

A Study of the Enforcement of Ta'zîr under the Sharī'ah Penal Code of Zamfara State (1999-2006)

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Abstract

The re-introduction of the application of Islamic Criminal Law in some of the northern states of Nigeria in 1999 is a turning point in the history of sharī'ah in Nigeria. Twelve out of the nineteen northern states with Zamfara as pioneer state adopted sharī'ah as a legal system and commenced the enforcement of Islamic Criminal Law according to the Maliki School of Jurisprudence. Ta'zîr (discretionary punishment) is one of the three categories of punishment under the Islamic Criminal Law and it has, since the re-introduction of this law, received a higher attention in the sharī'ah courts even though because the punishment is not always as harsh as those of hudūd and qiṣās, little is heard about it. This paper studied the provision for some of the offences that attract ta'zîr punishment under the Sharī'ah Penal Code of Zamfara State with the aim of establishing the relevance of Islamic Criminal Law to societal reform. Historical method was adopted for this work and data was collected from printed materials, research projects and Concordia. Statutes and electronic materials were equally not left out. Findings of the work revealed that Islamic Criminal Law is all encompassing and more productive in curbing crime in Nigeria. It was concluded that for Nigeria to move forward, there is the need for us to shun religious bigotry and embrace the Islamic legal system in all its ramifications.

Introduction

The history of the origin of the Zamfara State *Sharī'ah* Penal Code could be traced to a time when in June 1999, the then Executive Governor of Zamfara State in the Northwest of Nigeria, Alhaji Ahmad Sani, appointed a committee to study the ways and means of implementing full scope of Islamic Criminal Law in the State. Sequel to the submission of the Committee's report, Zamfara State promulgated its first *Sharī'ah*-related piece of legislation, *Sharī'ah* Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999 and this was assented to by the Governor on 8th October, 1999 (Ostiens, 2007). This law established *Sharī'ah* Courts for Zamfara State jurisdiction to determine both civil and criminal matters in Islamic law. The Zamfara State House of Assembly was subsequently mandated to establish offences, their punishments and the procedure for trials in criminal matters. Section 7(i) of the law provides that:

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The applicable laws and rules of procedure for the hearing and determination of all civil and criminal proceedings before the Sharī'ah Courts shall be as prescribed under Islamic Law... (Zamfara Law No 5, 1999)

The law also created a Council of *Ulama* for the State with the power (among others) to codify all the Islamic Penal Laws, their corresponding punishments, the rules of criminal procedure and evidence as prescribed by the Qur'an, *sunnah* of the Prophet (SAW), *ijmah*, *qiyas* and other sources of Islamic Law and to also advise on the enactment of the laws so codified.

The Zamfara State House of Assembly proceeded to enact a *Sharī'ah* Penal Code for the State. A draft was made apparently by the Legal Drafting Department of the State Ministry of Justice working in conjunction with the Council of *Ulama*. The draft bill was brought to the notice of the National Islamic Centre, Zaria (NIC), which was then mandated to go and make all the necessary consultations and come up with a final draft (Ostiens, 2007).

Ostiens (2007) confirmed that the NIC immediately contacted some lecturers in law from the Centre for Islamic Legal Studies (CILS) and the Faculty of Law, Ahmadu Bello University Zaria to take up the task and they came up with the final draft of the Zamfara State *Sharī'ah* Penal Code that was subsequently enacted by the House of Assembly as Law No.10 of 2000 and signed into law by the Governor on 27th January 2000. The enacted *Sharī'ah* Penal Code provides for *Hudūd* (prescribed punishment), *Qisās* (retaliatory punishment) and *Ta'zīr* (discretionary punishment) according to the Maliki School of Jurisprudence.

Ta'zīrāt (discretionary punishments) which are punishments for offences not expressly delimited in the primary sources of Islamic law and for which the judge is allowed to use his discretion in punishing the culprit

***Ta'zīr* in Islamic Law**

Ta'zīr is a punishment for offences not expressly delimited in the primary sources of Islamic law and for which the judge is allowed to use his discretion in punishing the culprit (az-Zuhaili n.d). *Ta'zīr* is a punishment which the law leaves to the discretionary power of the *qadi* (judge) with which he may punish all other crimes whether committed against the commandments of God or against one's neighbour. Muhammad (1998) observed that these

punishments may vary from one judge to another, depending on the judge who inflicts it and on the person on whom it is inflicted. Offences punishable by *ta'zīr* include usury (Q2:275, 2:278-279, 3:130), false testimony (Qur'an 4:135, 25:7, 22:30.), breach of trusts ((Q33:72).), bribery (Q2:188) and insult (Q. 49:11)..

Punishments for *ta'zīr* include flogging which is inflicted for offences such as stealing of a property below *niṣab* for reasons among which is the fact that the offender is saved from the corrupting influence of the prison with its immoral and unhealthy atmosphere. Regarding the number of lashes for any of the offences that attracts *ta'zīr* punishment, even though the Hanbali school in one of its opinion, restricted the lashes to ten (Oudah, 2000). He further observed that majority of scholars are of the opinion that it could be more than ten but should not be up to the magnitude of a *hadd* punishment determined by *shar'ah* for similar offence. The implication is that, for example, one hundred lashes is prescribed as a *hadd* for fornication, if fornication occurs between a boy and a girl of under age, the *ta'zīr* punishment shall not be up to one hundred lashes.

Admonition is recognized as the first step towards correcting an offender. This punishment gains the support of Q4:34. However, scholars observe that admonition should be adopted only for those who commit minor offences the first time and the judge thinks that such admonition will reform the offenders and prevent them from further transgression (Siddiqi, 1979). Mustapha (N.D) added that similar to the punishment of admonition is the punishment of reprimand which could take any form allowed by Islamic law provided it will help in reforming the offender.

At-Tahdīd (menacing) is considered a *ta'zīr* punishment provided it is done with the objective of scaring the offender from further committing similar offence. The menacing must be sincere such that if the offender commits the same offence another time, he should be made to face the full wrath of the law. In a situation where this fails, *Al-habs* (Imprisonment) is recognised as an alternative punishment. Siddiqi (1979) further observed that As Shafi'i, among other schools, fixed imprisonment of *ta'zīr* for a maximum of one year.

Boycott is used as a *ta'zīr* punishment to show dissatisfaction at a conduct by an offender. Boycott could be adopted against a person or a group of people until there is a change in the unlawful act. Equally, *at-tas-hir* (Stigmatization) is allowed as a *ta'zīr* punishment. An

offender could be stigmatized as a form of *ta'zir* and the general public should be made to know what he has done and how grievous it is. Reference is usually made to a man who was punished through stigmatization by the Prophet (SAW) for collecting *zakat* and dividing it into two portions, taking one to himself and claiming that it had been given to him as a present (Siddiqi,1979).

Al-gharāmah wal muṣādarah (fines and seizure of property) are considered as relevant forms of *ta'zir* punishment. Jurists disagreed on the legality of fines and seizure of property. The Hanafi and some Shafi'i regarded them as illegal but as for the Hanbali, Maliki and other disciples of Shafi'i, it is legal to seize property or fine the offender. The authority of the Hanafi school is of the view that no body, not even the *qādi*, is allowed to keep other's property unless by a legal reason. They claim that it was allowed at the beginning of Islam but later abrogated. The Hanbali however, refuted the issue of abrogation of seizure. Ibn al-Qayyim (nd) observed thus:

These are well-known cases which have been truly related. Those who claim that financial punishment was abrogated are wrong. Their view may be refuted by the cases ascribed to great Companions of the Holy Prophet (SAW), neither the Qur'ān nor the sunnah can help them in supporting their claim, nor is there any consensus about it. Even if there was a consensus, it would have no power to abrogate the sunnah, the best they may say is; 'in our school's view' they take their own view as standard of what is accepted and what is not.

The Provision for *Ta'zir* in the *Shar'ah* Penal Code of Zamfara State

Offences punishable by *ta'zir* are those offences that have no stipulated punishment in the primary sources of Islamic law. Such offences are many and best identified when committed and conceived to be a violation of the right of another person or of the right of Allah. The Zamfara State *Shar'ah* Penal Code (SPC) identifies some of these offences and stipulates sample punishments for them. The judge, in applying these punishments, could choose either of the two extremes depending on the condition under which the offence is committed. The following are the offences provided for.

Criminal Intimidation, Insult and Annoyance

Section 240 of the Zamfara State SPC identifies what constitutes the offence of Criminal Intimidation while Section 241 (a) and (b) of the SPC provides a maximum of two years imprisonment or fine or both for an offender. If however, the offence is to cause any harm or grievous hurt or destruction of property, the punishment shall be imprisonment for a term which may extend to seven years or with fine or with both.

In a situation where criminal intimidation is made by anonymous communication, section 242 of the Zamfara State SPC provides that such person, in addition to the punishment for the offence of criminal intimidation provided in section 241 of the Penal Code, shall be liable to a maximum of two years imprisonment. Section 242(2) of the Zamfara State SPC provides in addition to the imprisonment, caning which may extend to forty lashes.

Wrongful Restraint and Confinement

Sections 243 and 244 of the Zamfara State SPC define wrongful restraint and confinement and section 245 provides that the punishment for the offence shall be a maximum of six months imprisonment or with fine which may extend to one thousand naira (₦1,000) or with both. Section 246 provides that if the wrongful confinement continues for more than a day, the punishment shall be imprisonment for a maximum of one year or with a fine (the amount of which is not specified) or both. The confined person shall also be entitled to compensation, which will be determined by the court.

Still provided under wrongful confinement as found in sections 247 to 250 of the Zamfara State SPC are: wrongful confinement after warrant or order issued for production of liberation, wrongful confinement in secret, wrongful confinement to extort property or constrain to illegal act, wrongful confinement to extort confession or compel restoration of property. For each of these offences, *ta'zīr* punishment of imprisonment which may not exceed two years is provided except that in some cases, caning is added to the imprisonment. All the provisions however, fall within the ambit of decision of the court. The maximum punishment is given for the judge to choose within the provision of the law in line with the rule of *ta'zīr* under Islamic law.

Forgery

Forgery and forged document are defined under section 251 of the Zamfara State SPC. The SPC in section 253 provides that the punishment shall be five years imprisonment or a fine. A person who uses as genuine, a forged document is to be punished in the same manner as a person who forged the document provided he knows that the document is a forged one. Equally, a person who possesses forged document knowing that the document is a forged one and intending that the document shall be used fraudulently, shall also be punished under the SPC in the same manner as the person who forged the document. Section 259 of the SPC provides that where the value of the title amounts to a minimum value that attracts the *hadd* punishment of theft, the offender shall have his hand amputated. Otherwise, he shall be liable to the punishment of forgery.

Provision for Property Marks and Other Marks

Section 262 of the Zamfara State SPC defines using a false property mark while section 262 (a), provides that the offender shall be punished with fine or with both. The SPC adequately provide for the offence of being in possession of any instrument that could be used for counterfeiting a mark used by public servant or making use of any such false mark. The offence of possession of such instrument and that of making use of the instrument is the same in the Penal Code provided it is not done out of ignorance. The punishment for each, as provided for, under section 264,265,266 and 268 of the Zamfara State SPC is a maximum of two years imprisonment or fine or both. As for a person who tampers with property mark by removing or destroying such mark knowing surely that may cause injury to another person, he shall be liable to only one year imprisonment or fine or both; the fine may extend to ten thousand naira (₦10,000.00)

Provision for Criminal Breach of Contracts of Service and Breach of Official Trust

The Zamfara State SPC in section 269 identifies what constitutes criminal breach of contracts of service and provides for its punishment, a maximum of one year imprisonment in section 269 of the SPC. Section 271 of the Penal Code identifies what constitutes the breach of official trust and section 272 (a and b), provides that the offender shall be liable to imprisonment for a term which may extend to two years or fine or both and caning which may extend to fifty and thirty lashes respectively.

Provisions for Other Offences

Sections 273 to 404 provide for *ta'zīr* offences such as: Offences against the public peace, offences by or relating to public servants, contempt of the law authority or public servant, false evidence and offences relating to the administration of justice, screening of offenders, resisting arresting and escaping, public nuisance, vagabonds, mischief, lotteries and cruelty to animals. Adequate provisions for punishment of any body found guilty of these offences are made in the SPC under *ta'zīr*. In the case of offences against the public peace which involves being a member of an unlawful assembly or being a party to rioting. If the unlawful society is not such that is armed with deadly weapon, the punishment is a year imprisonment with fine. But if it involves the use of deadly weapons, offenders are liable to fine and seven years imprisonment. With respect to offences relating to public servants, provisions are made for taking gratification in respect of official act, taking gratification in order to influence public servant, abetment of public servant of the offences of taking gratification in respect of official act and offering or giving gratification to public servant and similar others.

Cases of *ta'zīr* have been tried under the *Sharī'ah* Penal Code of Zamfara State and criminals have been sentenced adequately. Some of these cases include the trial of AbdulSalami Ahmad Asha. A member of the Zamfara State House of Assembly who was indicted in November 2001 for selling his official car but was not sentenced (BBC News, 2001) and the case of a wedding party comprising eight individuals, who were sentenced in December 2004 to 25 strokes of the cane and a fine of 5000 Naira each for immoral act after organizing a picnic in honor of the groom (Daily Trust, 2004). The trial of Alhaji Aliyu (Saurin Keta) for taking gratification will be sampled for study in this paper to establish the strength or weakness in the enforcement of the law.

The Trial of Alhaji Aliyu (Saurin Keta) for Bribery Under the *Sharī'ah* Penal Code of Zamfara State

The Higher *Sharī'ah* Court (HSC) of Tsafe in Zamfara State under CR/TR/187/2000 on 26/10/2000 charged one Alhaji Aliyu (Saurin Keta) with the offence of accepting gratification of ₦3,950 from one Shuaibu Danmusa. The court sentenced him to three months imprisonment or payment of a fine of ₦6,000 as provided for in section 291 of Zamfara State SPC Law 2000 on 18/11/2000. When required to enter a plea, the accused pleaded not guilty of the offence because he said the gratification was collected by one Ado. He thereby showed

his dissatisfaction with the judgment of the Higher *Sharī'ah* Court adding that thorough investigation was not carried out by the judge before he was sentenced and he filed his appeal with the Upper *Sharī'ah* Court, (USC) Gusau which is equally an appellate court in the state.

The USC accepted the appeal on some grounds which include:

1. That the HSC has no jurisdictional authority to try an offence committed in Tsafe as provided for in section 133 of the Zamfara State *Sharī'ah* Criminal Procedure Code (SCPC 2001).
2. That considering the gravity of the offence, the HSC has no power to try a criminal offence of this type as established in S 291. The punishment for the offence of taking gratification as contained in S 288 to 304 of the Zamfara State SPC Law 2000 can only be meted by High Court of Justice and not by the HSC.
3. That HSC Tsafe seems to be ignorant of the interpretation of S 291 of Zamfara State SPC Law 2000 which, going by its content, Sauri shall not be the accused but rather Shuaibu Danmusa and Maiwada who gave the gratification.

Having listened to the evidences advanced by the counsels in defense of the accused and the complainant, the court passed its judgment thus:

- The HSC Tsafe has no competent jurisdiction of trying an offence committed by Saurin Keta, S 19 of the Zamfara State *Sharī'ah* Court Establishment Law orders the transfer of such matter to courts of competent jurisdiction before trial or at any stage of the proceeding before judgment. S. 133 of Zamfara State SCPC 2000 does not permit the HSC Tsafe to try such cases.
- Offence in S 291 of old SPC appendix B and S 200 of the new SPC can not be tried by the HSC but by the High Court of Justice.
- Even when a trial is a summary trial, the accused must be confirmed guilty and asked if he has objection to it before being sentenced.
- HSC Tsafe is ignorant of the interpretation of S 291 of Zamfara State SPC for sentencing Sauri to three (3) months imprisonment or payment of N6, 000 fines. The offence of gratification is charged in the section above on the giver and not on the receiver. It is gross injustice to charge Sauri Keta with the offence instead of charging Shuaibu Danmusa who gave the gratification with the offence.

Based on the above mentioned facts, the judges of the Upper *Sharī'ah* Court (USC), by the legal power vested on them in section 41(11) of the (*Sharī'ah* Court Establishment Law, 1999) Law No. 5 of Zamfara State, quashed the decision of the HSC and ordered that the ₦2000 collected from Sauri and given to Danmusa together with the ₦6,000 fine should be refunded to Sauri without any delay(Record book, 2000).

An Examination of the Tried Case

A look at the grounds for which the Upper *Sharī'ah* Court accepted the appeal shows that there are some errors in its decision. Statement number two where the USC said that ‘the HSC has no jurisdiction to try an offence with such punishment because the punishments for taking gratification in order to influence public servant as contained in S 289 are: imprisonment which may extend to two years and caning which may extend to twenty lashes. Also in S 304 of Zamfara State SPC Law 2000, the punishment for impersonating a public servant is: imprisonment for a term which may extend to three years and caning which may extend to thirty lashes. All these punishments are within the jurisdiction of the HSC as contained in S. 15 of Zamfara State CPC Cap 2000 which provides:

A Higher *Sharī'ah* Court Alkali may pass the following sentence:

- (a) Imprisonment for a term not exceeding fifteen years
- (b) Fine not exceeding ten thousand naira
- (c) All punishments under section 93 of the Sharī'ah Penal code except
- (d) subsection (a), (g), (h) and (i) thereof;
- (e) Detention under section 95 of the Sharī'ah Penal Code.

From the above, the jurisdiction of Higher *Sharī'ah* Court Alkali covers all aspects of punishments and compensations except punishments under S 93 of Zamfara State SPC Law 2000 which are: (a) Death (g) Amputation (h) Retaliation (i) Blood wit and this makes the assertion of the appeal court void.

- 1 The imprisonment imposed by the court in this judgment does not exceed fifteen years and the fine does not exceed ten thousand naira. With this, the second reason for accepting the appeal by the USC is null and void.

2. The USC is wrong in its reason number four (4). The accused was not to be charged under S 291 of Zamfara State SPC Law 2000 but rather under S288 which is the offence of public servant taking gratification in respect of official act. It would have been proper if it had said that the accused should be charged under S 288 while the complainant also is charged under S 291 because S288 specifically stated thus:

Whoever being or expecting to be a public servant accepts or obtains or agrees to accept or attempts to obtain from any person for himself ... shall be punished. (i)With imprisonment which may extend to five years and shall also be liable to caning.

While Section 291 of the law states that:

Whoever offers or gives or agrees to give any gratification whatsoever, whether pecuniary or otherwise in the circumstances and for any of the purposes mentioned in section 288 and 289 shall be punished with imprisonment for a term which may extend to two years and shall also be liable to caning which may extend to thirty lashes and in either case, shall also be liable to fine.

The USC dismissed the case for these two reasons among other reasons. Based on the provision of the SPC Law and that of the SCPC of the state. The advancement of the two reasons is not justifiable because even the mundane law will never dismiss the person who takes gratification and apprehend the giver of the gratification, not to talk of Islamic law that has justice as its bedrock. The Qur'anic verse on gratification is more specific on taking. Allah says:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ وَتُدُلُّوا بِهَا إِلَى الْحُكَّامِ لِتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ بِالْإِثْمِ وَأَنتُمْ تَعْلَمُونَ

Consume not your property between you in vanity, neither proffer it to the judge that you may sinfully consume a portion of other man's property intentionally (Q.2:188).

The jurisdiction vested on USCs to hear appeals from HSCs is statutory and it is only fair that when exercising such jurisdiction the principles of natural justice which includes fair hearing be observed and adhered to by the court.

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Recommendations and Conclusion

Islam is undoubtedly, a perfect and comprehensive religion that discusses not only issues of *al aqīdah* (faith) and *al ibādah* (worship) but also provided for issues of *muāmalat* (transaction). The concern it has for man's relationship with his Creator is as important as the concern it has for his relationship with his fellow human being. This is the more reason why the criminal issues are discussed comprehensively in the same manner civil issues are discussed and the application of one aspect at the expense of the other is a threat to one's position as a Muslim. The re-introduction of the application of Islamic criminal law in Nigeria is certainly, a fulfilment of the desires of the adherence of the religion of Islam. It is however recommended that, for the purpose of social justice, judges in the *sharīah* courts should be exposed to constant training and re-training and the government should not be deterred by religious bigotry of some people in adopting a legal system that has all that is needed to get the country reformed. The examined case has shown that Islam has provision for making the Nigeria a corrupt free nation.

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