The reintroduction of Sharia criminal law in Nigeria: new challenges for the Muslims of the North
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THE REINTRODUCTION OF SHARIA CRIMINAL LAW IN NIGERIA:
NEW CHALLENGES FOR THE MUSLIMS OF THE NORTH

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1. Introduction

The introduction of shari’a criminal law in most states of Northern Nigeria has been received with mixed feelings: jubilation and high expectations on the part of large sections of the Muslim population of the North and reserved feelings and even fears on the part of the Christian Nigerians. In addition, concerns have been expressed at the international level. An important cause of these fears was, and still is, the question of whether the newly introduced shari’a penal codes are consonant with the Nigerian constitutional order and, especially, whether they comply with the human rights standards of the Nigerian constitution and international conventions to which Nigeria is a signatory. In this article, I will precisely discuss this topic.

2. The introduction of shari’a criminal Law

On 27 January 2000, Zamfara, one of the Northern states of the Nigerian federation, enacted the first Shari’a Penal Code in Northern Nigeria, having first established Shari’a courts to apply the code. Like in the United States, the states of the Federal Republic of Nigeria have the power to enact legislation in the domain of criminal law. The example of Zamfara was followed in May by Niger State, where the government, like that in Zamfara, fully supported the re-Islamisation of the legal system. Other Northern states, prompted by popular pressure, followed suit. In Katsina and Sokoto, Shari’a criminal sentences were pronounced and executed (in one case a sentence of amputation of the right hand was carried out) even before a Shari’a Penal Codes came into force, on the strength of Shari’a Courts Laws stipulating that the Shari’a courts must apply the provisions of the Koran and hadith and those found in the traditional authoritative Malikite works of law. By the beginning of 2004, twelve Northern states have introduced Shari’a criminal law by setting up Shari’a courts with jurisdiction in criminal matters and promulgating Shari’a Penal Codes. These

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2 Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, and Yobe. The Shari’a Penal Codes of most of these states follow the example of the Zamfara codes.
codes include the Malikite law of *hudūd*, homicide and wounding, and under the heading of *taʿzīr*, most offences mentioned in the 1959 Penal Code for Northern Nigeria that was in force until then and is still effective for non-Muslims. All codes follow Malikite doctrine but there are some differences on points of detail. The Shar'ia Penal Codes apply only to Muslims (or to non-Muslims who desire to be tried under these codes and present a written document of consent to the court). Non-Muslim citizens are tried by Magistrate Courts under the 1959 Penal Code.

The swift success of the Islamisation movement in Northern Nigeria was due to powerful popular pressure. It is remarkable that Northern Nigeria is the only region where Islamic criminal law has been put into force by means of legislation passed by elected parliaments. Except in Zamfara and Niger State, the state governments were not enthusiastic about Islamisation of the legal system but were forced to enact it under popular pressure. The general clamour for Islamic criminal law was due to more factors than just religious zeal. The most prominent one was that many believed that Islamic criminal law would be the answer to widespread criminality and government corruption. Further, it was a protest against federal politics. Since the end of military dictatorship in 1997, the centre of gravity of Nigerian politics had moved to the mainly non-Muslim South. The Islamisation movement was a reaction against this: a challenge to federal politics and an attempt to reassert Muslim political power. There was also the idea that imposing Islamic norms on public life, by banning drinking and closing bars and by putting an end to prostitution, would secure God's help in making the Nigerian Muslims stronger. Finally, like in most other countries where Islamic criminal law has been introduced, it was a conscious reassertion of cultural roots against Western political and cultural dominance.

An important effect of the Islamisation of criminal law is that the codes are not regarded as exhaustive. Acts not mentioned in the codes may also be punishable offences, if they are so under classical Islamic criminal law. Most of the new codes contain the following provision:

Any act or omission which is not specifically mentioned in this Shari'ah Penal Code but is otherwise declared to be an offence under the Qur'an, Sunnah and *ijtihad* of the Malikite School of Islamic thought shall be an offence under this code and such act or omission shall be punishable:

(a) With imprisonment for a term which may extend to 5 years, or
(b) With caning which may extend to 50 lashes, or

with minor changes. Whereas Kano State has enacted an independent Shari'a Penal Code, Niger State has contented itself with adding a few amendments to the 1959 Penal Code for Northern Nigeria.
(c) With fine which may extend to N5,000.00 or with any two of the above punishments.³

Some codes contain provisions about the applicability of the Islamic rules of evidence. That most codes are silent on this point, although it is an essential part of the laws of fixed penalties and retaliation, must be attributed to a conscious omission by the various legislators. They must have been aware of the fact that according to the federal constitution of Nigeria legislation in the field of evidence is a federal matter. By now it has become clear that the Shari’a courts follow the Malikite doctrine with regard to evidence. This means for instance that unlawful intercourse can be proven by extramarital pregnancy, if there is no confession nor four eyewitnesses to the act. Two women (Safiyyatu Hussaini in Sokoto State and Amina Lawal in Katsina State) were sentenced in 2002 by lower Shari’a courts to be stoned to death for unlawful sexual intercourse, on the strength of pregnancy without being married. Both sentences, however, were quashed on appeal. This was partly for technical reasons: they were charged of having had unlawful sexual relations at a time that the Shari’a Penal Code in their states had not yet been promulgated. But more importantly, both Shari’a Courts of Appeal ruled that pregnancy of an unmarried woman is, in and by itself, not sufficient evidence of unlawful sexual intercourse, in view of the Malikite doctrine that the maximum period of gestation is five years.⁴

In some codes certain offences are equated with theft and can also be punished by amputation. Most Penal Codes make the kidnapping of a child under seven (or before puberty in some codes) punishable by amputation. The Zamfara Penal Code (Art 259) has a clause imposing amputation as the penalty for forgery of documents if the value they represent is more than the nisâb. The Kano Penal Code has made embezzlement of public funds or of funds of a bank or company by officials and employees an offence punishable by amputation (Art 134B). For these provisions there is some support of less authoritative Malikite opinions who regard amputation as a lawful penalty for these offences, however not as a fixed punishment (hadd) but as a discretionary punishment (ta’zîr). These provisions may result in more frequent enforcement of amputation, since, for these offences, the strict conditions for awarding the fixed penalty for theft, a critical constituent of this part of the law, do not seem to apply here.

³ Zamfara Shari’a Penal Code, Section 92. Other Penal Codes contain a similar section.
The law of homicide and wounding follows closely the classical doctrine. Some codes specify that the killer can be sentenced to be executed in the same way as he killed his victim. As in Malikite law, assassination (qatl ghila, defined as “the act of luring a person to a secluded place and killing him” (Zamfara Shari’ a Penal Code Art 50; Kano Shari’a Penal Code, 50) is a capital offence for which the position of the prosecutors is irrelevant. A striking omission in the Northern Nigerian Shari’a Penal codes is that they are silent on the requirement of equivalence in value between victim and killer or attacker. It is to be expected that on this points Malikite doctrine is applicable.

Several cases of judicial amputation have been reported. Appeals were not lodged, either because the convicts were put under pressure by their social environment with the argument that they would not be good Muslims if they would oppose the sentence, or because of their convictions that undergoing the punishment in this life would ease the sufferings in the Hereafter. In passing a sentence of retaliation for manslaughter, the qadi may order that the perpetrator is to be executed in the same way as he has killed his victim. At least one such sentence has been pronounced. A few sentences of retaliation for wounding have been pronounced. On 26 May 2001 Ahmed Tijani was sentenced in Malunfashi, Katsina, to have his right eye removed after blinding a man in an assault. The victim was given the choice between demanding ‘an eye for an eye’ and 50 camels. In a bizarre case, a 45 year old man was sentenced in January 2003 by the Upper Shari’a Court in Bauchi to have his right leg removed from the knee (without anaesthesia or painkillers, as the court directed) for having done the same to his wife, whom he had accused of overexposing herself to a doctor when she took an injection. I have no information on whether these sentences have actually been carried out.

The enforcement of the new Shari’a Penal Codes is sometimes problematical due to the structure of the Nigerian federation. The police is a federal institution and police personnel often work outside the region of the origin, which means that in Muslim states there are also many non-Muslim policemen. They are not overzealous in tracing specific Shari’a offences. Indeed, there have been reports about police stations in the North that began to function as beer parlours after the prohibition of drinking alcohol was enforced. This lax attitude on the part of the police resulted in vigilantism: Muslims, discontent with the level of enforcement of Islamic criminal law, would form what they called hisba groups and start patrolling urban neighbourhoods, attacking places where they suspected that alcohol was served or prostitutes were plying their trade. To

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5 Zamfara Penal Code, Section 240. In November 2001, a Katsina Shari’a Court sentenced Sani Yakubu Rodi to be stabbed to death in the same way as he had killed his victims. At this moment I do not know whether the sentenced has been carried out.
counter this phenomenon, some states established official hisba organisation that would operate in close co-operation with the police.

The reintroduction of Islamic criminal law in the North is surrounded by political and legal complications. It will remain a bone of contention between the Muslim North and the rest of Nigeria. One of the major legal problems is that the Shari'a Penal Codes are on several scores at variance with the Nigerian federal constitution. The first controversy is on whether the introduction of these laws can be reconciled with the secular character of the Nigerian state. Article 10 of the Constitution reads: 'The Government of the Federation or of a State shall not adopt any religion as State religion.' The issue, however, is not as clear as it prima facie would seem to be, since the Shari'a has for a long time been accepted as a part of the legal systems of the Northern states in the domain of family, private and commercial law. There is no doubt, however, about the unconstitutionality of the implicit introduction of the Malikite law of evidence: The Constitution stipulates that legislation on evidence is a prerogative of the federal legislature. Finally the Shari'a Penal Codes are in conflict with several human rights guaranteed in the federal constitution. We will return to this issue in the following section, dealing with Islamic criminal law and human rights. So far no sentences pronounced under the Shari'a Penal Codes, have been tested against the constitution by the Federal Supreme Court. Since it is expected that the court will find many of the provisions of these Shari'a Penal Codes unconstitutional, there are widespread fears that such a decision might fuel the antagonism between the North and the South to the point of even endangering the existence of the federation.

3. Conflicts between the shari'a penal codes and the constitution

Here we shall discuss the potential areas of conflict between the provisions of the Shari'a penal codes and the constitutions. I want to stress, however, that the exact definition and purport of human rights provisions are in many cases subject to cultural interpretations. This means that their contents are not for 100% fixed and are, within limits, subject to negotiation. Defining them would be the task of the national judiciary, and, more specifically, the Supreme Federal Court.

3.1. Torture or cruel, degrading or inhuman punishment

Torture or cruel, degrading or inhuman punishment is outlawed by both the Constitution and the Convention against Torture and other Cruel, Degrading or Inhuman Punishment or Treatment, 1989 (CAT). They lay down that no person
shall be subjected to torture or to inhuman or degrading punishments and that states shall take measures to prevent public servants from committing acts of torture or administering such punishment.\(^6\)

Here we have one of the most conspicuous domains of conflict between the new Penal Codes and human rights principles. Few jurists would deny that amputation of limbs and retaliation for grievous hurt such as blinding or the pulling out of teeth are indeed a form of torture. The same is true in regard to death by stoning and crucifixion (at least if the latter punishment is taken to mean that the convict will be killed after having been crucified) and to the execution for manslaughter carried out in the same way as perpetrator killed his victim.

3.2. Violation of the basic rights of children

In classical Islamic law, majority begins with puberty. The criterion is a purely physical one: it is established by physical signs such as menstruation and the growth of breasts (women) and the appearance of hair under the armpits and ejaculation (men). The classical doctrine is adopted by the new shari'a penal codes. This means that children in their very early teens can be punished with mutilating hadd punishments, and with retaliation for wounding and homicide,\(^7\) which violates the Convention on the Rights of the Child (1989) (CRC). That this is not an academic question is shown by a decision passed on 5 July 2001 sentencing a fifteen year old boy to amputation for theft in Birnin Kebbi, the capital of Kebbi state.

Both the Zamfara and the Kano Penal Codes, following the 1959 Penal Code, explicitly recognise that parents, guardians, schoolmasters and masters are entitled to physically discipline their children, wards, pupils and servants, as long as such castigation does not amount to grievous hurt and is not unreasonable in kind or degree.\(^8\) This seems to justify quite severe physical injury, since the upper limit (grievous hurt) is defined as emasculation, permanent deprivation of one of the senses, deprivation or destruction of a member or joint, permanent disfigurement of the head and face, fracture or dislocation of a bone or tooth or injuries that endanger life or cause severe bodily pain or render the sufferer unable to pursue his ordinary pursuits (Kano Penal Code, Section 159; Zamfara Penal Code, Section 216).

\(^6\) Constitution, Section 34; CAT, Art. 1 (1) and 16 (1).

\(^7\) Zamfara Penal Code, Section 47, 63(1), 71; Kano Penal Code, Section 47, 62A.

\(^8\) Zamfara Penal Code, S.76; Kano Penal Code, Section 76.
3.3. The principle of legality, i.e. that no act can be punished unless it has been made a punishable offence by enacted law

Section 36 (12) of the Constitution stipulates that "a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law." In violation of the constitutional provision, all Shari'a Penal Codes (with the exception of the Kano Penal Code) contain a section making punishable any act or omission that is an offence under the Shari'a even if not mentioned in the Penal Code itself.9

3.4. Equality before the law

One of the most prominent principles in human rights discourse is that all persons are equal before the law and entitled to the same legal protection. This principle is embodied in Section 42 of the Constitution. The same principle is expressed in international human rights instruments.10 Here we will examine whether the Shari'a Penal Codes violate the principle of equality with regard to gender and religion.

In the new Penal Codes there are only a few provisions that discriminate on the basis of gender. As in the 1959 Penal Code,11 the new Penal Codes allow the physical correction of a wife by her husband (Zamfara Penal Code, Section 76 (d)) and stipulate that, because of implied consent, a man is not capable of raping his wife in the sense of the law. The Niger Penal Code, Section 68 (A)(3)(b) is the only one stipulating that in the requirement for proving the offence of unlawful sexual intercourse (zind), the testimony of men is of greater value than that of women. On the other hand, men are placed in a disadvantageous position in the Kano Penal Code (Section 125), where the punishment for zind committed by unmarried men is caning as well as imprisonment for one year, whereas unmarried women are only to be punished by caning. On the whole, there is little gender bias in the texts of the new Penal Codes. However, where the codes are silent, the courts apply classical Malikite doctrine, which at a number of issues is discriminatory. The most prominent form of gender discrimination is the application by lower Shari’a courts, unwarranted by the Shari’a Penal Codes, of the classical Malikite doctrine that

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9 Zamfara Penal Code, Section 92; Jigawa Penal Code, 92; Bauchi Penal Code, Section 95; Yobe Penal Code, Section 92; Kebbi Penal Code, Section 93.
10 Art. 14 and 26 International Convention for Civil and Political Rights (ICCPR): “All persons shall be equal before the courts and tribunals.” “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”
11 Section 55 (1) (d), subject to the condition that such correction was lawful under customary law of the spouses.
extramarital pregnancy constitutes proof of unlawful intercourse. However, now that two Shari’a Courts of Appeal have reversed trial court sentences of stoning based of extramarital pregnancy, it seems that this is not anymore admitted as proof. Another form of discrimination on the ground of gender, is the difference in the amount of bloodmoney for men and women in cases of homicide and hurt. The codes only specify the blood price of a Muslim male, implying that the lives of women and non-Muslims have a different monetary value.

With regard to religion, it is clear that Muslims and non-Muslims are treated differently. However, I have not found instances of discrimination against non-Muslims, since the Shari’a Penal Codes apply only to Muslims. In fact, this also violates the principle of equality, but then to the advantage of non-Muslims. For example, the punishment for certain forms of theft, amputation for Muslims and imprisonment for Christians, is patently in conflict with this principle. However, since the 1959 Penal Code also distinguished between Muslims and Christians with regard to certain offences (e.g. drinking alcohol), it would seem that such distinctions are accepted and not regarded as an essential violation of the equality principle.

3.5. Violations of the freedom of religion

One of the most significant conflicts between the Shari’a and internationally recognised human rights principles is the Shari’a provision that Muslims cannot change their religion and that, if they do, they face a death sentence. Apostasy (ridda) also entails the loss of civil rights, such as the right to be married (the marriage of an apostate is dissolved immediately) and the right to hold property. However, none of the new Penal Codes has included apostasy as a punishable offence, no doubt because the conflict with Section 38 of the Constitution, which explicitly mentions the freedom to change one’s religion, was too glaring. This does not necessarily mean that apostasy cannot be punished under these laws. The Zamfara Penal Code, as we have seen, stipulates in Section 92 that acts and omissions that are punishable offences under the Shari’a, may be punished even in the absence of a provision in the Penal Code. It is plausible that those who drafted the law had apostasy in mind. However, as yet no cases of prosecution for apostasy have been reported.

Since Christians are not governed by the new Shari’a Penal Codes, they cannot be said to suffer from religious oppression. However, the new codes contain

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12 See Peters, R., "The re-Islamization of criminal law in Northern Nigeria and the judiciary."
some provisions which may affect the practice of traditional religions and magical practices. Section 406 (d) of the Zamfara Penal Code reads:

Whoever presides at or is present at or takes part in the worship or invocation of any juju which has been declared unlawful under the provisions of Section 405 will be punished with death;

The previous Section 405, to which it refers, makes the worship or invocation of juju unlawful and explains that "juju" includes the worship or invocation of any subject or being other than Allah. This forms part of Sections 405 to 409 (see Appendix Five), dealing with magical practices and witchcraft. The 1959 Penal Code contained an almost identical section, but with much lighter punishments. The explanation of Section 405, which extends the meaning of juju to the "worship or invocation of any subject or being other than Allah", and the fact that this has been made a capital offence render the provisions dangerous, since they could be used against all religious practices that are deemed un-Islamic. The exact purport of the section is not clear. Since the code only addresses Muslims, the provision seems to refer to persons who regard themselves as Muslims but nevertheless participate in the practices mentioned in these sections.

4. The challenge

4.1. Legislative reform

This tension between the Federation and the Muslim states of the North regarding the constitutionality of the shari’a penal codes poses new challenges, especially to the Muslims of Nigeria. If the Northern states with their Muslim majorities want to stay in the Federation there must be compliance with the constitution, assuming that there is no majority to be found within the federation to drastically change it and to revoke the human rights conventions. The Northern states, then, must make clear that shari’a criminal law does not necessarily constitute a problem in this respect. On the other hand, the South must realise that once shari’a law has been introduced, it is very difficult to abolish it. Any Muslim politician who would announce that he intends to do so, commits political suicide and loses his legitimacy. This means that the only option is reformulating shari’a codes. For a number of practical reasons, it is to be recommended that this be carried out as a common effort of all states that have introduced shari’a criminal law. Then, ultimately, there will be one Shari’a Penal Code operative in all these states, as was the case with the Penal Code (1959) for Northern Nigeria.
Now, what are the options for reformulating the Shari'a Penal Codes that are now in force? The first one is relatively simple: Drafting a shari'a penal code with the provision that the hadd penalties will not be applied until all citizens are free of want. This is not a totally novel notion with regard to the enforcement of hadd penalties. It was proposed for the first time, to the best of my knowledge, by the Egyptian Muslim Brothers in the 1940s and 1950s. Application of the hadd punishment for theft, they argued, can only be enforced after the state has taken care that all citizens are free from want by providing sufficient food, clothing and shelter. It is based essentially on the hadith al-majā'a (famine), i.e. a report that the Caliph ʿUmar once, during a year of famine, suspended the enforcement of the hadd penalty for theft, because under such circumstances theft is excusable. The argument can be extended to the punishment for highway robbery (hiraba, qatʿ al-tariq) and even to illegal sexual intercourse (zind), in view of the material burdens that must be assumed in order to be able to conclude a marriage (residence, cost of wedding, bridal price, etc.).

Other options are a complete overhaul of the penal codes. Often proposals to do so are met with the reply that these codes contain God's law and that God's law cannot be changed. However, this argument does not cut ice. The Shari'a Penal Codes that have been introduced so far are codifications of the Malikite school of jurisprudence complemented with a great many provisions taken from the Penal Code of 1959 that was in force until then. This, however, cannot be regarded as the only legal doctrine of the shari'a, since as we all know, there are several schools of legal interpretation (madhāhib). Therefore, these Shari'a Penal Codes of the Northern States give an incorrect impression of what the shari'a really is, since they are based on a selection of several options offered by the various schools of jurisprudence.

Moreover, the shari'a is not a static body of rules, laid down once and for all by the jurists of the early centuries of Islam. Most authoritative Muslim scholars would nowadays agree that the obligation of taqlid (i.e. following the authoritative opinions of a School of Jurisprudence, without testing the arguments for such opinions) is now obsolete. However, taqlid of the Malikite opinions is exactly what those who drafted the Nigerian Shari'a Penal codes, have done. A view generally shared by a great number (and maybe a majority) of present-day Muslim scholars is that the shari'a is a legal system suitable for all times and places. Some of its principles are fixed and unchangeable but the details can be adapted. Since society changes, this requires a continuous dialogue with the revealed sources of the shari'a, i.e. the Koran and the Sunna.

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by means of *ijtihād*. This is a collective duty (*fard kifāya*) for the Muslim community.

If one regards this new *ijtihād* as too daring, it is possible to reformulate the codes by remaining within the orbit of the opinions accepted by the various schools of jurisprudence. This is the way in which in most Muslim countries nowadays family law and the law of succession have been reformed. The codes of personal status that have been enacted in the overwhelming majority of Muslim countries, have selected those opinions that were deemed to be most in consonance with modern circumstances. Thus, in countries where the Hanafite doctrine was applied by the courts, the law codes have introduced parts of the Malikite law in order to expand the possibilities for wives to obtain a divorce, whereas some Malikite countries have adopted the Hanafite doctrine that legally capable women always must give their consent to marriage, even if they marry for the first time. In some cases these codes have introduced new interpretations based on *ijtihād*. Thus we find that in Egypt, since the year 2000, women can claim a divorce on the strength of *khul’*, even against their husbands’ will. What this demonstrates is that it is regarded as perfectly acceptable in the world of Islam, to make creative use of the variety of opinions and even to use *ijtihād*, taking the notion of the common good (*maslaha*) as a guideline in order to reach socially desirable solutions.

Many codes of personal status that have been enacted in the Islamic world have introduced minimum ages for concluding a marriage, although this was not known in the classical doctrine. This reform was inspired by the idea of *maslaha*, since large parts of the population regarded child marriages as socially undesirable. A similar step could be taken in the Shari’a Penal Codes: restricting criminal responsibility for *hadd* offences and homicide and wounding to those older than eighteen years, which would then make these codes more in agreement with the International Convention on the Rights of the Child.

That enforcement of shari’a penal law under the present circumstances does not just mean the slavish following of the texts of medieval Islamic jurists is gradually accepted even in countries where shari’a criminal has been codified, such as Iran and Pakistan. I will give a few examples to show that the scope for discussion is much larger that is usually thought.

One of the issues that have been widely discussed is the question of whether the penalty of stoning is really a *hadd* punishment. The problem is that it is not mentioned in the Koran. Koran 24:2 reads:

> Men and women who have unlawful intercourse, scourge ye each one of them (with) a hundred stripes. And let not pity for the twain withhold you from obedience to Allah, if ye believe in Allah and the Last Day. And let a party of believers witness their punishment. (K. 24:2)
When Libya introduced shari'a criminal codes in the early 1970s, unlawful sexual intercourse was not made punishable by stoning with the argument that stoning to death is not mentioned in the Koran. In the same vein, the Pakistani Federal Shariat Court ruled that the law imposing stoning as a punishment for unlawful intercourse was inoperative, as it was repugnant to the injunctions of Islam. The Pakistani Constitution lays down that laws are inoperative if they are repugnant to the injunctions of Islam. Unfortunately the decision was revoked when the President of the Republic interfered and replaced a number of judges in the court with more conservative ones. However, in spite of this, the punishment of stoning has never been enforced in Pakistan.

Even in Iran, which is regarded as one of the most conservative Islamic countries, such debates take place. Lately, a discussion about stoning was initiated and on 29 December 2002, the head of the judiciary ordered the courts not to pronounce sentences of stoning. This seems to have been the result of a campaign launched by a number female MPs and fatwas pronounced by leading ayatollahs. Another issue that was discussed there was whether the differentiation in the bloodprice between men, women and non-Muslims is justified. As a result a draft bill has been introduced removing the difference in blood price between Muslims and Christians.

These examples show that even in countries that are regarded as conservative in applying the shari'a, debates take place on the assumption that the exact contents of the shari'a have to be determined according to the circumstances of time and place.

4.2. The role of the judiciary

One of the most serious problems that accompanied the introduction of the sharia penal codes in Nigeria was the fact that the judiciary was not yet sufficiently equipped to enforce these laws. And this was the more serious because the new penal codes contained many gaps that had to be filled through case law. It is striking that in both the Safiyyatu Hussaini case and in the Amina Lawal case the sentences of the trial courts were quashed mainly on technical and procedural grounds. This, I am afraid, is indicative for the state of knowledge of shari'a criminal law and procedure among the lower court alkalis. A number of elementary rules are expressed in the following hadith:

A Muslim man came to the Prophet when he was in the mosque and shouted to him: “O Messenger of God, I have had illegal sexual relations.” The Prophet then turned away from him. But the man moved in order to face him and said: “O Messenger of God, I have had illegal sexual relations.” Again the Prophet turned away, until he had repeated it four times. After he had testified against
himself four times, the Prophet called at him: Are you perhaps a bit insane? The man answered no. Then he asked: Have you ever been married. The man answered yes. Then the Prophet said: take him away and stone him.

From the sentences I have just mentioned, it appears that these lower court alkalis, did not even follow this basic rule stating that the court, before sentencing, must actively ascertain whether there are any legal defences and should not leave that to the defendant.

Legislative reform then cannot be successful unless the judges that must apply the laws have been better trained in the new codes and, even more importantly, in the spirit of Shari'a criminal law. There are so many hadiths expressing reluctance of the Prophet Mohammed and the Well Guided Caliphs in applying hadd penalties. The best known is the saying: "Ward off the fixed punishments on the strength of shubha as much as you can." (udru'u al-hudud bi-l-shubuhät ma istata'tum). In order to fully implement this principle, Northern Nigeria might follow the example of Pakistan. Here, sentences for hadd offences and sentences of retaliation must be confirmed by the Federal Shariat Court. Since this court very strictly applies the law of hadd and retaliation, no sentences of amputation, stoning, mutilation for wounding and crucifixion have ever been carried out. This is a very important step, since the Federal Court does not hear the case by way of appeal, conditional on whether the defendant has lodged an appeal, but as a legal obligation without which such sentences cannot be executed. A similar institution in Northern Nigeria would be beneficial. It could remedy the shortcomings of the lower courts and secure a more correct application of the law.

5. Conclusions

I will briefly summarise my findings with regard to the possible solutions for the conflicts between the present Shari'a Penal Codes and the human rights guaranteed by the federal constitution. What I wanted to show is that the present stalemate can be overcome and that the claim of some Northern Muslims that the present Shari'a Penal Codes are identical with Gods law and, therefore, cannot be changed is incorrect and can be refuted if we take a look at the Muslim world at large and especially at such countries as have recently reintroduced shari'a legislation.

My point of departure is, as many Islamic scholars have asserted, that the shari'a is a flexible and adaptable doctrine of law. It is a collective duty of Muslim

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scholars of every age to exercise *ijtihād* and search for new interpretations, taking into account the specific circumstances of their period and thus develop a viable legal system that can applied in their time. This idea is contrary to what the legislators of the Northern states have done when they codified Shari’a penal law. For they went back to the classical Malikite doctrine, which they thus slavishly adopted, without taking into account the requirements of this age and place, and, especially, the position of the Northern states in the Nigerian federation.

In trying to reformulate Shari’a criminal law and achieve a greater compliance with human rights standards without abandoning the principle of application of the shari’a, three strategies might be followed:

1. Drafting a shari’a penal code with the provision that the *hadd* penalties will only be applied when all citizens are free of want.
2. Drafting a penal code incorporating only the very few immutable and unambiguous source texts and further elaborated through *ijtihād*.
3. Drafting a shari’a penal code on the basis of the doctrines of the four (or five, if we include the Imami Shiites) schools of jurisprudence, selecting those provisions that are most in consonance with the modern times and in case of need, supplemented by provisions based on *ijtihād*.

But whichever of these strategies will be chosen, a prerequisite is a better training of the judges of the lower courts, who sometimes are overzealous in enforcing shari’a punishments but lack the knowledge required for adjudicating in matters of *hudūd* and retaliation. In an Egyptian theft case tried in 1862, a lower qadi had sentenced two defendants to amputation of the right hand. The sentence was quashed by the High Court, which reprimanded the qadi and the mufti who confirmed the decision, saying that they ought to have been very cautious with regard to this kind of judgement and only have ventured to pronounce it after having reached complete certainty, for in this type of cases a sentence of amputation must not be pronounced like they did, by [only] dipping the fingertips in the sea of Abu Hanifa’s jurisprudence.15

After nearly a century and a half, this warning has lost nothing of its aptness.

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