

# Reconciling Rights and Obligations: An Examination of Shari`ah Penal Reform in Northern Nigeria

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## **Abstract**

This article examines the debate concerning the recent reinstatement of Shari`ah law with respect to criminal matters in Northern Nigeria. The discussion explores the inherent challenges in reconciling the equally entrenched and passionate views of pro-Shari`ah supporters on their right to freedom of religion with those that question its application in terms of human rights norms and obligations, and its constitutional legality. The analysis concludes that Shari`ah laws can coexist with Nigeria's common law system and remain relevant in the context of Islam, provided that its principles are adapted and modernized to comport with international standards for due process and are interpreted and applied consistently.

## **Introduction**

Nigeria exemplifies the struggles that so many other formerly colonized African nations have experienced and continue to reckon with in the wake of their independence. Its unrest stems largely from the artificiality of its creation, whereby approximately 248 different tribes, kingships, and other groups that are completely distinct in ethnicity, language, religion, and territory, were thrown together through foreign conquest and cast under the rubric of imperial Britain.<sup>1</sup> Of these groups, three represent about two-thirds

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of Nigeria's 116.9 million people<sup>2</sup>: the Hausa-Fulanis<sup>3</sup> in the north, the Igbos in the southeast, and the Yorubas in the southwest.<sup>4</sup> Perhaps the single most defining basis dividing these groups along geographic lines is religion, for most southern Nigerians are Christian while northern Nigerians are primarily Muslim and have a long history therein.

Predictably, colonization sought to amalgamate these groups in conformity with British values, administrative structures, and the common law system. While initial attempts sought to accommodate traditional institutions and practices through a policy of indirect rule, their erosion and transformation was inevitable as the influence of westernization increased. Despite the best efforts of imperial Britain's 6 decades of rule,<sup>5</sup> this process was never fully successful in the Muslim areas, for the Muslims always resisted full subjugation and sought to retain their own practices and structures to the furthest extent possible.

This commitment to and assertion of Islamic identity gained far greater momentum after Nigeria's independence, which was achieved on October 1, 1960. Indeed, without the stabilizing effect of Britain's controlling presence, groups have struggled against each other to assert their distinct priorities in an effort to reshape the balance of power within the government and to influence its administration. As a result, Nigeria has been plagued by internal armed conflict, government corruption, and persistent political and social instability. Some groups even seek to reject colonial vestiges altogether through self-determination. Once considered to be the "brightest star in the galaxy of new African states,"<sup>6</sup> based on its great human capacity and rich natural resources, Nigeria is now a hotbed of ethnic and religious division.

Among the most controversial and sensitive issues to flare up between Nigeria's Muslim and Christian communities of late is the reinstatement of Shari`ah law with respect to criminal matters in 12 of the country's 36 states. Under colonial rule (1900-60), Islamic penal law was slowly transformed and eventually displaced entirely by the Northern and Southern Penal and Criminal Procedure Codes as a condition of achieving independence. This paper examines the debate over reintroducing Shari`ah penal laws and establishing courts to enforce them, and analyzes what options exist for reconciling divergent opinions within Nigeria as to the desirability and legality of these developments.

Part One provides a brief historical overview of the extent to which Islam forms part of northern Nigeria's identity, while Part Two highlights salient principles of the Shari`ah penal system and its implementation in

Nigeria thus far. The debate is subsequently considered from three different perspectives in Part Three: human rights norms and obligations, constitutionality, and the right to the freedom of religion. The analysis undertaken in Part Four ultimately concludes that Shari`ah laws can coexist with Nigeria's common law system, provided that its principles are modernized to conform with international standards for due process, particularly its rules relating to criminal justice and sentencing. In comparison, elevating the issue to that of a constitutional challenge risks greater division and bloodshed regardless of the outcome, and potentially could lead Nigeria's Islamic states to secede. What is needed is mutual understanding, respect, and tolerance of one another's positions; cooperation toward creative solutions that foster the coexistence of different systems; and a shared commitment to a more peaceful and productive future.

### **An Historical Overview of Islam in Nigeria**

Islam's influence within present-day Nigeria began in the ninth century in Kanem Borno, with the residents' conversion by Arab and North African Muslim traders and jihadists, and spread to the rest of the region in the eleventh century.<sup>7</sup> However, it was not until the early part of the nineteenth century, when northern Nigeria's Muslim population, led by Shaykh Uthman Dan Fodio (1754-1817), undertook the jihad of 1804,<sup>8</sup> that Islamic law became more widely applied and its judicial structures were formalized with the establishment of the Sokoto caliphate.<sup>9</sup> A centralized imamate system of caliphal administration was developed along with a complex network of courts: *alkali* courts, *emir* courts, and an appeals court.<sup>10</sup> Shaykh Uthman appointed judges who were knowledgeable in Islamic law, while he himself headed the appeals court. In general, judges were charged with ensuring that justice was administered in accordance with the Shari`ah in both civil and criminal matters, including family law, land disputes, theft, homicide, and economic crimes.

During the Sokoto caliphate, Shaykh Uthman and his followers adopted several principles, which formed the foundation of the state's policy on the administration of justice.<sup>11</sup> In particular, he stipulated that in the sphere of legislation, only the Qur'an and the Sunnah are binding on Muslims, meaning that all other opinions represent the scholars' personal discretion (*ijtihad*) and are not binding.<sup>12</sup> In other words, only an action that is directly opposed to the Qur'an and the Sunnah can be condemned. Shaykh Uthman also emphasized the principles of tolerance and accom-

modating other opinions, which he believed were embodied in the Islamic belief that a difference of opinion among Muslims is a mercy from God. According to Yushau Sodiq, this implies that people enjoy the free expression of opinion even if it does not concur with the prevailing views of the majority or the opinion of the authority.<sup>13</sup>

Another important concept asserted was that “religion is ease,” since the law’s primary purpose is to serve the people.<sup>14</sup> To Shaykh Uthman, justice prevailed only when the scholars took a lenient approach to the law by adhering to its spirit, rather than to its letter, so that it did not become burdensome. A corollary to this principle was the idea that applying Islamic law should be considered in the context of its usefulness to society. Where a choice of alternatives existed, administrators were to apply the more practicable policy even if it did not conform to the strict letter of the law.<sup>15</sup>

The adoption of these principles suggests that Shaykh Uthman and his followers governed the Sokoto caliphate with an open and dynamic approach to Islamic law, which gave full consideration to preserving the public good. This approach is consistent with the concept of *istislah*, the practice of using legal reasoning to interpret existing law based on the Qur’an and Hadith literature in light of Islam’s general principles in order to serve the public good (*maslahah mursalah*).<sup>16</sup> Moreover, it comports with the views of leading Maliki jurists, the school followed in Nigeria, who regard the underlying rationale behind many of the Qur’an’s and Hadith literature’s legal statements to be the consideration of the common good.<sup>17</sup>

This situation changed with the beginning of colonial rule in 1903, despite the pledge of northern Nigeria’s first British Governor, Lord Fredrick Lugard, that the colonial government would not interfere with Islam.<sup>18</sup> Muslim political institutions were retained in the form of the *emirs* and their councils, while the *alkali* courts were permitted to administer the Shari`ah largely unfettered. These Islamic courts worked parallel to customary African (indigenous) courts and the superimposed British court system, which consisted of the Supreme Court and provincial courts.<sup>19</sup>

By 1933, however, as the British gained the people’s goodwill and became familiar with the caliphate’s vast territory, a policy of transformation and assimilation began to replace that of accommodation. The first signs of this shift appeared when the *alkali* judges were prohibited from applying those punishments that the British considered as repugnant to natural justice and humanity or as inhumane treatment.<sup>20</sup> In effect, these

judges were called upon to apply two completely different penal systems by prosecuting and convicting suspects under the Shari`ah but then sentencing them according to the British criminal code. Where such cases were appealed to the appellate courts or Supreme Court, a *de facto* amendment of Islamic law was obtained.

This westernization process has been characterized variably as having merely a “pruning” effect on traditional laws in order to “attune the moral tone of customary law to that of a new age,”<sup>21</sup> versus “transform[ing] the content and methodology of Islamic law, together with its judicial institutions, for the worse.”<sup>22</sup> Regardless of how one characterizes this colonial strategy, it was very effective in stripping the *alkali* and the *emir* courts of much of their once-held prestige, efficiency, and credibility among Muslims. It eventually led to the adoption of the penal code in 1959, which sealed the fate of Islamic criminal law in northern Nigeria. This change was recommended by a panel of jurists,<sup>23</sup> known as the Abu Rannat Panel, and was modeled after the Sudanese penal code, which reflected that country’s attempt to handle the concurrent application of Islamic criminal law and the British criminal code.

The code introduced a penal system uniformly applicable to all citizens within northern Nigeria. While it claimed to incorporate certain Islamic norms and principles in an effort to cater to Muslims, such as its proscription of drunkenness and adultery, these reflected more a semblance of Islam than a true reflection.<sup>24</sup> Strategically, the British recruited and trained *emirs* and *alkalai* as the code’s principal enforcers, together with the Criminal Procedure Code, thereby further discrediting the role and status of traditional *emir* and *alkali* courts.<sup>25</sup>

Indeed, the true purpose of introducing these codes was to displace completely certain substantive Shari`ah rules and relegate Islamic criminal law to an appendage of English common law.<sup>26</sup> While the codes did not affect the continued application of Shari`ah law with respect to civil or personal matters (e.g., marriage, divorce, child custody, inheritance, succession, and property), this field also was undermined and distorted by its subordination to British-style appellate and supervisory courts, which were the final arbiters on questions of Islamic law despite their lack of training in its complexities. This strategy curtailed the Shari`ah’s powers and jurisdiction and abrogated its development. In the few areas where Islamic jurisdiction remained, Muslim scholars sought to preserve it through strict adherence to the letter of the law and were less concerned with its development and interpretation for society’s benefit.

Northern Nigeria's legislature reluctantly accepted the codes while under great political pressure from the British.<sup>27</sup> Not only was the achievement of independence made conditional upon introducing these legal and judicial reforms, but so was the promise of future financing capital for developing the region's commercial and industrial interests.

This series of colonial policies and tactics has contributed to a persistent post-independence movement within northern Nigeria's Muslim community to reinstate the application of Shari`ah law to matters from which it was displaced, in particular the criminal justice domain, and to give it true effect. In turn, this has led to an upsurge of sectarian violence over the past several years between Christians and Muslims, which has left thousands dead on each side of the religious divide.<sup>28</sup>

### The Shari`ah Penal System

The Shari`ah penal system has been criticized as archaic and inadequate for dealing with contemporary issues, given its historical basis in events dating back more than a millennium. Abdullah Ahmed An-Na'im posits that its steadily diminished application during the nineteenth and twentieth centuries, due to European colonization efforts,

... is better understood ... as being the result not only of growing Western influence throughout the Muslim world, but also of growing Muslim awareness of the inadequacy of the relevant Shari'a concepts.<sup>29</sup>

Others present a more nuanced critique, noting that Shari`ah law *per se* is not problematic; rather, concerns stem from its traditional application and lack of interpretation.<sup>30</sup> In particular, many countries seeking to reinstate Shari`ah criminal law tend to codify the most conservative juristic opinions and blindly imitate medieval practices without considering the historical socioeconomic and political contexts in which they were constructed. These proponents argue that Muslims need to differentiate between what is divine, and therefore unchangeable, and what is human. In other words, while the source of Islamic law is divine, the human effort in understanding God's message and codifying it into positive law is not infallible and divine. Therefore, it can be refined and redefined to adapt to new realities. Prior to examining the current debate on the Shari`ah's reinstatement in northern Nigeria, however, an overview of its general principles, particularly in relation to criminal law, and its implementation in Nigeria thus far is necessary.

*The General Principles of Shari`ah Law*

To Muslims, Islam is the “whole duty of humanity” and encompasses all aspects of human life, such that governance, law, education, and religion are considered one (2:208).<sup>32</sup> It strives to create a society that is based on a deep sense of moral responsibility and justice in order to preserve the human dignity that God has accorded to each person. The Shari`ah comprises the entirety of all regulations that Muslims must observe in order to live up to Islam’s requirements. It also regulates the individual’s relationship to God and to the environment through an ideal code of law, even if its actual practice in Muslim states differs in the extent to which it achieves these ideals.

Islamic jurisprudence (*fiqh*) is fundamentally based on the text of the Qur’an, the Prophet’s specific *sunnah* (practices) or teachings (derived from the Hadith literature), and *ijma`* (consensus among the Companions or theologians on specific legal questions either not addressed in the Qur’an and Sunnah or answered in seemingly contradictory terms). To a lesser extent, it is also derived from *qiyas* (analogical reasoning). In principle, these four sources of jurisprudence are accepted by the Shi`ah and four Sunni schools of law (i.e., Hanafi, Maliki, Shafi`i, and Hanbali), although they are interpreted and weighed differently by each school.<sup>33</sup> Apart from these sources, the Maliki school recognizes legal decisions based on judgments that are derived in such a way as to be more conducive to the public interest (*istislah*) or common good (*maslahah mursalah*), while the Hanafi school recognizes two other sources: personal reasoning to solve a problem (*ra`i*) and abandoning one legal decision for another one considered more appropriate or relevant with regards to society (*istihsan*).<sup>34</sup>

It is important to note that rules decreed by the Qur’an, the Sunnah, and *ijma`* are unchangeable and valid for all times and places. In comparison, all rules decreed and concepts conceived by scholars on the basis of *qiyas* or other related reasoning sources are subject to evolution and may change according to time and place. Some Islamic scholars envisage the Shari`ah’s ability to meet contemporary challenges within Muslim societies on the basis of the latter view.

To clarify what is allowed and what is forbidden, Islamic jurisprudence divides human activity into five categories, which are distinguished by whether their performance and non-performance is rewarded, not rewarded, punished, or not punished: *fard*<sup>35</sup> (prescribed), *mandub*<sup>36</sup> (rec-

commended), *mubah*<sup>37</sup> (permissible), *makruh*<sup>38</sup> (disliked), and *haram*<sup>39</sup> (unlawful).<sup>40</sup> This paper concerns itself with the fifth category of forbidden actions, which Islam addresses through deterrent punishment.

*The General Principles of Shari`ah Criminal Law*

The Shari`ah classifies crimes into two distinct categories of offenses: crimes against God and crimes against private individuals. Islamic law does not penalize an act arbitrarily; rather, it penalizes in order to protect and promote the five indispensable interests of social value (viz., religion, life and bodily integrity, soul, filiations, and property).<sup>41</sup> People who are convicted after a hearing are punished according to the criteria of one of three possible categories, depending upon the type of offense and the strength of the evidence: *hadd* (specific penalty), *jinayah* (retaliation or compensation as penalty), and *ta`zir* (discretionary penalty).<sup>42</sup>

*Hadd* (pl.: *hudud*) penalties are the most serious, because they apply to crimes against God. As such, their purpose is general deterrence or prevention. *Hadd* penalties comprise those offenses named in the Qur'an and the Hadith literature for which a specific punishment is strictly applied without discretion. Examples are *zina* (adultery and fornication),<sup>43</sup> *qadhif* (slander or false accusation of adultery/fornication),<sup>44</sup> *sariqah* (grand larceny or theft),<sup>45</sup> *hirabah* (rebellion or highway robbery),<sup>46</sup> *sukr* (consumption of alcohol),<sup>47</sup> and *riddah* (apostasy).<sup>48</sup> The latter two crimes are treated as lesser *ta`zir* crimes in more liberal Islamic nations, primarily because the Qur'an does not strictly prescribe a clear penalty for them.

In comparison, *jinayah* penalties cover homicide<sup>49</sup> and bodily harm, which are punishable by either *qisas* (exact retaliation based on the principle of "an eye for an eye") or payment of *diyah* (blood money or monetary compensation) to the victim or his or her surviving kin.<sup>50</sup> Finally, *ta`zir* (corrective) penalties are the least serious and may be imposed under three circumstances: where the law does not provide a specific *hadd* or *qisas* penalty; when the proof of having committed a *hadd* or *qisas* offense establishes a strong presumption of guilt but is not enough to impose specific penalties, or when specific penalties are barred by retaliation (in the case of *qisas*) or doubt (*shubhah*); and (where the offense harms society (e.g., bribery, forgery of documents, blackmail, selling tainted or defective products, treason, usury, and selling obscene pictures). As *ta`zir* penalties are not mentioned in either the Qur'an or the Hadith literature, the ruler or *qadi* (judge) can determine how they are to be applied (e.g., admonition,

reprimand, threat, boycott, public disclosure, fine and seizure of property, imprisonment, flogging, and even death).<sup>51</sup>

In the Islamic legal system, the responsibility of administering justice lies with, in order of priority, the government, the believers, and all of humanity. Moreover, justice may not be administered blindly, but must be tempered with mercy based upon considerations of hardship or the community's best interests.<sup>52</sup> This is consistent with Islam's emphasis on each person's dignity. As in western criminal justice systems, the Shari`ah incorporates such humane principles as equal protection before the law and non-discrimination on the basis of religion, race, or social situation. According to Liaquat Ali Siddiqui, it also follows all the principles of natural justice, including the requirements that judges dispense justice without favor or fear (4:135 and 5:8), judge with justice (4:58), the presumption of innocence (24:15 and 39:7), and the defendant's right to be heard (82:11, 39:69, and 24:24).<sup>53</sup> It requires that a certain "culpable will" (*animus*) be proven for the construction of the offense, such that grounds for exoneration may exist where the perpetrator did not understand the act to be criminal (e.g., due to infancy or insanity) or if it was committed as a result of error, forgetfulness, or compulsion.<sup>54</sup>

While Islamic law's reflection of these principles and safeguards is notable, existing data shows that their application has fallen far short of the Shari`ah's own standards, as well as those of the international community, in northern Nigeria's Shari`ah court judgments. These issues are considered next.

#### *Implementing the Shari`ah Legal Code in Nigeria*

On October 27, 1999, Governor Alhaji Ahmad Sani of the northern Nigerian Zamfara state announced plans to reintroduce the Shari`ah legal code, with respect to criminal matters, after receiving solidarity visits from representatives of Palestine, Saudi Arabia, Sudan, and Syria. Full Islamic law officially became operational in Zamfara on January 27, 2000. A Shari`ah penal code was ratified and the state judiciary was reorganized, both of which effectively replaced the anglicized area courts by Shari`ah courts.<sup>55</sup> Additional practices were revived as well, such as the state collection and distribution of zakat, Friday sermons, community participation in crime detection and prevention (including enforcement by *hisbah* [religious enforcers]), and regulating commercial practices in conformity with the Shari`ah. In the ensuing months, the leaders of 11 other states followed suit, meaning that 12 of north-

ern Nigeria's 19 states, or one-third of Nigeria's 36 states, have adopted Zamfara's Maliki-based Shari`ah model or a version thereof.<sup>56</sup>

A complex combination of objectives, operating in tandem, appears to be propelling this movement. In particular, they are to reverse the imposition of British colonialism, satisfy the presumed majority sentiment to submit to Shari`ah law beyond the confines of "personal law" and thereby obtain majority votes in public elections, curb increasing criminality within states, respond to the increasing decentralization within Nigeria in the form of cultural self-determination, attract substantial financial support from oil-rich Arab countries, divert attention from investigations into corruption by previous military leaders, and assert new forms of autonomy as a political bargaining chip in light of the north's loss of political influence in the Nigerian federation. This last development is an outcome of the return to civilian rule in May 1999 and the election of President Olusegun Obasanjo, a southern Christian.<sup>57</sup>

According to the "Law To Establish Shari`ah Courts" in Zamfara state, courts have jurisdiction over all persons professing Islam and those non-Muslims who voluntarily consent to the exercise of such jurisdiction.<sup>58</sup> In some jurisdictions, non-Muslims are required to be subject to the Shari`ah in certain matters, for instance, in disputes with Muslims or when a non-Muslim woman marries a Muslim man. The northern Nigerian penal code remains in effect for non-Muslims in all other circumstances.

The momentum surrounding the establishment of the Shari`ah courts, combined with the people's relative lack of education concerning the new Shari`ah prohibitions, has ensured that these courts have had ample opportunity to exercise their jurisdiction in the short time since their establishment. Examples of various rulings include the following<sup>59</sup>:

- **THEFT:** In March 2000, Buba Bello Jangebe, a farmer, had his right hand amputated after being convicted of stealing a cow in Zamfara. In another case, 15-year old Abubakar Aliyu was found guilty of stealing the equivalent of \$300 and had his hand amputated in Kebbi state. Other convicted thieves have been punished with 20 to 50 lashes and sometimes imprisonment. Many of these individuals were arrested, convicted, and punished on the same day.
- **CONSUMING INTOXICANTS:** Individuals caught drinking alcohol or smoking marijuana have received 80 lashes.
- **NON-SEGREGATION OF SEXES:** Men caught carrying female passengers on motorcycle taxis have received 20 lashes as a result of laws

mandating gender-specific public transportation. Women also have been whipped for improperly covering their heads or not being veiled.

- **FORNICATION/ADULTERY:** In September 2000, 17-year old Bariya Ibrahim Magazu was sentenced to 100 strokes of the cane in Zamfara for having extramarital sexual relations, and a further 80 lashes for failing to produce sufficient witnesses to substantiate her allegation that her father had coerced her into providing sexual favors for three men to whom he owed debts, one of whom impregnated her. Magazu's pregnancy was considered sufficient evidence of her transgression. She reportedly had no legal representation during her hearing. A reduced sentence of 100 lashes was implemented on January 19, 2001, despite the fact that the authorities knew that an extension for leave to appeal was being prepared on her behalf.

In October 2001, Safiya Hussaini Tungar-Tudu, a pregnant divorcee, was sentenced to death by stoning for fornication outside of marriage in Sokoto state. She was acquitted on appeal in March 2002, on the technical grounds that the alleged act occurred prior to the Shari`ah's imposition in Sokoto state. In March 2002, Amina Lawal Kuram was convicted of the same crime and sentenced to death by stoning in Katsina state. An appeal is underway on her behalf. Similarly, in June 2002, Yunusa Rafin Chiyawa was convicted and sentenced to death by stoning in Bauchi state for adultery, while Ahmadu Ibrahim and Fatima Usman were sentenced to death by stoning for adultery in Niger state in August 2002. In the latter case, the court overturned its previous decision to fine the couple and imposed a much harsher penalty on them in absentia. An appeal is underway on their behalf.

- **SODOMY:** In September 2001, a man accused of sodomy for raping a 7-year old boy was found guilty in Kebbah state and sentenced to death by stoning.

### **The Debate over Shari`ah Penal Reforms**

The implementation of Shari`ah penal codes in 12 of northern Nigeria's states and the manner of their application has raised a tremendous outcry and concern within the country by Christian Nigerians and human rights organizations (e.g., non-governmental organizations [NGOs]), as well as within

the international community by western governments and NGOs. These parties seek to challenge the Shari`ah movement on two different fronts. The first challenge is from the international community and human rights NGOs, who charge that Shari`ah penal laws and courts violate the defendants' fundamental rights to receive a fair trial with accompanying due process. They also hold that the punishments imposed and carried out violate Nigeria's obligations under various international human rights treaties.

The second challenge arises almost exclusively from groups within Nigeria, particularly Christian communities, who hold that reinstating the Shari`ah penal system contravenes Nigeria's constitution by going beyond those powers delegated to states, as well as the right to religious freedom. In juxtaposition to these challenges lie the Muslim justifications for the Shari`ah's resurgence, which are based primarily on the Muslims' right to profess their religion to the fullest extent – a proposition, they argue, that is supported by Nigeria's constitution.

Under mounting pressure, President Obasanjo has taken an official stance, thereby putting the federal government on a collision course with pro-Shari`ah governors. In a letter sent to northern state governors in mid-March 2002 by Justice Minister and Attorney-General Kanu Godwin Agabi, the federal government declared the application of strict Shari`ah law unconstitutional and asked those states using it to modify its provisions in accordance with the constitution.<sup>60</sup> Prior to this, Obasanjo had been reluctant to interfere in those northern states that had adopted the strict Shari`ah code, instead characterizing them as political maneuvers that would wane with time. Each of these different sides is considered in greater detail below.

#### *Human Rights Norms and Obligations*

From a human rights perspective, the primary concerns with the Shari`ah penal codes stem from the dual system that it creates, whereby the rights of Muslims prosecuted before Shari`ah courts are protected to a lesser extent than those of non-Muslims under the penal code for northern Nigeria. This violates the principle of equal protection before the law – a position officially shared by the federal government. For example, Muslims prosecuted under the Shari`ah have no choice as to which court they wish to appear before and are subjected to far harsher penalties than non-Muslims for the same offences. Moreover, certain offences are not even criminalized in other states, such as those related to gender segrega-

tion, traditional Islamic attire for women, and consensual premarital and extramarital sexual relations. This presents a related issue of fairness in terms of the principle of legality, which requires that the people at large be given sufficient prior notice of changes in criminal prohibitions so that they may behave accordingly. There appears to have been a decided lack of such education campaigns concerning Shari`ah offenses and their penalties prior to their implementation, which has disproportionately affected poor uneducated Muslims – especially women.

Moreover, Shari`ah courts have led to unequal protection before the law due to their failure to guarantee certain basic rights to a fair trial. In particular, the rights to legal representation and to appeal have not been respected in many cases involving serious penalties, including flogging and amputation. Indeed, it is not uncommon for individuals to be arrested, convicted, and punished all on the same day, or for attempts to file an appeal to be obstructed on procedural grounds. Moreover, government-sanctioned hisbah vigilantes (religious enforcers), separate from the police, are known to monitor compliance with Shari`ah laws and mete out beatings on the spot against alleged violators.<sup>61</sup>

These shortcomings not only violate the due process rules within the Shari`ah penal codes themselves, but also within Nigeria's constitution; the International Covenant of Civil and Political Rights (ICCPR), to which Nigeria acceded without reservation on July 29, 1999; the Universal Declaration of Islamic Rights (UDIR); and the Resolution on the Protection of Human Rights in the Islamic Criminal Justice System.<sup>62</sup> Such shortcomings are especially troubling in light of the harsh and irreversible nature of the penalties involved.

The lack of due process in criminal proceedings could stem, in part, from the general lack of judicial training of Shari`ah court judges, which falls below international standards. Many of these judges are the same as those who sat on the area courts prior to their replacement. Since these area courts had no penal jurisdiction, Shari`ah judges have had only minimal training in Shari`ah penal laws, let alone in the rules of criminal procedure and evidence. This ties into a more systemic issue prevalent throughout northern Nigeria: the shortage of higher education schools specializing in the teachings of Islamic law. Indeed, it seems to be reminiscent of the approach adopted by Muslim scholars during colonization, when they sought to preserve what little legal jurisdiction was left to them by adhering strictly to the letter of the law, to the detriment of its development and interpretation, in order to adapt to changing social needs and new challenges.

The nature, severity, and application of Shari`ah criminal justice also raises concerns as to its consistency with international human rights norms, by which Nigeria has pledged to abide. Such punishments as being stoned to death while buried up to one's chest, flogging, amputation, and crucifixion are considered to constitute cruel, inhuman, and degrading treatment by international standards. Nigeria is a state party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT),<sup>63</sup> the ICCPR,<sup>64</sup> the Convention on the Rights of the Child (CRC),<sup>65</sup> and the African Charter on Human and People's Rights (Banjul Charter).<sup>66</sup> These treaties oblige Nigeria to take effective measures to prevent acts of torture and cruel, inhuman, and degrading treatment or punishment in any territory under its jurisdiction; to investigate reports thereof; and to ensure that victims obtain redress. Moreover, article 34 of Nigeria's 1999 constitution states that "no person shall be subject to torture or to inhuman or degrading treatment."

With respect to children, the UN Special Rapporteur on Torture has stated that corporal punishment and excessive chastisement of children for the commission of a crime is inconsistent with the CAT and article 7 of the ICCPR.<sup>67</sup> Such punishment is also contrary to article 19 of the CRC, which requires Nigeria to take measures to protect children "from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse." Given the CRC's standard age for children of less than 18 years old, there can be little doubt that applying such punishments as public flogging and amputation to teenagers below the age of 18 run afoul of international human rights standards. Part of the problem may stem from the historical lack of precision in Shari`ah law as to the age at which one is considered an adult. Reference is simply made to the age of "puberty," which is an unacceptably vague range that varies from person to person and invariably falls short of the international standard.

Having said this, Zamfara's Shari`ah penal code does appear to take into account the international standard age of 18, since it specifically provides for a discretionary substitution of a fine or 20 lashes when a person of less than 18 years is convicted of *any* offence. This is consistent with some Islamic scholarly opinion that children, along with mentally deficient individuals, cannot be accused of adultery since voluntariness cannot be proven.<sup>68</sup> Despite this apparent recognition within the law of the sanctity of childhood and the need for the special protection of children, there is little evidence that such lesser penalties have been applied where chil-

dren are found guilty of, for instance, fornication or theft. Indeed, in many cases it seems that judges impose punishments in accordance with the strictest interpretation of Shari`ah law – whether against children or adults. This is reflected in the sentence of death by stoning while partially buried that Amina Lawal Kuram received for fornication outside of marriage on the basis of her pregnancy (as mentioned above), while the male adulterer was acquitted after withdrawing his confession. The hadd punishment of stoning in cases of adultery is not even specified in the Qur'an; rather, it is found only in the Hadith literature. As a result, Khawarij jurists and some Shi`ah and Mu`tazilah jurists rejected it as a punishment for adultery altogether.<sup>69</sup>

This leads to the final source of human rights concerns: discrimination against women, on the basis of their gender, in cases where zina is charged. All Islamic jurists agree that the evidence required to prove zina is the oral testimony of four adult male Muslims who have seen the act of sexual intercourse.<sup>70</sup> This is derived directly from the Qur'an (4:15). The witnesses must be able to state where and when the offence took place, and must be able to identify the parties to the act. According to Mohammad S. El-Awa:

[t]hese requirements indicate the difficulty, if not the impossibility, of inflicting the hadd punishment for fornication or adultery. ... The severity of punishment in Islamic law indicates the law-maker's desire to warn the people in order to prevent them from committing the offences in question, while the obvious difficulty of proving the offence reflects his desire to regard the existence of these punishments as a mere threat.<sup>71</sup>

This is consistent with the Islamic belief that justice must be tempered with mercy upon consideration of hardship or the best interests of the community as a whole.<sup>72</sup> Indeed, under the majority view in traditional Islamic jurisprudence, pregnancy alone is not sufficient evidence to prove zina, since the Qur'an specifies nothing less than four eyewitnesses. Moreover, a fundamental principle of Islamic criminal procedure is that the benefit of the doubt lies with the accused.<sup>73</sup> In contrast, northern Nigerian Shari`ah courts are taking a more restrictive approach by permitting pregnancy to constitute sufficient circumstantial evidence to condemn an unmarried woman for zina without the need for four witnesses, as per the Maliki school's interpretation. This effectively creates a presumption of guilt on the part of the woman, unless she can prove that she was married to the person with whom she had sexual relations or that she was raped. In the case

of alleged rape, the presumption can only be rebutted by the testimony of four adult male Muslim witnesses – an enormously high reverse-burden that is contrary to the internationally recognized principle of the presumption of innocence applicable in criminal cases.<sup>74</sup> Moreover, if she is unable to secure such testimony, she will be subjected to the additional penalty of *qadhf*, further compounding her discrimination, insecurity, and injustice.<sup>75</sup>

In contrast, the oath of the man denying sexual intercourse with the accused woman is considered sufficient proof of innocence, unless four witnesses attest to his voluntary involvement. The clear implication of these disparate burdens is that the law protects men who rape or sexually coerce girls and women with impunity, provided that there are less than four witnesses, whereas their impregnated victims have a virtually impossible burden of disproving their voluntary fornication. As a result, they are subjected to 100 or more lashes or to death by stoning. The situation is exacerbated by the Shari`ah courts' unwillingness to pursue allegations of rape and coercion, and pressures placed on women by hisbah religious enforcers. Moreover, by the Shari`ah's own requirements, such women should receive, at the very least, the benefit of the doubt and be sentenced to a lesser discretionary *ta`zir* punishment.

This discriminatory and unduly restrictive application of Shari`ah penal laws also runs contrary to Nigeria's obligations under the Convention on the Elimination of Discrimination Against Women (CEDAW), which it ratified on June 13, 1985. This document includes the right of women to sexual autonomy and to make decisions freely regarding their bodies, as well as the right of all individuals to privacy, the realization of which is also challenged by the lack of knowledge of, and access to, birth control methods and abortion clinics within Nigeria.

### *Constitutionality*

The constitutional debate surrounding the Shari`ah movement is based primarily on the issue of whether Nigerian federalism, as entrenched in the 1999 constitution, accommodates the Shari`ah reforms undertaken at the state level thus far, including the enactment of religious norms into positive law and the creation of Shari`ah courts to enforce these norms. Opponents of such reforms claim that section 10 of the constitution enshrines the principle of secularity within Nigeria, such that any laws enacted on the basis of religion (e.g., the Shari`ah), are *ultra vires*; and that the constitution limits the Shari`ah to areas relating to personal sta-

tus, such that its expansion into the criminal domain is *ultra vires*. These propositions are examined below, in turn.

The enactment of Shari`ah laws by a state House of Assembly is necessarily exposed to constitutional challenge by virtue of section 1 of Nigeria's constitution, which provides for its supremacy over all other laws and subjects them to constitutional scrutiny. The first basis for challenging the Shari`ah movement by non-Muslims comes under section 10, which reads: "The Government of the Federation or a State shall not adopt any religion as state religion." In effect, this provision requires the separation of state and religion, such that the creation of a theocratic Islamic state is prohibited. When read together with section 38,<sup>76</sup> which guarantees the right to the freedom of religion, it is clear that Islam cannot be enforced as a state religion but must be left to the conscience of individual Muslims. Indeed, the freedom of religion is guaranteed to the individual, not to the state, for a state religion founded on the basis of electoral majorities would hinder the freedom of minorities. This principle reflects and supports the inherent diversity of Nigeria's various peoples.

While governors of those states that have expanded Shari`ah laws deny that these measures have elevated Islam to the level of a state religion, their effect is apparent. By its very nature, the Shari`ah encompasses all aspects of human life, such that all persons, Muslims and non-Muslims alike, living within its domain are directly affected. Shari`ah policies require segregating the sexes in public transportation and education, veiling women in public, prohibiting banks from charging interest on loans, eliminating state taxes and collecting zakat (alms) from Muslims, and criminalizing various activities (e.g., alcohol consumption, intercourse outside of marriage, prostitution, begging, and gambling). Moreover, it becomes a criminal offense punishable by death for Muslims to renounce Islam and change their religion.

These measures amount to more than just "borrowing"<sup>77</sup> or "sourcing"<sup>78</sup> elements from the Shari`ah code, as some pro-Shari`ah governors and scholars purport. Rather, they come close to approximating the Shari`ah's ideals as institutionalized in past and present Islamic theocratic states. While non-Muslims are not strictly bound by the Shari`ah if they choose not to be, the reality is that their lives are infringed upon and will be made very difficult if they do not abide by its requirements, given its pervasive nature and the zealotry of hisbah enforcers. In this way, the Shari`ah reforms in northern Nigeria amount to introducing a state religion, which is contrary to the constitution.

With respect to the second basis, many non-Muslims concede that the constitution recognizes the Shari`ah but that it is expressly granted limited jurisdiction in relation to personal matters, and that it cannot be extended unilaterally without seeking a constitutional amendment. While the law of the land primarily reflects English common law in terms of civil and criminal matters, the constitution symmetrically recognizes both Islamic and customary laws as arms in its plurality of legal systems that are applicable to civil matters. In other words, this was done to provide an institutional identity for Muslims in the emirate system and for indigenous non-Muslims in pre-colonial states, respectively.<sup>79</sup>

It does this by providing for the establishment of a Shari`ah court of appeal in the capital Abuja,<sup>80</sup> as well as in any state that requires it.<sup>81</sup> Moreover, nothing in the constitution prevents states from creating Shari`ah courts of first instance to address the inappropriate determination of questions of Islamic personal law by English magistrate or high courts, which may be presided over by persons not versed in Islamic law. Subsection 6(4) provides that “[n]othing in the foregoing provisions of this section shall be construed as precluding the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court.”

Of course, these Shari`ah courts are legitimate only to the extent that they do not adjudicate beyond their ascribed jurisdiction of personal law. Subsection 277(1) outlines the jurisdiction of the Shari`ah court of appeal at the state level,

... [t]he Shari`ah Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection 2 of this section.

Subsection 277(2) goes on to enumerate those areas of personal law over which such courts have jurisdiction, in particular, matters relating to marriage, family, inheritance, guardianship, and any other question that all parties to the proceedings, being Muslims, request the court to determine in accordance with Islamic personal law.<sup>82</sup>

This grant of limited jurisdiction to Shari`ah courts makes sense in the historical context of British colonialism. While Shari`ah courts were initially allowed considerable leeway to adjudicate all matters, their jurisdiction over criminal issues was gradually eroded and eventually taken

away altogether with the grant of independence and the adoption of criminal codes for northern and southern Nigeria. Colonial confinement of the Shari`ah to the personal realm stemmed from concerns that its penalties were inconsistent with the common law repugnancy test of fairness, equity, and good conscience, and from the desire to create a unified criminal system for both northern and southern Nigeria as a strong foundation on which to build an independent nation.

Accordingly, to unilaterally promulgate Shari`ah laws, with all of their ramifications within a state and then to have newly established Shari`ah courts of first instance enforce these laws, is inconsistent with the constitution, for such a development amounts to rejecting the federal ethos and usurping the voices of other constituent states. The only way pro-Shari`ah states can legitimately expand the Shari`ah's application is by following the constitutionally prescribed process and seeking an amendment to the constitution.

To counter these arguments, Shari`ah scholars and jurists assert that the division of powers between the federal government and state governments, as outlined in schedule II to section 4 of the constitution, grants jurisdiction to states over matters not included in the enumeration of powers.<sup>83</sup> Since the Shari`ah falls within the residue, states have the constitutional authority to promulgate laws relating to it. They further argue that the list provided in section 277, which relates to the jurisdiction of the Shari`ah court of appeal over personal matters, is not cast in exhaustive terms to preclude the jurisdictional expansion of such courts.<sup>84</sup> Shari`ah penal laws and punishments are thus constitutionally valid, provided that they are enacted into written law.

While numerous aspects of Shari`ah law do appear to fall within the jurisdictional residue of the division of powers, such that states may legitimately legislate on them, this is not the case with respect to criminal matters. In particular, legislative power over the law of evidence is solely within federal jurisdiction,<sup>85</sup> while states have been granted concurrent jurisdiction over "services and execution in a state of the civil and criminal processes, judgments, decrees, orders and other decisions of any court of law outside Nigeria or any court of law in Nigeria other than a court of law established by the House of Assembly of that state."<sup>86</sup>

While it is true that Shari`ah courts have been established by state Houses of Assembly, such that they fall within state jurisdiction, their activities must still be consistent with other constitutional provisions, notably the prohibition of establishing a state religion and the right to the

freedom of religion. The same point holds true for the justification based on section 277. While this provision grants leeway to the state-level Shari`ah court of appeal to exercise jurisdiction over enumerated personal matters as well as additional matters, “as may be conferred upon it by the law of the state,” these conferrals must comport with other aspects of the constitution, as well as with federal rules of evidence.

### *The Freedom of Religion*

The complexity of the debate surrounding the Shari`ah movement is compounded by the fact that each side relies on arguments tied to the right to the freedom of religion. The Shari`ah proponents rely on another argument as well: the right of cultural self-determination. These are delicate and touchy subjects, to say the least. On the one hand, Muslims in northern Nigeria want to discharge their religious obligations as true believers by enabling the laws of God to govern their lives by implementing the Shari`ah, which, in turn, they believe will act as a bulwark against corruption, crime, and social inequity. In their view, these efforts merely reinstate the law that was in place prior to the British conquest and imposition of colonial rule. Millions of Muslims in northern Nigeria support these efforts, as demonstrated by their election of such state governors as Alhaji Ahmad Sani, governor of Zamfara, who campaigned on a platform of reinstating Shari`ah law.

On the other hand, pro-Shari`ah governors were not elected as part of the Islamic political parties, nor have there been referendums within states that have expanded the application of Shari`ah law asking Muslims and non-Muslims to vote on such major policy changes. The right to the freedom of religion, as enshrined in the constitution, prohibits a state government, let alone a majority population, from elevating a particular religion to the state level. Not only does this infringe upon the rights of non-adherents or members of minority religions, but it can also discriminate against members of the majority religion. Indeed, recently enacted Shari`ah laws *require* all Muslims – as determined by birth rather than choice – to submit to its laws, courts, and penalties, without exception. While the Shari`ah’s pervasive nature will undoubtedly affect the daily lives of non-Muslims, they are still free, with respect to criminal matters, to be judged under the northern Nigeria penal code, except in limited disputes involving Muslims.

In contrast, all Muslims are automatically subject to Shari`ah penal laws, which carry far harsher punishments than the common law penal

codes for northern and southern Nigeria. Indeed, many Shari`ah crimes are not even criminalized elsewhere. Violating the rights to the freedom of religion and equality before the law are perhaps most clearly evident in the fact that Muslims can receive the death penalty, in accordance with the Shari`ah crime of apostasy, if they renounce and change their religion. This raises other serious practical problems of enforcement, including determining the offender's religious affiliation.<sup>87</sup> In fact, some commentators consider compulsion in religion to be the antithesis of Islam and directly counter to the Qur'an (2:256), since genuine submission or surrender to Allah's will presumably requires the deepest and most intimate form of personal consent and commitment.<sup>88</sup>

### **Reconciliation or Rejection as the Way Forward?**

The foregoing discussion exemplifies the inherent challenges in reconciling the equally entrenched and passionate views of pro-Shari`ah supporters with those who question its application in terms of human rights standards and/or its constitutional legality. It naturally leads one to consider two potential options for defusing tensions and creating an environment that fosters a peaceful and productive coexistence between groups that have been religiously divided for many years. The first option is to have the Supreme Court of Nigeria rule on the legality of Shari`ah reforms – either by way of a reference question or by appealing a particular case. The former would lead to a non-binding decision, whereas the latter would necessarily entail a binding decision on the facts of the case. The second option is for the federal government to work together with pro-Shari`ah states to find new ways in which Shari`ah laws and common laws can coexist. For instance, this could be done by supporting various efforts to ensure the development and consistent interpretation and application of Shari`ah laws within the confines of international and national human rights standards.

In many ways, the first option strikes one as the logical approach toward at least clarifying, if not resolving, any truly contentious question within a democracy that risks dividing the country, such as the Shari`ah debate. For instance, Canada chose to refer the question of Québec's secession to its Supreme Court for a non-binding opinion.<sup>89</sup> However, upon closer consideration, this is an unlikely path for Nigeria for several reasons. Foremost among them is that bringing this question to the Supreme Court risks dividing the judiciary along religious lines. While judicial neutrality is a cardinal requirement of adjudication, one must be

mindful of how and by whom each Supreme Court justice came to be appointed to the bench, in addition to the endemic problem of corruption within Nigeria's government (at least in the past) and judiciary. These realities have led Nigerians to have very little faith in the impartiality and fairness of courts, at any level.

Accordingly, regardless of which position the Supreme Court would favor in the Shari`ah debate, the losing party(ies) would undoubtedly reject the opinion of a handful of judges over this important question rather than try to manage within its framework. Moreover, it would take a very long time for the Supreme Court to decide either a referred question or an appeal. The more Nigerians feel that they are in limbo on this matter, the greater opportunity to entrench their respective positions. These factors could have serious ramifications in further deepening the constitutional crisis, as opposed to working toward its resolution.

The second option addresses these shortcomings by bringing opposing sides together for joint deliberation and collaboration in order to fashion a mutually satisfactory and respectful system in which both the common law and the Shari`ah can coexist. This approach is premised on two recognitions: the Shari`ah has a role in those northern states who seek, by legitimate political means, to expand its scope; and there is a need for the Shari`ah's adaptation and modernization, in the context of Islam, for its continued acceptance and relevance.

The first premise presupposes a certain process of state penal legislation within the framework of a legitimate constitutional order. Provided that the function of determining which conduct is prohibited by the criminal law and how it should be punished is undertaken by the society at large, usually through its legitimate representatives in the appropriate legislative organs, imposing criminal sanctions may be taken as a proper exercise of the state's division of powers. Having said this, criminal punishments must seek to conform to the widest possible consensus of the society as a whole by giving due regard to the legitimate expectations and concerns of ethnic, religious, and political minorities. As Abdullah Ahmed notes,

... [t]he key point is that national sovereignty over the substance of the criminal law is not a license for the majority to impose on the minority the majority's moral values and sense of the proper scope and content of the criminal law.<sup>90</sup>

The same holds true where a state seeks to modify its criminal justice system.

The second premise recognizes that before the Shari`ah can work successfully, there must be an improvement in the quality and orientation of Islamic legal education in northern Nigeria in order to produce efficient and well-educated Islamic scholars who can implement the Shari`ah and to educate Muslims generally as to the true meaning of their faith. At present, there is a serious concern among Muslim scholars as to whether newly appointed Shari`ah judges are learned enough or even qualified to interpret Islamic law correctly.<sup>91</sup>

For instance, Khaled Abou El Fadl points out that some of these jurists receive only a one-year rudimentary training in the Shari`ah, and that their exposure tends to be limited to strict fundamentalist Wahhabi interpretations, since northern Nigerian states receive funding and resources from Saudi Arabia, which follows a puritanical sect of Wahhabi-Salafi Islam.<sup>92</sup> Sanusi Lamido Sanusi also notes that the Muslim north's traditional educational system revolves around a set of books that were introduced by the Almoravids (ruled 1040-1147) and are centered on the Maliki school of thought, with the *Mukhtasar* of Shaykh Khaleel as the *magnum opus*.<sup>93</sup> These teachings emphasize rote learning and the perpetual *stasis* of Islamic law. As a result, Nigerian Islamic jurists have a very narrow and restrictive knowledge base of how the Shari`ah is interpreted by various schools of thought from which to draw in their adjudication, including the Maliki school's own application of the principle of *maslahah*. Indeed, Ibraheem Sulaiman starkly holds that "the Muslim Ummah in Nigeria is engulfed by ignorance."<sup>94</sup>

This lack of thorough and appropriate judicial training in interpreting and applying the Shari`ah is linked to the absence of a mechanism within Nigeria for the orderly and timely development and regeneration of its principles and norms.<sup>95</sup> What has been done so far is a mere restoration of fossilized Shari`ah laws developed centuries ago, based on an implicit assumption that the founders of the various schools of thought asked and answered all questions for Muslims everywhere once and for all. Sanusi aptly points out that,

... [t]he system confuses belief in the universal and eternal applicability of the Shari`ah with the need for a wholesale adoption of its historically specific interpretation to meet the requirements of a particular milieu.<sup>96</sup>

In fact, not only have generations of Islamic religious scholars and jurists rendered different interpretations of Qur'anic verses, but so have jurists of the same generation who have belonged to different cultures and schools

of thought.<sup>97</sup> In other words, nowhere is it mandated that early Qur'anic interpretations reflect a fixed source of rules for future generations.

Accordingly, what is needed in Nigeria is a process of construction that is flexible and contextually responsive to the needs and rights of a modern society. It must ensure that Shari`ah penal laws meet all applicable internationally recognized human rights standards regarding due process and honor all of the human rights instruments signed and ratified by Nigeria, as well as those enshrined in its constitution. This includes ensuring that those condemned under Shari`ah penal codes have access to adequate legal representation and are able to exercise their full rights of defense and appeal, not only at the state level but also at the federal level, and that persons are protected from the arbitrary meting out of extreme and unacceptable punishment.

It also must ensure that justice is tempered with mercy when applying Shari`ah penal laws, for instance, where economic and other conditions serve as extenuating circumstances. Moreover, laws must be applied consistently, regardless of an individual's social status, such that those who steal millions from public coffers do not enjoy impunity while the impoverished have their hands amputated for stealing.<sup>98</sup> This approach is linked to a parallel need for an overall improvement in the standard of living of northern Nigeria's populace. True Muslims should emphasize the eradication of social ills through good governance and improving the people's standard of living, and not just through punishment.

In this regard, efforts should be made within Nigeria's pro-Shari`ah states to draw upon relevant accumulated knowledge, expertise, and experience from Muslim countries that have codified and implemented Shari`ah laws in a rights-oriented manner in order to ensure the efficiency and credibility of their judicial systems. This should be a reflective process tailored to Nigeria's unique needs, rather than a patchwork product hastily stitched together from borrowed fragments. Ideally, this would occur as part of a collaborative effort between the federal government and pro-Shari`ah states, and take the form of a standardized Shari`ah penal code, a code of penal procedure and a code of penal execution, to be adopted by all Nigerian states whose populations support their implementation by way of a referendum.<sup>99</sup> These codes would replace all pre-existing Shari`ah reforms instituted by the 12 northern states over the past few years. Endeavors also could be made to standardize the common law penal codes for northern and southern Nigeria to further facilitate the consistent application of criminal justice and to ease complexity.

## Conclusion

Nigeria faces a critical juncture in terms of the direction in which the federal government and the pro-Shari`ah states wish to take the Shari`ah debate. If not handled with the appropriate integrity, understanding, and foresight by all parties involved, Nigeria risks further escalating ethnic tensions with more explicit religious overtones. This could lead to a greater loss of life, increased suffering for minorities within pro-Shari`ah states, and the potential separation of those states from the rest of Nigeria, which, in turn, could spread even more conflict throughout western Africa than already exists.

Accordingly, the federal government needs great leadership and courage to initiate a process and set parameters for squarely addressing this politically charged issue. This dialogue must be transparent and inclusive of all perspectives, and have as its objective the search for a resolution that genuinely accommodates divergent interests through cooperation. This is the first step toward building trust where none has existed before.

In addition, the governors of those states that have already expanded the Shari`ah's realm and those who are contemplating doing so must be willing to modernize it in such a way that it complies with relevant human rights norms and all obligations binding on Nigeria. Furthermore, they must be willing to address systemic internal challenges relating to establishing more rigorous and comprehensive schools for Islamic jurisprudence. In turn, these measures will foster a social climate that is more able and willing to adhere to the strictures of Islamic law. Equally, there is a need for those who have sought to challenge the Shari`ah movement to deepen their understanding of its premises. Greater insight into and sensitivity toward Shari`ah law would allow for a more creative and effective advocacy of ways in which it can be brought into line with domestic and international human rights standards and designed to complement Nigeria's common law system.

In short, tremendous intellectual vigor and moral courage are required on both sides. However, above all, what is needed is a genuine joint commitment to fashioning a solution that truly seeks to transcend the historic divisions between Nigeria's splintered groups and unify the nation in a common objective of long-term peace and productivity. The stakes could not be higher for Nigeria's future, as it teeters between regression and reconciliation.

## Notes

1. Larry Diamond, "Nigeria: The Uncivic Society and the Descent into Praetorianism," in *Politics in Developing Countries: Comparing Experiences with Democracy*, 2d ed., eds. Larry Diamond, Juan J. Linz, and Seymour Martin Lipset (Boulder: Lynne Rienner Publishers, 1995), 417 at 419.
2. Economist Intelligence Unit, *Nigeria: Country Profile* (2002), 3.
3. These two groups are so closely integrated culturally and politically that they are often counted as one. See Philip C. Aka, "Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in The New Century," 14 *Temp. Int'l & Comp. L.J.* 327, 330.
4. *Ibid.*, 327. These three groups are estimated to control over 50 percent of Nigeria's 36 states. See Diamond, "Nigeria," 455.
5. Britain actually began its colonization efforts in Nigeria in 1861 by establishing the coastal colony of Lagos. Over the ensuing years, control was extended over additional coastal communities, which were eventually merged in 1906 to form the Protectorate of Southern Nigeria. In 1900, Britain also assumed control over the area north of Lokoja, which it named the Protectorate of Northern Nigeria. These two protectorates were subsequently amalgamated in 1914 to form the territory of present-day Nigeria.
6. Richard L. Sklar and C. S. Whitaker, "Nigeria: Rivers of Oil, Trails of Blood, Prospects for Unity and Democracy," 179 *CSIS Africa Notes* (December 1995), 1.
7. Auwalu H. Yadudu, "Colonialism and the Transformation of the Substance and Form of Islamic Law in the Northern States of Nigeria," 9 *J.L. & Religion* 17 (1991), 24.
8. *Ibid.*, 24. The Jihad was launched by the Islamic scholar Shaykh Uthman Dan Fodio to displace the corrupt and unjust leadership of Hausaland at the time and to establish a caliphate based in the city of Sokoto, whose institutions and leadership would be shaped in accordance with the Shari`ah.
9. *Ibid.*, 24.
10. *Alkali* courts were lower courts that had jurisdiction over any case except those dealing with murder or land, which had to be referred to the *emir* courts. *Emir* courts heard appeals from the *alkali* courts and had jurisdiction over any civil or criminal case and the power to pronounce the death penalty or life imprisonment.
11. Ibraheem Sulaiman, *A Revolution in History: The Jihad of Uthman Dan Fodio* (New York: Mansell Publishing Ltd., 1986), 156-60.
12. Ismail Balogun, *The Life and Works of Uthman Dan Fodio* (Lagos: Islamic Publishing Bureau, 1975), 50-1.
13. Yushau Sodiq, "Malik's Concept of Maslahah (The Consideration of the Common Good): A Critical Study of this Method as a Means of Achieving the Goals and Purposes of Islamic Law with Special Reference to its

- Application at the Shari`ah Courts in Northern Nigeria,” (Ph.D. diss., Temple University, Department of Religious Studies, 1991), 181.
14. Ibid., 182.
  15. Ibid.
  16. Ibid., 13-16. It should be noted that some scholars reject this usage of *maslahah mursalah*, instead positing that it only refers to arriving at a decision based on perceived public interest when there is neither legislative guidance as to that particular interest nor controlling religious text or consensus. In other words, it is applied to enact laws or rulings on issues not regulated by the Qur’an and the Hadith literature.
  17. Leading Maliki jurists who support this interpretation include Imam Malik, Ibn Rushd, Ibn `Abd al-Barr, and al-Shatibi. It is notable, however, that not all Maliki scholars or those of other schools consider the concept of *maslahah mursalah* as a basis for legal ruling, including Ibn al-Hajib, Shihab al-Din al-Qarafi, and Abu Ishaq al-Shatibi. See Sodiq, “Malik’s Concept of Maslahah,” 21-48.
  18. Yadudu, “Transformation of the Substance and Form of Islamic Law,” 27.
  19. The British grouped Islamic and customary African courts under the new name of “native courts,” which were later renamed “area courts,” around the time of independence.
  20. Yadudu, “Transformation of the Substance and Form of Islamic Law,” 28.
  21. Ajayi, “The Interaction of English Law with Customary Law in Western Nigeria”, 4 *J. African L.* 98 (1960), 105-8.
  22. Yadudu, “Transformation of the Substance and Form of Islamic Law,” 24.
  23. The panel was appointed by the Government of Northern Nigeria in 1958 to visit the Sudan, which had a similar religious mix, and investigate its approach to criminal justice.
  24. For instance, Islam actually prohibits the mere act of consuming intoxicants rather than the effect of drunkenness.
  25. This eventually led to abolishing the *emir* courts in 1977 and transforming the *alkali* courts into area courts.
  26. Yadudu, “Transformation of the Substance and Form of Islamic Law,” 30-31.
  27. It should be noted that a different penal code was promulgated for southern Nigeria.
  28. See, for example, International Relief Information Network (UN Office for the Coordination of Humanitarian Affairs), “Nigeria: Focus on Constitutional Crisis Caused by Islamic Law” (April 3, 2002). Available online at: [www.irin-news.org](http://www.irin-news.org).
  29. Abdullahi Ahmed An-Na’im, *Toward an Islamic Reformation Civil Liberties, Human Rights and International Law* (Syracuse: Syracuse University Press, 1999), 106.
  30. Zainar Anwar, “Islamisation and its Impact on Democratic Governance and Women’s Rights in Islam: A Feminist Perspective,” at 4. Available online

- at: [www.islam-democracy.org/4th\\_Annual\\_Conferene-Anwar\\_address.asp](http://www.islam-democracy.org/4th_Annual_Conferene-Anwar_address.asp). Keynote luncheon address for 4th Annual Conference hosted by the Center for the Study of Islam and Democracy, May 17, 2003 (Washington, DC).
31. Ibid., 4.
  32. Ibid., 11.
  33. The Maliki school is dominant in North and West Africa, and is followed in Nigeria.
  34. International Society for Human Rights, "Islamic Jurisprudence and Its Sources," 4-5. Available online at: [www.ishr.org/activities/index.html](http://www.ishr.org/activities/index.html).
  35. The prescribed (fard) is also referred to as obligatory (wajib), mandatory (muhattam) and required (lazim). The action may be an obligation for the individual Muslim (fard al-'ayn) (e.g., daily prayer [salah]), or for the whole Muslim community (fard al-kifayah) (e.g., funeral prayers). Performance of the prescribed is rewarded, while non-performance is punished.
  36. The recommended (mandub) is also referred to as *sunnah*, preferable (mustahabb), meritorious (fadilah), and desirable (marghub fih) (e.g., night vigil (tahajjud) prayers, remembrance of Allah (dhikr) and additional fasting). Performance of the recommended is rewarded, while non-performance is not punished.
  37. The performance and non-performance of the permissible/allowed (mubah) is neither rewarded nor punished as they are not subject to judgement from a religious point of view (e.g., travelling by plane).
  38. Non-performance of the disliked (makruh) is rewarded, while performance is not punished (e.g., eating specific types of fish is not recommended).
  39. Non-performance of the unlawful/prohibited (haram) is rewarded, while performance of the unlawful is punished (e.g. drinking alcohol).
  40. Muslim Students Association of the University of Southern California, "An Introduction to the Shari`ah and Fiqh." Available online at: [www.usc.edu/dept/MSA/law/Shari`ahintroduction.html](http://www.usc.edu/dept/MSA/law/Shari`ahintroduction.html).
  41. Naguib Hosni, "Islamic Fundamentalism and the Criminal Law," 411-12 *L'Egype Contemporaine* 5 (1988), 15.
  42. Muhammad Abu-Hassan, "Islamic Criminal Law," in *Justice and Human Rights in Islamic Law*, ed. Gerald E. Lampe (Washington DC: Intl. Law Institute, 1997), 81-88.
  43. Fornication occurs where neither party to an illicit sexual liaison is married (e.g., premarital or post-divorce). The penalty is 100 lashes, as prescribed in 24:2. Adultery occurs where one or both parties to an illicit sexual liaison are married to a third party. The penalty for adultery is death by stoning, as prescribed in the Hadith literature, which goes beyond the Qur'an. In case of doubt (*shubhah*), the sentence of hadd is barred and may be commuted to a ta`zir crime. A verdict for adultery or fornication requires the confirmation of the crime by four male witnesses who have seen the actual act of sexual intercourse, or the confession of the perpetrators. In the case

- of rape, the Shari`ah rules that a rapist is to be punished with 100 lashes if unmarried, or with death by stoning if married, since this would then constitute adultery. A pregnancy as a result of rape counts first as evidence of adultery committed by the woman, since the victim bears the burden of proving that she was raped. In the likely event that the accused male denies having raped the woman, she must name four male witnesses to prove the rape, failing which she will be charged with slander (*qadhf*) in addition to fornication or adultery.
44. Whoever falsely accuses a chaste person of zina is to be punished with 80 lashings in accordance with 24:4.
  45. According to 5:33 and 5:38 and the Hadith literature, anyone who commits grand larceny (theft) for the first time is punished by having his or her right hand amputated. If the perpetrator is convicted a second time, his or her left foot is amputated. However, this punishment may be imposed only if it really is a case of grand larceny. That is to say, the stolen good must be of a certain value and must have been sufficiently kept safe, the thief must not have been in any way entitled to possess the good, and he or she must have stolen it secretly (i.e., pickpocketing is not a *sariqah*).
  46. The punishment depends upon the grade of severity. For example, mere highway robbery or brigandage is punished with a prison sentence, while street robbery calls for cross-amputation (i.e., right hand and the left foot). Where street robbery involves murder or manslaughter, the punishment is death by crucifixion.
  47. The Qur'an prohibits drinking alcohol, but does not prescribe a particular punishment. The Hadith literature, on the other hand, calls for either 40 or 80 lashings.
  48. The Qur'an does not specify a severe penalty for apostasy, unlike the Hadith literature, which requires a death sentence.
  49. Five distinct types of homicide are covered: willful murder, manslaughter, erroneous homicide, involuntary homicide, and accidental homicide.
  50. Murdering a human being is not a hadd crime, because according to Islamic legal understanding, it was not God's rights that were violated but the rights of a human being. Therefore, murdering someone or causing grievous bodily harm and damage to property can be avenged by personal retaliation, after the accused is found guilty by a court. If the aggrieved party relinquishes the killing, or if the killing is inadmissible due to its danger to the life of the accused, the revenge may be transformed into payment of blood money (*diyah*), which the Qur'an considers an "alleviation and mercy." *Diyah* acts as both a penalty in the form of a fine and as a civil sanction in the form of a reparation of damage. Its amount is set according to certain rules in order to hurt the offender financially and to satisfy the victim(s)'s interests.
  51. In some Islamic nations, ta`zir crimes are set by legislative parliament.

52. Liaqyat Ali Siddiqui, "The Conception of Justice: Western and Islamic," in *Justice and Human Rights in Islamic Law*, ed. Gerald E. Lampe (Washington, DC: Intl. Law Institute, 1997), 30-1.
53. *Ibid.*, 37-38.
54. Hosni, *Islamic Fundamentalism and the Criminal Law*, 18-19.
55. Center for Religious Freedom, Summary of "The Talibanization of Nigeria: Shari`ah Law and Religious Freedom," 2. Available online at: [www.freedomhouse.org/religion/publications/talibanization/summary.htm](http://www.freedomhouse.org/religion/publications/talibanization/summary.htm).
56. These states are Kaduna, Sokoto, Kebbi, Katsina, Niger, Kano, Jigawa, Yobe, Gombe, Borno, and Bauchi.
57. Since gaining independence in 1960 and until President Obasanjo's election, Nigeria was under military rule for a total of 28 years, primarily by northern leaders.
58. See section 5(ii).
59. These examples are taken primarily from Amnesty International and Human Rights Watch reports and news releases. In particular, see Amnesty International, "Nigeria: Time for Justice and Accountability," AFR 44/14/00 (December 2000) at 7-8. Available online at [www.amnesty.org/ailib/aipub/2000/AFR/4411400.htm](http://www.amnesty.org/ailib/aipub/2000/AFR/4411400.htm), and "Nigeria: How Much More Suffering Under Shari`ah Penal Legislation?" Available online at: <http://web.amnesty.org/pages/nga-010902-background-eng> (June 2003); Human Rights Watch, "Nigeria: Teenage Mother Whipped" (January 23, 2001), available at [www.hrw.org/press/2001/01/nigeria0123.htm](http://www.hrw.org/press/2001/01/nigeria0123.htm), and "Nigeria: Woman Sentenced to Death Under Shari`ah." Available online at: [www.hrw.org/press/2001/10/nigeria1023.htm](http://www.hrw.org/press/2001/10/nigeria1023.htm).
60. International Relief Information Network (UN Office for the Coordination of Humanitarian Affairs), "Nigeria: Justice Minister Says Shari`ah Against Constitution" (March 21, 2002). Available online at: [www.irinnews.org](http://www.irinnews.org).
61. For instance, in Zamfara state, Governor Ahmed Sani vested the local vigilante group with full powers of arrest and prosecution because he believed that the police were not enforcing the new Shari`ah laws. Governor Saminu Turaki of Jigawa state also mobilized a statewide Shari`ah enforcement committee to arrest, detain, and prosecute Muslim offenders.
62. This resolution was the outcome of the First International Conference on "The Protection of Human Rights in Islamic Criminal Justice," which took place at the International Institute of Advanced Criminal Science in Siracusa, Italy, May 28-31, 1979, under the chairmanship of Professors M. Cherif Bassiouni and Ahmad Fathi Sorour. In attendance were 55 jurists, mostly penalists, from 18 countries. Participants voted unanimously, with one abstention, in support of this resolution.
63. Nigeria signed the CAT on July 28, 1988, and ratified it on June 28, 2001.
64. The ICCPR protects the right to life and establishes that in countries that have not abolished the death penalty, death sentences must be imposed only for

- “the most serious crimes.” This has been interpreted by the UN Commission on Human Rights to be limited and not go beyond “intentional crimes with lethal or extremely grave consequences and ... not to be imposed for non-violent acts” (UN CHR Resolution 2002/77, para. 4cc).
65. Nigeria signed the CRC on January 26, 1990, and ratified it on April 19, 1991.
  66. Nigeria ratified the Banjul Charter in 1983 by way of the Ratification and Implementation Act.
  67. Report of the UN Special Rapporteur on Torture, UN Doc. E/CN.4/1997/7, para. 6.
  68. Abu-Hassan, *Islamic Criminal Law*, 83.
  69. Ibid.
  70. Mohammad S. El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publications, 1982), 126. It should be noted that the testimony of women and non-Muslims (*dhimmi*s) is inadmissible in the more serious criminal cases of hadd and qisas. When a woman’s testimony is accepted, two female witnesses are equal to one male witness.
  71. Ibid.
  72. Siddiqui, *The Conception of Justice: Western and Islamic*, 30-31.
  73. Asifa Quraishi, “Her Honour: An Islamic Critique of the Rape Laws in Pakistan from a Woman-Sensitive Perspective,” 18 *Mich. J. Int’l. L.* 287 (1997), 300.
  74. Safiya Hussaini Tungar-Tudu and Bariya Ibrahim Magazu (as referenced above) both alleged that they had been raped or coerced into sexual relations but were unable to prove it. Safiya Hussaini later recanted her allegation.
  75. Bariya Ibrahim Magazu was sentenced to *qadhif* in addition to *zina* for bringing false charges against three men whom she alleged had coerced her into having intercourse with them. All three men denied their involvement.
  76. Section 38 reads: “Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.”
  77. For instance, see Auwalu Hamisa Yadudu, “Benefits of Shari`ah and Challenges of Reclaiming a Heritage,” 7. Available online at: [www.Shari`ah2001.nmonline.net](http://www.Shari`ah2001.nmonline.net). Lecture given at the International Conference on Shari`ah, hosted by the Nigerian Muslim Forum, April 14, 2001 (London, UK).
  78. For instance, see Muhammed Tabiu, “Shari`ah, Federalism and Nigerian Constitution,” 7. Available online at: [www.Shari`ah2001.nmonline.net](http://www.Shari`ah2001.nmonline.net). Lecture given at the International Conference on Shari`ah, hosted by the Nigerian Muslim Forum, April 14, 2001 (London, UK).
  79. From a historical perspective, this stems from the acceptance of native legal institutions by British colonialists as manifested by maintaining Shari`ah

courts in the Northern Protectorate of Nigeria and customary courts in the Southern Protectorate.

80. See section 260.
81. See section 275.
82. This jurisdiction is confirmed by subsection 262, which provides parallel provisions in regards to the Shari`ah Court of Appeal at the federal level, as well as by subsection 244(1), which holds that “[a]n appeal shall lie from decisions of a Shari`ah Court of Appeal as of right in any civil proceeding before [it] to the Court of Appeal with respect to any question of Islamic personal law which the Shari`ah Court of Appeal is competent to decide.” Parallel provisions are provided with respect to customary courts.
83. Tabiu, *Shari`ah, Federalism and Nigerian Constitution*, 56.
84. Yadudu, “Transformation of the Substance and Form of Islamic Law,” 55.
85. Schedule II, para. 23 of section 4.
86. Schedule II, para. 57 of section 4.
87. For instance, the situation becomes complex when a non-Muslim is required to convert to Islam in order to marry a Muslim, and the marriage subsequently breaks down. Will the converted Muslim be charged with apostasy if he or she later wishes to revert to his or her original religion?
88. Robert Traer, “Muslims and Human Rights,” Center for the Study of Ethics and Social Policy at the Graduate Theological Union (2002), 7. Available online at: [www.geocities.com/r\\_traer/religion/islamic/muslims.fhr.htm](http://www.geocities.com/r_traer/religion/islamic/muslims.fhr.htm).
89. Reference re. Secession of Quebec, [1998] 2 S.C.R. 217.
90. An-Na`im, *Toward and Islamic Reformation*, 104.
91. Apprehensions also exist that Shari`ah courts risk being contaminated by corruption and ineptitude given that many judicial personnel used to work for the corrupt Area Court system. See Yadudu, “Benefits of Shari`ah,” at 8-9.
92. See William Eagle, “Islamic Law Under Scrutiny in Nigeria,” *Middle East News Online* (March 5, 2002). Available online at: [www.middleeastwire.com/africa/stories/20020305\\_5\\_meno.shtml](http://www.middleeastwire.com/africa/stories/20020305_5_meno.shtml). Professor El Fadl is a specialist in Islamic law with the University of California at Los Angeles. He also notes an alarming trend in Saudi Arabia, whereby many classical legal texts that differ from the strict Wahhabi point of view, such as the twelfth-century works of Ibn Taymiya, are being altered and censored of “un-Islamic” aspects to reflect a puritan view of what Islamic law is supposed to be. These censored texts are then used to train Muslim jurists around the world, as in Nigeria, without them knowing that they have been altered.
93. Sanusi Lamido Sanusi, “Shari`ah and the Woman Question,” 1. Available online at: [www.Shari`ahh2001.nmonline.net](http://www.Shari`ahh2001.nmonline.net). Lecture given at the International Conference on Shari`ah, hosted by the Nigerian Muslim Forum, April 14, 2001 (London, UK).
94. Ibraheem Sulaiman, “Shari`ah Restoration in Nigeria: The Dynamics and the Process,” 3. Available online at: [www.Shari`ahh2001.nmonline.net](http://www.Shari`ahh2001.nmonline.net).

Lecture given at the International Conference on Shari`ah, hosted by the Nigerian Muslim Forum, April 14, 2001 (London, UK).

95. Yadudu, "Transformation of the Substance and Form of Islamic Law," 8-9. Yadudu posits that this could be because either the mechanism of *ijtihad* is not available to the Shari`ah judges, or because there are few qualified to engage in it to arrive in a meaningful and acceptable outcome.
96. Sanusi, "Shari`ah and the Woman Question," 1.
97. Joelle Entelis, "International Human Rights: Islam's Friend or Foe?" 20 *Fordham Int'l. L.J.* 1251, at 1282.
98. It should be noted that no individuals of Nigeria's upper class or close to the government have been charged and prosecuted under the expanded Shari`ah penal laws to date.
99. It is unclear whether such joint efforts are already underway, under the umbrella of the Institute of Islamic Legal Studies of Zaria University in Kaduna, by a committee composed of members who favor approaches toward Shari`ah laws of varying strictness.