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THE DEATH PENALTY IN TRADITIONAL ISLAMIC LAW AND AS INTERPRETED IN SAUDI ARABIA AND NIGERIA

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I. TRADITIONAL ISLAMIC LAW

Traditional Islamic law is derived from the Qur'ān and the words and actions of the Prophet Muhammad. Although Islamic criminal law is based on ideals such as justice and due process, the international community generally understands Islamic law to be harsh, characterized by brutal punishments and inhumane treatment of defendants and those who are convicted. Many of these impressions are based on widely publicized events in countries that have adopted Islamic law as a basis for their criminal law systems, such as the recent convictions of Nigerian women for adultery, who have been sentenced to death by stoning. In order to properly evaluate Islamic criminal law and its use of the death penalty, however, it is necessary to first consider traditional Islamic law, *Shari'a*, as it is stated in the Qur'ān and the *Hadith*. Then, countries which have implemented Islamic law can be compared to the paradigm system of traditional *Shari'a* to determine if they implement a truly Islamic legal system. This paper will examine the death penalty in Saudi Arabia, where the legal system is based solely on Islamic law, and Nigeria, where *Shari'a* criminal law has recently been established in several states. Each of these countries has been identified by the international community as a violator of human rights as a result of its implementation of the death penalty. In many instances, however, Saudi Arabia and Nigeria have failed to incorporate the procedural protections and safeguards that traditional Islamic law has associated with the death penalty.

A. Basic Principles and Sources of Islamic Law

The text of the Qur'ān provides the basic principles for all of Islamic law, although it is a religious rather than legal document, designed to "regulate not the relationship of man with his fellows

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but his relationship with his Creator."¹ These principles include compassion and fair administration of justice, even though they are set forth as "desirable norms of behavior rather than . . . legally enforceable rules."² Of the 6342 verses of the Qur'an, thirty deal with penal law.³

The Qur'an mandates that that everyone has a right to life, unless a court of law demands killing: "Nor take life — which Allah has made sacred — except for just cause."⁴ Although the Qur'an provides for situations in which the death penalty can be imposed, the use of the death penalty is characterized by stringent evidentiary requirements and other means of avoiding imposition of the punishment.

Islamic law is derived from several sources. Primary guidance is obtained through *Shari'a*, the laws and ways of life prescribed by Allah.⁵ *Shari'a* is comprised of the Qur'an, considered to be Allah's direct words, and the *Sunnah*, the words and actions of the Prophet Muhammad.⁶ The *Fiqh*, Islamic jurisprudence, are the legal rulings that scholars have made based on *Shari'a*.⁷ There are three types of crimes recognized by Islamic law: the *hudud*, the *qisas*, and the *ta'zir*.⁸

B. Hudud Crimes

The *hudud*, set forth in the Qur'an and *Sunnah*, are crimes that threaten Islam.⁹ The harsh punishments required for *hudud* crimes are intended to deter those who might commit crimes that are dangerous to an Islamic society.¹⁰ Punishments for these crimes are fixed: judges have no discretion once a person has been found guilty.¹¹ Enforcement of *hudud* punishments are "the right of

1. Matthew Lippman, *Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law*, 12 B.C. INT'L & COMP. L. REV. 29, 30 (1989) (citing N. COULSON, A HISTORY OF ISLAMIC LAW 12 (1964)).

2. *Id.*

3. *Id.*

4. ABDULLAH YUSUF 'ALI, THE MEANING OF THE HOLY QUR'AN 17:33 (11th ed. 2004) (1425 A.H.).

5. William A. Schabas, Symposium, *Islam and the Death Penalty*, 9 WM. & MARY BILL OF RTS. J. 223, 231 (2000).

6. *Id.*

7. *Id.*

8. Robert Postawko, Comment, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E.L. 269, 285 (2002).

9. Schabas, *supra* note 5, at 231.

10. Aly Mansour, *Hudud Crimes*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM 195, 195-96 (M. Cherif Bassiouni ed., 1982).

11. Postawko, *supra* note 8, at 287.

Allah."¹² Four of the seven *hudud* offenses are punishable by death.¹³ These crimes are adultery (*zina*); apostasy (*riddah*); armed robbery (*hirabah*); and rebellion (*baghy*).¹⁴ Although punishment for *hudud* crimes is fixed, available affirmative defenses and interpretations of the requirements for the offenses differ among the schools of Islam.¹⁵

1. Adultery (*Zina*)

Adultery is a concern in Islam because of its effect on community stability; it is thought that adultery leads to family conflict, jealousy, illegitimate children, and the spreading of disease.¹⁶ The Qur'an provides that

The woman and the man
Guilty of adultery or fornication —
Flog each of them
With a hundred stripes.¹⁷

The provision for death by stoning was not set forth in the Qur'an, but was inflicted by the first caliphs.¹⁸ The *Hadith* of the Prophet provides more detail:

Verily God has ordained a way for them (the woman who commits fornication); (When) a married man (commits adultery) with a married woman, and an unmarried male with an unmarried woman, then in the case of married (persons) there is (a punishment) of one hundred lashes and then stoning (to death). And in the case of unmarried persons, (the punishment) is one hundred lashes and exile for one year.¹⁹

The difference between the general provision set forth in the Qur'an and the Prophet's more detailed *Hadith* illustrates the complexity of even the fixed *hudud* punishments.

12. *Id.* at 286.

13. *Id.* at 287.

14. *Id.*

15. *Id.*

16. Lippman, *supra* note 1, at 40.

17. 'ALI, *supra* note 4, at 24:2.

18. DAVID F. FORTE, *STUDIES IN ISLAMIC LAW: CLASSICAL AND CONTEMPORARY APPLICATION* 81 (1999).

19. Postawko, *supra* note 8, at 288 (internal citation omitted).

The schools of Islam have differed in how they put this *hadd* into practice.²⁰ The *Kharjis* follow the literal text of the Qur'ān and do not stone adulterers.²¹ Other schools differ in their views of whether offenders should be both flogged and stoned — the *Hanafi*, *Maliki*, and *Shafi'i* schools provide for only stoning, while the *Hanbali*, *Zahiri*, and *Zaydi* schools require flogging followed by stoning.²² Another issue is whether unmarried offenders must be punished in the same way as married offenders; the *Hanafi* school does not exile unmarried offenders in addition to flogging them, but each of the other schools requires flogging as well as exile.²³

There are difficult hurdles on the path to proving adultery. In fact, some scholars claim that the number of evidentiary requirements for *zina* makes the implementation of the penalty "virtually impossible."²⁴ A confession of the accused or the declarations of four eye-witnesses to the act of intercourse are required.²⁵ Some schools require that the confession be "repeated four times in definite and unambiguous words,"²⁶ and on four separate occasions.²⁷ A confession can be withdrawn at any time, which will overcome any finding that the person was guilty of *zina* by reason of that confession.²⁸

Witnesses must be of full legal capacity and of "good character."²⁹ Many schools also require that the witnesses be men.³⁰ In addition, witnesses must all be able to testify that they saw the act at the same time, and that it was unlawful.³¹ False accusation by one who testified regarding *zina* is itself a *hudud* crime, punishable by eighty lashes.³²

20. *Id.*

21. *Id.*

22. *Id.* at 288-89.

23. *Id.* at 289.

24. FORTE, *supra* note 18, at 81.

25. Postawko, *supra* note 8, at 289.

26. *Id.* at 289 (explaining that the Hanafi and Shi'ah Imamiyyah schools impose this requirement).

27. Lippman, *supra* note 1, at 40.

28. FORTE, *supra* note 18, at 82. Some schools interpret this provision to include any attempt by the convicted person to escape before the execution as a retraction of confession. *Id.*

29. Postawko, *supra* note 8, at 289. Legal capacity requires sanity, mature age, and full responsibility. *Id.* Good character requires that a witness must not "have committed grave sins and must not persevere in small ones." *Id.* (internal citations omitted).

30. *Id.*

31. FORTE, *supra* note 18, at 82.

32. *Id.* at 82, 83.

In addition, there are a number of possible defenses to an accusation of *zina*.³³ First, a woman who was married before becoming pregnant can claim that the child was her former husband's; this is the "sleeping fetus" doctrine, which is based on the idea that a pregnancy can last four to seven years.³⁴ Second, a woman can claim that the penetration requirement for *zina* did not occur.³⁵ Lastly, a woman can claim that the intercourse took place during her sleep and she did not know it was occurring.³⁶ The latter two instances do not require any evidence other than the woman's claim.³⁷

2. Apostasy (*Riddah*)

The changing of religion, or apostasy, is one of the greatest sins a Muslim can commit.³⁸ Apostasy can be committed by converting to a non-Islamic religion or by rejecting a tenet of Islam.³⁹ The Qur'an imposes the penalty of eternal damnation.⁴⁰ The Qur'an states that:

Anyone who, after accepting
Faith in Allah, utters Unbelief —
Except under compulsion,
His heart remaining firm
In Faith — but such as
Open their breast to Unbelief —
On them is Wrath from Allah,
And theirs will be
A dreadful Penalty.⁴¹

The *Sunnah* later provided that an apostate is subject to the death penalty, based on the statement of Muhammad, "Whoever changed his Islamic religion, kill him."⁴²

33. RUUD PETERS, *ISLAMIC CRIMINAL LAW IN NIGERIA* 4 (2003).

34. *Id.*

35. *Id.* at 5.

36. *Id.*

37. *Id.*

38. David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 43-44 (1994) [hereinafter Forte, *Apostasy*].

39. Lippman, *supra* note 1, at 42.

40. Forte, *Apostasy*, *supra* note 38, at 44.

41. 'ALI, *supra* note 4, at 16:106.

42. Forte, *Apostasy*, *supra* note 38, at 44 (internal citation omitted). The Prophet's words could be understood to mean that death can only follow renunciation of belief and an "affirmative attack on the community;" in addition, the Prophet never ordered a person accused of apostasy to be killed. Postawko, *supra* note 8, at 292.

Apostasy can be proven by circumstantial evidence.⁴³ The crime can be proven by the actions of "impious behavior, such as failing to pray or offending Islamic morals," statements contradicting or renouncing the principles of Islam, or conversion to another faith (unless under extreme threat of death).⁴⁴ Proof must be presented by two witnesses, although the schools differ as to whether a description of the acts is required or whether a witness can merely affirm that the offender is an apostate.⁴⁵

In addition, most schools allow for recantation, although *Shi'ites* will not accept recantation if the apostate was born a Muslim.⁴⁶ To encourage this recantation, there are requirements of waiting periods before execution, and some schools consider efforts to convince the apostate to return from his error an obligatory religious duty.⁴⁷

3. Armed Robbery (*Hirabah*)

This *hadd* crime is described in the Qur'ān as:

The punishment of those
Who wage war against Allah
And His Messenger, and strive
With might and main
For mischief through the land
Is: execution, or crucifixion,
Or the cutting off of hands
And feet from opposite sides,
Or exile from the land:
That is their disgrace
In this world, and
A heavy punishment is theirs
In the Hereafter;
Except for those who repent
Before they fall

43. Forte, *Apostasy*, *supra* note 38, at 46.

44. *Id.*

45. *Id.*

46. *Id.* at 46-47.

47. Postawko, *supra* note 8, at 292-93. For example, the *Maliki*, *Shafi'i*, and *Shi'ah Zaydiyyah* schools find that efforts to convince the apostate to return to Islam is an obligatory religious duty. *Id.* at 293. The *Shafi'i*, *Zahiri*, and *Shi'ah Zaydiyyah* schools find that any repentance should be accepted without further questions. *Id.*

Into your power:
In that case, know
That Allah is Oft-Forgiving,
Most Merciful.⁴⁸

This verse creates ambiguity about both the type of crime covered and the appropriate penalty.⁴⁹ Islamic jurists have interpreted the crime as "troubling the security of the roads [in order] to acquire property by menace," and have set forth four ways in which to violate the law.⁵⁰ These four possibilities include assaulting a victim with intent to acquire his property but without actually obtaining the property; assaulting a victim to obtain property and taking the property without killing the victim; assaulting the victim to acquire his property and killing the victim without taking the property; and assaulting the victim to acquire his property and both taking the property and killing the victim.⁵¹ Generally, the schools apply the punishments proportionally to the harm, using banishment in some cases and the death penalty in others.⁵² For example, the *Hanafi* and *Shi'ah Imamiyyah* schools punish troubling the roads without killing the victim or taking property with banishment; the *Shafi'i* and *Shi'ah Zahdiyyah* punish this with banishment, imprisonment, or a *ta'zir* punishment; the *Maliki* and *Zahiris* allow the *qadi* or sovereign to choose between amputation, execution, or crucifixion.⁵³ When the victim dies, the penalty is death, although the schools give different amounts of power to the *qadi* in deciding if execution is necessary.⁵⁴

To prove *hirabah*, two witnesses must testify or there must be a confession.⁵⁵ In addition, an offender can still escape the death penalty if he "repents before he is arrested and willingly places himself in the hands of the authorities."⁵⁶ Another safeguard against the imposition of the death penalty for *hirabah* is that if

48. 'AlI, *supra* note 4, at 5:33-34.

49. Postawko, *supra* note 8, at 294.

50. *Id.* (internal citation omitted).

51. *Id.* at 294-95 (citing Safia Safwat, *Offences and Penalties in Islamic Law*, 26 ISLAMIC Q. 149, 164-65 (1982)).

52. *Id.* at 295.

53. *Id.*

54. *Id.* at 296.

55. *Id.*

56. *Id.*

there was more than one perpetrator of the robbery, and one perpetrator cannot be given the *hadd* punishment because, for example, he is a minor, none of the other perpetrators can receive the *hadd* punishment.⁵⁷

4. Rebellion (*Baghy*)

Baghy is the intentional and forceful overthrow, or attempted overthrow, of the leader of an Islamic state.⁵⁸ The Qur'an defines *al-baghy* as

If two parties among
The Believers fall into
A quarrel, make ye peace
Between them: but if
One of them transgresses
Beyond bounds against the other,
Then fight ye (all) against
The one that transgresses
Until it complies with
The command of Allah;
But if it complies, then
Make peace between them
With justice, and be fair:
For Allah loves those
Who are fair (and just).⁵⁹

The purpose of this *hadd* is considered to be the reconciliation of the parties involved, rather than elimination of the rebellious.⁶⁰ The offense consists of three elements: an act of rebellion, with interpretation or reason, while the offender is enjoying power.⁶¹

The schools differ in their views of the three elements. For example, the *Maliki* school requires the rebellion to be of a religious nature, but many other schools believe that the rebellion can be motivated by politics or religion.⁶² All schools focus, however, on the order to seek peace among believers.⁶³ In fact, the *Imam* is required to first consider the demands or interpretation of the law proffered by the rebels, then call upon the rebels to cease their

57. FORTE, *supra* note 18, at 85.

58. Lippman, *supra* note 1, at 42.

59. 'ALI, *supra* note 4, at 49:9.

60. Postawko, *supra* note 8, at 298.

61. *Id.*

62. *Id.* at 298-99.

63. *Id.* at 299.

revolt.⁶⁴ Only then can the *Imam* use force to pursue rebels.⁶⁵ In addition, rebels who surrender are not subject to *hadd*, and even those who are wounded and captured are not put to death.⁶⁶ This *hadd* is concerned only with rebels who are killed during battle, and therefore punished by the *hadd*.⁶⁷ If claims of the rebels are just and the *Imam* was at fault, he will be subject to punishment, rather than the rebels.⁶⁸

5. Factors Constraining the Imposition of Hudud Penalties

Although the penalties for *hudud* crimes are mandated, there are a number of factors which decrease the likelihood that these punishments will be carried out. These include high evidentiary safeguards and a narrow construction of the law.⁶⁹

Generally, circumstantial evidence is not allowed to prove *hudud* crimes.⁷⁰ The *Maliki* school makes an exception to this rule for *zina*; pregnancy of a woman who is not married is considered sufficient evidence of *zina*.⁷¹

There are strict rules regarding witnesses in Islamic law. One requirement specific to the crime of *zina* is that an individual who falsely accuses a Muslim of *zina* is punished for defamation.⁷² This punishment is eighty lashes for a free person and forty lashes for a slave.⁷³ Witnesses must be male Muslims, sane, of

64. Mansour, *supra* note 10, at 197.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 198.

69. Postawko, *supra* note 8, at 287-88.

70. PETERS, *supra* note 33, at 4.

71. *Id.*

72. Lippman, *supra* note 1, at 40.

73. *Id.*

And those who launch
A charge against chaste women,
And produce not four witnesses
(To support their allegations) —
Flog them with eighty stripes;
And reject their evidence
Ever after: for such men
Are wicked transgressors.

'ALI, *supra* note 4, at 24:4.

legal age, and not have been punished for a serious offense or "engaged in sinful behavior."⁷⁴ Witnesses to crimes must also agree in their descriptions of the event and the time and place of the event.⁷⁵

Confessions are subject to similar safeguards. A confession must be given in open court, and each confession must be given at a separate hearing.⁷⁶ Confessions cannot be the product of "pressure, deception, coercion, abuse or encouragement."⁷⁷ A confession can be withdrawn until a sentence is executed, which will invalidate a judgment of guilt.⁷⁸

Doubt (*shubha*) prevents the application of a *hadd* penalty.⁷⁹ For example, if a person who commits *zina* thought he was married to the woman in question, the punishment cannot be imposed.⁸⁰ This requirement that there be no doubt has been considered to lead to the rare imposition of *hudud* punishments historically and currently in some Islamic criminal law countries.⁸¹

C. Qisas Crimes

Qisas are offenses proscribed by the Qur'an or *Sunnah*, but are the subject of personal claims, rather than offenses against Islam.⁸² They apply to the crimes of murder or bodily injury.⁸³ The Qur'an provides for retaliation against the individual who commits a *qisas* crime, but also expresses a preference for forgiveness:

We ordained therein for them:
 "Life for life, eye for eye,
 Nose for nose, ear for ear,
 Tooth for tooth, and wounds
 Equal for equal."
 But if Anyone remits the retaliation
 By way of charity, it is

74. Lippman, *supra* note 1, at 52-53. Some schools permit the testimony of two female witnesses in place of the testimony of one male witness. *Id.* at 52.

75. *Id.* at 53.

76. *Id.* at 54.

77. ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION 72 (Matthew Lippman et al. eds., 1988).

78. Lippman, *supra* note 1, at 54.

79. PETERS, *supra* note 33, at 4.

80. *Id.*

81. See *id.* (using Libya and Pakistan as examples of countries where *hudud* punishments are not often imposed).

82. Schabas, *supra* note 5, at 232.

83. Postawko, *supra* note 8, at 301.

An act of atonement for himself.
 And if any fail to judge
 By (the light of) what Allah
 Hath revealed, they are
 (No better than) wrongdoers.⁸⁴

The law of equality
 Is prescribed to you
 In cases of murder:
 The free for the free,
 The Slave for the Slave,
 The woman for the woman.
 But if any remission
 Is made by the brother
 Of the slain, then grant
 Any reasonable demand,
 And compensate him
 With handsome gratitude.⁸⁵

The schools all provide that the death penalty for *qisas* is appropriate only where killing is unjust and the murder was intentional.⁸⁶ The charge of homicide must be brought by the nearest relative of the victim.⁸⁷

The right of the family to demand harm is mitigated by the possibility that family members can accept payment, or *diya*, for their loss instead of requiring punishment.⁸⁸ The schools differ on whether this choice is allowed in cases of intentional murder, with the *Shafi'is* and *Hanbalis* granting the choice even in cases of intentional murder and the *Hanafis* and *Malikis* prohibiting it, although the family can still pardon the offender.⁸⁹ Generally, the Qur'ān expresses a preference for *diya* over *qisas*, saying that the Muslim who chooses *diya* will be rewarded in heaven.⁹⁰

84. 'ALI, *supra* note 4, at 5:45.

85. *Id.* at 2:178.

86. Postawko, *supra* note 8, at 302.

87. FORTE, *supra* note 18, at 93.

88. Postawko, *supra* note 8, at 303.

89. *Id.*

90. 'ALI, *supra* note 4, at 3:159.

It is part of the Mercy
 Of Allah that thou dost deal
 Gently with them.
 Wert thou severe
 Or harsh-hearted,
 They would have broken away
 From about thee: so pass over
 (Their faults), and ask

The last limitation on *qisas* is the requirement of consideration of the sex and religion of murderer and victim.⁹¹ Although not considered by all schools, the *Twelver Shi'ite* school provides that since the blood-money for a woman would be half that of a man, the family of a woman killed by a man must pay the difference in order to choose *qisas* against the murderer.⁹² Only the *Hanafi* school allows for a Muslim to be retaliated against if he kills a non-Muslim, unless the victim is Christian or Jewish.⁹³

D. Ta'zir Crimes

Ta'zir are discretionary punishments imposed by a judge for offenses not covered by *hudud* or *qisas*.⁹⁴ Punishment depends on a *human* determination of what is just.⁹⁵ The victim of a *ta'zir* crime can request the sovereign to exercise grace or pardon, after which the sovereign can choose not to punish the accused.⁹⁶ The purposes of *ta'zir* punishments are to prevent recurrence of crime, deter others from crime, and reform the guilty party.⁹⁷ The judge considers factors about the case, the offender, and society in deciding upon a punishment.⁹⁸

There are four situations when *ta'zir* punishment is used:⁹⁹ acts that do not meet the technical requirements for *hudud* or *qisas*, such as attempted adultery; offenses generally punished by *hudud* but involving extenuating circumstances or doubt; acts condemned in the Qur'ān or *Sunnah* or contrary to public welfare, but not subject to *hudud* or *qisas*, such as false testimony; and acts which

For (Allah's) forgiveness
 For them; and consult
 Them in affairs (of moment).
 Then, when thou hast
 Taken a decision
 Put thy trust in Allah.
 For Allah loves those
 Who put their trust (in Him).

Id.

91. Postawko, *supra* note 8, at 304.

92. *Id.* at 304-05.

93. *Id.* at 305.

94. *Id.* at 285.

95. *Id.* at 306.

96. Lippman, *supra* note 1, at 39.

97. FORTE, *supra* note 18, at 86.

98. *Id.*

99. Lippman, *supra* note 1, at 45.

violate social norms, such as obscenity.¹⁰⁰ Most criminal offenses are *ta'zir* crimes under Islamic law, although the discretion allowed to the judge in these cases has prevented the creation of a codification of offenses and punishments.¹⁰¹

Most schools find that death cannot be imposed for these types of punishments, unless there are extraordinary circumstances.¹⁰² One such extraordinary case is recidivism — the *Hanafi* and *Maliki* schools provide that habitual offenders may be executed.¹⁰³

There is generally a lesser standard of proof in *ta'zir* cases than in *hudud* cases. For instance, a confession for *ta'zir* cannot be retracted.¹⁰⁴

II. SAUDI ARABIA

Traditional Islamic law has become the basis for criminal law systems in Islamic countries. The most notable example of this is Saudi Arabia, where the Qur'an and *Sunnah* form the basis for the government and the legal system.

A. Political Background and Legal System

The modern Saudi state was established in 1902 and is governed by a monarchy.¹⁰⁵ The king's powers are limited, however, by the requirement that he must observe *Shari'a* and Saudi traditions.¹⁰⁶

Saudi Arabia is an Islamic state; the Qur'an and the *Sunnah* are the bases of government.¹⁰⁷ In 1992, the Basic Law of Government was passed, marking a move away from the traditional monarchy to a constitution.¹⁰⁸ In a speech about the Basic Law, however, King Fahd reaffirmed that the Saudi government had followed Islamic law throughout the country's history, and "the basis of the program of Islam is fixed and is not subject to

100. *Id.*

101. FORTE, *supra* note 18, at 87.

102. Postawko, *supra* note 8, at 307.

103. *Id.*

104. FORTE, *supra* note 18, at 87.

105. U.S. Dept. of State, *Background Note: Saudi Arabia*, available at <http://www.state.gov/r/pa/ei/bgn/3584.htm> (last updated Sept. 2004).

106. *Id.*

107. Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 147 (2000).

108. SAUDI ARABIAN CONST., art. 38, available at http://www.oeFRE.unibe.ch/law/icl/sa00000_.html#A001 (last visited Mar. 17, 2005).

change or alteration."¹⁰⁹ Article 1 of the Constitution states that "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution, Arabic is its language and Riyadh is its capital."¹¹⁰ The legal system is, therefore, based on the divine revelation, rather than judicial decisions or written law.¹¹¹

Article 38 of the Saudi Constitution sets forth that "there shall be no crime or penalty except in accordance with a Shari'ah or organizational law. There shall be no punishment except for acts committed subsequent to the coming into force of the organizational law."¹¹² This indicates that crimes and their penalties must be specifically set forth before punishments may be imposed.¹¹³ The Saudi Constitution also provides that "[t]he state protects human rights in accordance with the Islamic Shari'ah."¹¹⁴

Saudi Arabian courts follow the *Hanbali* school.¹¹⁵ A judge in Saudi Arabia is called a *qadi* and must be trained as a scholar and a "great follower of Islam."¹¹⁶ There are three levels of courts. *Musta'jalah* courts are the local courts and do not have jurisdiction over any case that could result in death.¹¹⁷ The High Courts of *Shari'a* Law, or *kubra*, have jurisdiction over *hudud* and *qisas* crimes.¹¹⁸ Although usually only one *qadi* sits on each court, the hearing of a crime that would result in execution is heard by a panel of three judges.¹¹⁹ The three *qadi* conduct the investigation, examine witnesses, and issue a verdict.¹²⁰ A defendant sentenced to death in a *kubra* court has a right of appeal to the Court of Cassation, and the case is heard by a five-*qadi* panel.¹²¹ During this review, the court does not examine the law or facts, but merely ensures that "the judge has

109. Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?* 15 MICH. J. INT'L L. 307, 353 (1994) (internal citation omitted).

110. SAUDI ARABIAN CONST., art. 1.

111. Esmaeili & Gans, *supra* note 107, at 145.

112. Mayer, *supra* note 109, at 359.

113. *Id.*

114. SAUDI ARABIAN CONST., art. 26.

115. Esmaeili & Gans, *supra* note 107, at 154.

116. Jeffrey K. Walker, *The Rights of the Accused in Saudi Criminal Procedure*, 15 LOY. L.A. INT'L & COMP. L. J. 863, 869 (1992-1993).

117. *Id.* at 870.

118. *Id.*

119. *Id.*

120. Esmaeili & Gans, *supra* note 107, at 149-50.

121. Walker, *supra* note 116, at 870-71.

paid sufficient attention to the point of objection."¹²² The Supreme Judicial Council reviews all death penalty cases.¹²³ The King has final review.¹²⁴ For death penalty cases for *hudud* crimes, the only review is of guilt; the penalty cannot be changed.¹²⁵

B. The Death Penalty

1. Offenses

There are four types of crimes in Saudi Arabia: *hudud* crimes; *qisas* crimes, *ta'zir* crimes, and crimes governed by royal decree.¹²⁶ Saudi Arabia uses the death penalty for all four categories of crimes.¹²⁷ For *hudud* crimes, the death penalty is prescribed for adultery, highway robbery, and apostasy.¹²⁸

i. Hudud Crimes

The penalty for adultery by one who is married or has previously been married is stoning.¹²⁹ *Zina* can be proven in two ways: first, if the offender swears four times that he has actually committed adultery and his confession is detailed enough to dispel any doubts of the *qadi*; second, if four witnesses testify to actually seeing the crime.¹³⁰

In Saudi Arabia, those guilty of *hirabah* are sentenced to death, and have been executed even if the victim was not actually killed, differing from most scholars' interpretations of the proportional nature of punishment.¹³¹ Saudi Arabian law provides that if the armed robbers give themselves up and repent, their repentance will nullify the *hadd* punishment and they will

122. *Defying World Trends: Saudi Arabia's Extensive Use of Capital Punishment*, available at <http://web.amnesty.org/library/Index/ENGMD230152001?open&of=ENG-SAU> (Nov. 1, 2001) [hereinafter *Defying World Trends*].

123. Esmaili & Gans, *supra* note 107, at 149.

124. *Id.*

125. Sheikh Omar Ibn Abdul Aziz Al-Mutrak, *Sharia Penalties and Ways of Their Implementation in the Kingdom of Saudi Arabia: Fixed Penalties, "Hudud" and Discretionary Penalties, "Ta'zir," in THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA* 407, 418 (Crime Prevention Research Centre ed., 1976).

126. Walker, *supra* note 116, at 867-68.

127. *Defying World Trends*, *supra* note 122.

128. *Id.*

129. Al-Mutrak, *supra* note 125, at 431.

130. *Id.* at 434-35. For the second means of proof, it is "not enough to say that they saw the offenders naked and embraced." *Id.* at 435.

131. *Defying World Trends*, *supra* note 122.

be punished only in accordance with *qisas* as to the rights of the victim.¹³²

Saudi Arabian law provides that the penalty for *riddah* is beheading.¹³³

ii. *Ta'zir Crimes*

The death penalty can also be applied for *ta'zir* crimes. A judge bases the decision to impose the death penalty on the severity of the act and character of the accused.¹³⁴ *Ta'zir* crimes punishable by death include sorcery, heresy, or spying by infidels.¹³⁵ In addition, the death penalty can be imposed upon those who do not "desist from crime, or those from whose evil society can be saved only by their death."¹³⁶

iii. *Government Edicts*

In addition, *fatwas* have been issued that delineate the death penalty as the mandatory sentence for drug smuggling and "corruption on the earth."¹³⁷

Fatwa Number Eighty-Five was issued in 1981 and dealt with abduction, assault, and drug crimes.¹³⁸ The first part of the *fatwa* declared that the *hadd* crime of highway robbery should apply to the crime of "abduction for sexual purposes,"¹³⁹ extending the definition well beyond the traditional meanings of *hirabah*.¹⁴⁰ First, *hirabah* is used in this instance to apply to crimes in cities (in addition to on highways), and without the use of arms.¹⁴¹ Second,

132. Al-Mutrak, *supra* note 125, at 456.

133. FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 242 (2000).

134. *Defying World Trends*, *supra* note 122.

135. VOGEL, *supra* note 133, at 249.

136. *Id.* Some interpret this provision as being applicable only by the king, but at least one *qadi* has sentenced a recidivist to death. *Id.* at n.85.

137. *Defying World Trends*, *supra* note 122 (citing *Fatwa* Number 138 (1987) and *Fatwa* Number 148 (1988)). Since 1987, at least 341 people have been executed under the drug smuggling laws. *Id.*

138. VOGEL, *supra* note 133, at 254 (citing Decision No. 85, 11 Dhu al-Qa'da 1401 (Sept. 9, 1981), in *Lajnat al-Buhuth*, "al Hukm fi al-satw" (pt. 2), 75-83).

139. *Id.* at 254. The *fatwa* therefore did not create, by government regulation, a new crime for which the punishment was death, but rather modified the requirements of an existing *hadd* offense to include this particular factual situation. *See id.* Due to the fact that this use of the *hadd* crime of *hirabah* is so divergent from traditional applications, the discussion of this aspect of *hirabah* is included as a government edict for the purposes of this paper.

140. *Id.* at 255.

141. *Id.*

hirabah refers to offenses of sexual honor rather than just offenses against life and property.¹⁴² In addition, the type of punishment for *hirabah*, carefully laid out in traditional law as it related to robbery, becomes discretionary on the part of the judge, although murdering the victim still requires the death penalty.¹⁴³

The second part of *Fatwa* Number Eighty-Five established punishments for drug smugglers and distributors.¹⁴⁴ The *fatwa* found these offenses so terrible as to fall under the prohibition against the "spreading of corruption on the earth."¹⁴⁵ Therefore, a second-time drug offender could be subject to the death penalty.¹⁴⁶ *Fatwa* Number 138 subsequently made the death penalty mandatory in drug smuggling cases.¹⁴⁷

Fatwa Number 148, issued in 1988, required the death penalty for "corruption of the earth."¹⁴⁸ This *fatwa*, designed to apply to terrorists, punishes

Anyone proved to have carried out acts of sabotage and corruption on earth which undermines security by aggression against persons and private or public property such as the destruction of homes, mosques, schools, hospitals, factories, bridges, ammunition dumps, water storage tanks, resources of the treasury such as oil pipelines, the highjacking and blowing up of air planes, and so on . . .¹⁴⁹

This *fatwa* placed actions within the *ta'zir* category and established the mandatory penalty of death due to the harmful nature of the offense in "shaking security and demolishing the structure of the umma, uprooting its faith, and diverting it from the Divine Path."¹⁵⁰

2. Procedure

There are a number of evidentiary safeguards intended to prevent the imposition of harsh *hudud* punishments. Some provisions are specific to the crime. For example, for the crime of

142. *Id.*

143. *Id.*

144. *Id.* at 257.

145. *Id.*

146. *Id.*

147. *Id.* at 267 (citing *Fatwa* Number 138 (1987)).

148. *Defying World Trends*, *supra* note 121 (citing *Fatwa* Number 148 (1988)).

149. *Id.*

150. VOGEL, *supra* note 133, at 271 (quoting Decision No. 148, 12 Muharram 1409 (Aug. 24, 1988)).

highway robbery, for which the punishment is death, a person can be spared if he repents and turns himself in, returns any stolen property, and pays *diya* to the family of his victim(s).

Under Saudi law, an accused is innocent until proven guilty, and conviction for an offense requires proof beyond a reasonable doubt.¹⁵¹ If there is any doubt about a defendant's guilt, a *qadi* cannot impose a *hadd* punishment.¹⁵² There are two types of doubt that could prevent the imposition of a *hadd* punishment. First, unclear or ambiguous authority regarding how to apply the law creates sufficient doubt.¹⁵³ Additionally, questions over the act itself create enough doubt to overcome the appropriateness of *hadd* punishments in a given case.¹⁵⁴

A confession can constitute proof of a *hadd* crime, but the accused must repeat his confession the same number of times as the crime would require evidence to be presented by witnesses.¹⁵⁵ If a confession is withdrawn, then a *hadd* punishment cannot be applied.¹⁵⁶ This withdrawal can occur any time until the moment of execution.¹⁵⁷

There are also strict requirements for witnesses. A witness in Saudi Arabian court must be male, sane, a Muslim, and of "good character."¹⁵⁸ A witness must be accurate, testifying, for example, in a trial for *zina* that he saw the act of adultery with his own eyes.¹⁵⁹ A witness who is found to be wrong is guilty himself and subject to a punishment as harsh as eighty lashes.¹⁶⁰ Other *hadd* crimes require at least two eyewitnesses.¹⁶¹

Judges are generally unwilling to accept circumstantial evidence of *hadd* crimes, and this type of evidence is easy to refute.¹⁶² For example, an unmarried woman who becomes pregnant

151. Mary Carter Duncan, *Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia*, 27 GA. J. INT'L & COMP. L. 231, 238 (1998).

152. Walker, *supra* note 116, at 875.

153. *Id.*

154. *Id.*

155. *Id.* at 876-77.

156. *Defying World Trends*, *supra* note 122.

157. VOGEL, *supra* note 133, at 244.

158. Walker, *supra* note 116 at 878.

159. *Id.* at 879.

160. *Id.* False testimony in a case of *zina* is a *hadd* crime, and punished by eighty lashes. *Id.* False testimony in another type of case is a *ta'zir* crime, and the punishment is not as harsh. *Id.*

161. VOGEL, *supra* note 133, at 245.

162. *Id.* at 245.

can simply declare that she was raped or that the act occurred while she was sleeping.¹⁶³

The judges of the general court have great discretion, although their decisions are subject to the review of the executive branch.¹⁶⁴ *Hadd* crimes are subject to the fixed punishments specified in the Qur'ān, but a judge can choose to impose a harsher punishment under *ta'zir*.¹⁶⁵ For example, theft has a *hadd* punishment of amputation; one judge, however, sentenced two people to death for a bank robbery in which no one was injured and most of the property was returned.¹⁶⁶ In regard to this decision, the Ministry of Interior said, "It is part of the completeness to pass a harsher sentence . . . for offences which generate harm."¹⁶⁷ *Qisas* crimes are also subject to fixed punishments; for example, the punishment for murder is public beheading.¹⁶⁸ The murderer will only be executed, however, if all of the victim's heirs demand it, and the family has the option to collect blood money from the defendant rather than demanding the death penalty.¹⁶⁹ It is preferable and in fact "the Government of Saudi Arabia, in pursuit of the Shari'a does its utmost . . . to convince the relatives of the victim to agree to commute the *Kisas* [sic] into blood-money."¹⁷⁰

For *ta'zir* punishments, judges enjoy much more flexibility in choosing the punishment but are also not subject to the strict rules of evidence regulating *hudud* crimes.¹⁷¹ Generally, the same safeguards are expected to carry over to *ta'zir* crimes, but compliance with these evidentiary requirements is considered only one factor among many.¹⁷² For example, if a confession is withdrawn for a *hadd* crime, the judge cannot apply the specified *hadd* punishment.¹⁷³ A withdrawn confession would not affect punishment for *qisas* or *ta'zir* crimes.¹⁷⁴

163. *Id.* at 244.

164. *Defying World Trends*, *supra* note 122.

165. *Id.*

166. *Id.*

167. *Id.*

168. Duncan, *supra* note 151, at 239.

169. *Id.*

170. Sheikh Mohammad Ibn Ibrahim Al-Hewesh, *Sharia Penalties and Ways of Their Implementation in the Kingdom of Saudi Arabia: First Retaliation Penalty "Kisas;" Blood Money, "Diya;" Expiation, "Kaffara," in THE EFFECT OF ISLAMIC LEGISLATION ON CRIME PREVENTION IN SAUDI ARABIA* 351, 377 (Crime Prevention Research Centre ed., 1976).

171. *Defying World Trends*, *supra* note 122.

172. VOGEL, *supra* note 133, at 249.

173. *Defying World Trends*, *supra* note 122.

174. *Id.*

III. NIGERIA

The Republic of Nigeria differs greatly from Saudi Arabia in its system of Islamic law. *Shari'a* law is used in combination with existing penal codes, and is only implemented in the northern part of the country.

A. Political Background and Legal System

Nigeria gained independence from Great Britain in 1960.¹⁷⁵ For the next sixteen years, Nigeria was governed by three separate military regimes.¹⁷⁶ The country was next ruled by a civilian government, the Second Republic, but, after only four years, the military was able, once again, to seize control of the country as it was suffering under a ruined economy.¹⁷⁷ Military rule lasted from 1983 until 1999, when a civilian government run by President Olusegun Obasanjo came into power.¹⁷⁸ Currently, Nigeria is divided into North and South regions.¹⁷⁹ The country has thirty-six states, each of which has its own governor and assembly.¹⁸⁰

As a colony of Great Britain, Nigeria was originally subject to English law.¹⁸¹ The government, however, allowed Islamic law to be applied in northern Nigeria.¹⁸² This permission was modified when the Native Court Ordinance of 1933 directed that "Native courts . . . may impose a fine or imprisonment . . . or may inflict any punishment authorised by native law or custom provided it does not involve mutilation or torture, and is not repugnant to natural justice and humanity."¹⁸³ This ban encompassed the penalty of

175. Shannon V. Barrow, Comment, *Nigerian Justice: Death-By-Stoning Sentence Reveals Empty Promises to the State and the International Community*, 17 EMORY INT'L L. REV. 1203, 1208 (2003).

176. *Id.*

177. *Id.* at 1208-09.

178. *Id.* at 1209.

179. Amnesty International, *The Death Penalty in Nigeria*, available at <http://web.amnesty.org/library/Index/ENGAFR440172004?open&of=ENG-NGA> (last updated May 21, 2004).

180. "Political Shari'a"? *Human Rights and Islamic Law in Northern Nigeria*, 16 HUMAN RIGHTS WATCH 9 (2004), available at <http://www.hrw.org/reports/2004/nigeria0904> [hereinafter *Political Shari'a*].

181. Barrow, *supra* note 175, at 1210.

182. *Id.*

183. *Id.* (internal citation omitted). There is only one documented case in which an Islamic procedural rule was found "repugnant to natural justice and humanity." PETERS, *supra* note 33, at 8. This finding involved the evidence rule that prohibited an accused from giving evidence on his own behalf in a trial for a *hadd* crime if the plaintiff produces "full evidence." *Id.* (citing *Guri v. Hadejia Native Authority*, 4 FSC 44 (1959)).

stoning.¹⁸⁴ In 1947, the law was amended to provide that if a person committed a crime under native law and written law, the punishment imposed could not exceed that provided for by the English written law.¹⁸⁵ This meant that the Supreme Court could reverse capital sentences even if the original sentence complied with *Maliki* law.¹⁸⁶ In addition, native punishments such as amputation and stoning were replaced with terms of imprisonment.¹⁸⁷ These provisions remained in force until 1960.¹⁸⁸

Currently, Northern and Southern Nigeria continue to have separate legislation. The North is governed by the Penal Code Federal Provisions Act of 1959 (Penal Code of Northern Nigeria), while the South is governed by the Criminal Code Act of 1961.¹⁸⁹

The secular constitution passed in 1999 prohibits adoption of state religion but provides for a *Shari'a* court of appeal if any state requires one.¹⁹⁰

1. *Islamic Law*

Twelve northern states, of the thirty-six states and one territory in Nigeria, have enacted *Shari'a* penal codes, reintroducing criminal law into the *Shari'a* courts.¹⁹¹ In 1999, Zamfara State became the first northern state to introduce *Shari'a* for criminal law; the law took effect on January 27, 2000.¹⁹² Other northern states soon followed, and by 2002, eleven more northern states, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, and Yobe, had adopted *Shari'a* criminal law.¹⁹³ Rapid change has resulted in pervasive confusion over the laws.¹⁹⁴ Some states amended existing laws rather than writing new codes, and there is still substantial similarity between the Penal Code for Northern

184. *Id.* at 6.

185. Barrow, *supra* note 175, at 1210.

186. PETERS, *supra* note 33, at 10.

187. Barrow, *supra* note 175, at 1210.

188. *Id.* at 1211.

189. See *Political Shari'a*, *supra* note 180, at 9.

190. Barrow, *supra* note 175, at 1211.

191. *Id.* at 1211-12. In some states, criminal sentences were guided by *Shari'a* law even before the official adoption of a *Shari'a* penal code. PETERS, *supra* note 33, at 13.

192. See *Political Shari'a*, *supra* note 180, at 13.

193. *Id.* at 14. There have been other instances in which *Shari'a* criminal law has been imposed in Nigeria. For example, in the southwestern state of Oyo, a man was flogged for having extra-marital sex after having been sentenced by an Independent *Shari'a* Panel established by Muslim groups rather than the government. *Id.* at 14 n.19.

194. *Id.* at 15.

Nigeria and *Shari'a* penal codes.¹⁹⁵ It has been observed that the laws generally contain "incomprehensible wording," mistakes in cross-referencing, and omissions.¹⁹⁶ In addition, the rigidity to which the *Shari'a* criminal code is adhered varies greatly from state to state.¹⁹⁷

Most Nigerian Muslims are *Sunni* and follow the *Maliki* school of jurisprudence.¹⁹⁸ The *Maliki* school is considered fairly flexible, because it allows for use of *urf*, or useful public practice, and *maslaha*, or public good, as sources of law.¹⁹⁹ The laws in the code contain provisions on *hudud* offenses and also set forth the appropriate punishments for certain other offenses.²⁰⁰ The *Shari'a* courts decide cases on a case-by-case basis, without the use of precedent.²⁰¹ The *Maliki* school of jurisprudence provides that a person is presumed guilty until innocence is proven.²⁰²

Shari'a law applies only to Muslim citizens, and non-Muslims are tried by common law courts or customary courts.²⁰³ Cases against Muslims are usually brought in *Shari'a* courts, although the government has some authority to decide which cases should go to which courts.²⁰⁴ Zamfara State has specifically provided that all cases involving Muslims must be heard by *Shari'a* courts.²⁰⁵

2. The Courts

First, a criminal case is heard in a state *Shari'a* court, where each case is heard by one judge.²⁰⁶ There are both lower and upper state *Shari'a* courts,²⁰⁷ and upper *Shari'a* courts can hear appeals

195. *Id.*

196. PETERS, *supra* note 33, at 14.

197. *Political Shari'a*, *supra* note 180, at 17. Generally, states with significant non-Muslim populations have enforced the new codes with less enthusiasm than states such as Zamfara. *Id.*

198. Amitabha Bose, *Do All Roads Lead to Islamic Radicalism? A Comparison of Islamic Laws in India and Nigeria*, 32 GA. J. INT'L & COMP. L. 779, 782 (2004).

199. *Political Shari'a*, *supra* note 180, at 11.

200. Barrow, *supra* note 175, at 1212-13.

201. Bose, *supra* note 198, at 787.

202. M. Ozonnia Ojielo, *Human Rights and Sharia'h Justice in Nigeria*, 9 ANN. SURV. INT'L & COMP. L. 135, 144 (2003).

203. *Political Shari'a*, *supra* note 180, at 14.

204. *Id.* at 19.

205. *Id.* at 21. The law, passed in 2002, provides that "magistrates courts of whatever grade shall cease to have jurisdiction to try any criminal offence where the accused or all the accused persons profess the Islamic faith." *Id.* at 21 (citing SECTION 3 OF MAGISTRATES COURTS LAW § 3 (2002) (*Restriction of Powers*)).

206. *Id.*

207. *Id.* at 18.

from lower *Shari'a* courts.²⁰⁸ A defendant has thirty days after sentencing to appeal her sentence.²⁰⁹ Appeals from the upper *Shari'a* courts are heard by a panel of three to five judges on the *Shari'a* Court of Appeal.²¹⁰ The Federal Constitution provides for Islamic courts, or a *Shari'a* Court of Appeal, "for any state that requires it."²¹¹ The state *Shari'a* Courts of Appeal have jurisdiction "as may be conferred upon it by the law of the State," and "exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law which the court is competent to decide."²¹² The Constitution defines Islamic personal law as:

- (a) any question of Islamic personal Law regarding a marriage concluded in accordance with that Law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
- (b) where all the parties to the proceedings are muslims, any question of Islamic personal Law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guarding of an infant;
- (c) any question of Islamic personal Law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a muslim;
- (d) any question of Islamic personal Law regarding an infant, prodigal or person of unsound mind who is a muslim or the maintenance or the guardianship of a muslim who is physically or mentally infirm; or
- (e) where all the parties to the proceedings, being muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.²¹³

With the introduction of *Shari'a* Penal Law, the courts hear criminal appeals as well. The decisions of the *Shari'a* Courts of Appeal are final, unless there is a constitutional question bringing the case under the jurisdiction of the Nigerian Supreme Court.²¹⁴ As

208. *Id.*

209. *Id.*

210. *Id.*

211. NIG. CONST. ch. VII, art. 275(1), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited Mar. 17, 2005).

212. NIG. CONST. ch. VII, art. 277(1).

213. NIG. CONST. ch. VII, art. 277(2).

214. Bose, *supra* note 198, at 789.

of September 2004, no *Shari'a* criminal sentences had reached the federal level.²¹⁵

B. The Death Penalty

As of January 2004, the Nigerian Prison Services reported that there were 448 people awaiting the execution of a death sentence.²¹⁶ At least thirty-three death sentences have been passed since 1999.²¹⁷

1. Offenses

Until recently, Muslim judges tried criminal cases under Islamic law according to statutes from the English common law and Nigerian statutes.²¹⁸ The extension of *Shari'a* law to criminal cases in the northern states, however, has resulted in harsher punishments and less discretion for judges.²¹⁹ For example, the new *Shari'a* law specifies that *zina*, which was previously punishable by flogging, now carries a mandatory death sentence, by stoning.²²⁰ Other capital offenses under the *Shari'a* penal codes include rape, sodomy, incest, robbery, and murder.²²¹ Apostasy, a *hadd* offense for which the penalty is death, is not included in the *Shari'a* penal codes, probably due to the diversity of religion in Nigeria.²²² Since 2000, at least ten people have been sentenced

215. *Political Shari'a*, *supra* note 180, at 18.

216. Amnesty International, *supra* note 179. Death sentences are given under the Criminal Code for crimes such as murder and armed robbery, but the last execution under the Criminal Code occurred in 1999. *Id.*

217. *Id.*

218. Bose, *supra* note 198, at 790 (internal citation omitted).

219. *Id.* at 791.

220. Amnesty International, *supra* note 179 (defining the person who commits *zina* as "whoever, being a man or a woman fully responsible, has sexual intercourse through the genital [sic] of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act"). The law distinguishes between married and unmarried defendants. *Political Shari'a*, *supra* note 180, at 22. Unmarried defendants are punished by one hundred lashes for the crime of fornication. *Id.*

221. See Amnesty International, *supra* note 179; *Political Shari'a*, *supra* note 180, at 22.

222. *Political Shari'a*, *supra* note 180, at 11.

to death, for murder, sodomy, and adultery.²²³ As of September 2004, only one sentence has been carried out, a hanging after the defendant was found guilty of murder and did not appeal his sentence.²²⁴

i. Zina

Unlawful sexual intercourse is punishable by death by stoning if the offender is married or has ever been married.²²⁵ Rape is considered a type of *zina*.²²⁶

Zina can be proven in three ways in Nigeria. First, a woman can be found guilty solely on the basis of pregnancy outside of marriage.²²⁷ The convictions in two of the most widely-publicized cases under *Shari'a* law were based upon this evidence.²²⁸ Safiya Husseini was sentenced to death by stoning in 2001 based upon her pregnancy and her confession, although she later withdrew her confession.²²⁹ Amina Lawal was similarly convicted in 2002, based on the evidence of her pregnancy and a confession, which the judge would not permit her to withdraw.²³⁰ Although not a factor in either of these cases, *Maliki* law, which allows pregnancy to definitively prove adultery, provides that a baby conceived within five years of a woman's marriage can be considered a child of the husband, even if the couple has gotten a divorce.²³¹ At least one woman has been acquitted on the basis of this "sleeping embryo" theory.²³²

Zina can also be proven by a confession of the accused. Lastly, *zina* can be proven by the testimony of four male witnesses.²³³

223. *Id.* at 22. These figures are based on independent research by Human Rights Watch, and some areas of Nigeria do not provide reliable information on this topic. The numbers are, therefore, approximate and expressed as "minimums." *Id.* at n.39.

224. *Id.* Sani Yakubu Rodi was executed after he was found guilty of the murder of a woman and her two young children in Katsina State. *Id.* at 32.

225. PETERS, *supra* note 33, at 19.

226. *Id.*

227. *Political Shari'a*, *supra* note 180, at 22. The impact of this on proof requirements is apparent — in the two most widely publicized cases of women sentenced to death by stoning for *zina*, Safiya Husseini in Sokoto and Amina Lawal in Katsina, the men involved were both acquitted for lack of evidence. *Id.* at 23.

228. *See id.* at 34.

229. *Id.* Her conviction was overturned by the *Shari'a* State Court of Appeal in 2002 on procedural grounds. *Id.*

230. *Id.* at 35. Her conviction was overturned by the *Shari'a* State Court of Appeal in 2003 on procedural grounds. *Id.*

231. *Id.* at 36.

232. *Id.*

233. PETERS, *supra* note 33, at 20.

Some state statutes specifically provide that the witnesses must have seen the man accused of *zina* engaged in the sex act.²³⁴

ii. *Hirabah*

The *hadd* punishment for *hirabah* is set forth as:

Whoever acting alone or in conjunction with others in order to seize property or to commit an offence or for any other reason voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint in circumstances that renders such person helpless or incapable of defending himself, is said to commit the offence of *hirabah*.²³⁵

The penalty for *hirabah* is death if a life is taken during the offense.²³⁶ Additionally, the Zamfara penal code provides that if life and property are taken during the commission of *hirabah*, the penalty is crucifixion.²³⁷

The *Maliki* school provides that a person who has committed *hirabah* will not be punished in this way if he gives himself up to the authorities.²³⁸ This provision, however, is not contained in any of the Nigerian codes.²³⁹

iii. *Qiyas*

Retaliation is applicable to intentional homicide under traditional *Maliki* law.²⁴⁰ Intentional homicide is defined as any homicide that is not caused by error or accident.²⁴¹ Intent can be inferred if a lethal weapon is used or if a person attacks another

234. *Political Shari'a*, *supra* note 180, at 22.

235. PETERS, *supra* note 33, at 23. This wording is taken from the Zamfara Penal Code, but the penal codes of six other states (Bauchi, Jigawa, Kano, Kebbi, Sokoto, and Yobe) have adopted the Zamfara Penal Code almost exactly. *See id.* at 13-14.

236. *Id.* at 24.

237. *Id.* The code does not define crucifixion, and the meaning is in dispute under *Maliki* doctrine — some authorities say that the convict must be crucified before death, others provide that the convict's body must be exposed after his death. *Id.*

238. PETERS, *supra* note 33, at 24.

239. *Id.*

240. *Id.* at 25.

241. *Id.* Homicide by error includes if the perpetrator is not legally capable, if he did not intend to attack the victim, or if the victim was killed by something that is usually not fatal. *See id.* (internal citations omitted).

person in anger.²⁴² Some of the new penal codes do not define "intention" clearly,²⁴³ but the Zamfara Penal Code uses the traditional *Maliki* definition:

... whoever being a *mukallaf* in a state of anger causes the death of a human being (a) with the intention of causing death in ... in such bodily injury as is probable or likely to cause death with an object either sharp or heavy; or (b) with a light stick or whip of any other thing of that nature which is not intrinsically likely or probable to cause death, commits the offence of intentional homicide.²⁴⁴

Although death is the penalty for intentional homicide, the penalty can be replaced by the payment of blood money, or *diya*, if the next of kin request it. Traditional *Maliki* law stated that the penalty of death could be imposed only if the victim was of a greater value than the killer, although this qualifier is not included in any of the new penal codes.²⁴⁵ Many of these penal codes do not clearly define what the *diya* should be.²⁴⁶

2. The Death Penalty and the Federal Constitution

The Federal Constitution of Nigeria includes several provisions that relate to the issue of the death penalty in Nigeria.²⁴⁷ First, the Constitution provides that "[e]very person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."²⁴⁸ This provision is followed, however, by the right that "[e]very individual is entitled to respect for the dignity of his person, and accordingly — (a) no

242. *Id.*

243. *Id.* The Niger and Kano Penal Codes do not clearly define intention according to traditional *Maliki* doctrine:

Whoever being fully responsible ... causes death (a) by doing an act with the intention of causing death or such hurt as is likely to cause death; or (b) by doing an act with knowledge that he is likely by such act to cause death; or (c) by doing a rash and negligent act, commits the offense of culpable homicide ...

Id. (citing KANO PENAL CODE § 142; NIGER PENAL CODE § 68A (2)(f)).

244. PETERS, *supra* note 33, at 26 (citing ZAMFARA PENAL CODE § 199).

245. *Id.*

246. *Id.* at 27.

247. See Caroline E. Nicolai, Note, *Islamic Law and the International Protection of Women's Rights: The Effect of Shari'a in Nigeria*, 31 SYRACUSE J. INT'L L. & COM. 299, 304 (2004).

248. NIG. CONST. ch. IV, art. 33(1), available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited Mar. 17, 2005).

person shall be subject to torture or to inhuman or degrading treatment"²⁴⁹ Some have argued that this provision is in conflict with punishments such as stoning and crucifixion that are provided for under the *Shari'a* penal codes.²⁵⁰

There are also potential conflicts between the *Shari'a* penal codes and Section 38 of the Nigerian Federal Constitution, which provides that: "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 in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance."²⁵¹ The Zamfara Penal Code, however, provides that "[w]hoever presides at or is present at or takes part in the worship or invocation of any *juju* which has been declared unlawful under the [previous provisions] will be punished with death."²⁵²

It appears as if views on the death penalty diverge widely between the state governments that have adopted *Shari'a* law and the federal government. In 2003, the federal government began a public debate on the death penalty in Nigeria and established the National Study Group on the Death Penalty.²⁵³ Federal officials have been outspoken in their opposition to some of the death sentences handed down under *Shari'a* law. During the trial of Amina Lawal for adultery, the Minister of State for Foreign Affairs, Dubem Onyia, issued a press release stating:

The recent flurry of comments and interest within the International Community on the trial of Amina Lawal piques wholesomely the concern of the Nigerian government [. . .] The Nigerian government [. . .] shall not fold its arms awhile the rights of its citizens are abused [. . .] The Nigerian government shall exude its constitutional powers to thwart any negative ruling, which is deemed injurious to its people. We restate that no person shall be condemned to death by stoning in Nigeria. Safiyat and Amina Lawal will not be subjected to abuse of rights. The Nigerian government shall protect their rights.²⁵⁴

249. NIG. CONST. ch. IV, art. 34(1).

250. PETERS, *supra* note 33, at 38.

251. NIG. CONST. ch. IV, art. 38(1).

252. PETERS, *supra* note 33, at 41 (citing ZAMFARA PENAL CODE § 406(d)). The previous provision implies that *juju* includes the worship of any subject other than Allah; included in this prohibition is the practice of witchcraft. *Id.*

253. *Political Shari'a*, *supra* note 180, at 24.

254. *Id.* at 100 (citing press release signed by Hon. Dubem Onyia, Minister of State for Foreign Affairs, Nov. 8, 2002).

The President of Nigeria, Obasanjo, has also made comments specifically addressing capital sentences handed down by *Shari'a* courts. After Safiya Hussein won her appeal in the *Shari'a* state court of appeal, he said, "I thank God and all those God has used to save the life of Safiya. Her stoning would have been a setback for us."²⁵⁵ These statements clearly indicate that the federal government has not accepted the new *Shari'a* penalties.

IV. COMPARISONS AND CONCLUSIONS

Traditional Islamic criminal law is based upon the fulfillment of four goals: (1) the ascertainment of the truth; (2) the determination of the responsibility of the accused; (3) the remedy to the victim; and (4) the social remedy.²⁵⁶ The implementation and execution of the death penalty as a punishment in traditional Islamic law is meant to carry out these goals.

Another important value of Islam, however, is the concept of justice. The word "justice" is used at least fourteen times in the Qur'an, and the words "justice and equality" are used at least sixteen times.²⁵⁷ This concern for justice is manifested by two primary precepts in the criminal justice system, the presumption of innocence and due process. According to the words of the Prophet, the burden of proof is carried by the accuser.²⁵⁸ A'isha, the wife of the Prophet, said to "avoid condemning the Muslim to Hudud whenever you can, and when you can find a way out for the Muslim then release him for it. If the Imam errs it is better that he errs in favor of innocence . . . than in favor of guilt."²⁵⁹ Addressing due process, the Prophet himself said, "Your lives, your property, and your honor are a burden upon you until you meet your Lord on the Day of Resurrection."²⁶⁰

255. *Id.* (internal citation omitted).

256. M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 1, 24 (M. Cherif Bassiouni ed., 1982).

257. *ISLAMIC CRIMINAL LAW AND PROCEDURE: INTRODUCTION*, *supra* note 77, at 60.

258. *Id.* at 61 (internal citation omitted).

259. *Id.* (internal citation omitted).

260. Bassiouni, *supra* note 256, at 27 (internal citation omitted). According to Bassiouni, this *Hadith* "emphasized the need to uphold due process of law whenever the life, freedom, honor, and property of individuals are at stake. . . . The *Sunna* is replete with examples in which personal freedom is upheld against the abuse of those who retain power." *Id.*

These themes of traditional Islamic jurisprudence are evident in the law of capital punishment. Although the death penalty is imposed for a number of crimes, and in ways which many Westerners find abhorrent, traditional Islamic law retains a number of safeguards intended to prevent imposition of the death penalty in many circumstances. These safeguards include evidentiary requirements and means of avoiding punishment for specific capital crimes. In general, crimes can be proved by the use of witnesses or confessions. The evidentiary requirements are stricter for *hudud* crimes, where death is the mandatory punishment, than for other types of crimes. For *hudud* crimes, there generally must be at least two witnesses, who are male, Muslim, sane, of legal age, and have not "engaged in sinful behavior." In addition, witnesses must have observed the crime and agree in their descriptions of the crime. If it is found that a witness has testified falsely, the witness himself is subject to punishment. Confessions are governed by similarly strict rules; a confession must be voluntary, and if it is withdrawn at any time before a sentence is executed, a guilty verdict will be invalidated. Although these evidentiary requirements apply to *qisas* and *ta'zir* punishments, they do not have to be strictly complied with, and are only one of several factors considered in determining guilt.

There are also a number of situations specific to certain crimes that prevent the imposition of the death penalty. The crime of *zina* has specific proof requirements, requiring two additional witnesses to the *act* of adultery. For the crime of *riddah*, recantation is encouraged until the time of sentencing, and some schools impose a duty upon other Muslims to urge recantation. The death penalty is imposed for offense of *hirabah* only if a victim is killed, and a person who turns himself in can escape the death penalty. For the last *hadd* crime, *baghy*, there is a focus upon reconciliation; the Imam has a duty to take extreme measures before resorting to the use of force.

The death penalty for *qisas* is also circumvented in many cases. Although the basis of this punishment is retaliation, the availability of *diyya* allows the victim's family to request money rather than the murderer's life. The choice of money is considered the more honorable choice, according to the Qur'ān.

Ta'zir crimes do allow for the use of the death penalty, but this punishment is only to be used in the most extreme circumstances.

Saudi Arabia is unique in that it is a completely Islamic state, and *Shari'a* law governs all aspects of the criminal law. Despite the total reliance on *Shari'a* law, as espoused in Article 1 of the Constitution, the system of criminal law has evolved so that procedures of capital cases are not perfectly aligned with traditional Islamic law. First, Islamic law has a strong sense of legality — laws should not be applied retroactively.²⁶¹ Although Saudi law has a similar provision,²⁶² practice diverges from the law. For instance, judges in Saudi Arabia have repeatedly used *ta'zir* punishments to circumvent the strict evidentiary requirements of *hudud* punishments. In addition, the government has used *fatwas* to change the definition of the *hadd* crime of *hirabah* from its traditional interpretation, in order to give the crime a much wider scope.

It is claimed that harsh penalties are rarely imposed “due to a strict law of evidence that serves as a human rights delimitation in the rigors of seemingly unalterable law.”²⁶³ Many of the safeguards which exist in name, however, are not always followed in practice. For example, although Saudi Arabian law has many of the same restrictions regarding confessions as traditional Islamic law, international organizations have reported that “voluntary confessions” to crimes are often obtained under coercive conditions. This violates traditional Islamic law and is dangerous when a conviction of a capital crime can be obtained from only one piece of evidence.

Although Saudi Arabian officials claim that their system of criminal justice, based upon *Shari'a*, has achieved its goals of deterrence, whether the capital punishment system has achieved the goals of a traditional Islamic law system of criminal justice is less certain. On paper, the similarities between the Saudi system and traditional Islamic law are clear. In practice, however, the systems diverge. The Saudi Arabian government has sacrificed the goals of justice and protections of due process in its system of capital punishment.

Nigeria, unlike Saudi Arabia, has a penal system which combines *Shari'a* law with European law influences. With the hurried, and often careless, creation of new *Shari'a* penal codes in

261. ISLAMIC CRIMINAL LAW AND PROCEDURE: INTRODUCTION, *supra* note 77, at 81.

262. SAUDI ARABIAN CONST., art. 38, available at http://www.oefre.unibe.ch/law/icl/sa00000_.html#A001 (last viewed Mar. 17, 2005).

263. Walker, *supra* note 116, at 879 (internal citation omitted).

response to political pressure, the northern states have created a system which departs from traditional ideas of Islamic justice. Most notably, perhaps, is the evidentiary rule that an accused is guilty until proven innocent. With this presumption, even the use of the traditional law about witnesses and confessions makes protection of due process rights difficult. In addition, the Nigerian states recognize the use of circumstantial evidence, which is not widely used for capital crimes under traditional Islamic law. In contrast, however, use of the theory that the "slightest doubt" should preclude the application of a *hudud* penalty have contributed towards the avoidance of most harsh *hudud* penalties.

In addition, many judges try to exercise "damage control" by making the imposition of controversial punishments under *Shari'a* law extremely difficult and using the provisions primarily for symbolic and deterrent value.²⁶⁴ For example, there have been several widely publicized cases involving stoning for *zina* in the years since the *Shari'a* penal codes were established. Although women were convicted in *Shari'a* courts on a presumption of guilt, and the use of circumstantial evidence required no proof other than pregnancy, the appeals courts overturned both sentences. In addition, there have been indications that the federal government of Nigeria would intervene to prevent the use of the death penalty for a *Shari'a* crime. It is possible that judges' cautious implementation of the death penalty and adherence to the evidentiary requirements during appeal are inspired by this knowledge.

Internationally, Islamic countries have been criticized for their treatment of human rights, particularly in cases involving the death penalty. Often, the international community blames Islamic influence for the harsh penalties and violations of human rights. Both Saudi Arabia and Nigeria have faced this type of criticism. Neither country, however, necessarily applies pure Islamic law as it is stated under *Shari'a*. Traditional Islamic law, while providing for the death penalty, has a number of safeguards to lessen the frequency with which the penalty is used, and also stresses principles such as proportionality and forgiveness. Saudi Arabia, although a 'pure' Islamic state, has incorporated different provisions into its penal code, including adding additional capital crimes and allowing for the use of *ta'zir* when the strict

264. See *id.* at 39.

requirements of a *hadd* crime cannot be met. Nigeria, as a secular state with some state Islamic penal codes, abandons some of the principles found throughout traditional Islamic law and does not require the same evidentiary burdens relied upon in *Shari'a*. In Nigeria, it ultimately seems to be the reluctance of the federal government, rather than the protections of Islamic law, that prevent the use of the death penalty for *Shari'a* crimes. Although traditional Islamic law provides for the use of the death penalty, this use is tempered by provisions meant to constrain the use of death as a punishment. When countries adopt Islamic criminal law, however, it is often these constraining provisions that are left behind, while the harsh punishments become an accepted part of the criminal code and lead to misunderstandings about the use of the death penalty in Islamic law.