Implications of Provisions of Shari'ah Criminal Procedure Codes of Some States of Nigeria Ousting the Power of Governor and Attorney-General of the State in Hudud and Qisas Offences

By

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Abstract

This paper discussed constitutional implications of some provisions of Shari'ah Criminal Procedure Code of some Northern States of Nigeria which prohibit the Attorney-General of the State from exercising power of nolle prosequi in any criminal proceeding instituted by him or any other person before any court of law and the Governor from exercising the power of prerogative of mercy in any case involving hudud and qisas offences before any Shari'ah Court. The paper analyzed the affected provisions of the Shari'ah Criminal procedure Codes of the concerned States vis-à-vis the relevant provisions of the 1999 Constitution. The writers' major findings are that sections 257(2) and 220 (4) of Zamfara State Shari'ah Criminal Procedure Code and Sections 211(4) and 248(2) of Sokoto State Shari'ah Criminal Procedure Code which oust the power of Attorney-General of the State from exercising the power of nolle prosqui and State Governor from exercising the power of prerogative of mercy are in conflict with relevant provisions of the Constitution, thereby unconstitutional. Arising from this, the paper recommends for the amendment of these sections of the Codes in a manner that they will be in conformity with sections 211 and 212 of the Constitution of the Federal Republic of Nigeria, 1999.

Keywords: Qisas, Constitution, Criminal Procedure Code, Hudud, Nolle prosqui, Prerogative of Mercy.

Introduction

The focus of this paper is to examine constitutional implications of some provisions of *Shari'ah* Criminal Procedure Codes of some Northern States of Nigeria ousting the power of Governor and Attorney-General of the State in *hudud* and *qisas* punishments. At the dawn of the 4th republic, some States in the Northern Nigeria took steps to embody Islamic Criminal Laws in their States laws. The concern States through their various Houses of Assembly promulgated into law various *Shari'ah* Penal Codes,[1] *Shari'ah* Criminal Procedure Code[2] and also established *Shari'ah* Courts of different grades with jurisdiction to try and convict the violators of the provisions of the *Shari'ah* Penal Codes. The *Shari'ah* Penal Codes of these States incorporate/contain *hudud* and *qisas* offences as States offences. *Hudud* are punishments that are textually fixed or designed and they apply to crimes whose penalties are

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[1] Such as *Shari'ah* Penal Code Law of Zamfara State, Law No. 10, (3), 2000; Kano State *Shari'ah* Penal Code Law, No. 1, (32), 2000; *Shari'ah* Penal Code Law of Sokoto State, 2000, etc.

[2] Such as *Shari'ah* Criminal Procedure Code Law of Zamfara State, 2000, *Shari'ah* Criminal Procedure Code Law, Sokoto State, 2000; Kano State *Shari'ah* Criminal Procedure Code Law, 2000 etc.

mandatory, that is, as defined in the Glorious Qur'an and Hadith of the Prophet.[3] *Hudud* punishments are not subject to an amendment or alteration whatever the case may be.[4] *Qadi* or judges are therefore duty bound to inflict them as prescribed. They are not allowed to waive, commute or substitute them; because they are perfectly right of Allah.[5] *Qisas* signifies retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating etc. The punishment prescribed for murder and the infliction of injury is *qisas.*[6]

The paper seeks to discuss briefly crimes punishable by *hudud,* their punishments and their means of proof, *qisas* punishments and their means of proof. The paper will take a critical look at and thoroughly examine some provisions of some *Shari'ah* Criminal Procedure Codes with a view to determining whether those provisions of the Codes which prohibit the Attorney-General of the State from exercising power of stay of any criminal proceeding (Nolle prosequi) and the Governor of the State from exercising power of prerogative of mercy in *hudud* and *qisas* offences are in conflict or in conformity with the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The paper will conclude with suggestions and necessary recommendations.

***Hudud* Punishments**

The Arabic word *hudud* is the plural form of *hadd* which literally means boundary, limit, obstacle, prevention, restraint or hindrance or prohibition.[7] *Hadd* is sometimes referred to as sin itself. This is the sense in which the word is used in the *Qur'an* thus: 'Those are the limits of Allah.'[8] *Hadd* may also refer to commandment as in this verse which reads: 'Those are the limits (commandments, injunction, instructions) set by Allah do not transgress.'[9]

In Islamic Law, *hudud* are punishments that are textually designed and they apply to crimes whose penalties are mandatory; i.e. as defined in the Holy *Qur'an* or prophetic tradition.[10] *Hadd* cannot be increased, decreased, altered, reviewed or remitted by anyone even the head of an Islamic State.[11] The following are generally considered to be crimes classified under *hudud*: adultery, defamation, theft, robbery, wine drinking, apostasy, sodomy and rebellion.

Zina – Adultery or Fornication

The crime of *zina* is defined as sexual intercourse between a man and a woman who are not lawfully married to each other.[12] That is to say, an intercourse between a man and a woman who are neither legally married nor is it a relationship of master and his slave girl or any

[3] Yahaya Yunusa Bambale, *Crimes and Punishments Under Islamic Law* (2nd Edition, Malthouse Press Limited, Lagos, 2003) 26.
[4] Ibid.
[5] Yahaya Yunusa Bambale, 'The Application of *Hudud* Punishments in Nigeria: Problems and Constitutional Implications' *UDUS Law Journal,* (1) (4), 2002. A Journal of the Faculty of Law, Usmanu Danfodiyo University, Sokoto, (1) No. 4, 2002, 75.
[6] Abdur Rahman I. Doi, *Shari'ah: The Islamic Law,* Taha Publishers, London, 1984, 87.
[7] Muhammad Anwarullah, *The Criminal Law of Islam* (Kitab bhavan 1784, Kalam Mahal, New Delhi, Indian, 2006) 112.
[8] *Qur'an* 2:187.
[9] *Qur'an* 2:229.
[10] Ibid.
[11] Yahaya Yunusa Bambale (n 3) 26.
[12] Y. Y. Bambale, (n 3) 28.

relationship that establishes some semblance of validity.[13] The word *zina* applies to both adultery (where one or both parties are married to a person or persons other than the persons involved in the sexual intercourse) and fornication where both parties are unmarried.[14]

Ordinarily, under Muslim Law, two witnesses are required to prove a fact. In some cases, only one witness can prove it.[15] But, in case of adultery, not less than four witnesses are required to prove the offence. All the jurists are agreed that adultery is established by means of four reliable male adult Muslims and sane witnesses who must have seen the actual act at the same time.[16] All the four schools are unanimous that the offence of *zina* is established or proved by the confession of the accused. It is based on the *Sunnah* of the Prophet (SAW) who accepted the confession of *Ma'iz bin Malik* and a woman named *Ghamidiyyah* when they confessed four times before the Prophet that they had committed *zina,* the Prophet gave an order to stone them to death and they were thus stoned to death.[17] The offence of *zina* in certain exceptional cases, may equally be proved, according to some jurists by the mere appearance of pregnancy on unmarried woman who fails to advance reasons that will ward off punishment from her.[18]

If the act of *zina* is committed by a married person, the punishment is stoning to death or death by stoning whereas if committed by an unmarried person, it attracts punishment of 100 lashes as stated in the Glorious *Qur'an* plus one year in exile which is added by the Prophet (SAW).[19]

Liwat (Homosexuality or Sodomy)

Homosexuality or Same-sex activity arises in a situation where a man engages another man through the anus to satisfy his sexual urge. It is defined as carnal intercourse committed against the order of nature by man with a man, or in the same unnatural manner with a woman, or by a man or a woman with a beast in any manner.[20]

All the Muslim jurists are unanimous that sodomy is unlawful as well as a great sin.[21] The companions of the Prophet (SAW) differ among themselves as to the punishment of a homosexual. *Caliph* Abu Bakr, the first *Caliph,* held that both the offenders should be burnt.[22] *Caliph* Ali, the fourth *Caliph,* held that the offender should be flogged and then stoned.[23] Another companion, Abbas, held that the offenders should be confined in a bad smelling place so that they may die by stench.[24]

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[13] Mansur Ibrahim Sa'id, *Islamic Criminal Law and Practice in Nigeria,* (1st pub., Usmanu Danfodiyo University Printing Press, Sokoto, 2011) 21 – 22.
[14] Abdur Rahman I. Do1, (n 6) 236
[15] MIR Waliullah, *Muslim Jurisprudence and the Quranic Law of Crimes,* (Taj Company, Delhi, 1986) 138 – 139.
[16] M. I. Sa'id, (n 35) 23; See also Qur'an, 24:13.
[17] Muhammad Anwarullah (n 7) 155.
[18] M. S. A. Al-kafawy, Offence of Adultery/Fornication (Zina) and their Punishments' *Journal of Islamic and Comaprative Law,* Ahmadu Bello University, Zaria, (1996) (20), 45.
[19] M. I. Sa'id, (n 13) 26. See also Qur'an 24:2.
[20] MIR Waliullah, (1 55) 148.
[21] M. I. Sa'id, (n 13) 32.
[22] Y. Y. Bambale, (n 3) 553.
[23] Ibid.
[24] Ibid.

According to all the Schools of law, homosexuals whether married or unmarried should both be killed on the basis of *hadd*.[25] They relied on the Hadith of the Abbas that the Prophet (SAW) said: 'If you find someone committing the act of people of *Lut* (that is homosexuality), kill the doer and the one with whom it is done.'[26] Equally, they relied on the Hadith of Abu Huraira that the Prophet (SAW) said: 'If you find someone committing the act of people of *Lut* kill the one on top and the one below.[27]

Qadhf (Defamation or False Accusation)

Qadhf is defined as an offence which comes into existence when a person falsely accuses a Muslim of fornication or doubts his paternity.[28] It is also defined as an unproved allegation that an individual has committed *zina*.[29] This crime is committed when one falsely accuses another of *zina*, (adultery or fornication), or unchastity to man or woman, or when one injuriously contests the status or the paternity of a Muslim. It is a serious and great crime in Islam and those who commit it are referred to as wicked transgressors by the Holy *Qur'an*.[30] All the jurists of Islam are unanimous that defamation is a serious crime which is punishable on the authority of the *Qur'an* which provides thus: 'And those who launch charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes, and reject their evidence even after, for such men are wicked transgressors.'[31]

The law has prescribed two basic means by which the offence of *qadhf* could be established, namely: testimony or evidence and confession. The *Shari'ah* has laid down punishment for *qazaf* (defamation or false accusation) which is eighty stripes of the cane, disqualification of the *qazif* from bearing witness and that he should be treated as *fasiqoon* i.e. a wicked transgressor until he repents.[32]

Sariqa (Theft)

One of the three things which Allah has declared inviolable is property. The protection to people's property is guaranteed against any violation from other people. This is reflected in several injunctions of the Holy *Qur'an* and traditions of the Prophet Muhammad (SAW) with respect to the laws of inheritance, *zakat*, use of property, charity and earnings. For example, the *Qur'an* states thus: 'And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.'[33]

Thus, theft is a criminal offence against property not only in Islam, but, in all known religion and laws in the world. Theft is an act of taking other people's property without any lawful

[25] Sa'id, (n 13) 33.
[26] Ibid.
[27] Y. Y. Bambale, (n 42) 41.
[28] A. I. Do1, (n 6) 246.
[29] Y. Y. Bambale, (n 3) 45.
[30] *Qur'an* 24:4.
[31] *Qur'an* 24:4.
[32] Y. Y. Bambale, (n 3) 52; M. I. Sa'id, (n 13) 53, see also Qur'an, 24:4.
[33] *Qur'an,* 2:188.

claim to it.[34] It is also defined as stealing of a protected property secretly. This is the definition of theft in the popular opinion of the jurists.[35]

The offence of theft is proved in either of the following ways:

i) By the ordinary judicial means of proof. That is by the evidence of two witnesses, who must satisfy that they are sane, adult and reliable witnesses.
ii) By confession of the accused which must be spontaneous and voluntary.

All Muslim jurists agree that the punishment for the offence of theft is amputation of the hand from the writ.[36]

Shurbul Khamr (Drinking Alcohol)

The word for an intoxicant used in the *Qur'an* is *khamar* which is derived from *khamara* meaning the covered or veiled thing.[37] The Arabic word *khamr* signifies any alcoholic drink which causes intoxication. It is reported on the authority of Ibn Umar that the Prophet (SAW) said that 'every intoxicant is *khamr* and every (type of) *khamr* is prohibited.'[38]

The crime of wine drinking is established by either of the following means:

i) The testimony or evidence of two just and reliable witnesses who had seen him drinking.
ii) The admission or confession of the accused *(al-Iqrar)* that he has drunk is the strongest means of proof of wine-drinking. The condition for the acceptance of such admission is that it must be free from suspicion and it must be voluntary.

All the jurists of the four schools are unanimous on the fact that there is *hadd* for consumption of alcoholic drink and that a drunkard must be punished with eighty lashes.[39]

Hiraba (Highway Robbery or Brigandage)

The term *hiraba* is defined as 'an exercise of a group of armed people or a single person who may attack travelers or wayfarers on the highway or any other place depriving them of their property through the use of force in the circumstances when the victims are away from receiving any immediate help.'[40] *Al-Hirabah* or highway robbery is a serious crime according to the Glorious *Qur'an*. It is a grave and most atrocious crime imaginable and is highly condemned by the Glorious *Qur'an* and *Sunnah* of the Prophet (SAW). The offence of *hiraba* is proved by either of the following means:

i) by confession of the accused person that he has committed the act; or
ii) by the evidence of two witnesses who are adult, sane, Muslims and reliable persons who will give evidence against the accused persons.

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[34] A. O. Nseef, *Encyclopedia of Seerah,* (The Muslim Schools Trust, London, 1982) (ii) 777.
[35] Abdul-qadir Zubair, *Exigesis of Legislative Verses in the Qur'an and the Relevant Traditions, (*Al-Maddinah heritage Publications, Lagos, 1997) 43.
[36] M. I. Sa'id, (n 13) 36. See also Qur'an 5:38..
[37] A. I. Doi, (n6) 261.
[38] Adh-Dhahabi, Muhammad, bin 'Uthman, *The Major Sins (Al-Kab'ir)* (Dar-al-fikr, Beruit; Lebanon, 1993) 171.
[39] Sayyid Sabiq, *Fiqhus Sunnah,* Darul Fikr, Beiruit, Lebanon, 1992 (2) 335. A. I. Doi, (n 6) 264.
[40] A. I. Doi, (n 6) 250.

The punishment for brigandage or highway robbery is spelt out in *Surat al-Maida* in the verse already cited above namely: execution, crucifixion, amputation of hand/leg in opposite and exile are prescribed, any one of which is to be applied by the Judge according to the circumstances.[41]

Ridda (Apostasy)

Literally, the word *ridda* means to turn, turn away or to return, to turn back.[42] Technically, *riddah* is the voluntary renunciation or abandonment of the Islamic faith, by a Muslim who is an adult and sane, for any other religion.[43] The person who forsakes Islam for unbelief or for another religion is called *murtadd*.[44] *Al-Riddah* also means rejection of the religion of Islam in favour of any other religion either through an action or through words of mouth. The act of apostasy thus puts an end to one's adherence to Islam.[45] In *riddah*, the mental element, that is, state of mind of an accused person is essential to establish the crime.

The crime of apostasy is proved by the evidence of two competent witnesses who must be explicit and precise in showing that the accused person is guilty of apostasy by virtue of such and such a declaration or by doing so, so and so.[46] The other method of proof is by the voluntary confession of the accused himself who must be an adult, sane and must have acted voluntarily.[47] The primary punishment of apostasy is death sentence. The punishment by death in the case of apostasy has been unanimously agreed upon by all the four schools of Islamic jurisprudence.[48] The second view, which is the minority view and being upheld mostly by contemporary Islamic jurists, is that the apostate is not to be put to death.[49] But, there are no textual authorities to support the view.

Baghye (Rebellion or Treason)

Rebellion is regarded as a political crime and the purpose of such crime is either the achievement of certain political goals, ends or their motives are political. A political crime does not take place in normal conditions. It takes place in extra-ordinary conditions i.e. in a state of revolution or civil war.[50] Since rebellion causes instability, disorder and destruction to the socio-political system of the Islamic State, the ruler or head of state who holds the mantle of power through a lawful means, has the right to protect the Islamic State from rebellion.

Al-baghye (rebellion) is one of the major crimes that attract infliction of *hadd* punishment. It is basically an act of rebellion against the state and it is a collective action by a group of

[41] A. I. Doi, (n 6) 251 - 252.
[42] *Qur'an* 5:54.
[43] S. Sabiq, (n 40) 381.
[44] S. A. Rahman, *Punishment of Apostasy in Islam,* (Institute of Islamic Culture, Lahore, Pakistan, 1978) 9.
[45] A. I. Doi, (n 6) 265.
[46] Y. Y. Bambale, 'Punishment of Apostasy in Islamic Law: A Paradox to the Freedom of Religion', *Journal of Islamic and Comparative Law,* Ahmadu Bello University, Zaria, Nigeria (2005) (25) 92.
[47] Ibid.
[48] A. I. Doi, (n 6) 266.
[49] Y. Y. Bambale, (n 3) 79. .
[50] Abdul Qadir Oudah Saheed, *Criminal Law of Islam,* (1st edn. International Islamic Publishers, Chitili, Qabar, Delhi, 2000) (1) 110-111.

Muslims.[51] Technically, it means to commit treason against legitimate government by a powerful group that is in possession of arms and weapons.[52]

In all classical juristic works, one can hardly find provisions prescribing proof for *al-baghye*. This is justified by the very nature of the offence. It involves a wide scale rebellion in which the offenders participate openly. It differs from other *hudud* offences in which it is mandatory that proofs must be produced showing that the accused is guilty. Punishment for rebellion is death sentence where the leader or the Head of State is a just leader.[53]

Qisas (Law of Equality)

Qisas signifies retaliation by slaying for slaying, wounding for wounding and mutilating for mutilating, etc.[54] In Islamic Law, the punishment prescribed for murder and the infliction of injury is *qisas*, that is, inflicting on the culprit an injury exactly equal to the injury he inflicted upon his victim,[55] a principle of law of retaliation. *Qisas* also refers to crimes for which punishments have been provided by way of retaliation or the payment of *diyya*h (blood money).

a. *Qatl al-Amd (Intentional Murder)*

Intentional homicide means committing the act of taking the life of a person with the intention of killing him, i.e. it is not enough that the culprit intends to commit the act resulting in the death of the person but, to treat him as a willful killer it is necessary that he intends to commit the victim's murder.[56] An intentional or willful murder is a murder in which a person intentionally uses implement or weapon such as gun, sword, spear, fire, knife, sharp wood, iron rod, etc on another person and kills him. Here, the culprit is said to have committed an intentional or willful murder.[57] Where intentional or willful murder is committed, death penalty is imposed on the murderer. The punishment of retaliation cannot be altered, or cancelled after the offender has been proved guilty, unless the heirs of the victim have agreed to collect compensation in place of retaliation.[58]

b. *Shubhul amd* (Manslaughter)

Shubhul amd is also known as quasi-intentional or homicide resembling willful murder. It is defined as 'Willful killing of one person by another using an instrument that does not usually kill, like whip, stick or small stone.'[59] Quasi-intentional homicide occurs when a person strikes someone in a manner which would not normally kill another person strikes in the same manner (but, it kills his victim).[60] *Shubhul amd* (manslaughter) attracts the same punishment as intentional murder. That is to say, the

[51] Y. Y. Bambale, (n 3) 83.
[52] M. I. Sa'id, (n 13) 46.
[53] Y. Y. Bambale, (n 5) 78.
[54] A. I. Doi, (n 6) 87.
[55] Ibid.
[56] A. Q Oudah Shaheed, (n 52) 9 – 10.
[57] MIR Waliullah, (n 15) 151.
[58] Sa'id, (n 13) 58.
[59] Ibid, 61.
[60] Jibril Muhammad Tukur, 'Appraising the Application of Qisas Punishment for International Homicide (Qatl Amd) by Nigerian Courts, *Journal of Islamic and Comparative Law* (J.I.C.L.) , ABU, Zaria, 2015, (30) 145.

punishment may range from *qisas* (retaliation), payment of blood money or pardon.[61] This is however against the view of the majority which is to the effect that manslaughter is only punishable by payment of blood money or pardon

c. *Qatlul Khata' (Unintentional Homicide or Homicide by Mistake)*
Unintentional homicide arises as a result of mistake, accident or in an indirect way.[62] Homicide is deemed unintentional 'where it resulted from mistaken act or mistaken object or through an indirect cause.'[63] This type of homicide is not punishable with death but entails the payment of normal blood money i.e. (*Diyyah Mukhaffafah*) payable in three years.[64] In addition to the *diyya*, the killer is also to free a believing slave or to fast for two consecutive months.[65] The proof of homicide is by *Iqrar* (confession) or *As-Shahadah* (testimony).

Power of the Attorney-General to Exercise *Nolle Prosequi*

The Attorney-General of the Federation or of a State is empowered under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to institute, undertake, take over, continue and discontinue, at any stage before judgment is delivered, any criminal proceedings instituted or undertake by him or any other authority or person against any person before any Court of Law in Nigeria, other than a court martial in respect to any offence created by or under any Act of the National Assembly or State House of Assembly, as the case may be.[66] The power of the Attorney-General to discontinue criminal cases is otherwise known as *"nolle prosequi"* meaning: " do not wish to proceed" or "will not prosecute[67] and it is conferred by sections 174(1)(c) and 211(1) (c) of the Constitution.[68] Section 211(1)(c) of the Constitution provides thus:

> The Attorney-General of a State shall have power to discontinue at any stage before judgement is delivered any such criminal proceedings initiated or undertaken by him or any other authority or person.

The import of this section is that the Attorney-General of a State has the power to discontinue, at any stage before judgment is delivered, any criminal proceedings by entering a *nolle prosequi* in any court of law in Nigeria except a court-martial, and in respect of any offence created by or under any law of the State. In the exercise of his powers, he is not subject to the direction or control of any other person or authority. The only injunction on him is to have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.[69] The power of Attorney-General in this regard is absolute.[70] It is known as the

[61] Ibid.
[62] Ibid.
[63] M. I. Sa'id, (n 13) 62.
[64] Y. Y. Bambale (n 3) 90.
[65] Ibid, 88; See also M. I. Sa'id, (n 13) 63.
[66] See sections 174 and 211 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[67] A. F. Afolayan, *Criminal Litigation in Nigeria,* Chenglo Law Publications Ltd; Enugu, 2016, 115.
[68] See also section 107(1) Administration of Criminal Justice Act; Section 73(1) Criminal Procedure Act; Section 253 (2) Criminal Procedure Code, Sections 71 and 72 of Administration of Criminal Justice Law, Lagos State, 2011.
[69] Section 211(1)(3) Section 211(2) (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See also Jadesola O. Akande, *Introduction to the Nigerian Constitution, Sweet & Maxwell*, London, 1982, 161 and 191.

power of the Attorney-General to enter a *nolle prosequi* which is a personal,[71] power. The powers of *nolle prosequi* may be exercised by the Attorney-General or through an officer of his department.[72] Where the power is to be exercised by an officer of his department, it must be in writing.[73]

It is important to state that numerous judicial authorities have given effect to this constitutional power of the Attorney-General of a State.[74] In *Olusemo v. C.O.P.*[75] it was held that the Attorney-General has discretion under the Constitution to take over criminal prosecution but, that he cannot be compelled by any person, including the court, to do so. The provisions of section 211(1)(c) of the Constitution were considered in *State v Okonipere,*[76] where it was held that under the constitutional scheme of Nigeria, the Attorney-General has power to discontinue any criminal proceeding undertaken by him or taken over by him before judgment is delivered and that if the Director of Public Prosecution defies any direction of the Attorney-General in this regard, such DPP would be said to be "on a frolic of his own and also acting *mala fide.*

Once the Attorney-General enters a *nolle*, the proceedings cum prosecution must stop and the court is mandatorily restrained from taking any step that would undermine in any way the potency of such *nolle.*[77] In *Audu v Attorney-General of the Federation,*[78] The Supreme Court held in emphatic terms thus:

> At any stage of any criminal proceedings before judgment, the Attorney-General of a State or the Attorney-General of the Federation may enter a *nolle prosequi* either by stating in court or filing appropriate processes to inform the court that the State intends that the proceedings abate. Once this is bought to the notice of the presiding judge, the accused person shall be discharged immediately from the charge the *nolle prosequi* was filed or entered. The judge has no power to question the Attorney-General as to why he filed a *nolle prosequi.* My lords with the filing of nolle prosequi by the Chief Law Officers of Kogi State and Nigeria on the same day a reference was made to the Court of Appeal for determination, the learned trial judge ought to have discharged the appellant and struck out the case i.e. Charge No. KG/EFCC/1/2006 was no longer in existence.

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[70] James Atta Agaba, *Practical Approach to Criminal Litigation in Nigeria,* Third Edition, Bloom Legal Temple, Abuja, 2015, 375.
[71] *Attorney-General, Kaduna State v. Hassan* (1985) 2 NWLR (Pt 8) 483.
[72] Oluwatoyin Doherty, *Criminal Procedure in Nigeria, Law and Practice,* Blackstone Press Limited, 1990, 64.
[73] *Ibrahim v State* (1986) 1 NWLR (Pt. 18) 650.
[74] Such as was held in *Omoboriowo v Oniororo* (1985) 6 NCLR, 419. *The State v Adakule and Others* (1981) 2 NCLR 410, 710. *Ibrahim v The State* (1986) 1 NWLR (Pt. 18) 650 and *The State v Ilori* (1983) SCNLR 94.
[75] (1998) 11 NWLR (Pt. 575) 547 C.A.
[76] (2011) All FWLR (Pt. 598) 993 C.A.
[77] Sebastine Tar Hon., *Constitutional and Migration Law in Nigeria*, Pearl Publishers International Ltd. Port Harcourt, Nigeria, 2016, 872.
[78] (2013) All FWLR (Pt. 667) 607 at 623 S.C. See also *Abacha v The State* (2002) (9) M. J.S.C. pg 1 pg32 paras E.F.

It is observed from the above decision that the Supreme Court concluded that by the filing of the *nolle prosequi* by the Attorney-General, the trial Court ought to have discharged the appellant and struck out the case and ought not to have proceeded to make reference on questions of law to the Court of Appeal. It is also observed that the questions referred to the Court of Appeal became academic questions in view of the *nolle* entered by the learned Attorney-General of Kogi State. The Supreme Court, therefore, consequently struck out the questions referred to the Court of Appeal. This decision further confirms the absolute power of the Attorney-General to stay or discontinue any criminal proceedings before any court of law at any stage before the judgement is delivered.

Power of State Governor to Exercise Prerogative of Mercy

Akin to *nolle prosequi* is the constitutional concept of prerogative of mercy exercisable by the president and governors of states. The concept is an executive power by which the president or governor may pardon, grant respite, substitute a less serve or remit the whole or part of the punishment of a person convicted of any crime against any law of the National Assembly or House of Assembly as may be, however heinous the crime.[79] The authority and power to grant free or conditional pardon in certain circumstances, and in relation to federal law has always been given to the head of the executive under our Constitution since 1960 and is one of the most basic and fundamental powers exercised.[80]

It has been observed that the president or governor may grant free pardon or one subject to lawful conditions. It would appear that the president or governor needs not wait until after conviction and sentence before exercising this power.[81] It was in the exercise of this power that President Muhammadu Buhari, granted a presidential pardon to 159 convicts including the former Governor of Plateau State, Joshua Dariye and ex-governor Jolly Nyame of Taraba State who were both jailed for stealing ₦1.16 billion and ₦1.6 billion respectively. A pardon may be granted at any time after an offence has been committed, not necessarily after conviction. Nor are the type of offences for which pardon will be granted specified. So, it could be the highest offence, that is treason or any minor misdemeanour. The pardon may be to suspend the execution of any sentence, to substitute a less severe punishment or, to remit the whole or any part of any punishment imposed.[82] Section 212(1) of the Constitution provides thus:

(1) The Governor may

a) grant any person concerned with or convicted of any offence created by any law of a State a pardon, either free or subject to lawful conditions;

b) grant to any person a respite, either for an indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;

c) substitute a less severe form of punishment for any punishment imposed on that person for such an offence; or

[79] See section 175 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended); section 212 made similar provision for State governors in respect of offences against the law of State enacted by State Houses of Assembly.

[80] See for example, section 101, 1963 Constitution: sections 12 and 13 of the 1979 and 1989 Constitutions.

[81] Jadesola O. Akande, (n 71) 161.

[82] Ibid.

d) remit the whole or any part of any punishment imposed on that person for such an offence or of any penalty or forfeiture otherwise due to the State on account of such an offence.

It has been held that the phrase person "concerned with or convicted" used in subsection (a) above implies the fact that free or conditional pardon may be granted to a person who is still on trial, or who has been arrested in connection with the offence but has not yet been tried or has been convicted though punishment is not yet imposed.[83] It has been further held that the effect of a free pardon is such as to remove from the subject of the pardon "all pains, penalties and punishments whatsoever that from the said conviction may ensure, but, not to wipe out the conviction itself.[84] That is, it has the effect of forgiving the person of his offence by removing the penalties even though the conviction is still in the record of the court.[85]

By virtue of section 212 (1) (c) and (d), the governor may either substitute less severe punishment than the one imposed on the person or remit the whole or part of it. For example, if a person convicted by an offence has been sentenced to fifty years imprisonment with hard labour under these subsections, the governor may remit the whole of the punishment, or remove just the heard labour or reduce it to ten years imprisonment with no hard labour.[86]

Supremacy of the Constitution

The supremacy of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), has been established in very clear terms by the Constitution itself.[87] The Nigerian 1999 Constitution is an organic instrument which confers powers and also creates rights and limitations. It is the supreme law in which certain first principles of fundamental nature are established. Once that powers, rights and limitations under the Constitution are identified as having created, their existence cannot be disputed in a court of law, but their extent and implications may be sought to be interpreted and explained by the Court in cases properly before it. All agencies of government are organs of initiative whose powers are derived either directly from the Constitution, or from laws enacted thereunder. They, therefore, stand in relationship to the Constitution as it permits of their existence and functions.[88]

Subsections (1) and (3) of section 1 of the Constitution which have established in clear terms the supremacy of the Nigerian Constitution provides thus: 'This Constitution is supreme and its provisions shall have binding force on all authorities and person throughout the Federal Republic of Nigeria.'[89] Subsection 3 provides thus: 'If any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.'

[83] See *Okongwu v State* (1986) 5 NWLR (Pt 44) 721.
[84] Ibid.
[85] Kehinde M. Mowoe, *Constitutional Law in Nigeria,* Malthouse Press Limited, Lagos, 2003, 152 – 153.
[86] Ibid.
[87] Section 1(1)(2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[88] See Supreme Court decision in the case of *Attorney-General of Ondo State v Attorney-General of Federation and 35 Others* reported in (2002) 9 NWLR (Pt 722) 418.
[89] Section 1(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

This jurisprudence of constitutional supremacy has often received judicial approval in the Nigerian Courts. In *Eleso v Government of Ogun State*,[90] the Supreme Court held that all persons and authorities in Nigeria are bound by the Constitution to act lawfully. Also, in *First Bank of Nigeria Plc v. T.S.A. Industries Ltd.*[91] the Supreme Court held that by section 1(3) of the Constitution, any law which is inconsistent with any provision of the Constitution shall be null and void. It is submitted that the words 'the Constitution is supreme' seek generally, to establish the Constitution, especially under a civilian democracy, as the *grundnorm* [92] of Nigeria.

Similarly, it was held *Ifegwu v F.R.N.*[93] that the Nigerian Constitution is the *grundnorm* of Nigeria. Also, in *Anka v. Lokoja*,[94] it was held that the Constitution of the Federal Republic of Nigeria is the *grundnorm* of the country; hence, all laws have to be enacted in such a way as to be consistent with its provisions. Therefore, that any law that is inconsistent with the provisions of the Constitution shall be null and void to the extent of its inconsistency. In *H.D.P. v Obi*,[95] the Supreme Court, held that:

> The Constitution is the supreme law of the land; therefore, the provisions are superior to every provision embodied in any Act or law and are binding on all persons and authorities in Nigeria. The failure to follow any of the provisions renders the steps taken unconstitutional, null and void. Such Act must be set aside by the court.[96]

The implication of the above constitutional provisions and judicial pronouncements is that the Nigerian Constitution is the supreme and superior to any other law or legislation enacted by local, State or Federal Government and that any law or legislation which is inconsistent with the Constitution shall, to the extent of its inconsistency, be null and void.

Implications of Provisions of *Shari'ah* Criminal Procedure Codes that Oust the Power of Governor and Attorney-General of the State in *Hudud* and *Qisas* Offences.

Having established the supremacy of the Constitution, it is incontestable that for any law or statute to be valid, its provisions must be consistent with the Constitution of the Federal Republic of Nigeria, 1999. The implication of section 1 of the Constitution is that, the 1999 Constitution is the *grundnorm* of the country; hence all laws, statutes or legislations have to be enacted in such a way as to be consistent with its provisions. Therefore, that any law that is inconsistent with the provisions of the Constitution shall be null and void to the extent of its inconsistency.[97]

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[90] (1990) 2 NWLR (Pt. 133) 420 S.C.
[91] (2010) All FWLR (Pt. 537) 633 at 678 S.C.
[92] The word "grundnorm" has been defined as "the basic law or model or standard accepted (voluntarily or involuntarily) by the society as the right behaviour superior to every other law" – *Oluwagbemi v Ajayi* (2007) ALL FWLR (Pt. 393), 183 at 199 C.A.
(2001) 13 NWLR (Pt. 729 C.A.
[93] See also *Attorney-General, Ondo State v Attorney-General, Federation* (2002) FWLR (Pt 111) 1972, (2002) 9 NWLR (Pt 772) 222 *Marwa v Nyako* (2012) All FWLR (Pt 622) 1621 at 1707-1708 and *I.N.E.C.v Musa* (2003) FWLR (Pt. 145) 729 at 772 S.C.
[94] (2001) 4 NWLR (Pt 702) 178.C.A.
[95] (2011) 18 NWLR (Pt 1278) 80 at 110 S.C.
[96] See also *Kayili v Yilbuk* (2015) 7 NWLR (Pt 1457) 265 S.C.
[97] See also *Anka v Lokoja* (2001) 4 NWLR (Pt 702) 178 C.A.

Despite the fact that the Constitution empowers the Attorney-General of the State to institute, undertake, take, continue and discontinue, at any stage before the judgment is delivered, any criminal proceedings against any person before any court of law in Nigeria,[98] except a court marital, section 220(2) (3) and (4) of Zamfara State *Shari'ah* Criminal Procedure Code Law, 2000 provides that the Attorney-General of the State has no power to order for a stay of any criminal proceedings (*Nolle prosequi*) in any case involving *Hudud* and *qisas* punishments before any *Shari'ah* Court. It provides thus:

(2) At any stage before the finding in any trial under this *Shari'ah* Criminal Procedure Code the Attorney-General may in writing or in person exercise his power to inform the court conducting such trial that he does not in respect of all or any of the offences alleged or charged intend to prosecute or further to prosecute the person or any one or more of the persons accused

(3) When the Attorney-General exercises the powers referred to subsection (2) all proceedings in respect of the offence alleged or charged shall be stayed and the person accused shall be discharged of and from the same, but such discharge shall not operate as a bar to any subsequent proceedings against the person accused on account of the same facts.

(4) The powers of the Attorney-General mentioned in this section does not apply to *hudud* and *qisas* offences.

The import of the above section 220 (4) is that the Attorney-General of Zamfara State, despite the fact that the 1999 Constitution empowers him to stay or discontinue any criminal proceedings at any stage before judgment is delivered in any court, has no power by virtue of the above section to order for a stay or discontinue criminal cases involving *hudud* and *qisas* offences. In a nutshell, this subsection (4) seeks to oust the power of the Attorney-General of the State to order for a stay of criminal proceeding in respect of a person being accused of committing any *hudud* and *qisas* offence, from the time the court has taken cognizance of the case up to its final trial.[99] But, section 211 of the Constitution gives the Attorney-General of a State the power of *nolle prosequi* which is employed to discontinue with any criminal proceedings at any stage before judgment, which was instituted by him or by any other authority or person.

Also, section 211(4) of *Shari'ah* Criminal Procedure Code Law, Sokoto State, provides thus: 'In exercising powers conferred upon him under this section, the Attorney-General of the State shall have regard to the principles, norms and tenets contained in the State *Shari'ah* Penal Code and this *Shari'ah* Criminal Procedure Code.'

It is submitted that the principles, norm and tenets contained in Sokoto State *Shari'ah* Penal Code and the *Shari'ah* Criminal Procedure Code are the principles, norms and tenets of *Shari'ah*. Under the *Shari'ah*, or under the principles of Islamic Criminal Justice, divine punishment or *hudud* cases are treated as the perfect rights of Allah and not that of State. The State has no control over their prosecution. The State has therefore no power to stay or stop

[98] See section 211 of the Constitution.
[99] Nasiru Abdulkadir Ahmed, *Administration of Islamic Criminal Law Under the Nigerian Constitutional Democracy*, Ahmadu Bello University Press Limited, Zaria, 2011, 136.

arbitrarily any ongoing trials or discontinue proceeding in respect of *hudud* offences.[100] It is with this spirit in view that the *Shari'ah* Criminal Procedure Codes of these concerned States ruled out the application of the powers of *Nolle prosequi* and prerogative of mercy in all *hudud* and *qisas* cases. Hudud offences accommodate no remission, emendation, reconciliation nor relaxation of their rules.[101] Equally, in cases involving *qisas,* it is the victim or his relatives that have prerogative power to forgive the convicted person or to settle for the payment of *diyya* (blood money) or that retaliation should be carried out.[102] It is submitted that like the provision of section 220(4), Zamfara State *Shari'ah* Criminal Procedure Code, section 211(4) of Sokoto State *Shari'ah* Criminal Procedure Code indirectly seeks to oust the power of the Attorney-General of the State to order for a stay of criminal proceedings in any case involving *hudud* and *qisas* before any *Shari'ah* Court.

Related to this is the power of prerogative of mercy. By section 257(2) of Zamfra State *Shari'ah* Criminal Procedure Code, the state governor has no power to pardon persons who have been convicted of any *hudud* and *qisas* offences. It provides thus: 'The Governor, in the public interest, may in consultation with the Executive Council pardon any convicted person of the offence punishable with death other than *hudud* or *qisas*.[103]

Also, section 248(2) of the Sokoto State *Shari'ah* Criminal Procedure Code Law, 2000 provides thus: 'The Governor in the public interest, may in consultation with the Executive Council pardon any convicted person of the offence punishable with death other than *hudud* or *qisas*.[104] These provisions, that is section 257(2) of Zamfara State *Shari'ah* Criminal Procedure Code Law, and section 248(2) of Sokoto State *Shari'ah* Criminal Procedure Code Law, are apparently in conflict with such power given to the Governor of a State under section 212 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The section has undoubtedly given the Governor the power to grant pardon to a person convicted of an offence created by the law of a State. In the exercise of this power of prerogative of mercy, the Governor can set free any convicted person, with or without any condition or to give respite to a convicted person for the execution of the punishment imposed on him. The power even extends by entitling the Governor with the right to substitute the punishment imposed on the convicted person or to remit the whole or any part of the punishment.[105]

Similarly, section 220(4) of Zamfara State *Shari'ah* Criminal Code Law and section 211(4) of Sokoto State *Shari'ah* Criminal Code Law which prohibit the Attorney-General of the State from discontinuing or staying of any criminal proceedings involving *hudud* and *qisas* before any *Shari'ah* Court are in direct conflict with section 211(1)(c) of the Constitution which empowers the Governor to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted by him or any other person before any court of law.

In view of the supremacy of the constitution rule which forms part of Nigeria's constitutional democracy, the question now is whether a constitutional right or power given to both

[100] Ibid.
[101] Y. Y. Bambale, (n 3) 26.
[102] N. A. Ahmad, (n 100) 136.
[103] Section 257(2) of Zamfara State *Shari'ah* Criminal Procedure Code, Law, No. 1. (4) 2000.
[104] Section 248(2) of Sokoto State *Shari'ah* Criminal Procedure Code Law, 2000.
[105] See generally, section 212(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

Attorney-General and Governor or any other person for that matter, can be abrogated by other statute. In *Osungwu v. Onyeikigbo,*[106] it was held that:

> A right conferred by the Constitution cannot be taken away by any other legislation or statutory provision except by the Constitution itself. Any other law purportedly made abrogating a right conferred by the Constitution will be void to the extent of its inconsistency.[107]

It is submitted that the Supreme Court has emphatically stated that any power given by the Constitution cannot be taken away by an Act of the National Assembly or the law of a State or any subsidiary legislation.[108] Also, any right conferred or vested by the Constitution cannot be taken away or interfered with by any other legislation or statutory provision, except by the Constitution itself,[109] hence, any law purportedly made which abrogates a right conferred by the Constitution will be void to the extent of its inconsistency.[110] Such right can also only be taken away by following due process.[111]

It is submitted that in view of the above decisions, the power and right given to Attorney-General of the State by the Constitution to discontinue at any stage, before judgment is delivered, any criminal proceeding instituted by him or by any other person before any court of law, cannot be taken away or abrogated by Zamfara, Sokoto or any other Northern States Criminal Procedure Code Law or any other legislation or statutory provision for that matter. Equally, the power of prerogative of mercy granted to the State Governor by the Constitution to grant pardon to a person convicted of an offence created by the law of the State cannot be abrogated or taken away by the Zamfara, Sokoto or any other States *Shari'ah* Criminal Procedure Code Law or any other legislation or statutory provision. Therefore, both sections 211(4) and 248(2) of Sokoto State *Shari'ah* Criminal Procedure Code Law, 2000 and sections 220(4) and 257(2) of Zamfara State *Shari'ah* Criminal procedure Code Law, 2000 purporting to abrogate the constitutional power/right given to both Attorney-General of State and State Governor are incompatible with sections 211(1)(c) and 212(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) therefore, unconstitutional, null and void.[112]

Constitutionality and Validity of the Remaining Sections of the *Shari'ah* Criminal Procedure Code of Zamfara, Sokoto and Other Northern States of Nigeria

In spite of the fact that sections 220(4) and 257(2) of Zamfara State *Shari'ah* Criminal Procedure Code and sections 211(4) and 248(2) of Sokoto State *Shari'ah* Criminal Procedure Codes are in conflict with sections 211(1)(c) and 212(1) and (2) of the 1999 Constitution, it is

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[106] (2005) 16 NWLR (Pt 950), pg 80 at (p 92, paras G – H).
[107] See also *Turkur v Government Gongola State* (1981) 1 NWLR (Pt 117) 517; *Oloba v Akereja* (1988) 3 NWLR (Pt 84) 508; *Okulate v Awosanya* (2000) 2 NWLR (Pt 646) 530.
[108] See the Supreme Court decision in *F.R.N. v. Osahon* (2006) All FWLR (Pt 312) 1975 at 2002 S.C.
[109] See *N.C.P. v National Assembly* (2016) 1 NWLR (Pt 1492) 1 C.A.
[110] *Madu v. Mbakwe* (2008) 10 NWLR (Pt. 1095) 293 C.A.; reliance on *Tukur v Governor of Gongola State* (1989) 4 NWLR (Pt 117) 517 S.C. Same decision was reached in *Amusan v Olawuni* (2002) 12 NWLR (pt 780) 30 at 57 C.A.
[111] *R. Benkay (Nig.) Ltd v. Cadbury (Nig.) Plc.* (2006) 6 NWLR (Pt 976) 338 C.A.
[112] See section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

not enough legal justification to invalidate the entire *Shari'ah* Criminal Procedure Code Laws of the two or other States on the basis of the 'blue pencil rule' established by the Supreme Court in *Attorney-General of Abia State v Attorney-General of the Federation*.[113]

The 'Blue pencil' rule or principle is applied to serve a part of a legislation that is good in the sense that it is valid, from that part that is bad, in that it is invalid. That is, the blue pencil is run over the part that is bad. If what remains of the impugned legislation, that is the part that is good and valid can stand, then, it is applied. But, if what remains cannot stand on its own, the impugned legislation is declared invalid.[114]

It is submitted that by the blue pencil, there is need to server these two inconsistent sections which is bad or invalid from that other part or sections of the Codes which are good and valid. Since the remaining sections of the Codes which are not found to be inconsistent with the Constitution are good and valid, they will be allowed to remain as valid sections of the Codes[115] because they can stand on their own, notwithstanding the two inconsistent sections of the Code. Therefore, having severed these two inconsistent sections from other consistent sections with Constitution, the remaining sections will constitute the *Shari'ah* Criminal Procedure Code which is valid and constitutional.

Conclusion and Recommendations

The paper carefully examined *hudud* crimes which attract the punishments that are textually designed, fixed, and defined in the Glorious Qur'an and Hadith as the perfect rights belonging to Allah. They are primarily designed to cater for the betterment of the entire Ummah (community) in the way of protecting and securing their communal interest. It was shown that these punishments cannot be reviewed, altered, or remitted by anyone even the head of an Islamic State because they are the right of Allah (Haqq Allah).[116] The paper also discussed *qisas* as the punishment prescribed for murder and the infliction of injury. It was further pointed out that the *qisas* punishment cannot be altered or cancelled after the offender has been proved guilty unless the heirs of the victim have agreed to collect *diyyah* (compensation) in lieu of retaliation.[117]

The paper examined constitutional implications of some provisions in the *Shari'ah* Criminal Procedure Codes of some Northern States which prohibit the Attorney-General of the State from exercising the power of *nolle prosequi* and the State Governor from exercising the power of prerogative of mercy in criminal proceedings involving *hudud* and *qisas* offences. It was established that those provisions of the Code are in conflict with section 211 of the Constitution which empowers the Attorney-General of the State to discontinue or enter *nolle prosequi* with respect to any criminal proceeding at any stage before the judgment is passed and section 212 which empowers the Governor to grant pardon to a person convicted of an offence created by the law of the State. Therefore, sections 211(4) and 248(2) of Sokoto State

[113] (2002) 6 NWLR (Pt 763) 264 at 436.
[114] *Attorney-General of the Federation v Attorney-General of the 36 States* (2002) vol. 5 M.J.S.C. p.1 p.90 para A – B; *Attorney-General of Abia State v Attorney-General of the Federation* (2002) 3 SCNJ 158 at 248; *Attorney-General of Ondo State v Attorney-General of the Federation* (2002) 9 NWLR (Pt 772) 222 S.C. and *Balewa v Doherty* (1963) 1 WLR 949 at 960.
[115] Nasiru Abdulkadir Ahmad (n 100) 60.
[116] Y. Y. Bambale, (n 5) 75.
[117] M. I. Sa'id, (n 13) 58.

Shari'ah Criminal Procedure Code and sections 220(4) and 257(2) of Zamfara State *Shari'ah* Criminal Procedure Code were faulted due to their apparent conflict/inconsistency with the relevant constitutional provisions.

The major finding is that sections 257(2) and 220(4) of Zamfara State *Shari'ah* Criminal Procedure Code and sections 211(4) and 248(2) of Sokoto State *Shari'ah* Criminal Procedure Code which prohibit the Attorney-General of the State from exercising the power of *nolle prosequi*, that is to discontinue any criminal proceedings instituted by him or any other person and the State Governor from exercising the power of prerogative of mercy are in conflict with the provisions of sections 211 and 212 of the Constitution and are therefore, null and void to the extent of their inconsistency with these constitutional provisions.

Another finding is that, notwithstanding the inconsistency of the two sections of the Codes with the Constitution, it is not enough legal justification to invalidate the entire *Shari'ah* Criminal Procedure Codes of the concerned States on the basis of the 'blue pencil rule' established by the Supreme Court in *Attorney-General of Abia State v Attorney-General of the Federation*.[118] By this rule, those other sections of the Codes which are not in conflict or inconsistent with the Constitution will be allowed to remain valid.

It is suggested that in order to utilize maximum advantage of the provisions of section 4(6) and 4(7) of the Constitution which empower the State to enact law, for peace, order and good government of State or any part thereof, the provisions of the *Shari'ah* Criminal Procedure Codes of the concerned States should be made to be in total conformity with the provisions of the Constitution.

On the strength of the foregoing, we recommend that sections 211(4) and 248(2) of Sokoto State *Shari'ah* Criminal Procedure Code and sections 220(4) and 257(2) of Zamfara State *Shari'ah* Criminal Procedure Code should be amended, repealed or retouched in a manner that they will be in conformity with the relevant provisions of the 1999 Constitution. With this amendment, the Code will empower the Attorney-General of the State to exercise power of *nolle prosequi* or stay of any criminal proceedings in court with respect to the offences created by the law of the State and also empower the Governor to exercise the power of prerogative of mercy in total conformity with the provisions of the Constitution. In the alternative, in order to safeguard these Islamic Law principles, the Constitution should be amended so as to exempt the exercise of these powers (of nolle and prerogative of mercy) in trials involving *hudud* and *qisas* offences. If this constitutional amendment is effected, it will make these *Shari'ah* Criminal Procedure Codes to be in total conformity with the Constitution, and it will remove or at least reduce controversies surrounding the unconstitutionality or otherwise of some aspects of various *Shari'ah* Criminal Procedure Code Laws.

[118] (2002)6 NWLR (Pt 763) 264 at 436.