PUNISHMENTS IN ISLAMIC CRIMINAL LAW AS ANTITHETICAL TO HUMAN DIGNITY: THE NIGERIAN EXPERIENCE

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Introduction

Prior to the inception of the present democratic regime the scope of application of Sharia law under the Nigerian legal system was limited to the area of personal law[1]. This position was affirmed and reaffirmed by the courts, including the Supreme Court, in a number of cases[2]. This does not mean, however, that this position has gone down well with a large majority of Moslems in Nigeria. Thus, the matter has always remained controversial. The controversy was however accentuated when on 27th October 1999 Governor Ahmed Sani Yerima of Zamfara State inaugurated the "wholesale" adoption of the Islamic legal code in Zamfara State, which took off on 27th January 2000. Zamfara State extended the application of the Sharia system from personal law to all aspects of civil law, and also to the field of criminal law. Eleven other states in Northern Nigeria has since followed the Zamfara State example[3].

In implementing the criminal aspect of Sharia, all manner of punishments are being imposed by the courts ranging from flogging, amputation of hand or leg to death by stoning etc.

This article takes a critical look at some of the punishments imposed by Sharia courts in Nigeria to determine whether they are compatible with the right to human dignity guaranteed by the 1999 Constitution of Nigeria and the African Charter on Human and People's Right, which has not only been ratified by Nigeria but has been incorporated into Nigeria's domestic law. The right to human dignity is also guaranteed in some other international human rights instruments and declarations to which Nigeria is a party, like the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR).

The author comes to the conclusion that these punishments are incompatible with the right to human dignity as guaranteed by the Constitution and the international human rights instruments and declarations applicable to Nigeria.

Scope of Sharia Under the Nigerian Legal System Before the Recent Expansion

Controversy has dogged the issue of Sharia long before now. The former Northern Regional Government had made strenuous efforts to find a compromise

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[1] See sections 242 1979 Constitution; SS. 262 and 277 1999 Constitution.
[2] See *Maida v Modu* [2000] 4 NWLR (pt 651) 99; *Gambo v Tukuji* (1997) 10 NWLR (Pt 526) 591; *Usman v Kareem* [1995] 2 NWLR (Pt 379) p. 537.
[3] Kano, Kaduna, Niger, Kebbi, Katsina, Borno, Sokoto, Jigawa, Bauchi, Gombe and Yobe States.

legal system in the multi-religious and multi-ethnic society of Northern Nigeria. In 1959 the whole structure of the legal and court systems in the North were re-examined in order to allay the fears of minorities who are not of Moslem faith and the Moslem majority vis-a-vis the Moslem law. This resulted in sending two delegations to other Moslem countries, which had experienced similar type of problems. One delegation visited Libya and Pakistan while the other visited Sudan[4]. A commission was equally set up to look into the fears of minorities and the means of allaying these fears. On receipt of the reports of the delegations and the commission the Northern Regional Government appointed a panel of Jurists to consider

(a) the system of law at present in force in the Northern Region, that is English law as modified by the Nigerian legislation, Moslem law and customary law, and the organization of the courts and the judiciary enforcing the systems; and

(b) whether it is possible and how far it is desirable to avoid conflict, which may exist between the present systems of law; and to make recommendations as to the means by which this object may be accomplished and as to the re-organization of the courts and the judiciary in so far as this may be desirable[5].

The panel was composed of some eminent Nigerians and the following foreigners: Abu Rammat, Chief Justice of the Sudan; Mr. Justice Mohammed Sherrif, chairman of the Pakistan Law Commission; Professor J. N. D. Anderson, a lawyer and authority in Islamic law. The panel made the following recommendations:

1. Northern Nigeria should have a uniform penal code law and a criminal procedure code, thus displacing Moslem law and other customary laws. The codes were to be drafted with necessary caution and care so as not to offend the basic tenets of Islamic law and at the same time must be of such quality as to win universal acceptance among the adherents of faiths other than Islam.
2. The personal and family law of each community was to be retained and unaffected.
3. Contract cases would be governed by such law as the parties thereto intended to govern the transaction.
4. Tort cases would be governed by the law applicable to the parties[6].

The panel's recommendations were implemented and brought into effect from 1st October 1960. The jurisdiction of the Sharia Court of Appeal, which was consequently created, was confined to matters of Islamic personal law, though the Court has jurisdiction in matters other than Moslem personal law where both parties in the court of first instance stated in writing that they wanted the case decided according to Moslem law[7].

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[4] Nwali, A. B. "Constitutional Structure and Position of the Judiciary with particular reference to the Sharia Court of Appeal" 1989 Judicial Lectures: Continuing Education for the Judiciary (Lagos: MIJ 1991) p 150.
[5] *Ibid* p 151.
[6] *Ibid* p. 152.
[7] S.12 Sharia Court of Appeal Law of Northern Nigeria, 1960.

The Sharia controversy reared up its head again at the Constituent Assembly constituted in 1977 to deliberate on the draft 1979 constitution. The Constitution Drafting Committee had proposed that "there shall be a Federal Sharia Court of Appeal which shall be an intermediate Court of Appeal between the States Sharia Courts of Appeal and the Supreme Court of Nigeria." After heated debate it was agreed that there shall be no Federal Sharia Court of Appeal. Whenever there was a Sharia case on appeal, the Federal Court of Appeal (as it was then called) would be constituted by three judges learned in Islamic law. Furthermore, each State that wants it should set up a Sharia Court of Appeal whose jurisdiction would be confined to questions of Islamic personal law[8]. Effect was given to these decisions in sections 242 and 247 of the 1979 Constitution.

In 1986, Decree No. 26 of that year amended the 1979 Constitution by removing the word 'personal' wherever it occurred after the word Islamic in the Constitution. In the recent case of *Maida v Modu*[9] it was held by the Court of Appeal that he omission of the word 'personal' from the provision conferring jurisdiction on the Sharia Court of Appeal does not enhance the court's restricted jurisdiction. It is also implied in the Supreme Court decision in *Usman v Kareem*[10] that though the word 'personal' was omitted from the section of the 1979 Constitution conferring jurisdiction on the Sharia Court of Appeal, the jurisdiction of the Court was still restricted to matters in respect of which the Court is competent to decide under subsection (2) of section 242 of the 1979 Constitution (as amended). Ogwuegbu, J.S.C. said:

> The cause of action in this appeal involves a gift and the donors are Moslems. Section 242(2)(c) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 26 of 1986 vests the Sharia Court of Appeal with jurisdiction to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Law which the Court is competent to decide in accordance with the provisions of subsection (2) of that section.[11]

The 1999 Constitution is even more restrictive on the scope of the jurisdiction of the Sharia Court of Appeal. Sections 262(2) and 277(2) of the 1999 Constitution, which provides for the jurisdiction of the Sharia Court of Appeal is almost in pari materia with section 242(2) of the 1979 Constitution. However, whereas section 242(2)(e) of the 1979 constitution extends the jurisdiction of the court to cases "where all the parties to the proceeding (whether or not they are Muslims) have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, the equivalent provisions in the 1999 Constitution (section 262(2)) and 277(2) require that the parties must be Muslims. Thus, a non-Muslim party cannot by consent submit himself to the jurisdiction of the court whereas that was possible under the 1979 Constitution.

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[8] Kukah, M. H. *Religion, Politics, and Power in Northern Nigeria* (Ibadan: Spectrum, 1993) pp. 125-126.
[9] [2000] 4 NWLR (Pt 651) 99; See also *Gambo v Tukuji* [1997] 10 NWLR (Pt 526) 591; *Muninga v Muninga* (1997) 11 NWLR (Pt 527) 1.
[10] (1995)2 NWLR (Pt 379) p. 537.
[11] At 551–552.

Section 6(4) of the 1999 Constitution empowers States to create courts other than the one mentioned in the Constitution and to confer them with jurisdiction. However, the creation of such courts cannot be in pursuance of adoption of a State religion, which is expressly prohibited by section 10 of the Constitution. Secondly, the criminal jurisdiction of any court in Nigeria can only extend to offences under a written law. And a written law is defined by section 36(12) of the Constitution to be either Acts of the National Assembly or Laws of State Houses of Assembly. The Court of Appeal held in *Ojisua v Aiyebelehin*[12] that though a State House of Assembly has the legislative power under section 6(4) of the 1979 constitution to establish courts outside those provided for in section 6(5) and confer them with jurisdiction, once an appeal lies from such court to an appellate court created by the Constitution, the appellate court can only entertain those matters which fall within the jurisdiction conferred on it by the Constitution.

The Recent Extension of the Scope of the Sharia Beyond Personal Law by Some States of Northern Nigeria

The Zamfara State Governor, Ahmed Sani Yerima, exacerbated the Sharia controversy when on 27th October 1999 he inaugurated the adoption of the Sharia legal system which took effect from 27th January 2000. Eleven other State Governments in Northern Nigeria have so far followed his example. In adopting the Islamic legal system, the different states adopted different approaches. Zamfara State legislated the entire corpus of the Sharia Law to form part of the formal or material source of law in the state. By the Sharia Courts (Administration of Justice and Certain Consequential Changes) Law 1999, which came into effect on 27th January 2000, the Zamfara State Government established the following Sharia Courts: Sharia Court, Higher Sharia Court, Upper Sharia Court. These Sharia courts have jurisdiction to hear and determine:

(a) Civil proceedings in Islamic law in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim (due to an individual or individuals or the state) is in issue; or

(b) Criminal proceedings in Islamic law involving or relating to any offence, penalty, forfeiture, punishment or other liability in respect of an offence committed by any person or against the state[13].

The Sharia Courts are empowered to exercise jurisdiction and power over all persons professing the Islamic faith; and any other person who does not profess the Islamic faith but who voluntarily consents to the exercise of the jurisdiction of Sharia Courts[14]. The applicable laws and rules of procedure for the hearing and determination of all civil and criminal proceedings before the Sharia Courts shall be as prescribed under the Islamic Law. For purposes of the section, Islamic Law comprises: the Holy Quran; the Hadith and Sunnah of Prophet Muhammed (Saw); Ijmah; Qiyas; Masahalat Mursala; Istihsan; Al-urf;

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[12] (2001)11 NWLR (Pt 723) p. 44 at 53.

[13] Section 5(1)(a) & (b) Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, 1999 of Zamfara State

[14] *Ibid* S. 5(ii) (a) & (b)

Mashabul-Sahabi; Shar'u man Kablana[15]. Thus, Zamfara State Government made the whole corpus of the Sharia to form part of the direct and formal source of law in the State.

Niger State, on the other hand, instead of legislating the entire corpus of the Sharia to form part of the sources of law in the state enacted five laws, which amended relevant provisions of the penal code, the law of procedure and sundry other laws applicable in the state to confirm to the Sharia ideals. The State also proscribed certain identified 'un-Islamic' practices. Kano State enacted a comprehensive Sharia Penal Code Law 2000 which criminalizes certain acts or omissions in line with the Sharia ideals and prescribed punishments for the offences. The procedure adopted by the other states approximates to any of the above three models.

The Right to Human Dignity as Guaranteed by the 1999 Constitution of Nigeria and Applicable International Human Rights Instruments

The right to the dignity of the human person is guaranteed in section 34 of the 1999 Constitution in the following terms:

(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 labour.

The African Charter on Human and People's Rights[16] guarantees the same right in Article 5 as follows:

> Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Nigeria is a signatory to the Universal Declaration of Human Rights (UDHR) and has ratified the International Covenant on Civil and Political Rights (ICCPR), though she has not ratified any of the optional protocols. These instruments also guarantee the right to the dignity of the human person[17].

Perhaps, because of the phraseology of constitutional provision on the right to human dignity, Nigerian courts have interpreted the right narrowly. In *Uzoukwu v Ezeonu II*[18] the Court of Appeal maintained that the specific acts which section 31(1) of the 1979 Constitution (equivalent to 34(1) of the 1999 Constitution) regards as inimical or antithetical to the word 'dignity' are clearly enumerated under subsections (1)(a), (b) and (c). Accordingly, since section 31(1) has specifically mentioned acts which will be regarded as a violation of the

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[15] *Ibid* S. 7(i)(a)
[16] The African Charter was ratified by Nigeria and domesticated pursuant to the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap 10 Laws of the Federation 1990.
[17] See Articles 1, 4 and 5 of the UDHR and Articles 7 and 8 of the ICCPR.
[18] (1991)6 NWLR (Pt. 2002) p. 708.

human dignity, a court of law has no jurisdiction to go outside the clearly enumerated acts in search for more violatory acts. Similarly, in *Onwo v Oko*[19] the Court of Appeal expressed the opinion that any complaint of acts, which falls outside section 31(1) will not support an action under the provisions of section 31(1). These opinions clearly put the right to human dignity as guaranteed by the Constitution within a very narrow compass, which should not have been intended by the makers of the Constitution. Under the European Convention, the right to the dignity of the human person is guaranteed in a separate Article from the right not to be subjected to torture, inhuman or degrading treatment or punishment, and the right not to be held in slavery or servitude. Similarly, the provisions of the African Charter did not restrict the right to the dignity of the human person to the specifically mentioned instances, thus allowing greater latitude to the courts in the interpretation of what violates the right to human dignity.

The word 'cruel', which appears in the African Charter, was not used in the text of the constitutional provision. However, it will appear that every case of cruel treatment will amount to inhuman or degrading treatment. The Constitution went further than the Charter by expressly prohibiting forced or compulsory labours.

The United Nations General Assembly has stated that 'torture constitutes an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment[20]. In similar vein, the European Commission on Human Rights maintained that the word 'torture' is often used to describe inhuman treatment, which has a purpose such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment[21]. In this view, torture is similar to inhuman or degrading treatment but is directed towards a limited range of purposes. On the other hand, the interpretation given to the word 'torture' by the Nigerian Court of Appeal seems to equate it with cruel, inhuman or degrading treatment. In *Uzoukwu v Ezeonu II*[22]. Niki Tobi, JCA said:

> The word 'torture' etymologically means to put a person to some form of anguish or excessive pain . . . it conveys the same meaning in section 31(i)(a). The torture under the subsection could be a physical brutalization of the human person. It could also be a mental torture in the sense of mental agony or mental worry. It covers a situation where the person's mental orientation is very much disturbed and he cannot think and do things rationally as the rational human being he is."

In this case, his Lordship defines an inhuman treatment as a barbarous, uncouth, and cruel treatment; a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty. The European Commission on Human Rights expressed the opinion, obiter, that the notion of inhuman

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19 (1996)6 NWLR 587

20 Declaration on Protection of All Persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, G.A. Resolution 3452 (xxx) of 9/12/75, Art 1. Quoted in *Robertson, A. H., et al Human Rights in Europe: A study of the European Convention on Human Rights* (Manchester: Manchester University Press, 1993) 36.

21 The Greek Case, Yearbook XII, p. 186. Cited in Robertson *Ibid* p. 39.

22 [1991] 6 NWLR (Pt. 200) 708.

treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable. On the other hand, according to his Lordship, treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience[23].

Corporal Punishment: Whether Constitutes an Inhuman or Degrading Treatment

Nigerian criminal law still authorizes whipping as a punishment to be imposed by a judicial body for an offence[24]. Furthermore, corporal punishment is common in Nigerian primary and post primary schools. There is no judicial authority known to the present writer where an opinion has been expressed on the constitutional validity of imposition of corporal punishment by judicial bodies. Nevertheless, the courts have held extra-judicial infliction of corporal punishments on adults to be an infringement of the right to the dignity of the human person. In *Mogaji v Board of Customs and Excise*[25] Adefarasin, CJ held that it is a violation of the constitutional prohibition of inhuman or degrading treatment to organize a raid with the use of guns, horse whips, tear-gas, and to strike or otherwise injure custodians of goods suspected to be smuggled into the country. In *Alaboh v Boyles, & Anor*[26] the beating, pushing and submersion of the applicant's head in a pool of water by the first respondent was held to constitute inhuman and degrading treatment.

In the absence of local decisions on the constitutionality of corporal punishment as a sentence imposed by a judicial or quasi-judicial body guidance will be sought from decisions of foreign tribunals. In interpreting human rights provisions, the Bangalore principles enjoin municipal courts to draw inspiration and guidance from the impressive body of jurisprudence, both international and national, concerning the particular human rights, and freedoms and their application[27]. This position was endorsed by Nnaemeka-Agu, JSC in *Kim v The State*[28] where His Lordship said:

> Once (human rights) are incorporated (into domestic law), their application loses the character of insular isolationism. Rather, they assume a universal character in their standard of interpretation and application.

Decisions from foreign jurisdictions are consistent that corporal punishment as a sentence imposed by a judicial or quasi-judicial body constitutes inhuman and degrading treatment.

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[23] See also the Greek case, Yearbook XII, 1969, part II p. 186.

[24] See for instance S.444 Criminal Procedure Law Cap 37 Law of Anambra State 1986.

[25] (1982) 2 NCLR 552 at 561

[26] (1984) 3 NCLR 830

[27] See paragraph 3 of the Bangalore principles. Between 24th and 26th February 1988 there was convened in Bangalore, India, a high level judicial colloquium on the Domestic Application of International Human Rights norms. The colloquium was administered by the Commonwealth Secretariat on behalf of the convener, the Hon. Justice P. N. Bhagwati (former Chief Justice of India). The colloquium yielded the Bangalore principles which was developed, affirmed and re-affirmed by subsequent colloquia in Harare, Zimbabwe, 1989; in Banjul, the Gambia, in 1990; in Abuja, Nigeria, in 1991; in Oxford, United Kingdom in 1992; and in Bloemfontein, South Africa in 1993.

[28] (1992) 4 SCNJ 81, 91.

However, the authorities are not similarly consistent on the question of corporal punishment in schools. A review of some of these decisions is necessary. In the *Tyrer case*[29], the question was whether the birching of a juvenile ordered by a court in the Isle of Man contravened Article 3 of the European Convention. In deciding the question, the European Court of Human Rights pointed out that the Convention is a living instrument, which must be interpreted in the light of present-day conditions. Consequently, in the instant case, the court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in the field. In the light of these factors, and taking account of the nature and context of the punishment and the manner and method of its execution, the court concluded that birching amounts to degrading punishment.

In *Hobbs et al v The Queen*[30] the Court of Appeal of Barbados stated that to determine whether meaning of section15(1) of the Constitution of Barbados which guarantees the right to human dignity, a value judgement has to be made by the court in response to the question whether whipping with cat-o'-nine tails is degrading punishment within the such a whipping in the particular circumstances is calculated to, or it is probable that it will, humiliate or debase the prisoner to such an extent as to constitute an assault on his dignity and feeling as a human being. The court came to the conclusion that there is no doubt whatever that whipping with the cat-o'-nine tails is a punishment that is degrading within the meaning of section 15(1). In *Stephen Ncube and ors v The State*[31] the Supreme Court of Zimbabwe considered the question whether the imposition of a sentence of whipping upon the person of a male adult offender is an inhuman or degrading punishment in contravention of section 15(1) of the Declaration of Rights contained in the Constitution of Zimbabwe. The Supreme Court, in allowing the appeal and declaring unconstitutional the sentence of whipping, held, inter alia, that section 15(1) is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are "grossly disproportional" – those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty – the punishment being so excessive as to shock or outrage contemporary standards of decency. According to the court the whipping each appellant was ordered to receive breaches section 15(1) of the Constitution of Zimbabwe as constituting a punishment, which in its very nature is both inhuman and degrading. In coming to this conclusion the court had regard to the current trend of thinking among distinguished jurists and leading academics referred to in the judgement and the abolition of whipping in very many countries of the world as being repugnant to the conscience of civilized men.

Similarly, the Namibian Supreme Court held that the imposition of corporal punishment amounts to inhuman and degrading punishment within the meaning of Article 8(2)(b) of the Constitution of Namibia and is inconsistent with civilized

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[29] *Tyrer v U.K.* 2.
[30] (1994) 20 CLB 44 – 45.
[31] (1988)14 CLB Vol. 4 p. 1260

values pertaining to the administration of justice and the punishment of offenders[32]. The Court further held that corporal punishment in schools was degrading to students sought to be punished. The position is the same in the United States of America where the Court held in *Jackson v Bishop*[33] that corporal punishment by flogging is degrading because of the acute mental suffering and physical pain it inflicts and therefore unconstitutional.

It can, therefore, safely be concluded that corporal punishment as a punishment for an offence imposed by a judicial or quasi-judicial institution constitutes inhuman and degrading treatment within the meaning of section 34 of the 1999 Constitution of Nigeria and Article 5 of the African Charter.

Does the Death Penalty Amount to Inhuman or Degrading Treatment?

It is pertinent to mention that the right to the dignity of the human person avails condemned persons. In *Peter Nemi v A. G. Lagos State and Another*[34]; the appellant and four other persons were convicted of conspiracy to commit armed robbery and armed robbery and sentenced to death on February 28, 1986 after the appellant had been in custody since he was arrested on September 9, 1982. His appeal was dismissed by the Court of Appeal on October 4, 1994. On January 17, 1995 the appellant applied for leave to enforce his fundamental rights and sought the following reliefs: a declaration that the prison confinement of the applicant under sentence to death since February 28, 1986, a period of eight years, constitutes an infringement of applicant's fundamental rights against torture, inhuman and degrading treatment protected by section 31(1)(a) of the 1979 Constitution of Nigeria; an order directing that the sentence of death on the applicant be quashed and/or commuted to such term of imprisonment as the honourable court may direct. The defendants raised a preliminary objection on the grounds that: (a) the appellant had no legal capacity to institute the action; (b) the court lacked the jurisdiction to entertain it; and (c) the application was incompetent in law. The learned trial judge, Olomojobi, J on June 6, 1995 upheld the objection and came to the conclusion that the court was not competent to adjudicate on the action. The appellant's appeal to the Court of Appeal was upheld. Uwaifo, J.C.A., who read the leading judgement opined that the aspect of the Respondent's brief that a condemned prisoner has no right to life, and cannot enforce any fundamental rights and is therefore as good as dead was quite perturbing. He posed the following questions. Does it mean that a condemned prisoner can be lawfully starved to death by the prison authorities? Can he be lawfully punished by a slow and systematic elimination of his limbs one after another until he is dead? Is a condemned prisoner not a person or an individual? According to his Lordship, these questions gravely touch not only the heart but bring section 31(1)(a) of the Constitution into focus even in cases of condemned prisoners. Consequently, ending the life of a condemned prisoner must be done according to due process of law, and the due process of law does not end with the pronouncement of sentence.

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[32] *Corporal Punishment by Organs of State; Ex Parte Attorney-General, In re*, (1993)19 CLB vol. 1 pp. 62-63.
[33] 404 F2d 571 (CAB 1968).
[34] [1996] 6 NWLR 587.

This is a commendable decision which is consistent with trends in other jurisdictions. In the Zimbabwean case of *Catholic Commission for Justice and Peace in Zimbabwe v The Attorney General & Ors*,[35] the applicant Commission brought proceedings in the Supreme Court of Zimbabwe to restrain the respondents form carrying out death sentence on four prisoners who were convicted for murder and sentenced to death. The Commission claimed that by March 1993 the executions had been rendered unconstitutional due to the fact of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners were confined in the condemned section at Harare Central Prison. The main issue for determination was whether the delay in carrying out the sentence of death constituted a contravention of section 15(1) of the Constitution of Zimbabwe which provides "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment."

The Supreme Court of Zimbabwe, in allowing the appeal and substituting, in each case, a sentence of life imprisonment for the sentence of death, held that prisoners retained all basic rights, save those inevitably removed from them by law, expressly or by implication. Therefore a prisoner who had been sentenced to death did not forfeit the protection afforded by section 15(1) of the Constitution.

The question, however, is whether the death penalty per se, constitutes an human or degrading treatment or punishment. If the death penalty amounts to inhuman or degrading punishment or treatment, then the prohibition of inhuman and degrading treatment in section 34 of the Constitution could be interpreted to override the provisions of section 33 of the Constitution which permits the death penalty.

Professor B O Nwabueze[36] has argued forcefully that the death penalty is unconstitutional in the Nigerian context. According to him, 'the death penalty, viewed as retribution for murder, may well not be cruel in the constitutional sense, but it is inhuman to terminate human existence by killing, and the fact that it is inflicted as a punishment for crime does not make it any less so'. If it is not inhuman, and even if some method of making it completely painless could be devised, it is still degrading, and therefore a violation of the constitutional prohibition against degrading treatment, he argued.

A somewhat similar view was canvassed by counsel for the appellant in the recent Nigerian case of *Onuoha Kalu v The State*[37]. The appellant, Onuoha Kalu, was on the 6th day of March, 1981, arraigned before the High Court of Lagos State, charged with the offence of murder punishable under section 319(1) of the Criminal Code Cap 31 Laws of Lagos State of Nigeria, 1973. At the conclusion of hearing, the trial court found the appellant guilty as charged. The appellant was accordingly convicted and sentenced to death pursuant to the mandatory provision of section 319(1). Dissatisfied with the decision of the trial court, the appellant unsuccessfully appealed to the Court of Appeal. Thereafter the appellant further appealed to the Supreme Court. At the Supreme Court the appellant sought and obtained leave to raise the issue of the constitutionality of

[35] Judgement No. S. C. 73/93 reported in Commonwealth Law Bulletin Oct 1993 pp. 1393- 1394.
[36] *The Presidential Constitution of Nigeria* (London: C. Hurst and Co., 1981) p 411.
[37] (1998)13 NWLR (Part 509 – 659) p.531.

the death sentence in Nigeria. After granting the said leave the Supreme Court invited eminent counsel as *amici curiae* to assist it by proffering arguments on the constitutional issue. At the end of the submissions by all the parties, the Supreme Court held, inter alia, that under section 30(1) of the 1979 Constitution, the right to life, although fully guaranteed, is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria. According to the Supreme Court, the qualifying word 'save', used in the section, seems to be the unmistakable key to the construction of the provision. Thus it is plain that the 1979 Constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, section 30(1) of the 1979 Constitution permits it in the clearest possible terms so long as it is inflicted pursuant to the sentence of a court of law in Nigeria in a criminal offence. In the words of Iguh, J.S.C.:

> Upon a careful perusal of the various foreign authorities to which our attention was drawn by the appellant, the opinion that the death penalty per se amounts to torture, inhuman and degrading treatment and, therefore, intrinsically unconstitutional seems to me a minority view. Indeed a close study of those decisions reveals that the foreign jurisdictions that have similar provisions in their Constitutions as ours have repeatedly pronounced the death penalty to be constitutionally valid. The decisions tended to turn on the crucial question of whether the right to life therein contained is qualified or unqualified. If qualified the death penalty was, in the main, held to be constitutional. If unqualified, however, the death penalty was, rightly in my view, declared to be unconstitutional.

The Supreme Court further stated that apart from the provisions of section 30(1) of the 1979 Constitution there are also the provisions of sections 213(d) and 220(1) (e) of the Constitution which in no mistakable terms, recognize the death penalty. His Lordship, Iguh, JSC went further to review a number of decisions from other jurisdictions on the matter. In *Mubshuu and Anor v The Republic*[38] the Tanzanian Court of Appeal held that although the death penalty is a form of 'cruel, inhuman and degrading treatment', it was nevertheless constitutionally permissible, having regard to the qualified nature of the right to life as entrenched in the Tanzanian Constitution. In the *Zimbabwean Case of Catholic Commission for Justice and Peace v AG*[39] the Supreme Court of Zimbabwe impliedly adopted the position that the right to life under their Constitution was qualified and thus upheld the constitutional validity of the death penalty in Zimbabwe Gubbay, C. J. said:

> It was not sought, nor could it reasonable be, to overturn the death sentence on the ground that they were unlawfully imposed. The judgments of this court dismissing the appeals of the condemned prisoners cannot be disturbed. And the constitutionality of the death penalty, per se, as well as the mode of its execution by hanging, are also not susceptible of attack.

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[38] Criminal Appeal No. 142 of 1944: 30/1/95.
[39] Supra

In *Bacon Singh v State of Punjab*[40] the constitutionality of Article 21 of the Indian Constitution came into question before the Supreme Court of India. In a well considered judgment that court ruled that the right to life entrenched in their Constitution was qualified and that in the circumstance, the death penalty was constitutionally valid. In *Noel Riley and Ors v AG Jamaica and Anor*[41] Lord Bridge of Harwich, delivering the Judgement of the Privy Council with regard to the constitutionality of the death sentence in Jamaica had this to say:

> Quite apart from section 17 of the Constitution the continuing constitutional validity of the death sentence is put beyond all doubt by the provision of section 14(1).

As against the above decisions is the decision of the Constitutional Court of South African in *The State v Makwanyane and Anor*[42] where it was held that the death penalty violated the constitutional protection of freedom from cruel, inhuman and degrading treatment under section 11(2) of the South African Constitution and was in consequence invalid and unconstitutional. In that case, however, the right to life as prescribed under section 9 of the South African Constitution was clearly unqualified hence the Constitutional Court was able to arrive at the decision. A second and equally vital reason why the death penalty was declared unconstitutional in the Makwanyane case is that the Court took account of the arbitrary, discriminatory and selective nature of its exercise at all material times in South Africa. The decision of the American Supreme Court in *Furman v Georgia*[43] follows the trend that the death penalty per se does not amount to inhuman or degrading treatment. It must, however, be noted that the manner of and circumstances surrounding the execution may contravene the prohibition of inhuman or degrading treatment. In the U.S. case of *Louisiana ex rel. Francis v. Resweber*[44], Justice Reed, speaking for the majority of the U.S. Supreme Court, said:

> The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eight Amendments. The Fourteenth (Amendment) would prohibit by its due process clause execution by a state in a cruel manner.... The cruelty against which the constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.

In the *Furman* case the U.S. Supreme Court ruled that the power of the legislature to authorize death penalty for crime is not exempted from the constitutional prohibition against cruel and unusual punishments. Similarly, in *Soering v U.K*[45] the European Court of Human Rights held that the prohibition of

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[40] (1983) (2) SCR 583.
[41] (1983) 1 PAC 719 (PC).
[42] (1995) (6) BCLR 665 (CC), (1995) SACLR LEXIS 218.
[43] 408 U.S. 238 at 283 (1972).
[44] 329 U.S. 459 (1947)
[45] ECHR, Series A. No. 161, Judgment of July 7 1989, 11 EHRR 439.

inhuman and degrading treatment does not per se outlaw death penalty. In the *Soering* case, the Court, however, said that it might be necessary to take account of factors such as 'the manner in which the death sentence is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention while awaiting execution'. The applicant in that case was in the U.K. with a view to extradition to the U.S. for trial in Virginia on a charge of capital murder, an offence which made him liable to the death penalty there. Because of the circumstances that had attended the imposition of the death penalty in U.S.A. with long periods of confinement and the threat of imminent execution hanging over the defendant the European Court of Human Rights unanimously held that extraditing the applicant to the U.S.A. would put him at risk of inhuman and degrading treatment in contravention of Article 3 of the European Convention on Human Rights.

From the foregoing analysis, the death penalty is not per se a violation of the right to life or the right to the dignity of the human person guaranteed by the Nigerian Constitution. However, the manner of execution of the death penalty may undoubtedly infringe the right to human dignity. Furthermore, where it is not imposed for the most serious offence, it will constitute a violation of the right to the dignity of the human person.

Punishments Imposed By Various Sharia Courts In Nigeria

Since the adoption of the Sharia legal system, the punishment imposed by the Sharia courts includes haddi lashing, caning, amputation of hand or leg or both, fines, death by stoning. The following table shows some of the sentences imposed by various Sharia courts in various States of Nigeria.

Examples of Punishments Imposed Under the Various Sharia Laws[46]

S/N	YEAR	NAMES	OCCUPATION	STATE	OFFENCE(S)	PUNISHMENT
1.	2001	Maniru Abdullahi	Not stated	Zamfara	Carrying a Muslim woman on motor cycle	126 lashes
2.	2001	Jafaru Isa	Not stated	Katsina	Woman on motor cycle	126 lashes
3.	2001	Sule Sale	Not stated	Katsina	Stealing three packets of cigarette	80 lashes
4.	2000	Yakub	Not stated	Niger	Making love with his mother-in-law	Amputation
5.	2001	Bariya	Not stated	Zamfara	Fornication	180 lashes
6.	2001	Maguzu	Igbo Trader	Kano	Taking alcohol	100 lashes
7.	2001	Livinus Obi Muhammed Fauzi, 58-yrs old	Not stated	Kano	Homosexual act with a 12 year-old boy	Two years imprisonment with fine of N5,000 after receiving 100 lashes.
8.	2000	Isa	Not stated	Zamfara	Fornication	100 lashes in presence of lover
9.	2000		Trader	Zamfara	Taking alcohol	80 lashes
10.	2000	Bashiru Sule	Not stated	Zamfara	Slapping his wife	100 lashes
11.	2000	Aliu	Herdsman	Niger		Amputation
12.	2001	Yunusa Musa	Teenage Mother	Zamfara	Making love to mother-in-law	100 lashes
13.	2001	Ibrahim Magazu	Herdsman	Katsina	Fornication	Amputation
14.	2001	Sule Abdullahi	Not stated	Sokoto	Stealing nine donkeys	Amputation
15.	2001	Umaru Aliyu	Herdsman	Katsina	Stealing sheep	Amputation
16.	2000	Isyaku Sani Ingawa	Imam	Zamfara	Stealing donkeys	80 lashes
17.	2000	Sani Jibiya	Imam	Zamfara	For taking alcohol	80 lashes
18.	2000	Samaila Dan Gawo	Imam	Zamfara	For taking alcohol	80 lashes
19.	2001	A. A. Sani	Not stated	Sokoto	For taking alcohol	100 lashes and one year imprisonment
20.	2001	Abubakar Aliyu	Not stated	Zamfara	Making love with a mad woman	15 lashes
21.	2001		Not stated	Zamfara		15 lashes

22.	2000	Ambaya Nahuche	Herdsman	Zamfara	Gambling	Amputation
23.	2000	Sani Chanya	Herdsman	Zamfara	Gambling	Amputation
24.	2001	Baba Karegita	Director, Sokoto State National Orientation Agency, NOA.	Sokoto	Stealing	40 lashes, N7,000 fine and one month imprisonment
		Lawali Inchitara			Stealing	
25.	2001	Muhammed		Sokoto		80 lashes
26.	2001	Jabi Shuni	Not stated	Sokoto		40 lashes, N7,000 fine and 18 months imprisonment
		Bello Ahmed	Accountant, Sokoto NOA		Taking alcohol	
27.	2000	Isa Abdullahi		Zamfara	Stealing	
28.	2001		Herdsman	Sokoto		Amputation
29.	2001		Not stated	Zamfara	Stealing a cattle	80 lashes
30.	2001	Bello Jangedi	Herdsman	Sokoto		80 lashes
		Ahmed Binji	Herdsman		Taking alcohol	24 lashes and one-year imprisonment
		Lawali Gummi			Stealing a cattle	
		Sani Muhammed a.k.a Dan' Ashana			Stealing and selling Carcasses of animal to a food seller	
31.	2001	Lawali Isa	Firewood seller	Zamfara	Stealing two bicycles	Amputation
32.	2001	Alhaji Abba Ajiya	Traditional ruler	Jigawa	Keeping a house wife Faiza Bala, who was not his legal wife	40 strokes of the cane
33.	2002	Hajo Poki	A pregnant woman	Bauchi	Fornication	100 strokes of the cane
34.	2002	Attahiru Umaru	35 year old man	Kebbi	Sex with a seven year old boy	Death
35.	2002	Mallam Soni Rodi	25 year old	Kaduna	Murder	Death – Sharia Court of Appeal set her free on 25/3/2002 amidst International outcry. Her partner in the adultery
36.	2001	Safiya Husseni Tungur Tudu	A divorcee	Sokoto	Adultery	
37.	2002					

38.	2002			Jigawa	Drunkenness	was not found guilty
39.	2002	Idris Ibrahim	30 years old	Bauchi		80 stokes
40.	2002	Ahmadu Saleh		Bauchi	Stealing two sheep	Amputation
41.	2002		36 years old	Bauchi	Stealing two sheep	Amputation
42.	2002	Isa Adamu	Farmer	Niger	Stealing of cow	Amputation
43.	2002	Samaila Shehu	Not stated	Niger	Adultery	Death by stoning
44.	2001	Fatima Usman (female)	Not stated	Jigawa	Adultery	Death by stoning
45.	2001	Ahmadu Ibrahim	Not stated	Sokoto	Raping a 9 year old girl	Death by stoning
		Sarumi Mohammed	Not stated	Sokoto	Robbery	Amputation of one hand and one leg
		Shehu Wangyy			Robbery	Amputation of one hand and one leg
		Garba Dandare				

Haddi Lashing/Caning

As earlier noted, caning or any other form of corporal punishment, imposed by a judicial body as a punishment for an offence outrages the conscience of civilized world, and have been held in a plethora of cases to constitute inhuman and degrading treatment. Haddi lashing or flogging is intended to expose the offender to public disgrace. For instance, hundreds of jubilant Muslims on 3rd April, 2002, at Dutse, Jigawa State, witnessed the infliction of 80 strokes of the case on Idris Ibrahim for drunkenness. As rightly observed by Niki Tobi, J.S.C. in *Uzoukwu v Ezeonu II*[47] torture includes physical brutalization or mental agony. The offender is here subjected to mental agony. There is no gainsaying the fact that the treatment is inhuman and deliberately degrading and therefore constitutes a violation of section 34 of the 1999 Constitution and Article 5 of the African Charter on Human and People's Rights.

[47] (1991)6 NWLR (Pt 200) 708.

Amputation

Amputation is a sordid, brutal, crude and most barbaric form of punishment which is manifestly incompatible with the conscience of any civilized society. It was not surprising that the wife of Lami Lawali slumped down on the sight of his husband with amputated hand following a conviction and sentence by a Zamfara State Sharia Court. She was rushed to hospital but died within the week[48]. Amputation is cruel, inhuman and degrading treatment within the meaning of section 34 of the 1999 Constitution of Nigeria. It is an uncouth and cruel treatment, which demonstrates absence of human feeling on the part of the person inflicting or imposing the punishment. It permanently deforms and dehumanizes the offender. Worse still, it is usually disproportionate to the offence for which it is imposed. For instance, Lawali Isa's hand was amputated in Zamfara State for stealing two bicycles[49]. The hand of Sule Abdullahi was amputated in Sokoto State for stealing donkeys[50]. The hand of Umaru Aliyu was amputated in Sokoto State for stealing sheep.[51]

Sentence of Death by Stoning

A basic fact which emerges clearly from local and foreign jurisprudence is that the manner of execution of death sentence may constitute torture, cruel, inhuman or degrading treatment. Prior to the recent extension of the Sharia system to the field of criminal law, the mode of execution of the death penalty known to Nigerian law was by hanging by the neck. Thus, in *Ejelikwu v State*[52], the Supreme Court of Nigeria said:

> It is the duty of the judge under the law to pronounce the manner in which the sentence is to be carried out, and failure to do so might raise apprehension that the execution could be carried out by any other means as for example by poisoning, drowning or any other means; but as it is clear that the only mode of execution known to the Nigerian law is by hanging by the neck till the convict is dead, any other mode of execution could not be contemplated.

Some learned writes have contended that execution of the death penalty by hanging by the neck is cruel, inhuman and degrading[53]. If this could be said of hanging by the neck, what of death by stoning? Can it, by any stretch of the imagination, be said to be compatible with the contemporary standard of decency? Death by stoning involves a wanton, continuous and callous infliction of cruelty and barbarity on the person until his death. The opinions expressed obiter by the Court of Appeal and the Supreme Court of Nigeria in *Peter Nemi v A.G. Lagos State and Anor*[54] and *Onuoha Kalu v The State*[55] respectively are

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[48] Thisday, Sunday, July 8, 2001 p. 1.
[49] The Guardian, Thursday, August 29, 2002 pp. 1 – 2.
[50] Newswatch, September 17, 2001 p.22.
[51] *Ibid*
[52] (1993)7 NWLR (Pt 307) 560.
[53] Unegbu, et al "Revisiting the Question of validity of Death Penalty in Human Rights Jurisprudence" . *In Search of Legal Scholarship (Essays in Honour of Ernest Ojukwu)* (Uturu: Abia State University Law Centre, 2001) p. 28.
[54] Suit No. (A/LA/221/95; (1996)6 NWLR 587
[55] (1998)3 NWLR 531.

unequivocal that the manner of execution of death sentence may infringe the right to the dignity of the human person. It is obvious that death by stoning involves brutal torture, superlative cruelty, and most inhuman and degrading treatment contrary to the right to the dignity of the human person guaranteed under section 34 of the 1999 Constitution of Nigeria and Article 5 of the African Charter on Human and People's Rights.

Another dimension to the matter is that the punishment in many instances is disproportionate to the offence committed. Thus, it was imposed on Attahiru Umaru in Kebbi State for defilement,[56] and has been imposed for adultery[57]. In *Soering v United Kingdom*[58] the European Court of Human Rights said that it might be necessary to take account of such factors as the manner in which the death sentence is imposed or executed, and a disproportionality to the gravity of the crime committed.

In the case of Zamfara State, it could, strictly speaking, be said that the punishments are for no offence. By section 36(12) of the 1999 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; and in this section a written law is defined as an Act of the National Assembly or a Law of a State. While some States like Kano and Niger enacted Sharia laws by which they criminalized certain acts or omission (though based on the ideals of Islamic Law), Zamfara State simply created courts and vested them with jurisdiction to enforce the entire corpus of Islamic Law. By this procedure, the State failed to create specific offences with penalties stipulated by law. Islamic Law, though written, does not qualified as an Act of the National Assembly or a Law of a State House of Assembly within the meaning of section 36(12) of the 1999 Constitution.

Conclusion

Nigeria is a federation. A federation presupposes a supreme Constitution and Nigeria has one. By section 1(3) of the 1999 Constitution, the Constitution is supreme. The 1999 Constitution in chapter 4 contains a bill of rights which includes the right to the dignity of the Human person. Nigeria has equally ratified the African Charter of Human's and People's Rights. The Charter which has been enacted into Nigerian domestic law, equally guarantees the right to the dignity of the human person. Nigeria is a signatory to the UDHR and has ratified the ICCPR and other international human rights instruments. As observed by Justice Jackson of the U.S. Supreme Court, the very purpose of a bill of rights is to withdraw certain subjects from the vicissitudes of political controversy; to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts[59].

Every Government in Nigeria is under obligation to comply with the letters and spirit of the Constitution. Every Government in Nigeria is under obligation to protect, promote and enforce the right to the dignity of the human person

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[56] The Guardian, Thursday, August 29, 2002.

[57] On Safiya Husseni Tungur-Tudu of Sokoto State *Ibid*

[58] (1989)1 EHRR 439. See also *Stephen Ncube and Ors v The State* (1988) 14 CLB Vol. 4 p. 1260 decided by the Supreme Court of Zimbabwe.

[59] *West Virginia State Board of Education v Barnette* 319 U.S. 624

guaranteed by the Constitution. Certain punishments in Sharia Criminal Law violates the right to human dignity in more ways than one. In the first place, corporal punishment recognized by Sharia law constitutes inhuman and degrading treatment. It may even be a cruel treatment. Amputation as a punishment for an offence is crude, barbaric, uncouth, cruel and inhuman treatment or punishment. It is also a punishment which is disproportionate to the offences for which it is imposed. Sentence of death by stoning offends the conscience of any civilized society and outrages contemporary standards of decency. It is also disproportionate to some of the offences for which it is imposed.

Perhaps, it is in recognition of the fact that the "wholesale" adoption of the Sharia legal system is incompatible with the bills of rights applicable to Nigeria that the Zamfara State Governor who set the pace in the adoption of the system called for a redefinition of human rights[60]. He said:

> In this regard, I like to say that there is a very fundamental problem internationally which needs to be addressed so that this world peace we are looking for can be achieved. That is the redefinition of human rights. We have to redefine human rights the world over, to take cognizance of various religious beliefs and aspirations of both Moslems and Christians.

The Federal Government has merely expressed the illegality of the adoption of the Islamic legal code but did to take any concrete steps to stop the illegality, perhaps for political considerations. Human rights activists and NGOs are hampered from challenging the unconstitutional action by the rule of locus standi. The victims of the punishments under the Sharia law are usually either indoctrinated or intimidated into not bringing an appeal to the regular courts. It is hoped that the Federal Government will take the bull by the horn by challenging the constitutionality of some of the punishment under Sharia Criminal Law.

[60] The Guardian Thursday, March 21, 2002 p. 1.