Criminal Law in Nigeria in the Last 53 Years: Trends and Prospects for the Future

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Abstract: **Objectives:** The article is an overview of developments in substantive criminal law in Nigeria in the last 53 years. It examines the sharing of constitutional legislative powers to enact criminal laws between the federal (national) government and the state (local) governments. The examination of federal laws revealed proactive legislative activity responding to emerging local and international criminal law issues. The main development at the state level is the introduction by States in Northern Nigeria of Sharia Penal Codes and the enactment of the Criminal Law of Lagos State 2011. A common trend is the entrenchment of death penalty as punishment for some crimes. **Implications**: While federal criminal laws have responded to emerging realties, state criminal laws have generally failed to respond to emerging issues at the state level. Consequently, in most of the southern states criminal laws introduced in 1916 have continued to apply. **Value:** The paper demonstrates the need for southern States to reform their criminal laws to respond to emerging realties, the federal government to respond to some outstanding criminal law issues and calls for a suspension of death penalty and a revaluation of its continued relevance.

Keywords: federal offences; state offences, corruption, death penalty; Sharia

1. Introduction

The Criminal Law is an important vehicle not only for maintaining law and order, it also signals society's disapproval of acts and omissions which are injurious to society and violates moral norms which are worthy of legal protection. Consequently, the Criminal Law should keep pace with evolution of society and respond to contemporary realties that require its intervention. New crimes may be created to cover emerging realities. The core of substantive Criminal Law in Nigeria in 1960 (when Nigeria became independent from Britain) bore the imprints

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of Nigeria's British colonial heritage. Fifty three years on, the core of Nigeria's substantive criminal law still largely retain English concepts of criminal responsibility and principles. With the exception of the Northern States (to a certain extent) and Lagos State, the core of substantive criminal law in Nigeria has remained the same. There has however been tremendous legislative activity with respect to criminal legislations falling within federal legislative powers. Despite the difference in the scale of reform and legislative initiatives at the Federal and State Levels, a common trend is noticeable.

The objective of the paper is to examine the extent to which the legislative powers to enact criminal laws in Nigeria have been used to respond to emerging realties both on the domestic and international law scene. Part II examines the constitutional framework for substantive criminal laws in Nigeria (as distinct from the laws regulating criminal procedure and proceedings). Part III highlights and analyses legislative activities with respect to Federal offences. Part IV highlights legislative activities at the State level. Part V examines the common trend in the developments of substantive criminal law in the last 53 years. Part VI evaluates the extent to which developments in substantive criminal law at the federal and state levels have responded to domestic and international criminal law issues. Part VII is the conclusion and projects into the future.

2. Constitutional Framework for Criminal Laws

The legislative competence of the Parliament of the Federation of Nigeria and the respective Legislatures for the Northern, Western and Eastern Regions of Nigeria in 1960 over the creation of offences were set out in the Constitution of the Federation of Nigeria 1960[1] (hereafter "1960 Constitution"). The Constitution vests in the Parliament the power to make laws for the peace, order and good government of Nigeria with respect to any matter included in the Legislative Lists.[2] The 1960 Constitution provided for the Exclusive and Concurrent Legislative Lists.[3] The legislature of the Regions (regions subsequently became 36 States) could make laws with respect to any matter that is not included in the Exclusive Legislative List.[4] The implication of the scheme of sharing of legislative powers

[1] 2nd Schedule to The Nigeria (Constitution) Order in Council, 1960, L.N. 159 of 1960 contained in the Annual Volume of the Laws of the Federation of Nigeria 1960.
[2] 1960 Constitution s. 64(1)(a).
[3] See The Schedule to the 1960 Constitution.
[4] 1960 Constitution, s. 64 (5).

under the 1960 Constitution is that the Parliament was competent to make laws on matters on the Exclusive and Concurrent Legislative Lists, while the Legislature of the Regions could only make laws on matters not listed in the Exclusive Legislative List and the matters listed on the Concurrent Legislative List. Matters not listed in the Exclusive and Concurrent Legislative Lists are said to fall within the Residual Legislative List within the competence of the Regions. It is important to add also that the Legislative powers of the Parliament extended to any matter incidental or supplementary to any matter referred to elsewhere in the Exclusive Legislative List and any incidental and supplementary matter also include offences for the purposes of the Exclusive and the Concurrent Legislative Lists.[1]

The creation of offences under the 1960 Constitution as a separate and independent power is not mentioned in the Exclusive and Concurrent Legislative Lists. This implies that the power to create offences generally fell within the legislative competence of the Regions. The offences that fell within the legislative competence of the Parliament include: (a) offences against the Nigerian State or the Federal Government, its agencies, functionaries or property; (b) offences against public order and public safety (other than offences against the federal or state governments); (c) creation of criminal offences with respect to matters on the Exclusive Legislative List; and (d) creation of offences with respect to matters on the Concurrent Legislative List. The implication of the scheme of sharing Legislative powers under the 1960 Constitution was that the States had the pre-eminence with respect to legislating on crimes generally. The 1963,[2] 1979[3] and 1999 Constitutions[4] retained the scheme of sharing legislative powers by empowering the Federal Government to legislate solely on matters contained in the Exclusive Legislative List and jointly with the States on matters contained in the Concurrent Legislative List subject to any Federal law that has covered the field. States are also empowered to legislate on matters not listed in the Exclusive Legislative List.

The leading case on sharing of legislative powers over criminal laws under the 1999 Constitution is the case of *Attorney General of Ondo State v. Attorney*

[1] See item 44 on the Exclusive Legislative List and Part III of the First Schedule to the 1960 Constitution. See also item 68 of the Exclusive Legislative List, Part 1 of the Second Schedule to the 1999 Constitution and Part III of the Second Schedule.
[2] Constitution of the Federation, 1963, s. 69(1)(a), (2), & (5).
[3] See Constitution of the Federal Republic of Nigeria 1979, s. 4(2), (3), (4), and (7).
[4] See Constitution of the Federal Republic of Nigeria 1999, s. 4(2), (3), (4), and (7).

General of the Federation & 35Ors. (the Anti-Corruption Case).[1] The issue before the Supreme Court in that case *inter alia* is whether the National Assembly had the legislative competence to enact the Corrupt Practices and Other Related Offences Act 2000[2] (the "ICPC Act"). The Supreme Court delivered a landmark judgment in which it upheld the constitutionality of the ICPC Act. By a unanimous decision, the Court held that the ICPC Act was valid and constitutional. The Court held further that the Federal and State Governments have concurrent powers in order to prohibit corrupt practices. The Court construed the word 'State' used in section 15(5) of the 1999 Constitution as imposing an obligation on the Federal, State and Local Governments to abolish corruption. The implication of the decision is that both the National Assembly and the House of Assembly of the States can make laws on corruption. The Court further held that although the power to legislate on corruption is vested in the National Assembly and House of Assembly of the States, when a conflict arises in the exercise of the power, the legislation by the National Assembly will prevail by virtue of section 4(5) of the 1999 Constitution.

The Criminal Code, Schedule to the Criminal Code Law (hereafter the CC) was the principal Criminal Law legislation applicable in Southern Nigeria in 1960.[3] The Penal Code Law (hereafter the PC) was the principal Criminal Law statute applicable in Northern Region of Nigeria in 1960.[4] In addition to the PC, the Federal Parliament enacted the Penal Code (Northern States) Federal Provisions Act[5] (hereafter the Federal Act) to make the provisions on federal offences in the CC[6] applicable in Northern Nigeria. The rationale for the Federal Act was to ensure ensure conformity between the PC provisions relating to Federal offences and those in force elsewhere in the Federation. (Richardson, 1987, p. 321)

While the above analysis represented the general feature of the scheme of legislative powers over criminal laws, a noticeable exception during the regimes of Military Governments is that the Federal Military Governments are usually

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[1] [2002] 27 WRN 1.
[2] Cap. C31 Laws of the Federation of Nigeria 2004.
[3] The CC was introduced into Northern Nigeria in 1994 by proclamation vide Ordinance No. 10 of 1904. It was extended to the whole of Nigeria in 1916.
[4] The Penal Code Law No. 18 of 1959 was enacted by the Legislature of Northern Region to replace the CC in Northern Nigeria in 1959 following dissatisfaction with the CC which was based essentially on English Law.
[5] No. 25 1960 now Cap. P3 Laws of the Federation of Nigeria, 2004.
[6] The provisions cover offences against the state, sedition, customs offences, offences relating to copyright, offences relating to ships and wharves, offences relating to coins and notes, offences relating to revenue stamps, offences relating to weight and measures amongst others.

empowered to make laws with respect to any matter whatsoever. Starting with the Constitution (Suspension and Modification) Decree 1967[1] the combined effect of sections 1(2) and 5 of the Decree is to empower the Supreme Military Council to legislate on any matter whatsoever.

3. Developments in Federal Offences

There has been tremendous activity in the enactment of federal offences in the last 53 years covering a wide range of matters falling within federal legislative powers. The Federal offences will be examined under the following sub-headings: (i) Corruption; (ii) Economic Crimes; (iii) Other offences including regulatory offences; and (iv) Retroactive penal legislations.

3.1. Legislations on Bribery and Corruption

In the last 53 years there have been legislations at both Federal and State levels on corruption. For the purpose of convenience, the provisions on corruption under State laws will be discussed in this part of the paper in conjunction with developments under Federal Laws.

The main provision in the CC on bribery is section 98, 98A and 98B. The definition of the offence of bribery revolves around bribery involving a public official. There is a general dissatisfaction (Osipitan & Oyewo, 1999, p. 257) with the provisions of anti bribery statutes in Nigeria. The general perception is that the laws are unclear complex (Okonkwo, 1992, p. 355) and difficult to interpret and apply (Akinseye, 2000, p. 47). The main problem is the use of the word "corruptly" to denote the fault element of the offences. The word "corruptly" is not defined. The problems associated with the non-definition of the word corruptly still remain in Nigeria despite the valiant attempt of Bairamian J to define the meaning of "corruptly" in *Biobaku v Police.*[2] His Lordship explained the essence of "corruptly" as follows: "*…the receiving or the offering of some benefits as a reward or inducement to sway or deflect the officer from the honest and impartial discharge of his duties- in other words as a bribe for corruption or its price*."[3]

The attempt to ascribe a meaning to the term "corruptly" by Bairamian J is

[1] Decree no. 8 of 1967.
[2] (1951) 20 NLR 30.
[3] *Ibid,* at p. 31.

commendable because, beyond the vague term "corruptly" he sought to articulate the policy underlying the criminalization of receipt of property or benefit of any kind by a public officer in relation to his official duties. The approach adopted by the Court however fails to achieve the objective of clarity and certainty. The clarification or definition of the meaning of corruptly is too important to be left with the judge. What constitute "corruptly" should be clearly set out in any law prohibiting bribery.

In contrast, the main provisions on bribery by a public official under the PC did not use the word 'corruptly.' The offence of bribery under the PC covers a person being or expecting to be a public servant who accepts, or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification whatever whether pecuniary or otherwise, other than lawful remuneration. The receipt of the gratification is as a motive or reward for: (a) doing or forbearing to do any official act; or (b) showing or forbearing to show in the exercise of his official functions favour or disfavor to any person; or (c) rendering or attempting to render any service or disservice to any person with any department of the public service or with any public servant.[1] The drafting of the wording of the offence under section 115 of the PC is clearer and less convoluted. The language of the PC is considerably simpler and easier to understand than that of the CC (Ostien, 2007, pp. 14-15) and its therefore an improvement on the definition of bribery under the CC. The definition of the offence of bribery under the PC however still revolves around bribery involving a public official.

The Federal Military Government intervened in the law on bribery in 1975 with the enactment of the Corrupt Practices Decree 1975[2] (hereinafter the 1975 Decree). The definition of the general offence of bribery under the 1975 Decree although attempted to simplify the offence of bribery but unfortunately still retained the word "corruptly."[3] It also failed to successfully remedy the public/private distinction in the law relating to bribery despite an attempt do so through the provision of section 1 of the 1975 Decree. The Decree was repealed on 28 September, 1979. The last intervention of the Military Government in the law of bribery was vide the provisions of the Recovery of Public Property (Special Military Tribunals) Decree 1984 as amended by Decrees No. 14 of 1984 and No.

[1] Penal Code, s. 115(a)(b)(c).
[2] No. 38 of 1975, Annual Volume of the Laws of the Federal Republic of Nigeria, 1975.
[3] Ss. 1(1) and 2. The Decree however contained other specific offences of bribery of member of the Supreme Military Council, the National Council of States or the Federal or State Executive Council- s. 7 and bribery of member of a public body- s. 8.

21 of 1986. The Decrees were enacted following the Military takeover of Government on 31st of December, 1983. The Decree sought to punish any public officer who has: (i) engaged in corrupt practices or has corruptly enriched himself or any other person; (ii) by virtue of his office contributed to the economic adversity of the Federal Republic of Nigeria; (iii) in any other way been in breach of the Code of Conduct; or (iv) attempted, aided, counseled, procured or conspired with any person to commit any of the aforementioned offences. The Decree was remarkable for violating the constitutional prohibition of retroactivity of penal laws.

The enactment of the ICPC Act in 2000 to specifically deal with the problem of corruption provided a unique opportunity to improve on the provisions of the CC. The writer disagrees with the view that the ICPC Act is a well-crafted piece of anti-corruption legislation in the history of Nigeria (Ocehje, 2001, pp. 177-191). This is because the ICPC Act retained the antiquated word “corruptly” in the definition of bribery offences under sections 8 and 9. The ICPC Act also failed to successfully address the focus of the CC and PC on bribery on only cases involving public officers. All the offences of bribery in the ICPC Act were defined in relation to cases involving public officers. The provisions of the Sharia Penal Code Law of Zamfara State[1] introduced around the same time as the ICPC Act and the Sharia Code of other States criminalizing bribery involving public official is substantially similar to the provisions of sections 115 – 118 of the PC. The Sharia Penal Code fails to make any meaningful improvement on the provisions of the PC.

One major problem of the laws so far examined is the focus on bribery involving only public officers. The laws do not cover cases of bribery involving only private sector officials. There is support for the view that there is no justification for maintaining the distinction between public officers and non public officers (Adedokun, 1991, p. 1). The author agrees with the view that if “we attempt to clean up the public sector without correspondingly doing the same for the private sector, the cankerworm will continuously contaminate the public sector (Adedokun, 1991, p. 1).

[1] Law No. 10 of 2000.

3.2. Legislations on Economic Crimes

Between 1962 and 2012 a number of legislations were enacted to punish economic and financial crimes. The principal legislations in the period include the Counterfeit Currency (Special) Provisions Act; [1]the Exchange Control and (Anti Sabotage) Decree[2] now replaced by the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act;[3] Miscellaneous Offences Act;[4] the Money Laundering (Prohibition) Act 2011;[5] Advanced Fee Fraud and Other Fraud Related Offences Act 2006;[6] the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act.[7] A major problem with the enforcement of these laws on economic and financial crimes is the lack of dedicated institutional capacity to enforce the Laws.

The establishment of the Economic and Financial Crimes Commission (hereafter the Commission) by the EFCC Act provided a dedicated institutional capacity to ensure the diligent enforcement of the laws. The Commission was saddled with the responsibility of enforcing some of the aforementioned legislations and any other law or regulation relating to economic and financial crimes including the CC and the PC. Despite the high profile nature and publicity of the work of the Commission, available evidence indicates that the Commission had little real success in the prosecution of 'nationally prominent leaders.'[8] Between 2003 and July 2011 only 30 nationally prominent leaders were charged with only four convictions.[9] Only one conviction was obtained at trial, with others obtained through plea bargain that involved dropping some of the most serious charges

[1] Enacted as Decree No 22 of 1984 now contained in Cap. C35 Laws of the Federation of Nigeria 2004.
[2] No. 7 of 1984.
[3] Cap. F 34 Laws of the Federation of Nigeria 2004.
[4] Decree No. 20 of 1984 now contained in Cap. M17 Laws of the Federation of Nigeria 2004.
[5] The first Money Laundering Act was enacted in 1995 as Decree No. 3 of 1995 repealed and replaced by the Money Laundering (Prohibition) Act No. 7 of 2003 which also repealed and replaced by the Money Laundering (Prohibition) Act 2004.
[6] The 2006 Act repealed and replaced the Advanced Fee Fraud and Other Fraud Related Offences Act No. 13 of 1995 and the Advance Fee Fraud and Other Fraud Related Offences (Amendment) Act, 2005.
[7] Enacted as Decree No 18 of 1994 now Cap. F2 Laws of the Federation of Nigeria 2004.
[8] A term defined to 'include current or former State Governors, and members of the federal Senate and House of Representatives , as well as handful of other political figures who can without any controversy be described as nationally prominent,' see (2011). *Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes*. New York, Human Rights Watch at p. 17.
[9] *Ibid*, at pp. 19 – 22.

against the defendants.[1] The Commission however claims to have secured over 600 600 convictions, obtained forfeiture with respect to 459 units of real estate, 593 units of vehicles/ oil vessels, 404 units of bank accounts and 183,627 units of other assets since its establishment.[2] The Commission also claims to have recovered over over US $11 Billion.[3]

An aspect of Commission's work that has attracted some criticism relates to use of plea bargaining in the prosecution of cases by EFCC. The issue of plea bargaining is however concerned with criminal procedure, and is therefore outside the scope of this paper. (Oguche, 2012, pp. 26-55).

3.3. Legislations on Other Offences

The other federal offences can roughly be divided into three: (i) legislations motivated by the desire of the Government to respond to international concerns and obligations assumed under international law; (ii) legislations responding to purely local issues; and (iii) legislations creating regulatory offences.

Legislations in the first category include the National Drug Law Enforcement Agency Act[4] the (hereafter the NDLEA Act), Trafficking in Persons (Prohibition) Law Enforcement and Administration Act[5] (hereafter the Trafficking Act). The NDLEA Act was enacted to deal with the then growing involvement of Nigerians in illicit trafficking in drugs and narcotics and to fulfil obligations under international Conventions on illicit trafficking in drugs.[6] The NDLEA Act established the National Drug Law Enforcement Agency (hereafter the Agency) and saddled it with the responsibility of enforcement and administration of the Act including the investigation and prosecution of offences under the Act.[7] The main offence addressed by the NDLEA Act are the importation, exportation, selling and

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[1] *Ibid* at 22.
[2] Oscarline Onwuemenyi, "EFCC Recovers U.S.$ 11 Billion, 459 Houses, 593 Vehicles/Oil Vessels," *Vanguard*, 28 May 2011 http://allafrica.com/stories/201105302012.html (accessed on 27 September 2011).
[3] *Ibid.*
[4] Enacted as Decree No. 48 of 1989 and now contained in Cap. N30 Laws of the Federation of Nigeria 2004.
[5] Cap. T23 Laws of the Federation of Nigeria 2004.
[6] The Conventions are the Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol Amending the Single Convention on Narcotic drugs, and the Convention on Psychotropic Substances and the United Nation's Convention Against Illicit Traffic in Narcotics and Psychotropic Substances. The international instruments have been ratified by Nigeria.
[7] NDLEA Act, s. 3.

knowingly possessing drugs known as cocaine, LSD, heroine or any other similar drugs.[1] Other offences include occupier unlawfully permitting use of premises for drug activities, conspiracy, tampering with drugs and offences in relation to drug abuse. The NDLEA Act made ample provisions to ensure the tracing and interim forfeiture of proceeds of any illegal dealing in trafficking in narcotics and psychotropic substances before conviction[2] and forfeiture after conviction.[3] The work of the Agency has received international acclaim. The United States of America recently delisted Nigeria from the list of major drug trafficking countries due to the laudable efforts o the National Drug Law Enforcement Agency (NDLEA).[4]

The Trafficking Act was enacted in 2003 to respond to international concerns about the role of Nigeria in the global illicit trade of trafficking in persons and international obligations assumed by Nigeria.[5] The Trafficking Act established the National Agency for the Prohibition of Traffic in Persons and Other Related Matters (NAPTIP) and empowered it to enforce and administer the provisions of the Act amongst other responsibilities.[6] The Trafficking Act commendably responded to the international dimensions of trafficking in persons by specifically criminalizing the exportation and importation from and into Nigeria of persons under the age of eighteen years with intent that such person or knowing that such person will be forced or seduced into prostitution.[7] The response to the international dimension of trafficking in persons is also evident in the offences relating to procurement of any person under eighteen, offence relating to promoting foreign travels which promote prostitution, procuring the defilement of any person by threats, fraud or administering drugs, and unlawful forced labour.

The impressive performance of the NAPTIP over the years in prosecuting persons involved in trafficking in persons and assisting trafficking victims has not gone

[1]NDLEA Act, s. 11.
[2] NDLEA Act, ss. 36 and 37.
[3] NDLEA Act, ss. 27, 28, 29, 30, 31, 32, 33.
[4] This was contained in 2010 Annual Drug Certification Report presented to the United States Congress. See Chinedu Eze, (18 September 2010). US Strikes-off Nigeria from Major Drug Nations' List" *This Day Live*, available on line at http://www.thisdaylive.com/articles/us-strikes-off-nigeria-from-major-drug-nations-list/78615/ accessed on 10 March 2013.
[5] Nigeria is a party to the United Nations Convention Against Transnational Organized Crime and one the Protocol made pursuant to the Convention, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Nigeria signed the Convention and the Protocol on 13 December 2000 and ratified it on 28th of June 2001..
[6] The Trafficking Act, ss. 1(1) and 4.
[7] The Trafficking Act, s. 11.

unnoticed. Nigeria has recently been elevated to Tier 1 of Trafficking in Persons List for 2001 (TIP) issued by the United States Department of State which indicates that Nigerian Government has fully complied with minimum standards for the elimination of trafficking. The writer agrees with the view that the problem now is not with the laws, but with the administration of the Laws (Ogungbe, 2007, pp. 362-379). Consequently effective enforcement and due administration of the Laws is important to reduce the scale of the trafficking problem in Nigeria.

The second category of federal legislation relate to responses to purely local issues such as the Treason and Other Offences (Special Military Tribunal) Act,[1] the Civil Disturbances (Special Tribunal) Act.[2] The Robbery and Firearms (Special Provisions) Act[3] (hereafter the Robbery Act) is another legislation that was enacted enacted to respond to the then prevalent problem of armed robbery post Nigerian civil war.

The third category of Federal Legislation relate to regulatory offences created pursuant to matters falling within Federal competence. A regulatory offence is a crime that is not inherently wrong, but that is illegal because it is prohibited by legislation.[4] A distinction is often drawn between wicked types of conduct such as murder *"mala in se"* and on the other hand the technical offences *"mala prohibita"* (Okonkwo, 1992, p. 20). Legislations on regulatory offences include offences created under such statutes and offences created under Regulations made pursuant to the statutes: (i) National Environmental Standards and Regulations Enforcement Agency (Establishment) Act;[5] (ii) the National Agency for Food and Drug Administration and Control Act[6]and (iv) Offences created under statutes regulating professional bodies.

3.4. Retroactive Penal Legislations

The prohibition of retroactive penal legislations has been a feature of the constitutional guarantee of human rights since the provision of section 21(7) of the

[1] Enacted as Decree No. 1 of 1986.
[2] Enacted as Decree No. 2 of 1987.
[3] Original enacted as Decree No. 47 of 1970 was amended by Decree No. 48 of 1971 and Decree No. 8 of 1974. The Decree lapsed with the coming into force of the 1979 Constitution by virtue of the Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals, etc) Decree No. 105 of 1979.
[4]http://law.yourdictionary.com/regulatory-offense (Accessed on 10 March 2013).
[5] No. 25 of 2007.
[6] Cap. N1 Laws of the Federation of Nigeria 2004.

1960 Constitution. This fundamental guarantee has however been trampled upon in the course of developments in substantive criminal law under Military Governments. An example of such retroactive penal legislation was the Recovery of Public Property (Special Military Tribunals) Decree[1] made retroactive to cover offences under the Decree committed since 1st October 1979.[2] The Decree was enacted to deal with corrupt practices of public officers who served between 1979 and 1983. There was indeed no justification for backdating the Decree as there were ample provisions of existing laws such as the provisions of the CC and PC to deal with such conducts. The provision of section 36(8) of the 1999 Constitution precludes the enactment of retroactive penal legislation.

4. Developments in State Offences

There were virtually no significant developments in State offences until the return to constitutional democracy in 1999. A factor that might have accounted for this is that during Military Regimes (unlike what obtain in a constitutional democracy) the Federal Government can make laws on any matter whatsoever thereby leaving the States with very limited legislative powers. The first major development in States offences occurred with the introduction of Sharia Penal Code in States in Northern Nigeria. The other major development in State offences occurred with the enactment of the Criminal Law of Lagos State 2011 and the recent enactment of laws in some eastern States to respond to the phenomenon of kidnapping.

4.1. Developments in Sharia Penal Code Law

One of the central motivations for introducing Sharia Penal Code Law in Northern Nigeria is the desire to find a cure for the many social ills besting the predominantly Muslim North (Ostien, 2007, p. 3). Whether the Sharia Penal Codes introduced by States in Northern Nigeria has reduced the social ills however remains to be seen. The provisions of the PC criminalizing conduct contrary to Islamic values such as consumption of alcohol,[3] and adultery[4] have continued to be

[1] No. 3 of 1984.
[2] Recovery of Public Property (Special Military Tribunals)(Amendment) (No. 2) Decree of 1984. See also the Special Tribunal (Miscellaneous Offences) Decree No. 20 of 1984 introduced death penalty by firing squad for any person convicted of dealing with selling, buying etc of cocaine or similar drugs.
[3] Penal Code, s. 403.
[4] Penal Code, ss. 387 and 388.

be criminalised under the Sharia Penal Codes. Section 148 of the Harmonised Sharia Penal Code also criminalised knowingly and voluntarily drinking alcohol or any other intoxicant. Generally the offences only apply to Muslims and the provisions of the PC continue to apply to non-Muslims.

The Sharia Penal Codes introduced some offences which have continued to generate controversy. The offence of theft or *sariqah* is punishable at first instance with amputation of the right hand, second offence amputation of the left foot, third offence amputation of the left hand, fourth offence amputation of the right foot and subsequent theft for a term not exceeding one year.[1] The provisions of sections 126 and 127 of the Sharia Penal Code of Zamfara State while slightly changing the definition of the offence of adultery under sections 387 and 388 of the PC has rechristened the offence as "zina" and imposed a sentence of one hundred lashes of caning and imprisonment for one year where the offender is unmarried and a sentence of stoning to death where the offender is married. The following offences when committed by a married man attracts the punishment of stoning to death: (i) rape;[2] (ii) sodomy;[3] and (iii) incest[4] The cases of two women convicted of the offence of zina and sentenced to death by stoning attracted public outcry and international concern. The first was the case of *Commissioner of Police v. Yakubu Tudu and Safiyatu Hussaini* (Ostien, 2007, pp. 17-51) who was sentenced to death by stoning in October 2001 for allegedly having a child with a married neighbour. She successfully challenged her conviction on appeal. The second was the case of *Commissioner of Police v. Aminu Lawal and Yahayya Muhhamed*[5] who was also convicted of *zina* on 20th of March 2002. Like Hussaini she won her appeal against conviction at the Sharia Court of Appeal Katrina State on technical grounds including inter alia the fact that the trial court was not properly constituted as required by section 4(1) of the Sharia Court Law[6] because contrary to the law the judge did not sit with two court members.

The issue of the constitutionality of the punishment of stoning to death in the light of the constitutional prohibition of torture or inhuman or degrading treatment was not raised or considered at the trial and appellate courts in the above cases. Section

[1] Zamfara Sharia Penal Code, ss. 144-145. See however section 147 which provides a list of circumstances that will remit the penalty of amputation.
[2] S. 129(b).
[3] S. 131(b).
[4] S. 133(b).
[5] For proceedings and judgment see Philip Ostien, ibid at pp. 52- 107.
[6] Law No. 5 of 2000 of Katisna State.

34(1) of the 1999 Constitution guarantees the right of respect to the dignity of the human person and precludes subjecting any person to "torture or to inhuman or degrading treatment." While the death penalty is allowed in Nigeria by section 33(1) of the 1999 Constitution, carrying it out in a manner that amounts to torture or inhuman or degrading treatment in the writer's view may violate the constitutional protection. In the case of *Uzoukwu v. Ezeonu II*[1] the Court of Appeal in the judgment of Justice Niki Tobi defined inhuman treatment to mean a

"*Treatment which is barbarous, uncouth, and cruel treatment: a treatment which has no human feeling on the part of the person inflicting the barbarity or cruelty*."

The decision in the United States Supreme Court in the case of *Furman v. Georgia*[2] holding that the power of the legislature to impose the death penalty is not exempted from the constitutional prohibition against cruel and unusual punishments is instructive. Similarly, the European Court of Human Rights in the *Soering v. U.K.*[3] also held that while the prohibition of inhuman and degrading treatment does not per se outlaw the death penalty, it might be necessary to take account of the manner in which the death sentence is imposed and the personal circumstances of the condemned person. Having regard to the foregoing, the writer agrees with the view that amputation of limbs and death by stoning are indeed a form of torture,[4] inhuman and degrading treatment and a violation of the right to human dignity.

The assessment of impact of the implementation of Sharia Penal Codes in Northern Nigeria is a difficult task. The initial expectations that Sharia would curb corruption in government, enhance socio-economic welfare, reduce grassroots level crime and ensure more efficient dispensation of justice have not been realised.[5] There is little evidence that Sharia has reduced overall criminality in the twelve Sharia States that have adopted Sharia Penal Code.[6] The slight changes in the law

[1] (1991) 6 NWLR (Pt. 200) 708.
[2] (1972) 498 U.S. 238.
[3] ECHR, Series A No. 161, Judgment of July 7 1989, 11 EHRR 439.
[4] Ruud Peters, " The Reintroduction of Sharia Criminal Law in Nigeria: New Challenges for the Muslims of the North" http://uva.academia.edu/RuudPeters/Papers/367800/_The_reintroduction_of_sharia_ criminal_ law_in_Nigeria_New_challenges_to_the_Muslims_of_the_North._in_S._Tellenbach_and_Th._Hanstein._Beitrage_zum_islamischen_Recht_IV._Frankfurt_a.M._Peter_Lang_2004_Leipziger_Beitrage_zur_Orientforschung_15_pp._9-23 accessed on 9 March 2013).
[5] See International Crisis Group Africa Report No. 168, (20 December 2010). *Northern Nigeria: Background to Conflict*, 20 at p. 17
[6] *Ibid.*

in some States in Northern Nigeria relating to consumption and manufacture of alcohol has not resulted in changing the consumption of alcohol in Northern Nigeria by Muslims. In the words of a commentator, "not much has really changed on the ground: the sinning continues." (Ostien, 2007, p. 42). The initial enthusiasm that followed the introduction of Shania in 2000 has waned over the years as State Governments have exercised restraint in applying the harsher punishments and Sharia has not been widely applied in some states.[1]

4.2. Other Major Developments in States Offences

A cursory look at the CC of States in Southern Nigeria reveals that some minor amendments were introduced into the law since the introduction of the CC into the whole of Nigeria in 1916. What has been lacking is any serious effort to undertake a comprehensive reform of CC, in terms of underlying philosophy and criminalisation policy. The Lagos State Government in 2008 set up a Criminal Code Law Reform Committee (hereafter the Reform Committee) with a mandate to undertake a reform of the CC and propose a draft Criminal Law Bill for Lagos State. The Reform Committee proposed the Criminal Law of Lagos State Draft Bill 2009 which was eventually enacted as Criminal Law of Lagos State 2011(hereafter Criminal Law 2011).

The Criminal Law 2011 has considerably modernised and simplified the provisions of the Law. The provisions of the Law have been substantially reworded with the goal of ensuring clarity and user friendliness. Many of the old offences have been redefined and many provisions have been reviewed in response to academic reviews calling for reforms. The Criminal law 2011 also introduced a number of new offences such as: (i) offences related to the unauthorised access to any program or data held on a computer and unauthorised modifications of the contents of a computer; (ii) special offences designed to protect public property such as unlawful interference with public property and unlawful conversion of public property; (iii) offences relating to acts of terrorism; (iv) provisions increasing the penalty for offences where special circumstances exist to aggravate the offence such as hostility towards members of a particular ethnic, religious or racial groups. The Criminal Law 2011 also reformed the law relating to sexual offences, assault and in particular the law relating to the offence of stealing. The definition of things

[1] See International Crisis Group Africa Report No. 168, (20 December 2010). *Northern Nigeria: Background to Conflict.* 20 at p. 16.

capable of being stolen has now been widened to allow for fraudulent dealings relating to land to be punished as stealing or obtaining by false pretences.

The Criminal Law 2011 did not reform the provisions of the law relating to the imposition of the death penalty[1] and has not provided any other exceptions to the law prohibiting abortion except when abortion is required to save the life of the mother.[2]

The other major development in relation to State Offences is the enactment of State Legislations imposing death penalty for kidnapping offences. This would be discussed under the subsequent part of the paper.

5. Common Trend in Substantive Criminal Law- The Death Penalty

This part discusses common trends in the developments of substantive criminal law at both the Federal and State Offences. The common trend in the evolution of federal and state offences in the last 53 years is the continued provision for death penalty in the criminal Laws.

In the period under review, while the death penalty has continued to be used as punishment for certain offences, it has been introduced and later removed as punishment for certain other offences. The death penalty has always been imposed for the offences of murder and treason.[3] The punishment for the offence of armed robbery was initially life imprisonment. The increase in the incidence of armed robbery after the civil war necessitated the imposition of death penalty with the enactment of Robbery and Firearms (Special Provisions) Decree.[4] The death penalty has since remained the punishment for armed robbery.

The imposition of death penalty has been introduced and abolished for a number of offences in the last 53 years. The following offences have at one time or the other attracted the death penalty: (i) counterfeiting of Nigerian banknote; (ii) arson of public building etc; (iii) tampering with oil pipelines; (iv) tampering with electric and telephone cables: and (v) offences relating to drugs amongst others. The death penalty for the foregoing offences was abolished and replaced with varying terms of imprisonment by the Special Tribunal (Miscellaneous Offences) Amendment

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[1] Section 15(1) of the Criminal Law 2011 retains the death penalty.
[2] Criminal Law 2011, s. 201.
[3] The death penalty was imposed for murder and treason in the Criminal Code introduced into Northern Nigeria in 1904 and the Criminal Code applicable to the whole of Nigeria in 1916.
[4] No. 47 of 1970.

Decree.[1] Recent legislations have however, introduced death penalty for offences relating to terrorism where death results[2] and kidnapping offences[3]

The Terrorism (Prevention) Act 2011 (the Terrorism Act) according to its explanatory memorandum was enacted for the prevention, prohibition and combating of acts of terrorism, the financing of terrorism in Nigeria and for the effective implementation of the Convention on the Prevention and Combating of Terrorism and the Convention on the Suppression of the Financing of Terrorism. The Terrorism Act prohibits acts of terrorism and defined various activities that constitute acts of terrorism.[4] The Act also contains provisions aimed at dealing with sources of finance for terrorist activities and seizure of funds belonging to terrorists.[5]

Various arguments have been canvassed for and against the death penalty. It is beyond the scope of this paper to examine the arguments for and against the use of the death penalty. There is no unanimity in the literature on whether the death penalty should be retained (Okonkwo, 1990). One undeniable fact however is that the introduction of the death penalty for offences other than murder and treason were not preceded by any scientific effort to determine the usefulness of the death penalty as an effective criminal sanction. With the exception of recent introduction of the death penalty for offences of terrorism and kidnapping, all the cases of fresh introduction of death penalty in the last fifty three years occurred during Military Regimes. While available evidence does not support the efficacy of the death penalty (Adeyemi, 1990, p. 284) it appears that public perception and opinion may support the continued use of the death penalty for offences such as murder and armed robbery (Okonkwo, 1990, p. 268). The recent Criminal Law of Lagos State 2011 although did not introduce death penalty for new offences however retained its use for murder and armed robbery.[6] A decision on the question of whether or not to abolish the death penalty is one that has to be taken with great care.

[1] No. 22 of 1986.
[2] Terrorism Prevention Act, 2011, s. 4(2).
[3]Akwa Ibom, Abia, Anambra, Imo and Rivers State are all reported to have enacted legislation introducing death penalty for kidnapping. The Abia State's Internal Security and Enforcement Law 2009 and Anambra State's Criminal Code (Amendment) Law 2009 imposed death penalty for kidnappers.
[4] Terrorism Act. S. 1(1) & (2).
[5] Ss. 10, 12, 13, 14, 15, 16 and 17.
[6] It is important to note however that despite the retention of the death penalty, a practice has evolved in Lagos State of commuting all death sentences to life imprisonment since the return to constitutional democracy in 1999. This may be perceived as a tacit abolition of the death penalty in Lagos State.

Technically the 1999 Constitution[1] and criminal laws allowing the death penalty at the federal and State levels in Nigeria are within the provisions of article 6 of the International Covenant on Civil and Political Rights (ICCPR) which permit countries to continue to use death penalty. This is however subject to the conditions that the penalty is imposed only for serious crimes in accordance with the law in force at the time of the commission of the crime and pursuant to a final judgement rendered by a competent court.[2] The execution of the appellant in the case of *Nasiru Bello v. Attorney General of Oyo State*[3] which took place before the ratification of the ICCPR by the Nigerian Government (Nigeria ratified ICCPR on 29th July 1993) would have been a breach of its provisions. In that case, the Supreme Court awarded damages against the Government of Oyo State, for executing the appellant, when an appeal against his conviction and sentence of death was still pending at the Court of Appeal. Nigeria has not ratified the Second Optional Protocol to the ICCPR[4] which provides that no one within the jurisdiction jurisdiction of a State Party to the Protocol shall be executed and obliges each State Party to take all necessary measure to abolish the death penalty within its jurisdiction.[5] The Protocol however allows a State Party to make a reservation at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.[6] The provision of article 9 of the Protocol stating that the Protocol shall "extend to all parts of federal States without any limitations or exceptions" poses a challenge to federal States.

The challenge is that in Nigeria both the Federal and the State Governments have legislative powers to enact criminal laws and impose the death penalty. It is however only the Federal Government that exercises treaty making powers.[7] Before ratifying any treaty it will therefore be necessary for the Federal

[1] Section 33(1) of the 1999 Constitution allows for the imposition of the death penalty after conviction for a criminal law if the punishment is prescribed by law. In the case of *Kalu v. The State* (1998) 13 NWLR (Pt. 598) 531 the Supreme Court sustained the constitutional validity of the death penalty in Nigeria.

[2] Article 6 of the ICCPR. Adopted and opened for signature, ratification and accession by General Assembly
resolution 2200A (XXI) of December 1966 entry into force 23 March 1976.

[3] (1986) 12 SC 1.

[4] The Protocol was adopted by the United Nations General Assembly Resolution 44/128 of 15 December 1989 and entered into force on 11 July 1991.

[5] Article1.

[6] Article 2(1).

[7] Section 12(1) of the 1999 Constitution recognizes that treaties can only be made between the Federation and any other country.

Government to ensure that the majority of States are agreeable to the abolition of the death penalty. Building national consensus on abolishing the death penalty in a multi ethnic and multi religious society like Nigeria is probably going to be a very difficult task having regard to the controversy that trailed the introduction of Sharia in Northern States. Indeed, where the National Assembly enacts an Act to incorporate a treaty into Nigerian Law on matters not included within Exclusive Legislative List, there is requirement that it shall be ratified by a majority of all the House of Assembly of the States before the Act is assented to by the President.[1] This provision makes it difficult for the President as head of the Federal Government to ratify the Second Optional Protocol without first ensuring that there is a consensus to abolish the death penalty in Nigeria amongst the majority of the States. It is therefore not surprising that a country like United States of America with similar constitutional arrangements has not ratified the Protocol.

Having regard to the foregoing, the way forward with respect to the issue of death penalty in Nigeria is for the Federal and State Governments to suspend the continued implementation of the death penalty and allow for consultations and dialogue over the issue to shape future legislative intervention.

6. Evaluating Responses to Domestic and International Law Issues

Substantive criminal laws at the federal level have generally fulfilled obligations assumed by Nigeria under international conventions. The principal international conventions on bribery and corruption are the African Union Convention on Preventing and Combating Corruption (AUCC)[21] and the United Nations Convention Against Corruption (UNCAC)[3]. The Nigerian Government has signed and ratified these Conventions[4]. The obligations assumed by State parties to the Conventions include taking legislative measures to criminalize the conducts defined under the Conventions through new laws or amendments of existing ones[5].

[1] Section 12(2) & (3) of the 1999 Constitution.
[2] The AUCC was adopted in Maputo on the 11 July 2003 and it entered into force on 5 August 2006.
[3] The United Nations General Assembly adopted the UNCAC by Resolution 58/4 of 31 October 2003 and it entered into force on 14 December 2005.
[4] The UNCAC was signed by the Nigerian Government on 9 December 2003 and ratified on 14 December 2004 <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (visited on 15 January 2013). The AUCC was signed by the Nigerian Government on 16 December 2003 and ratified on 29 September 2006 at: http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%refor20on%20Combating%20Corruption.pdf (accessed on 20 March 2013).

ones[1]. UNCAC and AUCC sets out the offences that State parties are obliged to create under municipal laws. The criminalization of bribery under the Nigerian statutes earlier examined has fulfilled the obligations assumed by Nigeria to criminalize bribery involving public officers. The obligations to criminalize bribery involving only private sector officials however still remain outstanding. The Nigerian statutes examined on bribery should be amended to introduce provisions criminalizing bribery involving only private sector employees.

The Nigerian government has also significantly fulfilled obligations assumed under international Conventions related to illicit trafficking in drugs. The NDLEA Act earlier examined has fulfilled the obligations assumed under international law to criminalize illicit trafficking in drugs and other issues associated with illicit trafficking. Similarly the Trafficking Act earlier examined has also fulfilled the obligations assumed by Nigeria under international conventions related to trafficking in persons.

With respect to responding to domestic issues, federal offences have also substantially responded to emerging domestic criminal law issues, some of which also have international dimensions. Bribery and corruption is a cardinal domestic issue which the statutes have generally responded to. Another domestic issue which the statutes examined have also responded to is the issue of money laundering, and advanced fee fraud. The EFCC Act and other legislations have responded to the issue of money laundering and advanced fee fraud.

Apart from bribery involving only private sector employees, another important gap in federal offences is the absence of legislation dealing with cyber crimes. Cybercrime is defined as crimes committed on the internet using the computer as either a tool or a targeted victim (Joseph, 2006[2]). While some of the property offences like stealing, obtaining property by false pretences may be applied to prosecute some cyber crimes, it is important to enact legislation to specifically deal with all the issues relating to cyber crimes.

The Council of Europe's Convention on Cybercrime provides a platform to model

[1] United Nations Office of Drugs and Crime, Division for Treaty Affairs, *Legislative Guide for the Implementation of the United Nations Convention Against Corruption* available at http://www.unodc.org/pdf/ corruption/CoC_LegislativeGuide.pdf p. 4 (accessed on 20 March 2013).
[5] See generally AUCC, Arts 4, 5(1), 6, 8, and 11 and UNCAC, Chapter III.
[2] http://www.crime-research.org/articles/joseph06/(accessed on 20 March 2013).

legislation on cybercrime.[1]

Developments in criminal laws in the Northern States in the period under review have significantly responded to domestic criminal law issues. The introduction in 1960 of a PC for the Northern States reflected the predominant cultural and religious sensibilities of the people of Northern Nigeria by criminalizing conducts contrary to Islamic values as noted earlier in the paper. A further response to accommodate cultural and religious sensibilities also occurred with the introduction of Sharia Penal Codes. The introduction of the punishments of stoning to death and amputation of hand and foot however, runs contrary to the right to human dignity, prohibition of torture, inhuman and degrading treatment guaranteed under the 1999 Constitution and article 7 of ICCPR.

Unlike what obtains in Northern States, developments in criminal laws in Southern Nigeria cannot be said to have significantly responded to domestic issues. The CC introduced into Southern Nigeria in 1916 has continued to apply in all Southern States with the exception of Lagos State. The other Southern States need to reform the CC to reflect modern realties as was done in the Lagos Criminal Law 2011.

7. Conclusion: Prospects for the Future

The paper examined developments in substantive criminal law in Nigeria since 1960. Federal legislative powers over offences have been proactively used to respond to emerging local and international criminal law issues. States however, have been slow to use their legislative powers to keep pace with evolution of society and respond to contemporary realties that require statutory intervention. The need for proactive legislative interventions in the creation of offences by States cannot be overemphasized. Offences are generally local in nature and require the intervention of states. The 1916 CC applicable in Southern States (except Lagos) is in need of urgent reform to respond to contemporary realities.

The PC introduced to Northern Nigeria in 1960 is already fifty three years old and should be reviewed. The recent introduction of Sharia Penal Codes in Northern States also needs to be reviewed to ensure that punishments which violate the right to the dignity of the human person guaranteed under section 34(1)(a) of the 1999 Constitution and the ICCPR are removed from the Codes. The freedom of States to

[1] The Convention was opened for signature on 23 November, 2001 and entered into force on 1 July 2004.

enact criminal laws that suits their cultural and religious persuasion is conceded. State laws must however conform to fundamental human rights.

While the attempt to respond to contemporary forms of criminality at the domestic and international levels at the federal level is commendable, existing gaps relating to bribery involving only private sector officials and the need to introduce cybercrime legislation should be filled. It is expected also that the issue of the death penalty should be subjected to extensive consultations and dialogue before legislative intervention, especially in view of the recent introduction of death penalty for the offence of kidnapping.

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*** Constitution of the Federal Republic of Nigeria 1979, s. 4(2), (3), (4), and (7).

*** The Conventions are the Single Convention on Narcotic Drugs 1961 as amended by the 1972 Protocol Amending the Single Convention on Narcotic drugs, and the Convention on Psychotropic Substances and the United Nation's Convention Against Illicit Traffic in Narcotics and Psychotropic Substances. The international instruments have been ratified by Nigeria.

*** The Penal Code Law No. 18 of 1959.

***International Crisis Group Africa Report No. 168 (20 December 2010). *Northern Nigeria: Background to Conflict,* 20, p. 17.