punishments are applied for various purposes especially to encourage and enforce proper behaviour by society. Criminals are punished judicially by, for instance, fines, corporal punishment or custodial sentences such as imprisonment. In ordinary parlance, children, pupils, and other trainees may be punished by their educators, parents or instructors. Slaves, domestic and other servants were punishable by their masters. Employees can be subject to a contractual form of fine or demotion. Most hierarchical organizations, such as military and police forces, or even churches, still apply quite rigid internal discipline, even with a judicial system of their own (courts-martial, canonical courts). In common usage too, punishment may also be applied on moral, especially religious grounds, as in penance (which is voluntary) or imposed in a theocracy with a religious police as in strict Islamic States or under the Taliban or even if not a theocracy, by inquisition.

The prevailing features in the modern theory of punishment were developed by analytic philosophers of the twentieth century. Although there are some emergent views, the *terminus a quo* of these ideas is the influential writings of Herbert Hart in England and John Rawls in the United States of America.[18] These features are properly delineated in Stanford Encyclopaedia of Philosophy in which the term punishment is described thus:

> *An authorized imposition of deprivations – of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens – because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent.*[19]

Suffice the above to be our working definition of punishment for the purpose of this study. It may still be helpful to attempt an analysis of the features thereof.[20] First

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[17] "Punishment". Available at <http://en.wikipedia.org/wiki /punishment> Accessed 18 January 2012.

[18] H. L. A. Hart, *Punishment and Responsibility* (London: Oxford University Press, 1959); J. Rawls, "Two Concepts of Rules" (1955) 64 *Philosophical Review* 3-32.

[19] "Pupishment". Available at <http://plato.stanford.edu/entries /punishment> Accessed 18 January 2012.

[20] *Ibid.*

and foremost, punishment is seen as an authorized act, not an incidental or accidental harm. It is an act of the political authority having jurisdiction in the community where the harmful wrong occurred. Second, punishment is constituted by imposing some burden or by some form of deprivation or by withholding some benefits. The deprivation may be a deprivation of rights since a crime is, *inter alia*, a violation of the victim's rights, and the harm thus done is akin to the kind of harm a punishment effects.

Third, punishment is a human institution, not a natural event outside human purposes, intentions, and acts. Its practice requires persons to be cast in various socially defined roles according to public rules. Harms of various sorts may befall a wrong-doer, but they do not count as punishment unless they are inflicted by personal agency. Fourth, punishment is imposed on persons who are believed to have acted wrongly even as the basis and adequacy of such belief in any given case may be open to dispute. Again, being found guilty by persons authorized to make such a finding, and based on their belief in the person's guilt, is a necessary condition of justified punishment. Actually being guilty is not a necessary precondition. Therefore, it may not be, though unfortunate, to punish the innocent and undeserving without being legally unjust. Fifth, no simple explicit purpose or aim is built into the practice of punishment. The practice is consistent with general functions or purposes and inconsistent with having no purpose or functions whatever. Sixth, not all socially authorized deprivations count as punishments. The only deprivations inflicted on a person that count are those imposed in consequence of a finding of criminal guilt rather than guilt only of a tort or a contract breach, etc. Thus, what differentiates non-punitive deprivations from the punitive ones is that the former do not express social consternation.[21] This expression is quintessential to the practice of punishment.

[21] J. Feinberg, "The Expressive Function of Punishment", (1965) 49 *The Monist* 397 – 423; H. A. Bedau, "Feinberg's Liberal Theory of Punishment", (2001) 5 *Buffalo Criminal Law Review* 103 – 144.

Therefore, the terms of the foregoing analysis of the meaning of punishment are expected to be congruous and congenial to our idea of criminal punishment. These fundamental principles of penal justice are summarized in the following Latin maxims: '*Nulla poena sine leges*' meaning, no one shall be held guilty of any act or omission which did not constitute a penal offence under any law at the time it was committed. The second maxim, '*nulla poena sine culpa*', is translated to the effect that no one shall be punished for a violation of the law which did not result from personal guilt. Finally, the maxim, "*in dubio pro reo*," means that a person is to be presumed innocent until proved guilty according to due process of law. All these principles have been guaranteed in the Constitution of the Federal Republic of Nigeria 1999. Hence, section 36 (5) thereof provides that "every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty". Again, section 36(8) states that no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed. Further, section 36(12) provides as follows:

> *Subject as otherwise provided by the constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law...*

It may also be noteworthy that in this provision, "the written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of a law."[22] The above principles, no doubt, will constitute a fulcrum around which our discussion on punishment and death penalty will revolve.

While the above discourse holds, scholars are nonetheless divided on what justifies punishment. Whereas some advance retributive theory according to which penalties are seen as forms of retaliation or retribution on the offender in favor of the victim,[23]

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[22] Constitution 1999 (as amended), section 36 (12).

[23] H. D. Barlow, *Introduction to Criminology*, 3rd edn. (Boston: Little, Brown and Company, 1984); B. J. Cavanaugh, "The Justification of Punishment", (1978) 16 *Alberta Law Review*, 109-130; I. Kant, "Justice and Punishment", trans. W. Hastie, in G. Ezorsky (ed.), *Philosophical Perspectives on Punishment* (Albany: State University of New York Press, 1972) pp. 156-170; C. L. Ten, *Crime, Guilt*

others accept the utilitarian views by which account is taken of every consequence of a given punishment in so far as it affects the balance of happiness over unhappiness.[24] Under this later perspective, some scholars hold that punishment is useful for deterrence purposes,[25] while others anchor the need for punishment on rehabilitation or reformation reasons.[26] Yet others take punishment as a means of education and of reparation.[27] Not a few scholars too maintain an incapacitation or disablement theory according to which offender's ability to commit further crimes is removed.[28] Be that as it may, the merits or demerits of each of these theories are dependent on the circumstances of the place and time. Besides, the measure of penal liability pivot around a number of factors, namely, motive of the offence, magnitude of the offence, and character of the offender.[29]

3.2. Punishment under Islamic Law

It is now time to juxtapose the nature of punishments under *Shariah* criminal justice with the above penal jurisprudence. The *Shariah* Penal Code Law 2000 of Zamfara State of Nigeria provides for the punishments to which offenders are liable under the code.[30] They include death (*qatl*), forfeiture and destruction of property (*al-musadarah wal ibadah*), imprisonment (*sijn*), detention in a reformatory (*harbs fie islahiyyat*), fine (*gharamah*), caning (*jald*), amputation (*qat'*), retaliation (*qisas*), blood-wit (*diyyah*), restitution (*radd*), reprimand (*tawbikh*), public disclosure (*tash-heer*) boycott (*hajar*), exhortation (*wa'az*), compensation (*arshlhukumah*), closure of

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and Punishment (Oxford: Clarendon Press, 1987); J. M. P. Weiler, "Why do we Punish: The Case for Retributive Justice", (1978) 12 *UBC Law Review*, 14-30.

[24] See Stanford Encyclopedia of Philosophy (n.19).

[25] J. Bentham, *The Principles of Morals and Legislation* (New York: Hafner Publishing Company, 1948); C. Beccaria, *Essays on Crime and Punishments*, trans. Paolucci, (New York: Bobbs – Merrill, 1963); J. Andeneas, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974).

[26] R. Gross, *Psychology: The Science of Mind and Behaviour*, 2nd edn. (London: Holder & Stoughton, 1992).

[27] P. A. Fitzgerald, *Salmond on Jurisprudence*, 12th edn. (Bombay: N. M. Tripathi Private Ltd., 2001).

[28] I. K. E. Oraegbunam, "Some Basic Principles of Penal Jurisprudence: An Analytical Approach", (2010) 1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 146 – 175.

[29] Fitzgerald (n. 27).

[30] Constitution 1999, section 93.

premises, and warning. These punishments are claimed to have been prescribed directly or indirectly by the sources of Islamic law. No wonder Ghassemi holds that "crime and punishment are revealed by God in the Quran and have been practiced by the Prophet Muhammad which constitutes the penal *Sunna* (deeds) of the Prophet...."[31] This claim to divine authorship of punishments spells enormous implication for constitutionalism in Nigeria. Section 36 (12) of 1999 constitution states thus:

> *Subject as otherwise provided by this constitution, a person shall not he convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a state, any subsidiary legislation or instrument under the provisions of a law'.*

The effect of the above provision is that *Shariah* punishments derogate from the time-honored jurisprudential maxim "*nulla poena sine crimen*" (no crime without punishment) which is embedded' in section 36 (12) of the constitution. In the first place, *Shariah* penalties are impliedly not subject to legislative deliberation and discussion. They are simply taken as revealed by God. Hence, punishments as provided for in *Shariah* penal codes are different from what obtains in Penal Code Law[32]. The provisions of the latter were fruits of parliamentary debates while those of the former are just divine dictates. Secondly, the constitutional requirement of a written punishment refers to a human positive law rather than a divine law. The fact of mere codification of *Shariah* penalties by the relevant Northern states legislatures does not detract from the reality of the divine source of the punishments. This paper observes that this practice is contrary to the intendment of the constitution that adopts secularity principle.

However that may be, there are three categories of offences in Islam, which are classified according to the origin and nature of the punishments prescribed therefor. They are *hudud*, *qisas*, and *taazirat*. It may be helpful to discuss these classes of

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[31] G. Ghassemi, "Criminal Punishment in Islamic Societies: Empirical Study of Attitudes to Criminal Sentencing in Iran", (2009) 15 *Eur J Crim Policy* 161.

[32] Cap 89, Laws of the Northern States of Nigeria1963.

punishments briefly. *Hudud* (plural of *hadd*) technically are crimes whose punishments are expressly determined by Allah in the Koran or Sunna.[33] Literally, "*hudud*" means a bar that separates and creates a boundary. *Hudud* refers to offences and / or punishments that are fixed under the *Shariah*. In Nigeria, they include, for instance, offences or punishments in sections 126 to 141 of *Shariah* Penal Code Law 2000 of Zamfara State. Examples of *hudud* offences are adultery or fornication, rape, sodomy, incest, lesbianism, bestiality, false accusation of adultery, theft, consumption of alcohol, robbery, and so on. According to Ghassemi, "whipping is the hadd punishment for adultery, sapphism, procuring sexual defamation, and drinking alcohol."[34] While noting that some offences are punished with 80 lashes he equally maintains that maximum amount of *hadd* lashes is 100 and the minimum is 75.[35] Under the *Shariah*, such offences like burglary and theft are punished with amputation. Treason (rebellion) on the other hand is penalized either by cross-maiming the perpetrator's hand and foot, crucifixion for three days, banishment or death. In Iran in this regard, the judge has the discretion to decide on the type of punishment.[36] In northern Nigeria, a man convicted of stealing cows had his right hand amputated in 2000. This was also the case with a man who stole a cell phone and other items in 2006. In Nigeria too, the death penalty is the punishment for other types of *hadd* crimes such as adultery, sodomy, rape and incest. Noteworthy however is that in most of these cases, the procedural rules were ignored and the defendant's rights like access to a lawyer, public trial, and so on were violated.

The second group of offences is referred to as *qisas*. According to section 1 of the *Shariah* Criminal Procedure Code Law 2000 of Zamfara State, *qisas* means

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[33] Ghassemi (n.31) 162; B. Babaji, & Y. Dankofa "Assessing the Performance of the Lower Courts in the Implementation of *Shariah* Penal Law in Northern Nigeria" in J.N.Ezeilo, M.T.Ladan, & A. Afolabi – Akingode, (eds.) *Shariah Implementation in Nigeria - Issue & Challenges on Women's Rights and Access to Justice* (Enugu: Women's Aid Collective, 2003) p.107; B.Y. Ibrahim. "Application of the *Shariah* Penal Law and Justice System in Northern Nigeria: Constitutional Issues and Implications" in Ezeilo, Ladan, & Afolabi - Akiyode, (eds.), *Shariah Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice* (Enugu: Women's Aid Collective & others, 2003) p.131.

[34] Ghassemi (n.31) 162.

[35] *Ibid.*

[36] *Ibid.*

"punishments inflicted upon the offenders by way of retaliation, or payment of *diyya* (compensation or blood money) for causing death of or injuries to a person". Like hudud, qisas is also claimed to be a type of punishment which is stipulated by Allah in the Koran. Ghassemi cites this Koranic provision:

> *The Quran states that "Q you who believe! Retaliation (Qisas) is prescribed for you in the case of murder: the free for the free, the slave for the slave and the female for the female". It continues "and in Qisas (law of retaliation) there is a life for you". However, in the same surah (chapter), the Quran encourages Muslims to forgive their Muslim brothers who commit murder and to take the blood money (diya) instead.*[37]

In Nigeria, *qisas* is punishment for murder and assault related offences enshrined in sections 199 to 239 of *Shariah* Penal Code Law 2000 of Zamfara State. Consequently, it may be enforced in two types, namely, life qisas and limb qisas. If the intentional injurious act of the offender causes the death of the victim, the heirs of the victim may take revenge and ask the judge for qisas (death penalty). They may also commute the revengeful reaction and request for *diya*. When, however, the intentional injurious act does not cause the death of the victim but rather the loss of a limb or its proper function, the victim may take revenge (limb qisas) or ask for diya. It goes without saying that diya is blood money given to the injured or heirs of the murdered victim. The amount of *diya* received for a murdered person and injury of different parts of body is determined by *fiqh* books (the Islamic jurisprudence compiled in books of different Islamic jurists). In Nigeria, penalty of retaliation and payment of diya are regulated by, for instance, the provisions of Part A to J of the Schedule to *Shariah* Penal Code Law 2000 of Zamfara State. Often, the amount for the payment of diya of life or limb is determined according to the inflation rate. Although the death penalty can be meted in relevant situations in relation to some *qisas* offences, it is by no means limited to them. Hence, in addition to hudud and qisas, some taziraat offences attract the death penalty.

The effect of the above is that tazirat constitutes the third form of punishment. Unlike hudud and qisas, *tazirat* (plural of *tazir*, meaning chastisement) punishments are not

[37] *Ibid*, 163.

provided for in the Koran and the Sunna. According to section 57 of the *Shariah* Penal Code Law, 2002 of Kaduna State, "taazir denotes any punishment applied or fixed by the state in which discretion is not specified by way of hadd or qisas". Thus, in classical *Shariah*, taazir punishments are left to the discretion of the judges (*hakim*) who may determine the quantity and quality of the punishment for emerging forms of crimes or for Islamic forbidden behaviors whose punishments are not prescribed in the primary source of *Shariah*. It is noted that "the only limit for discretionary taazir punishment is that it may not exceed the *hadd* punishments in quantity,"[38] and which limitation has been construed to be viable only in whipping. In modern times, however, taazirat punishments have been codified and which action transfers the discretionary power of the judge (*hakim*) to the legislator (*majlis*). This is the situation in Nigeria where tazir offences and punishments are provided for, for instance in sections 240 to 409 of the *Shariah* Penal Code Law 2000 of Zamfara State. Instances of these offences include criminal intimidation, wrongful restraint, forgery, criminal breach of contract of service, breach of official trust, unlawful assembly, rioting, bribery, giving false evidence, resistance to arrest, public nuisance, mischief, and so on. The attendant punishments include imprisonment, whipping, fines, forfeiture, restitution, and so on.

3.3. Shariah Punishment for Adultery: A Case Study

While the above discussion relates generally to the classifications of offences and the attendant punishments under the *Shariah* penal codes, it may be quite illustrative to concentrate on one of the oft-adjudicated *Shariah* offences in Nigeria today in order to highlight the public perception on *Shariah* punishments in relation to human dignity. There is no gainsaying that the offence of adultery (*zina*) perfectly qualifies for the purpose of this consideration as it has more than any other *Shariah* offence generated a no mean controversy ever since the adoption of Islamic criminal law in Nigeria. Although under Islamic law, the Arabic word '*zina*' which translates to adultery also refers to fornication, this research is concerned only with adultery. Adultery is revealed as an offence in the Koran: "And do not come near to adultery

[38] Ghassemi (n. 31) 164.

for it is a shameful deed and an evil, opening the road to other evils."[39] Consequently, every Muslim who has attained his majority and is responsible for his or her actions, commits the crime of zina when he or she has sexual intercourse with another person to whose sexual possession he or she has no lawful right. Hence, *zina* is committed when one engages in sodomy or sexual intercourse other that with lawful partner, or has carnal intercourse with a female slave who by reason of her status may not exercise her freewill.[40] Again, zina is committed when one unites himself in marriage with a woman perpetually bared to him by reason of affinity.[41] This is incest under the *Shariah* penal codes in Nigeria. More still, one commits zina who marries a fifth wife when he has four already living. Whereas the prohibition of adultery is clear and unambiguous in the primary sources of Islamic law, there is no unanimity of provisions and opinions about the punishment that should be meted to offenders. And it is precisely this question of punishment vis-à-vis adultery that raises dust.

Nevertheless, in 2001, Safiyyatu Hussaini and Yakubu Abubakar were by the complainant, the Commissioner of Police Sokoto State, charged for the offence of adultery contrary to section 128 and punishable with death by stoning under section 129 of the *Shariah* Penal Code Law, 2000 of Sokoto State. While in the course of investigation and proceedings Yakubu Abubakar denied having committed zina with Safiyyatu Hussaini despite latter's protestation, the latter confessed and pleaded guilty of committing zina with Yakubu Abubakar. As the Police Commissioner could not prove the case beyond reasonable doubt against Abubakar, he was acquitted and discharged while Hussaini was convicted of the offence and sentenced to be buried in sand up to her neck and stoned to death in the presence of some Muslims as witnesses.[42] Again in 2002, Amina Lawal and Yahaya Muhammad were charged of zina by the Commissioner of Police Katsina State at *Shariah* Court Bakori on a First Information Report. Zina is an offence contrary to section 124 of the *Shariah* Penal

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[39] M. M. Ali, *The Holy Qur'an. Arabic Text. Translation and Commentary*, 4th edn., (Lahore: Ahmadiyyah Anjuman Isha'at Islam, 1951) Chapter 17: 32

[40] F. A. R. Adeleke, "The Offence of Adultery: Proof and Punishment in the *Shariah* and Challenges for the Muslim Jurists" in Z. I. Oseni (ed.), *A Digest on Islamic Laws and Jurisprudence in Nigeria* (Auchi: Darun – Nur, 2003) p. 83.

[41] The Holy Qur'an (n. 39) Chapter 4: 23 – 24.

[42] Unreported Case No. USC / GW / CR / F1 / 10/ 01 with judgment delivered on 9/10/2001.

Code Law No. 1 of 2001 of Katsina State. Just like in the case of Hussaini, Lawal confessed committing adultery with Muhammad although she stated she was deceived with a promise of marriage. Muhammad denied the accusation and requested to take an oath with the Koran in order to authentic his denial. After taking the oath, the court accepted his denial and went ahead to acquit and discharge him. Conversely, the court on the grounds of the admission by Lawal of committing the offence in addition to the proof by the prosecution convicted her and sentenced her to death by stoning.[43] Further, in 2002 a *Shariah* court in Bauchi convicted a man, Yunusa Chiwaya, of adultery and sentenced him to death by stoning sequel to his confessions. The woman in the case was cleared after she swore on the Koran that she had been hypnotized before she left home with Chiwaya.[44] Again, the Upper *Shariah* Court in Niger State in 2002 sentenced Ahmadu Ibrahim and Fatima Usman to be stoned to death after confessing of a premarital sex. One would be surprised at this as that is a case of fornication rather than adultery.[45] Although these judgments were upturned by the competent *Shariah* Courts of Appeal perhaps as a result of procedural errors of the lower courts or on account of the global outcry against the sentences, the question that continues to bug many civilized minds is whether it is proper to punish adultery with the death penalty.

Certainly, the legal requirement for the proof of adultery is found in the Koran, namely, production of four eye witnesses who give their testimonies with regards to the time, place and the persons committing the crime.[46] What is however not so provided is the penalty of death by stoning for the offence of adultery. Far from prescribing the death penalty for adultery, the Koran which is the foremost source of Islamic law stipulates two punishments for *zina* depending on the time of the revelation. The first goes thus:

> *And for those of your women who are guilty, call to witness against them four witnesses among you. So if they bear witness,*

[43] Unreported judgment of the *Shariah* Court Bakori, Katsina State. Case No 9/2002.

[44] M. Duff, "Nigerian Man Faces Death for Adultery" BBC News, June 27, 2002. Available at <http://news.bbc.co.uk/1/hi/world/Africa/2070954.stm> Accessed on 17 March 2011.

[45] Available at http://www.iol.co.zajinadex.php2. Accessed on 21 January 2012.

[46] The Holy Qur'an (n.39) Chapter 24: 4.

> *confine them to the house until death takes them away or Allah makes a way for them.*[47]

This punishment can be interpreted to mean life imprisonment. The second Koranic punishment for zina states:

> *Those who commit zina, flog each of them with a hundred stripes and let not pity for them detain you from obedience to Allah, if you believe in Allah and the last day and let a party of Muslims witness their chastisements.*[48]

Since the word *zina* covers both adultery and fornication, it seems that the consensus of Muslim jurists and scholars is that the later provision is for those guilty of fornication rather than adultery. Yet as Adeleke asserts, "it is an indisputable fact that where two different pronouncements are made on the same issue, the latter shall automatically abrogate the former."[49] According to the equivalent legal principle which is well encapsulated in the Latin maxim, *leges posteriores contrarias abrogant* (a statute coming later in time may repeal the provisions of a previous statute either expressly or by implication), the provision of sura 4: 15 seems to be abrogated by that of sura 24: 2 with the effect that 100 stripes remain the only punishment for adultery as prescribed by the Koran. Adeleke also observes that "as at today, there is no place in the Holy Quran where as an adulterer is ordered to be stoned."[50] What then is the source of Islamic practice of stoning to death convicted adulterers? It is to be noted that stoning offenders to death who have been convicted of adultery is not limited to Nigerian Islam. Robinson reports that in Afghanistan, some strict interpretations of Islamic law called for the death penalty for any woman found in the company of a man other than a close family member. Hence, sexual activity is readily assumed to have taken place.[51] Accordingly, Jamila, a woman was found guilty of trying to leave the country with a man. She was caught and stoned to death in 1996. In that same country and year under the Taleban, a woman, Nurbibi, 40, and a man, Turylai, 38,

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[47] *Ibid.*, Chapter 4:15.

[48] *Ibid.*, Chapter 24:2.

[49] Adeleke (n. 40) 86.

[50] *Ibid.*

[51] Available at <http://punishment_for_adultery_in_islam/robinson/2002>. Accessed on 12 January 2012.

were stoned to death in a public assembly using palm-sized stones. After the execution which was strictly regarded as an instance of religious occasions that were not normally viewed by non – Muslims, Wali, the Head of the Office for the Propagation of Virtue and the Prohibition of Vice expressed satisfaction with the execution: "I am very happy, because it means that the rule of Islam is being implemented."[52] These are not isolated cases. Kartini Binti Karim was in 2000 under the United Arab Emirates form of *Shariah* sentenced to death by stoning. Karim an unmarried citizen of Indonesia was working as housemaid in UAE when her pregnancy was detected. She and a man, a citizen of India, were charged with adultery. While the man fled the country, Karim was convicted under dubious circumstances that flouted the adjectival rules. It took the appellate remedy for the sentence to be reduced to one year imprisonment followed by deportation.[53] Again, in Sudan, an 18 year-old pregnant woman, Abok Alfa Akok, a non-Muslim, was in 2001 accused by her husband of adultery. She claimed she had been raped. The man co-accused with Abok was not tried due to lack of evidence. Abok was tried, found guilty of adultery and sentenced to death by stoning in spite of the fact that Sudan claims as Nigeria that *Shariah* would not apply to non – Muslims. It was on appeal that the sentence was upturned and remitted to the trial court which set punishment at seventy five lashes, and which punishment was immediately executed in breach of Abok's right to seek for legal advice and / or launch an appeal prior to the beating.[54]

Be that as it may, the recurrent question is still salient about the origin in Islam of the death penalty in relation to adultery. This question has divided Islamic scholars into debating camps. Those who support capital punishment for adultery maintain that stoning to death was first prescribed by Allah in the Koran but was later abrogated and does not exist in the Koranic text as at today. They also argue that the Prophet Muhammad executed capital punishment on adulterers in his life time as recorded in the Hadiths, and that the Prophet's successors continued with this. It is equally

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[52] *Ibid.*

[53] P. Leduc, "A Woman Seeking Pardon". *Digital Freedom Network*. Available at <http://www.dfn.org/news/uac/Kartini.htm> .Accessed on 17 March 2011.

[54] Available at <http://www/soultsadanfriends.org/ News/2002-feb-28-dinka-woman-whipped-in-nyala>. Accessed on 12 January 2012.

asserted by the protagonists of capital punishment for adultery that the contexts of those Koranic provisions which do not spell death penalty today are only centered on fornicators rather than adulterers even as the concept of zina refers to both. It is finally claimed that there is unanimity of opinions of all revered ancient jurists that stoning to death is the punishment for adulterers, and as this punishment is recorded in the traditions of the Prophet Muhammad, it should be binding. However, those who argue against the death penalty for adultery in Islam are not persuaded by the above positions. In a rather sustained argumentation, they tenaciously maintain that stoning adulterers to death is not prescribed by Allah in the Koran. It is rather 100 lashes that are expressly stipulated. To buttress this fact allusion is made to the Koranic punishment concerning slave girls when they commit adultery. Koran 4: 25 states that 50 lashes (that is, half of 100 lashes) should be the punishment for a male or female slave, married or unmarried, if he or she commits illegal sexual intercourse. It is therefore argued that since the Koran prescribed for the slave half of the punishment meant for a free adulterer, there would not be any means of measuring this half if the penalty is death by stoning. It only accords with logic and commonsense that half of hundred lashes can more easily be ascertained than half of stoning to death.[55] But yet a more formidable argument is the fact that in the hierarchy of sources of Islamic law, the Koran occupies the prime position. It is regarded as the ultimate law and guide for the Muslims. Therefore, it is not thought of that the provisions of the Hadiths (traditions of the Prophet Muhammad) should override those of the Koran. Hence, among the sources of Islamic law the Koran remains the *grundnorm*. It is the "*norma normans non normata*" (the norm that norms other norms but not normed by any other norm). The effect is that all other rules take their validity and effectivity from the Koran. Thus, it is argued that "any deed or saying credited to the Prophet can only be valid if it does not expressly contradict the words contained in the Holy Quran."[56] After all, Islam believes that Prophet Muhammad is no more than human unlike the Christian belief in the divino-human nature of Christ. As a corollary to the argument on the supremacy of the Koran, Okunnu is convinced that "the Ultimate Authority is Allah: And the Quran is the word of Allah, which was revealed to the Holy

[55] Adeleke (n. 40) 86.

[56] *Ibid.*, 88.

Prophet."[57] It is further observed that "it is only when the words of the Quran are not clearly understood that a Muslim can turn to the Hadith or the Sunnah, the traditions of the Holy Prophet Muhammad (S.A.W), for understanding."[58] Really, these later positions are more appealing to this research.

4. *Shariah* Punishment and Right to Human Dignity in Nigeria

However that may be, the consideration of the punishment for adultery in Islam is only a tip of an iceberg of discussion on *Shariah* punishments generally, and specifically on other offences like theft, consumption of alcohol, and rape which have also raised no less dust in Nigeria since the adoption of *Shariah* criminal law. Nonetheless, it may be apt to delve straight away into the consideration of the effect of the *Shariah* punishments on human dignity. Mowoe observes that the right to dignity of human person "is one of the most intrinsic rights of man and can be seen as the determinant of personhood."[59] In Nigeria, section 34 of the Constitution defines the right thus:

> (1) Every individual is entitled to respect for the dignity of his person, and accordingly:
> (a) no person shall be subjected to torture or to inhuman or degrading treatment;
> (b) no person shall be held in slavery or servitude; and
> (c) no person shall be required to perform forced or compulsory labor.

The effect of this provision is that the right to dignity of human person eschews torture, inhuman and degrading treatment, slavery or servitude, and forced or compulsory labor. While subsection 1 deals with the general provision, subsection 2 provides the exceptions the performance of which would not be forced or compulsory labor and thus would not violate the right to dignity of human person. The exceptions are enumerated thus:

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[57] F. Okunnu, "The *Shariah*: Adultery as a Case Study" in Z.I. Oseni, (ed.), *A Digest on Islamic Law and Jurisprudence in Nigeria*, (Auchi: Darun – Nur, 2003) p. 200.

[58] *Ibid.*, 201.

[59] K. M. Mowoe, *Constitutional Law in Nigeria* (Lagos: Malthouse Press Ltd., 2008) p. 307.

(2) For the purpose of subsection (1) (c) of this section, "forced or compulsory labor does not include:

(a) any labor required in consequence of the sentence or order of a court;

(b) any labor required of members of the armed forces of the Federation or the Nigerian Police Force in pursuance of their duties as such;

(c) in the case of persons who have conscientious objections to service in the armed forces of the Federation, any labor required instead of such service;

(d) any labor required which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community; or

(e) any labour or service that forms part of:

(i) normal communal or other civic obligations for the well-being of the community,

(ii) such compulsory national service in the armed forces of the Federation as may be prescribed by an Act of the National Assembly, or

(iii) such compulsory national service which forms part of the education and training of the citizens of Nigeria as may be prescribed by an Act of the National Assembly.[60]

The consequence is that apart from the above exceptions, any form of acts of indignity to any person beaches the right to human dignity in Nigeria. However, the questions of death penalty, prison condition, death-row phenomenon, and the entire idea of punishment recently constitute issues for global discussion in the light of the right to the dignity of human person.

Although the constitution does not define what torture, inhuman and degrading treatment is, the meaning of the expressions is supplied by Nigerian case law. Hence, in

[60] See also United Nations Declaration of Human Rights, 1948, articles 4, 5 and 6; International Covenant on Civil and Political Rights 1966, art. 8; Vienna Declaration and Programme of Action, 1993, item I (28).

Uzoukwu v. Ezeonu,[61] the Court of Appeal defines "torture" to include mental harassment as well as physical brutalization. Torture implies putting a person to some kind of pain or anguish which could be extreme or excessive. In the same meaner "inhuman treatment" characterizes any act without feeling for the suffering of others. It means a "barbarous, uncouth and cruel treatment which has no human feeling on the part of the person inflicting the barbarity or the cruelty."[62] Degrading treatment on the other hand was articulated as the element of lowering the societal status, character, value or position of a person". Surely, some of the *Shariah* punishments can be resolved into above elemental derogations from right to dignity of the human person. The very idea of stoning, or stoning while half buried in sand is surely contrary to respect for human dignity. This is also the case with such punishments as crucifixion and amputation which involve a severe excruciating pain on the offender-victim thereby constituting an inhuman treatment. The situation is not different from caning under Islamic penal system. It is good to note that there is a real distinction between caning as a punishment under the Criminal Code and the Penal Code, on the one hand, and caning (haddi-lashes) under the *Shariah* Penal Code on the other hand. While in the former the purpose is to inflict pain for deterrence, the aim in the latter is to disgrace the offender which attitude does not fall short of a degrading treatment in breach of section 34 of the 1999 constitution.

However, while there is a progressive move towards a global abolition of death penalty, the interest of this research is not necessarily condemning the death penalty under Islamic penal system. After all, death penalty is still the law in Nigeria supported by both the constitution and case law. Section 33 (1) of the 1999 constitution contains a claw back so the effect that one's right to life can be derogated from "in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria". Court decisions on the cases of *Kalu v. The State*[63] and *Adeniji v. The State*[64] constitute a judicial confirmation of this legal position in Nigeria. Yet it is a

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[61] *Uzoukwu v. Ezeonu* (1991) 6 NWLR (pt 200) p. 708.

[62] *Ibid.*

[63] *Kalu v. The State* (1998) 13 NWLR (pt. 583) p. 531.

[64] *Adeniji v. The State* (2000) 2NWLR (pt 645) p. 354.

sustained conviction of this paper that even the convict has right to his dignity, and which issues are also well articulated in decided court cases. In *Nemi v. A. G. Lagos State & Comptroller of Prisons,*[65] the Court of Appeal held that even the person on a death row is still seized with his fundamental right not to be subjected to torture, inhuman and degrading treatment. Hence, according to Uwaifo, J.C.A, the presiding justice, in the cases,

> *There is nothing in sections 30(1) (now section 33 (1)) and 42 (1) & (2) (now section 45 (1) & (2)) of the 1979 constitution to suggest that a condemned prisoner may be inflicted any form of act that may amount to torture or to inhuman or degrading treatment, and therefore not an infraction of section 31 (1) (a) (now section 34 (1) (a)) of the said constitution as far as the applicant is concerned and may be held justifiable or without a remedy. To end the life of a condemned prisoner, it must be done according to the due process of law, and the due process of law does not end with the pronouncement of sentence.*[66]

There is no doubt that this position of the law articulated in Nemi's case is of a global standard. It is littered in many an International human rights instrument: Article 1 of the Inter-American Convention to Prevent and Punish Torture 1985, Article 3 of the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment 1987, Article 5 of the African Charter on Human and Peoples' Rights 1981, Article 5 of United Nations Declaration of Human Rights, Article 7 of International Covenant on Civil and Political Rights, Article 7 (1) (f) of the Rome Statute 1988 which sees torture as a crime against humanity , and generally United Nations Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984.

In the light of this, it may be *apropos* to consider the theory of justification of punishment in Islam. According to Maududi, Islamic law punishment is awarded to meet three purposes: "(a) to inflict pain on the criminal for the excess he committed against the other person or society, (b) to stop him repeating the crime and (c) to serve

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[65] *Nemi v. A. G. Lagos State & Comptroller of Prisons* (1996) 6 NWLR (pt 452) p. 42.

[66] Brackets are mine and the contents refer to 1999 constitution.

as a deterrent for others."[67] This is not a different view as enunciated in the jurisprudence of punishment above. It is however noted by Kamali that although "the Kuranic outlook on punishment may be characterized by its dual emphasis on retribution and reformation, the conventional *fiqh* approach to the formulation of the underling policy toward the hudud has failed to be adequately reflective of the Quranic guidance."[68] For Kamali then, there is a caesura between Koranic justification of punishment and the interpretations of same by Islamic jurisprudence. Ghassemi also observes a distinction between the theories of justification of punishment in Islam and those in the West. He asserts that "while Islamic justification of punishment is based on divine will of God, Western penal justifications depart from human intellect and ague either for the maximum welfare of society or autonomy of the free moral agent."[69] In the same vein, according to Garland, the penal pendulum in the Western world has swung along different ideological poles from liberal ideology to welfarist penal strategies and again to neo-literal ideals.[70] More clearly, Bottoms argues that changes in modern sentencing and punishment in the West may be understood by reference to four main conceptual developments: human rights / just desert, managerialism, community, and populist punishment.[71] Ghassemi's view has been built on the above ideas when he holds that while "criminal punishment in the West has been justified through utilitarian and deontological philosophies or a combination of both", "the penal justification in Islam, due to its being beyond human reason, may not be tested and challenged by terrestrial values like individual autonomy, public welfare and happiness or many other values derived from them". Thus, unlike Maududi, Ghassemi is of the view that "Islamic punishment is applied not only to keep social safety and deter potential criminals from crime, but also to defend the cultural borders of Islamic society against 'the corrupt' cultures of

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[67] Cited in Adeleke (n.40) 89.

[68] M. H. Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malasia", (1998) 13 (1) *Arab Law Quarterly* 203.

[69] Ghassemi (n. 31) 161.

[70] D. Garland, *The Culture of Control Crime and Social Control in Contemporary Society* (Oxford: Oxford University Press, 1990) p. 201.

[71] A. Bottoms, "The Philosophy and Politics of Punishment and Sentencing" in C. Clarkson, & R. Morgan (eds.) *The Politics of Sentencing Reform* (Oxford: Clarendon Press, 1995) pp. 16-49.

the West."[72] It therefore goes without saying that much of the theory of justification of punishment is Islam is built on apologetics and unwarranted reaction to the Western ideals. This may explain the reason why, as Fadl holds, "despite the active involvement of countries such as Egypt, Lebanon, and Tunisia in drafting the inspirational language of several international human right documents, there remained a considerable tension between traditional Islamic law and the normative demands of human rights."[73] This tension is no doubt made manifest in the Islamic criminal penalties, among others. It is also this attitude that informs the practice of several Muslim countries of entering reservations to human rights treaties providing that they are bound by human rights law only to the extent that such international obligations are consistent with *Shariah* law.

Be that as it may, even as the *Shariah* punishments are claimed to have originated from God, yet for this paper, it still does matter what the general world community has come to believe are the minimal standards of conduct that ought to be observed when dealing with human beings. Concretely too, it does matter if the world community has come to see the cutting of the hands of the thief, and the stoning of an adulterer as violative of the basic standards that should be maintained in dealing with human beings. If not anything, it is relevant if the concept of mercy and human diversity is taken seriously.[74] Hence, while not agreeing with Igwe that "*Shariah* has become a weapon for Islamic inquisition in Nigeria."[75] this research believes that Islamic law can still be made to put on a humane garb in the execution of its penalties. Although it may be granted that "a norm that is enshrined in the Koran or in one of the Prophet's traditions may not be simply abolished even if it appears no longer appropriate, Tellenbach adumbrates a number of methods which "Islam has developed of de facto voiding any regulations, including punishments that are no

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[72] Ghassemi (n. 31) 161.

[73] K. A. Fadl, *The Human Rights Commitment in Modern Islam*. (2010) p.117. Available at <http://www.musawah.org/docs/pubs/wanted/wanted-KAEF-EWpdf>. Accessed on 12 August 2010.

[74] *Ibid.*, 157.

[75] L. Igwe, *Shariah and Human Rights in Nigeria*. (2007). Available at <http://www.islamwatch.org/others/*Shariah*-and-Human-Rights-in-Nigeria.htm>. Accessed on 23 December 2009.

longer considered conformable with the times."[76] First of these methods is that of tacit non-application. According to this method, crucifixion, for instance, which is still in the *Shariah* penal code of some Islamic states including Nigeria, is no longer practiced anywhere. In law too, slavery, strictly so-called, has ceased to exist and blood money paid for slaves on the basis of their material value no longer appears even in states where blood money as such is encoded in criminal law. Secondly, another method is narrow interpretation. In line with this, theft, a crime for which amputation of hand is prescribed in the Koran, has been strictly limited in law. Tellenbach observes that "to satisfy the Koranic definition, the object stolen should not just be anything but has to have a relatively high minimum value and had to be suitably contained to protect it from theft."[77] In fact, in pure Islamic countries like Iran, the criminal code cites sixteen conditions that have to be met to justify cutting of a hand. If only one of them is not met, all an offender may be sentenced to is a term in prison.[78] Yet another way of dealing with a rule that cannot be abolished is to hedge it in with procedural restraints. Thus, even as a Muslim is basically entitled to marry as many as four women, yet there are many modern states in which he needs a court permit to do this often after series of conditions are met. Thus, the court may check whether he is able to feed another family in the first place. It is therefore strongly suggested that Nigerian Islamic praxis employs these techniques and does away with such harsh punishments that are nevertheless claimed to have been dictated by God. The situations under which such harsh penalties were "revealed" or practiced may not after all exist today.

5. Conclusion

In the light of the above discussions, Nigerian Islam may do well to consider the observation of Harnischfeger that carrying out the classic *Shariah* punishments may be difficult for so many reasons. First and foremost is the constitutional provision which has the effect of subjecting the *Shariah* Courts in Nigeria to the supervision of

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[76] S. Tellenbach, "Muslim Countries Between Religious and Secular Law" in B. Krawietz and H. Reifeld (eds.), *Islam and the Rule of Law: Between Shariah and Secularization*, (Berlin: Konrad-Adenauer-stiftung, 2008) p.116.

[77] *Ibid.*, 117.

[78] *Ibid.*

the federal courts.[79] Under the arrangement, a defendant who has been sentenced according to *Shariah* may appeal against it, first to *Shariah* Court of Appeal,[80] and ultimately to the Supreme Courts which has to ensure that the provisions of the constitution and other relevant laws are complied with. This was the situation in the cases of Amina Lawal and Saffiyatu Hussaini whose respective appeals were allowed by the *Shariah* Courts of Appeal as a result of the trial court breach of constitutional and procedural stipulations. But in order to circumvent this process, Zamfara had to obtain the consent and approval of the convicts before carrying out amputations. Hence, a cow thief who was the first person in Nigeria to lose his right hand under the *Shariah* law was offered 25,000 naira in rehabilitation assistance. Several months later, a bicycle thief had to negotiate the amount of compensation due before he accepted to have his limb amputated. After the sentences were carried out, both offenders were also given jobs by the state government.[81] This governmental seeking for consents of the offenders is a clear indication of lack of conviction on the part of the government. At best, execution of *Shariah* penalties seems to be a make-belief employed to show that *Shariah* is working while other extra judicial interest are really subjacent or subterranean. Yet a further reason the authorities hesitate to carry out stoning and amputations is not that adultery and theft are no longer committed in *Shariah* states. Rather, it is for the fact that greater majority of Muslims were disappointed at the uneven approach to criminal prosecution. Virtually, all those who received harsh penalties were poor and marginal individuals who had not been informed of their rights and were not afforded legal representation even in cases involving capital punishment.[82] It may therefore be well-advised for Zamfara and other *Shariah* states to reconsider *Shariah* criminal law into rather than labor to put up a penal system that may either not be adequately enforced or selective in its judicial coverage. Such a framework would surely form an avant-garde to partiality in a polity already fraught with discrimination on account of a dual penal structure.

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[79] J. Harnischfeger, *Democratization and Islamic Law: The Shariah Conflict in Nigeria* (Chicago: University of Chicago Press, 2008) p.93.

[80] Constitution 1999; S. 277 (1).

[81] Harnischfeger (n.79).

[82] *Ibid.*

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