

***Zinā* in the Criminal Legislation Act (1999-2000): An Evaluation of the
Implication for Muslim Women's Right in Nigeria**

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Paul Orerhime Akpomie

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Glossary of Islamic Technical Terms

Fiqh: This is the science of applying *Shari'a*.

Hadd (pl. *hudūd*): The literal meaning is limit. The boundaries laid down by law. When applied in the criminal law, it carries the meaning of unchangeable penalty or punishment handed down by Allah for specific offenses.

Hadith (pl. *ahadith*): The report of the actions, sayings and consents of the Prophet Muhammad (SAW).

I'izar: Hausa Language for the Arabic *i'dhar*. It refers to a formal opportunity given by the judge of a *Shari'a* court to the individual(s) being trialed to challenge evidences.

Ihsan: This is a state for an adult who is free, mentally sound, who is or was a partner in legal marriage.

Ijtihad: Refers to the technical application of judges make to arrive at the law from its sources.

Kwatacen Ciki: Hausa language for Sleeping embryo. It is used in reference to the principle of “dormant embryo” in the Maliki jurisprudence.

Madhab (pl. *madhahib*): It refers to a school of Islamic jurisprudence (*fiqh*).

Mohsan: Refers to a man (or *mohsinat*, a woman) in the state of *ihsan* .

Shubha: This means doubt with regards to illegal acts.

Qadhf: Means defamation. It falls under *hadd* offenses for it is an unfounded accusation of adultery.

Rajm: Refers to stoning to death. It is a fixed penalty for *zinā* (adultery).

Zinā: Means adultery. Illegal sexual intercourse outside wedlock.

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ABSTRACT

The research engages in an exploration of human rights in Islam. Human rights issues are then contrasted with international law positions. The data gotten is then used for investigating women's human rights issues in *Shari'a* penal tradition regarding *zinā* (adultery) in Nigeria. The re-emergence of Sharia penal codes adopted by 12 Northern states in Nigeria in 1999 as an operative Islamic law has sparked concerns about rulings amounting to stoning to death in several cases of *zinā*. These events raised concerns about Shari'a penal traditions' legality and relationship with other legal traditions operational in Nigeria, a secular political space. (Chapter I)

Another element presented is the discrepancy between the theoretical viewpoint on women's human rights. How is this perspective applied to Muslim women jurisdictions? The research uses the example of *Shari'a* court cases with regards to *zinā* in Nigeria to illustrate the branching between theory and practice of *Shari'a* penal laws. Our essay shall consider *Shari'a* court proceedings and rulings of Safiyatu Hussaini and Amina Lawal cases of *zinā* for our research.¹ We shall focus on some of the infringed women's rights violations articulated in the primary court sources and other secondary sources. (Chapter II)

Chapter III is dedicated to evaluating the development of the court cases and ruling from the *zinā*, as mentioned earlier in chapter II. The analysis provides an insight into areas of human rights violations, especially against women. It demonstrates that where women and men had been prosecuted for *zinā*, mostly women, have been charged and convicted of the crime. Therefore, illustrating the gender biases exhibited in the court convictions and procedural neglects against the women charged. However, the paper's research will also proffer that women's rights in *Shari'a*

¹ In 2002, Safiya Hussaini was sentenced to death by *rajm* under the new *Shari'a* criminal codes in Sokoto. Amina Lawal was sentenced to be stoned to death for *zina* in 2002. These two cases gained international recognition.

are not completely at odds with principles of international human rights standards of the United Nations. The argument's postulation stems from asserting that the Islamic penal tradition is not inflexible. Based on its primary sources the *Shari'a* lends itself to various explications in jurisprudence (*fiqh*) to help circumvent issues bordering on abuse of women's rights in Islam. The jurisprudence of the Maliki *Shari'a* Courts of Appeal in *zinā* cases will help illustrate this fact. (Chapter III)

The research concludes by addressing the possibility of discerning the reconciliation between international rights standards and Islamic women's rights concerns. This thesis acknowledges that there are aspects of women violations' present in *zinā*-related cases and establishes that there is room for reforms. However, in a pioneering manner, the essay considers a more exhaustive review of the *zinā* cases above to argue against the notion that it is impossible to attain any form of human rights or justice in Shari'a courts for women. In other words, it challenges the proposition that Shari'a penal laws are incompatible with international human rights. This research attempts to refute the position that Shari'a penal codes are not-dynamic. The Shari'a Appeal Courts in Nigeria is saddled with the responsibility of safe guarding Shari'a from a reductionist approach to a holistic form that is multi-valued and teleological rather than causal. Such a consideration bridges Shari'a with regards to women rights issues in zina cases with the spirit of international set norms for all human rights. (Chapter IV)

This thesis proposes that the Shari'a Courts of Appeal ruling could be set as a benchmark forum for further evaluative projects of the Shari'a criminal and penal codes procedures. Adhering to such reforms will be following the legacy of the Shari'a committee of 1958-1962 set at bridging Shari'a law in the penal code of 1960 with human rights concerns. The 1999 Shari'a committee failed to meet this salient mark as discussed in chapter I.

The paper ends on a note of suggestions for some considerations for Shari'a criminal and penal reforms at ordering and safeguarding women's rights in Nigeria.²

BACKGROUND OF STUDY

In today's world, the interplay between religion (in this case, Islam) and civil law, human rights, and constitutionalism take prominence in intellectual circles and dialogues in international and local spaces. It is vital to understand how the re-establishment of *Shari'a* criminal law in Northern Nigeria has influenced human rights issues, especially women's rights.³ The international standard of non-discrimination based on gender as considered in the United Nation's human rights instrument led to the adoption of exterminating all discriminatory forms of against women. In 1999, there was a resurgence of *Shari'a had* codes in some Northern States of Nigeria.⁴ Since this re-emergence cases of *zinā* (adultery) in *Shari'a* courts have led to criticism of Shari'a penal codes on certain matters as contravening the significant arrangements of the international human rights norms.

Women's rights in *Shari'a* (specifically with regards to Nigeria's *Shari'a* penal code ruling in *zinā* cases) has always been of keen interest to me for about a decade now. The intricacy of the

² Before 1960 (Nigeria's independence), *Shari'a* law was fully applied in Sokoto caliphate, northern Nigeria. It was affected by colonial rule. *Shari'a* penal codes were revoked at the dawn of Nigeria's independence in 1960. From then on, Islamic sharia law was limited to the law of family relations and personal rank. The settlement in 1960 brought these changes: The Northern courts in which her *qadis* (judges) administered Islamic law witnessed changes in the court systems and their judges become more Western-trained and less traditionally Muslim. In response to this trend, the program of "implementation of *Shari'a*" started in 1999 in 12 Northern states. It was an attempt at restoring the *status quo ante* of Sharia before 1960.

³ The UN's General Assembly adopted it on 18th December 1979 and entered into force on 3rd September 1981.

⁴ On 27th October 1999, Zamfara State adopted Shari'a penal codes for criminal judgments, which came into force on 27th January 2000. 12 states adopted *Shari'a* penal codes into the crime legislation: Zamfara, Borno, Bauchi, Gombe, Yobe, Kaduna, Katsina, Sokoto, Kebbi, Niger, and Jigawa.

research into women's right issues, and its varied subject matters is captivating, requiring more research in the area.⁵

RATIONALE AND OBJECTIVE

Our essay shall consider Shari'a court proceedings and judgments of cases of *zinā* in Nigeria.⁶ This study aims to analyze women rights issues with regards to *zinā* (adultery) in Islam and conventual United Nation's law as adopted in Nigeria's 1999 national constitutions. It applies this scientific approach to investigate Muslim women's rights issues regarding Nigerians' re-emergence of the *Shari'a* penal codes (1999) applications to cases of *zinā*. vital to this research is its underpinning refutable to the "generalized" criticisms about Shari'a's inability at meeting international human rights positions because Islamic legal traditions are tagged as a non-monolithic entity.

Our research argues that the postulates of *Shari'a*, do not incorporate of unyielding group of rules; rather, regarded holistically and in non-reductionist approach, Shari'a is in-built with a dynamism sensitive at meeting human rights issues in every time and age.

This paper is a useful tool in comprehending *Shari'a* law's interaction (criminal and penal procedure codes) and women's rights. It is significant to the debate of justice for all.

⁵ Ann Mayer was keen on the relationship of rights as it interplayed in Islam and in international law. Her work took a look at some women's right issues in *Shari'a* from the Middle East Islamic nations. Cf. Elizabeth Ann Mayer, *Islam and Human Rights: Traditions and Politics*, 5th ed. (Boulder: Westview Press, 2007). There are rooms for further researches. I have decided to look at the issues around women's rights centered on *zinā* cases in Northern Nigeria.

⁶ In 2002, Safiya Hussein was charged for adultery and sentenced to rajm under the new *Shari'a* criminal codes in Sokoto. In the same year, Amina Lawal was convicted of the same crime sentenced to death for *zinā* These two cases gained international recognition and are models for considering the basic standings and standards for Zina cases in Nigeria sharia courts today.

METHODOLOGICAL APPROACH

With an anthropological hindsight on our subject matter which concerns women right issues in *zinā* court cases in Nigeria, our thesis shall use a deductive and comparison methodology format. It shall present and analyze court case materials (both primary and secondary) from Shari'a Court records of first instance (Lower court and the Upper Shari'a courts) to deduce information on areas where *zinā* cases embedded formation of inequality that take their lawfulness from deductions from *Shari'a*. Thus, illustrating a reductionist approach of this arms of jurisprudence and its implication for women's right.

Next, our findings shall be compared with the interpretations of the *Shari'a* Appeal Courts (representing a wider and holistic interpretation of the laws) to illustrate how *Shari'a* meets the integrity of human dignity assured by the 1999 Constitution of Nigeria which heavily incorporates international human rights laws.

Given its huge insistence on the interpretations and positions of the *Shari'a* Appeal Courts on *zinā* issues addressed, it also proposes this arm as a tool to help meet the need for *ijtihad* needed to converge Islamic *Shari'a* goals with international rights, especially regarding women's right issues. This is proposed as an avenue for amending the rushed process of the 1999 *Shari'a* panel committee to help it reach the models of its antecedents' legacy of the Sharia committee of 1958-1962 as discussed in chapter one.

Chapter One

1. 0 A Contextual and Historical Consideration of *Shari'a* Status in Nigeria

Introduction: 1999 to 2000 witnessed 12 northern States of Nigeria adopt *Shari'a* criminal penal codes. The re-emergence of *Shari'a*'s criminal and penal codes is a reaction against the settlement of 1960.⁷ In 1960 *Shari'a* criminal law was revoked. From then on, Islamic civil law strictly catered only to family relations and personal status laws. Our chapter, therefore, identifies the area of contention about *Shari'a* today (that is, criminal and penal codes) with regards to concerns about her relationship with Nigeria's constitutional laws and concerns about the *Shari'a* criminal penal codes meeting up with international human rights issues. This chapter shall expound on the relationship between the legal traditions (customary, Islamic, and common law) of Nigeria to establish *Shari'a* criminal law's status and scope today.

We shall further delineate the crux of the matter in the 1999 *Shari'a* penal committee in contrast to the 1958–62 *Shari'a* panel, which amended applying the penal codes and principles to bring *Shari'a* criminal laws into harmony with international human rights.

1.1 Relationship and Status of *Shari'a* in the Legal Traditions in Nigeria

Since the 9th century, Islam was brought into Northern Nigeria when Arab merchants had trade contacts with Borno Caliphate. *Shari'a* has been used at least since Shehu Uthman established the Sokoto Caliphate in 1804.

What is the relationship and status of *Shari'a* law in the legal traditions in Nigeria?

⁷ At Independence of the nation in 1960, trials were carried out to help develop a legalized way to consider different religious adherents via meetings which included a committee on Islamic jurisprudence experts. The *hudud* punishments of *Shari'a* were curtailed to other alternatives such as flogging, fines, and in some cases, imprisonment.

Intertwined to Nigeria's political history is legal pluralism.⁸ British authorities controlled the northern and southern protectorates separately. Both parts of the country were joined together in 1914. In 1954, Nigeria was broken into 3 (three) parts. Each area was given considerable power which made them advance along negligible variant lines. During the year 1967, including the Capital city, Nigeria had 36 states. Despite the states' subsequent creations, majority of the state laws were unified laws of particular regions. The reason for this was because unified laws were used in each of these regions before they became states. The conformity of *Shari'a* and customary laws in the northern states continued mostly until 1999, when 12 of these states adopted *Shari'a* as the essential origin of laws.

Legal diversity is multiplex in Nigeria; it has tripartite distinct forms. Laws in Nigeria comes from these legal systems discussed next. Customary law is native law, with each aboriginal groups having their specific local law.⁹ Hence, customary law constitutes legal diversity stemming from the country's diverse legal systems or legal cultures. In Nigeria, religion has intrinsic close links with ethnicity and wider scope with regionalism.¹⁰ During the last half of the 18th century, Islam was common and eventually emerged as state law in each emirate making up the Sokoto Caliphates.¹¹ There were large numbers of adherents to other religions within the caliphates to whom native laws applied.¹² Yet, for the British administration at the colonial times, Islamic law

⁸ Nigeria consists of heterogeneous ethnic, religious, and legal elements. There are more than 250 ethnic tribes and within these groups sub-groups. The Yoruba, Igbo, and Hausa-Fulani, are the predominant tribes of the country. The pluralistic nature of the nation makes for the diverse legal system practiced. The legal pluralism practiced in Nigeria arises from the country's diverse legal traditions or legal cultures.

⁹ Cf. Yemisi Dina, Guide to Nigerian Legal information, GLOBALEX (February 2005), <http://www.nyulawglobal.org/globalex/nigeria.htm>

¹⁰ There are categorical discourses on disparity between a "Muslim North," and "Christian South." We should note that this is a misunderstanding. Muslims are predominant in the North, but there are non-Muslim groups from the North too. Similarly, although Christians are predominantly more in the south, Islam has its pocket of adherents.

¹¹ Cf. Mervyn Hiskett, *The Development of Islam in West Africa* (New York: Longman Inc. House, 1984), p. 172.

¹² Cf. Ahmed Beita Yusuf, *Nigerian Legal System: Pluralism and Conflict of Laws in the Northern States* (New Delhi: National Publication House, 1982), pp. 55, 71-75.

is customary law. English laws (which widely govern the federal and State styled legal status) owe their antecedents to colonialism. English laws operate within a Eurocentric ideology of law.¹³

The concept of “religious law” is a Western contraption of religion. Different from such a view, there is an opinion between Islamic and Western thoughts on religious. Eurocentric perception of religion is mostly seen as system of beliefs. This is not so in Islam. This is because religion falls under two categories simultaneously: It is ones *iman* (belief) that encompasses the manner of lifestyle (*minhaj*)¹⁴ lived. Islamic law is a fully developed legal body like civil law, or common law. In the context of Islam, “religious law” refers solely to laws linked to worship (*ibadat*) which is different from the laws associated to human interactivities (*muamalat*).¹⁵

Eurocentric classification of religious law and its Western legal traditions logically results in a problematic categorization of religious law in Nigerian. The three legal systems (Islamic, customary, and English-styled laws) are inextricably linked with religions.¹⁶ The common legislation is transferable to Christianity, *Shari`a* is assignable to Islam, and native laws are associated with the religions of African locals.

¹³ The Eurocentric comparative law studies classify “religious law” along with its Western legal traditions. Western legal traditions consist of civil law, socialist legal systems, and common law. They are considered “the three most important families of law in the modern world”. Other legal systems are clustered together and given only religious status. *Shari`a* is dealt with from this stand view. For further clarification confer, Mallar, V.S. *Journal of the Indian Law Institute Vol.30*, no. 3 (1988): 377-80. Accessed 17th January, 2021. <http://www.jstor.org/stable/43951188>.

¹⁴ Sayyid Abul A`la Mawdudi, *The Islamic Movement: Dynamics of Values, Power and Change* (Leicester: Islamic Foundation, ed. Khurram Murad, 1984), pp. 79-81.

¹⁵ Yerushalmi, David, *Shari`a's “Black Box”*: Civil Liability and Criminal Exposure Surrounding *Shari`a* -Complaint Finance, (March 2008). Utah Law Review, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=1105101>

¹⁶ Cf. Abdul-Lateef Adegbite, *Shari`a in the Context of Nigeria*, in *The Shari`a Issue: Working Paper for a Dialogue* (2000), pp. 57, 68-69.

Considering the Nigerian situation, to insist that *Shari'a* is “religious law” makes little sense. As a result, the grouping “religious law” and “customary law” are maladroit for colloquy about *Shari'a* in the legal system of Nigeria.

At this juncture, it is reasonable to discuss about legal diversity in Nigeria under the three-tiers of law as widely recognized legal systems.

1.1.1. The Position and Extent of *Shari'a* and Customary Law in Nigeria

Customary law in Nigeria is a composite of cultural practices embraced by community members as constituting power because of duration of usage. Statutory definitions in northern Nigeria have Islamic law included in native law. The term “Native Law and Custom” absorbs *Shari'a*.¹⁷

In Nigeria the *Shari'a* jurisprudence practiced is that of the Maliki madhab since the 13th century. In Nigeria, the other *Shari'a* schools are referred to sketchily. However, the Maliki school of jurisprudence is given legal endorsement in the *Shari'a* Court of Appeal.¹⁸

It becomes imperative to inquire, “What is the status of Islamic law (*Shari'a*) in Nigeria?”

1.1.2. Status of *Shari'a* in Nigeria

As noted above, aboriginal law includes Islamic law. Colonial authorities decreed the position of *Shari'a* as local law. On the contrary, scholars have illustrated the incompatibility of classifying *Shari'a* as customary law.¹⁹ Yet, this form of categorization was still followed until recently. Some states abrogated those laws that reduced *Shari'a* into native laws. This took place in 1999.

¹⁷ Cf. Laws of Northern Nigeria, High Court Law (1963) Cap. (49), sub section 34.

¹⁸ Cf. Laws of Northern Nigeria, Sharia Court of Appeal Law (1963) Cap. (122), Sub-section 14.

¹⁹ Cf. AA Oba, “Islamic Law as Customary Law: The Changing Perspective in Nigeria”, *The International and Contemporary Law Quarterly* Vol. 51, Cambridge University Press (2002) 817.

Therefore, we can deduce two phases concerning the status of Islamic law in Nigeria: First, Shari'a's status (as customary law) through the settlement of 1960-62. Second, the status of Shari'a (as religious law) in 1999.

1.2 An Attempt at Reform of *Shari'a* through the Settlement of 1958-62

“The *Shari'a* settlement of 1960” which was accepted by the hegemony of Muslims in northern Nigeria was applied in succession of parliamentary validating in the dawn of independence was of crucial occasion in the history of *Shari'a* implementation in Nigeria. Before independence in 1960, the *Shari'a*, alongside its penal laws, were still “widely, applied in Northern Nigeria than anywhere else outside Arabia”.²⁰

The northern regional government, by 1957, recognized the need for legal and judicial reforms. Details of the settlement of 1960 was carried out in consecutive stages. Delegation of Islamic scholars were assigned to other Islamic countries to study the legal processes there which took place in 1958.²¹ The government commissioned an international body of scholars to visit Northern Nigeria saddled with the responsibility of examining the present legal workings and to give recommendations for growth. It took place from August to September in 1958. This team of jurist submitted that there should be an introduction of a new Islamic penal code in which the scope

²⁰ J.N.D. Anderson, *Islamic Law in Africa* (London: Frank Cass and Co. Ltd., 1955), p. 219.

²¹ We read from the Panel of Jurist submitting a report to the governor: “His Excellency Sir Gawain Westray Bell, K.C.M.G.,(Governor of the Northern Region of Nigeria), “Your Excellency, We were charged on the 29th July, 1958, by your government, as a Panel of Jurists with this reference: “In the light of the legal and judicial systems present in other parts of the world where Muslims and non-Muslims live side by side, and with reference to the systems obtaining in, Pakistan, Lybia, and the Sudan, to consider the following: i) The processes of law at present in force in the Northern Region, that is, Islamic law, British styled law as modified by the Nigerian legislation, and customary law, and the organization of the judiciary empowering the systems and ii) Whether it is possible and how far is it possible to prevent any forms of conflict which may perdue in the systems of law being practiced, and to make recommendations as to the means by which this object may be accomplished and as to the reorganization of the courts and the judiciary, in so far as this may be desirable.” For a clear account of the successful effort of persuasion, perhaps the chief accomplishment of Jurists’ Panel. Confer James N. Anderson, “Conflict of Laws in Northern Nigeria: A New Start”, *International and Comparative Law Quarterly*, 8 (1959), 442-456 at 451-53.

of *Shari`a* be limited to deal with personal status and family relations exclusively.²² The Northern House Assembly adopted the recommendations of the commission in December 1958. Henceforth, *Shari`a* jurisprudence did not handle criminal cases. Criminal cases were dealt with under modified penal codes of the British law and adopted for Northern Nigeria. Although the Islamic Penal Code had other components of *Shari`a*, the British administration removed weightier chastisement, for example, amputation and death by stoning. However, floggings continued as a form of punishment.

Shari`a hudūd was revoked in 1960. Since then, the implementation of *Shari`a* treated personal status and family relations cases.

At the Government's invitation, the team of experts returned in 1962 to evaluate the application of their earlier directives and give further advice.

1.3 Re-emergence of *Shari`a*'s Penal and Criminal Procedure Codes in 1999

Shari`a has been practiced for many decades in northern Nigeria because most of its inhabitants are Muslim. Yet, it was not until 1999-2000, that its range covered both criminal law and personal status law. Thus, *Shari`a* Penal and Criminal Procedure Codes' re-introduction did mark a significant shift for many Muslims. It entails the power to apply in full penal criminal codes according to *Shari`a* over convicted Muslim persons.

²² Article 8 "Civil and Domestic Law: The "*Shari`a*" which is on the table of the legislative Houses (December 1958) reads:

"The Panel has recommended that, with the introduction of the Northern Nigerian Penal Code, Moslem Law as such should be confined to the law of personal status and family relations and, when applicable, to civil cases. Personal status and family relations are meant questions of marriage, paternity, divorce, guardianship of minors, interdiction, guardianship of interdicted persons, waqfs, gifts, wills, and succession (except for claims to immovable property) in respect of Muslim litigants. Civil litigation, claims to the ownership of immovable or movable property, and questions of a tort, would be dealt with respectively under statute law, customary law, or the law under which the parties concluded their contract."

For a detailed record confer Ostien: *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook: Vol. I*. Chapter 1, Part IV, pp. 49-56.

The *Shari'a* Establishment Law was commenced in Zamfara State on 27th October 1999 and enacted on January 2000. The Zamfara state governor, Ahmed Sani, officially launched the *Shari'a* implementation program on Wednesday, 27th October 1999.²³ This event was revolutionary for it reverted the *status quo* and the attempts of the 1962 jurist's adjustments to the 1960 *Shari'a* law settlement at bridging *Shari'a* law in the penal code of 1960 with human rights principles. This event was a catalyst for other states with weighty Muslim numbers. The Gusau convention had in its attendance important dignitaries of various Muslim organizations within Nigeria. Addresses were given by the leading *Ulama'* and leaders signaling the phase of the *Shari'a* implementation in Nigeria. In a rapid and successive manner 11 states more all adopted *Shari'a* jurisprudence for criminal matters. In doing so, *Shari'a* courts could abjugated over criminal cases. The government of these states oversaw the implementation of *Shari'a*. The Governors appointed committees – usually called “*Shari'a* Implementation Committees” – whose recommendation were to meticulously analyse the procedures to be taken, to take into cognizance *Shari'a* jurisprudence and its relation to constitutional concerns, to evaluate public thoughts and give its reports to the governor. The implementation bodies checked their ideas with the *ulama'* and jurists. They conducted public pool and debates. Other States that had established *Shari'a* prior were also visited; Zamfara State, which led the way, was much visited.²⁴ Zamfara's *Shari'a* code of criminal

²³ Popular Newspaper (The Guardian) in Nigeria reports about this event: “The occasion was fixed at the Ali Akilu Square for 8:00am, but interestingly enough the square came to full capacity on the eve of the launching. Around 10:30 a.m., the Governor, Ahmad Sani, made a triumphant entry into the square. At the sight of the Governor entering into the arena, the shouts of Allahu Akbar (God is Great!) filled the air. while he managed to squeeze his way to the high table where other dignitaries were seated”. Cf. Fidelis Agu, “The Birth of Sharia”, The Guardian, 30th October 1999.

²⁴ Upon the report from *Shari'a* Implementation Committee, the state governments appointed a “White Paper Committee”, whose duty it was to formulate the ideas and plans for the government. Cf. Philip Ostien: *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook: Vol. II*. Chapter 2, Part 1, p. 3. (From here on: A Source Book)

procedure and penal codes is applied by most of the 12 northern states. However, only Niger State amended her existing laws to make them align with the recommendations of the implementation committee.

In establishing the new status for the Shari'a project, the following steps were taken to adopt the laws without violating the Nigerian constitution sections.

1.3.1. The Steps Taken and Arguments for Legality of *Shari'a* Penal Codes

Ahmed Yarima Sani, Governor of Zamfara State, desirous of fulfilling his bond and the desire of the masses to implement *Shari'a*, went on to constitute a board of experts to:

1. Evaluate the present laws by their conformity with cultural values of the people;
2. Study and analyze the formation of local courts;
3. Make possible efficacious management of *Shari'a* jurisprudence in the State.

The board of experts is to make salient observations, especially on constitutional provisions in defense of the Shari'a Penal Code and the need to meet up with the obligatory conditions in section 36(12) of the 1999 Nigerian Federal Constitution which reiterates that for effectuation of any criminal charge(s), these crimes and their penalties must be authorized in codified laws that are validated by a legislature. Ostien observes that inputs from counties with established Maliki madhabs and jurisprudences were collected. Following the Maliki madhab, all criminal offenses and their punishments are distinguished under *hudūd*, *ta'zir*, and *qisas*. Therefore, punishments such as *rajm*, caning, and their likes, are included in the criminal code system.²⁵ Therefore, the *Shari'a* Criminal Procedure Code was established for the examination of offenders and the execution of a judgment according to the *Shari'a*.²⁶

²⁵ Cf. Ostien, *A Sourcebook: Vol. II*. Chapter 2, Part III, pp. 171-2.

²⁶ The *Shari'a* Penal Code is essential for the prosecution and execution of the Penal Codes. It provides legitimacy for the execution of *Sharia* in accordance with the Country's constitution.

Area Courts Repeal Laws was enacted to repeal former established local Courts and the jurisdiction executed there in within the northern States for *Shari`a* Courts have been put in their stead. Section 277 in the 1999 Constitution limits the power of these former Area Courts. Therefore, circumventing this limitation, Amendment Law of *Shari`a* Court of Appeal was established. The reformed established *Shari`a* Courts are given authority over *hudūd* judgements, and redress of their rulings are automatically referred to the *Shari`a* Court of Appeal.

Logically, this jurisdiction stood because to argue contrary to its extension is to support the motion for the denial of the human right of any appellant (for example, individuals who may be pronounced guilty and sentenced to stoning to death) the right of fair hearing at the *Shari`a* Court of Appeal. This reasoning is logically deducible because, the 1999 Constitution allows for the founding of *Shari`a* Courts having control over criminal cases, and with the powers of administrating punishments. Even more so, it provides for due process of law which necessarily leads to the establishment of an appellate court (*Shari`a* Court of Appeal) to listen to its appeals.

The model of *Shari`a* criminal court established is as follows: The lower *Shari`a* Courts and Upper *Shari`a* Courts. The Upper *Shari`a* courts also have quasi authority to address cases from the Lower *Shari`a* Courts. The apex of *Shari`a* court structure is the *Shari`a* Court of appeal. This court is saddled with redressing cases from the lower courts. Around four to five *Qadis* (judges) oversee the *Sharia* Court of Appeal. *Qadis* of the *Shari`a* Appeal Courts are experienced in Islamic *fiqh*. An appellant who wishes to have their judgements from the lower courts redressed are given a 30 days period to appeal.

A transition period of about six months was taken to study and implement the *Shari`a* Penal Code and Criminal Procedure 2000. Compared to the 1962 jurist's adjustments to the 1960 *Shari`a*

law settlement, this time frame is relatively concise. The 1999 sharia legislation was quickly and incompletely rushed.

1. 4 Other Literary Assessment of Historical Development of Sharia in Northern Nigeria

Several literary corpuses give further retrospection on the evolution (and its application) of the Sharia in Colonial Northern Nigeria. Scholars are unanimous in this matter and none of them dissented. Takehiko Ochiai, a specialist on politics and religion in Nigeria, researched on the changes in the system of native courts (of which Sharia courts were included) in Northern Nigeria. His research covered a time span from 1900, when this region was made a British protectorate, until 1960, when she gained independence as part of Nigeria. Ochiai, classified the evolution into three epochs; namely: The first epoch is the preservation period (1900-1932). This is the period from the proclamation of the Northern protectorate to the judicial reforms. The second epoch is the subjugation period (1933-1953). This is the period during which the Islamic judiciary was subjected to the English laws and courts. The third epoch is the period of compromise (1954-1960). This period covers from the establishment of the Nigerian Federation to its independence. This is the time when Nigerian-Muslim led members of the Northern parts voluntarily chose to restrict Sharia's application to personal criminal law.²⁷

Prior to judicial reformation in the 1930s, when aims were made to review the legal order of the aboriginal courts (*Shari'a* courts inclusive) and English courts, the *Shari'a* courts were mostly autonomous, except in matters where restrictions were imposed partially, especially in

²⁷ Cf. Takehiko Ochiai, (August, 2020), "The Application of Sharia and the evolution of the native court system in colonial Northern Nigeria (1900-1960)", *Asian Journal of African Studies* Vol. 49, pp. 86-105.

matters of *hudūd*.²⁸ Commenting on the preservation period, David Smith, a specialist on native courts in Northern Nigeria, notes that the interference with the systems of the native courts after the Proclamation Acts of 1906 was not extensive as permissible. Through administrative control, interference which was permitted was moderated.²⁹ For about 30 years until the judicial reform in 1930s, the first period could be justly called preservation period.

Researches on the second period (the epoch of subjugation) illustrate that the sole aim was to revise the dual legal systems (native court systems, which also encompassed *Shari'a*, and the English). In 1933, reforms put an end to provincial laws. These were replaced with Magistrate and High Courts. Magistrate courts were subjugated to the High courts. Keay and Richardson opines that the effect of this reform to the native courts was the extension of appeals. Before the 1933 reforms, dissatisfied rulings submitted by Alkali courts could be filed for appeals to the Emir Courts because the Native Court Ordinances of 1933 had permitted for the power to appoint Emirs and head chiefs of courts to serve as Native Courts of Appeal.³⁰ With the reform of 1933, for the first time, unsatisfied appellants with the rulings of the Alkali courts were not restricted to the higher native appeal courts of the Emir, but could apply to English courts like the Magistrate Courts. The reforms therefore, linked native courts to English courts through the appeal systems.

²⁸ The first article of the Native Courts Proclamation Act in 1906 was issued by British administration of Sokoto. The sole aim of the proclamation was to insert Islamic judiciary at the center of the native court system. The result of this was the classification into two groups: First is the Al-Qali courts in which Islamic judges served as head judges with *ulamā*; second is the judicial council was defined as native court consisting of Emirs and community head chiefs who presided over trials. The Native courts were empowered based on the proclamation to oversee trials based on native laws and customs (*Shari'a* inclusive), with the power to sentence the guilty to punishment. However, penal actions that were deemed 'abhorrent to natural justice and humanity' were prohibited. This meant partial ban of *hudūd* prescribed by Sharia, such as amputation, or death by stoning. Cf. Elias T. Oluwale, *The Nigerian Legal System*, (London: Routledge and Kegan Paul Publication, 1963), pp. 120-121.

²⁹ David Smith, "Native Courts of northern Nigeria: Techniques for institutional development", *Boston University Law Review*, 48 (1), (1968), pp. 55-56.

³⁰ Cf. Richardson and Keay, *The Native and Customary courts of Nigeria*, (London: Sweet and Maxwell, 1966), pp. 38 -40.

Consequentially, English courts were seen as superior to native courts, which in turn created the misinterpreted perception that English criminal law was superior to native (*Shari'a*) law. This was a 'subjugation period' in *Shari'a*'s implementation.

In the third phase, the leaders of the Northern Region paved the way for overhauling the native court system. They sought a political compromise regarding Sharia execution. With the prospects of independence imminent, the government of the Northern region began to examine Sharia applications, especially its provisions on punishment. The government drafted a new criminal code adopted in 1959. This penal code did contain some Sharia provisions on punishment, but its application was limited. According to Norman Anderson, an expert in Islamic law, colonial Northern Nigeria, uncodified Islamic criminal laws faded when the new, codified criminal code and its procedural law went into effect at the time of independence.³¹ In the third phase, it was not the colonial administrators that developed the native system but the Nigerian Muslim-led government. They also chose the path to voluntarily abandon Islamic criminal law and restrict Sharia's application to personal law to alleviate concerns held by non-Muslims and foreign companies. They sought political compromise regarding Sharia's execution. As such, this phase is the period of compromise.

Since independence, Shari'a clauses on punishments were virtually banned and not legally applied in the region. Later in the 21st century (from 2000 onwards), in its movement to apply Islamic law, centered on the re-introduction of Sharia's provisions on punishment, twelve states in Northern Nigeria created a separate Shari'a penal code, or the 1959 Penal Code was revised to include Sharia codes on punishment.

³¹ Cf. Norman Anderson, *Law Reform in the Muslim World*, (London: The Athlone Press, 1976), p. 27.

Since then, there are cases and allegations of violations of accused persons' human rights argued against *Shari'a* criminal courts. Some of the famous critiques surrounded the abuse of women's rights regarding *zinā* (Adultery).

We shall take an analytical look at some of these cases in chapter two.

Chapter Two

2. 0 Some Court Cases of *Zinā* in Shari`a Penal and Criminal Code Considerations

Introduction: At the dawn of western legislative organizations in the early 20th century, the application of *shari`a* law were progressively limited to cater for personal status concerns in Northern Nigeria. However, in the close of the 20th century, the revival of Islam in both political and religious spheres began to challenge and change the process and limitations of *Sharia* application. *Shari`a* penal and criminal codes were carefully revived and fixed into the criminal legislative structures. It was done in varying degrees and grafted with the aid of modern states. Amongst *hudūd* laws and penalties, *zinā* (adultery) has been most controversial.

With the advent of *Shari`a* court jurisprudence several death sentences in cases dealing with *hudūd* crimes have been handed down since 2000. These sentences cut across both men and women. Their offenses include adultery, homosexuality, and murder. With regards to *zinā* cases, the number of women affected is disproportionate to the number of men because of the varying requirements of evidences demanded. For example, a man that is being prosecuted for the crime of *zinā* requires the evidence of four witnesses at the scene of the crime. The same requirement of four witnesses is needed when a woman is facing charges of *zina*. However, other requirements can be used as evidence for the crime, such as pregnancy.

Two primary questions need to be asked in order to comprehend the reasons for women's rights concerns since the resurgence of *zinā* laws: Firstly, what is the context of *zinā* as an idea in the Islamic *fiqh* tradition? Secondly, what is the situating of *zinā* as a set of juridical postulations in *Shari`a* as applied via *fiqh* (established rules that are derived) of the *Shari`a* criminal and penal laws in Nigeria? With regards to the second consideration, our research shall deal with primary court records from the trial proceedings of some *zinā* cases. We hope that the data gathered will

give us a closer look at the court proceedings to see where abnormalities and issues may bother the violation of women's rights and gender biases. Most especially, we hope it also presents data (facts) arguing for the adaptability of Shari'a penal codes procedures to uphold social rights issues such as dignity to life and respect for women dignity. To illustrate this, we shall consider the latitude provided and applied by Shari'a court judges of the Appeal court to emphasize repentance and preserve life by repealing the judgments of the lower courts.

2.1: Zinā in Islamic Legal Traditions

Classical Islamic legal traditions did not deal with crime in the sense that criminal law is used today. Within the Islamic legal tradition, legal doctrines prescribed punishments for acts that are considered crimes under the category "Islamic criminal law". Classical jurisprudence (*fiqh*) categorizes offenses into three groups in relation to rules and the punishment they sustain: *ta'zir*,³² *qisas*,³³ and *hudūd*.

Hudūd (singular, *hadd*: means limit or restriction) means limits prescribed by God. These are offenses that have stipulated penalties derived from the Qur'ān or *Sunna*. *Hudūd* offenses are five. Namely, robbery (*qat'al-tariqhiraba*), theft (*sariqa*), drinking wine (*shurb al-khamr*), unsupported allegations (*qadhf*), and adultery (*zinā*). These first three are actions that breach public interest, while the last two are transgressions against God. *Hudūd* crimes are considered crimes against religion.

³² *Ta'zir* (means discipline), involves offenses that are not under the categories of *hudūd* and *qisas*. *Ta'zir* disciplines are lesser than *hadd*'s.

³³ *Qisas* means retribution. These are offenses carried out against neighbour, such as physical injury of another person. These offenses are limited to matters of private spheres. There are fixed penalties to crimes and also victims may choose to forgive their offenders or ask for compensation (*diya*).

Fiqh madhabs do not all agree on the statutory elements and pieces of evidences to be used when examining offenses; nor do they agree on the liberating conditions and punishments required in the three offenses against public interest. *Hudūd* crimes, on the other hand, have stringent links to revelation and textual basis. *Zinā* falls under this category.

Closer scrutiny of classical judges substantiates that when addressing *zinā* crimes, they relied on even the smallest conditions of doubts to prevent application of *hadd* penalties, especially in relation to women accused of *zinā* by their spouses or people in their environments. For instance, in the attempt to curb abuses, in *Suratul Hujurat*, limits and restrictions are stated for the class of those who can bring charges of *zinā*. Jurist such as Iman Shafi'i submits that even leaders have no authority to command anyone accused of *zinā* to investigate the accusation.

Classical jurists depended on Qur'anic verses and the traditions of the Prophet to abrogate the infringement of the solitude and dignity of persons, particularly of women. Verses in the Holy Qur'an stipulate difficult requirements for establishing *hadd* crimes such as *zinā* such that practically, to be able to validly demonstrate and convict any individual for such crime is highly impossible.

An unfounded assertion (*qadhf*) is *ipso facto* a *hadd* offense, punishable by 80 lashes (Qur'an 24: 23). In cases where a woman is found with child and her spouse mistrust her for adultery, in order to get around *hadd* penalty of *qadhf*, he will have to reject fatherhood and separate from her by the process of *li'an* (reciprocal taking of oaths and curses). In the occasion where the woman also takes the oath of denial, she is exonerated from the crime of *zinā* (Quran 24. 6-7).

Another measure put in place in order to help acquit people from crime of *zinā* is the principle of retraction from a confession of *zinā*. An individual who had confessed to the act of adultery can

retract their confession at any time. The idea of *shubha*³⁴ exonerates from the crime of illicit sexual relations. For instance, when a man mistakenly swaps another woman for his legitimate wife, or vice versa, if she mistakenly assumes another man to be her husband, and they both have sexual intercourse, on account of the element of *Shubha*, they are both exonerated from *zinā*. Jurists aver that the prescribed 100 lashes for *zinā* offenses are prohibitory rules and not necessarily penal. The following verse illustrates this fact: “Let no man guilty of *zinā* or fornication marry any, but a woman similarly guilty (of *zinā*), or an unbeliever. To the believers, such a thing is forbidden.” (Quran 24. 3). Sexual decorum, a certain amount of guarantee of true paternity, and virtue are guarded by the submission of jurist on *zinā*.

In 2000, at the introduction of the *Shari`a* Penal Codes, death penalty was extended to include crimes of adultery.³⁵ This was a significant introduction to the jurisprudence of *Shari`a* because prior to its resurgence, penalties for *zinā* were either served by financial fines and prison terms. Penalties are different for unmarried and married culprits of *zinā* crime. The sentence of *rajm* is reserved to married people or divorced; while unmarried persons get the punishment of 100 lashes.

The death penalty cases of Safiyatu Husseini and Amina Lawal sparked several interest. These cases were exceedingly intriguing because the men allegedly accused of carrying out the offenses were acquitted on the postulation of the lack of evidence (with regards to the men, four witnesses were required to corroborate the accusation against them). The same postulation was not

³⁴ The instructions on doubt (*shubha*) is founded upon the words of Mohammed: “God’s punishments will not be executed in cases where there is room for doubt”. For further study on this subject matter, confer FIERRO, M. “*Idru l-Hudūd bi-l-Shubhat: When Lawful Violence Meets Doubt*”, *Hawwa: Journal of Women of the Middle East and the Islamic World*, Vol. 5, n. 2-3, (2007) pp. 208-238.

³⁵ *Zinā* is defined thus: “Whoever, a man or a woman, fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offense of *zinā*.” Cf. *Zamfara State Shari`a Penal Code Law 2000*, Section 126.

the case for the women. Although there were no witnesses to corroborate the crime of *zinā*, the women were convicted based on the evidences of pregnancy and child birth, respectively. They were sentenced to *rajm*. Evidently, different standards for evidence required of both sexes allude to the discrimination against women.

2. 2 Some Case Studies of *Zinā* in Northern Nigeria

2. 2. 1. The Case Against Safiyatu Husseini (Sokoto State)

Safiyatu Husseini was a divorced 35 years old mother of 5 children. She is from a poor background and grew up in Tungar Tudu, Sokoto State. She was initially married at a very young age (12yrs) but divorced not quick long after that. It is a usual practice to get married several times in Hausa culture so she got married two more times. All of her marriages ended up in divorces. It was after her last marriage that she got romantically involved with another man. His name is Yakubu. He was the man she allegedly accused of raping her and getting her pregnant. On 9 October, 2001, the Upper *Shari'a* Court in Gwadabawa convicted her of *zinā* and she was sentenced to death by *rajm*.

On 23rd December 2000, she was presented before local *Shari'a* implementation committee. The committee got her detained in the police station. After that, Safiyatu was charged in the lower *Shari'a* Court for the allegation of *zinā*.³⁶ After her trial, she was found guilty. The case was then referred to the Upper *Shari'a* court. The case went through strenuous processes and here too, she was convicted for *zinā*.³⁷ She maintained that she was raped by Yakubu. In her words, she narrated what transpired:

³⁶ Cf. Ogbu Kalu, _Safiyya and Adamah: “Punishing Adultery with sharia stones in Twenty-First-Century Nigeria” In *African Affairs* (2003) <http://afraf.oupjournals.org/cgi/reprint/102/408/389.pdf>. p. 394. (Accessed 5 January, 2021).

³⁷ Cf. News Release by Amnesty International USA _Nigeria: BAOBAB for Women’s Rights and Amnesty International Statement on the Implementation of New Sharia-based Penal Codes in Northern Nigeria. 25 March 2003. p.1.

He ambushed me and the whole event was insane. He forced himself on me using his strength to overpower me. At another occasion, when I visited a neighbouring village, he forced himself on me there and had sexual intercourse with me. This happened three times. After the act, I informed him that I was displeased with his action and committed the entire affair in Allah's hands for he took advantage of me and I was ashamed to report the affair to anyone.³⁸

Establishing the date of Safiyatu's conception was an integral element in the process of appeal against the conviction. Her lawyers argued that Safiyatu's conception occurred prior to the enactment of *Shari'a* in the state, that is in June 2000.³⁹ Therefore, it was illegal to establish any crime against her for a law that was not existent at the time of the event. To this claim, the prosecution team replied that irrespective of the time of her conception, Maliki jurisprudence recognizes pregnancy as *prima facie* evidence for *zinā* crime. After weaning her baby, the penalty of *rajm* (stoning) will be carried.⁴⁰ After the court's ruling, she expressed her dissatisfaction:

"I felt like dying that day because of the judgement. I never thought there would be such a penalty. It is because I am poor, my family is poor, and I am a woman."⁴¹

The man alleged to be her accomplice, Yakubu, refused that he had sexual relations with her. Since there were not enough witnesses to refute his claims, he was set free for the lack of evidence. On the other hand, Safiyatu was found guilty on two counts, first, on the evidence of her confession to having sexual relations out of wedlock and second, on the fact of her pregnancy.

The following are excerpts⁴² from the findings and rulings in the Upper Shari'a Court (this is trial of the first instance), which found Safiyatu Hussaini guilty of the crime of *zinā*.

³⁸ Okorie Uguru interviewed Safiya, 'Amina Lawal: Let Off the Hook' in *The Comet* 27 September, 2003. p. 11.

³⁹ Lamido, 'The real crime is being a woman' in <http://scotsman.com> network of Friday 25 January, 2002. (Here after, Lamido, "The Real Crime" will be used).

⁴⁰ Cf. Kalu, 'Safiya and Adamah', p. 394.

⁴¹ Lamido, 'The Real Crime', 25th August 2002.

⁴² Philip Ostien provides an apt and good record of the Court documents on the manner of judgement. The cases of Safiyatu and Amina are translated into English and analyzed in the book, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* Vol. 5, Two Famous Cases (Ibadan: Spectrum Books, Ltd, 2007). I have been able to extract

On 3 July 2001, the case file number USC/GW/F1/10/2001 was issued to the Upper Shari'a Court, Gwadabawa presented an allegation of *zinā* against Yakubu Tangar Tudu and Safiyatu Hussaini Tundar Tudu. The judge overseeing the case is Muhammadu Bello Sanyinnawal.

The statement of the complaint reads:

I, police sergeant Idrisu Abubakar No. 125816, on behalf of the Commissioner of Police, indict Yakubu Abubakar Tungar Tudu, and Safiyatu Hussaini Tungar Tudu, from Gwadabawa Local Government Area, on the allegation of committing *zinā* contrary to sections 128-129 Sokoto State Shari'a Penal Code 2000. On 23th/12/2000, at around 2:00 p.m., the Gwadabawa police unit received a complaint that Safiyatu Hussein committed *zinā* with Yakubu Abubakar as a result of which she became pregnant. They are both known to have been married once. After interrogation, the police is satisfied with the allegation leveled against them. I, therefore, sue you before this Court so that you will be tried accordingly.⁴³

The court proceedings are as follows:

The Upper *Shari'a* Court recognized the offense.⁴⁴ The accused persons listened to charges against them, after which they were both asked if they understood the complaints and agreed to the alleged offense made against them? The first accused (Yakubu Abubakar) said: "I did not commit this offense." "I did not commit *zinā* with her." Safiyatu Hussaini said: "I heard and understood the complaint they made against me." "It is true that Yakubu Abubakar committed *zinā* with me. He impregnated me, and I have a baby girl aged six months today."⁴⁵ The Court asked Safiyatu if she had heard that the accused, Yakubu, had rejected her claims about him?

and summarize vital details of the records and modified some of the translations especially from Hausa to come closest to what is recorded in the paper and not just the sense as presented by Philip.

⁴³ Proceedings and Judgment in the Safiyatu Hussaini Case. Confer, Philip Ostien, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* Vol. 5, p. 17.

⁴⁴ In the *Shari'a* Criminal Procedure Code Law 2000", section 12(1) Chapter III; states that "Subject to the other provisions of this *Shari'a* Criminal Procedure Code, the Upper *Shari'a* Court shall have the exclusive power to try any or all the offenses listed in 'Appendix A' of this Code".

⁴⁵ *Op. Cit.*, p. 18.

She affirmed that she did. The prosecutor's bench was then asked if it had evidence to prove the allegations?

The prosecutor presented witnesses for the case. Therefore, they applied for a date to open the case. The upper *Shari'a* court rescheduled hearings to 17/7/2001. Safiyatu and Yahaya were freed on bail.

In the court proceedings of 17 July 2001, the testimony of two prosecution witnesses (PW) was heard. The first prosecutor witness (PW1) presented is Abdullahi Tungar Tudu. He is elderly was 64year old at the time and a Muslim. He was the first witness. The second prosecution witness (WP 2) is Attahiru Tungar Tudu. He is a man in his mid-40's and a Muslim. Both of these men resided in Gwadabawa local government.

The proceeding of the Court is as follows:

Prosecution Witness 1 (PW1) Abdullahi Tungar Tudu, swore to narrate the truth. And the Court asked him about his knowledge of the case. He gave the following testimony:

What I, Abdullahi Tungar Tudu, know of this matter is that, some time ago, two policemen came and met us at Tungar Tudu. One of them is called Ali. They called Safiyatu in my presence and informed her that they heard that she was pregnant even though she was out of wedlock. They inquired from her who was responsible? She informed them that it was Yakubu Abubakar. He was summoned in my presence and informed about Safiyatu's confession. He swore, "Safiyatu, by Allah, have you not known any other person apart from me alone?" Safiyatu responded by saying that, "By Allah, I have never had intercourse with anybody apart from you alone." Then, the policemen inquired from Yakubu the number of times he had intercourse with her. He retorted, "Three times." Safiyatu objected to this and said that it occurred four times. They both exchanged words on whether it was three times or four times. The policemen concluded that the act was carried out three times. This is my account on the matter. In agree with the police; it occurred three times and not four times.⁴⁶

The Court then proceeded to ask if Yakubu Abubakar, had objections or questions on the exhibit?

The first accused said that he heard all that was said but refused to agree with the witness because

⁴⁶ *Ibid.*, p. 19.

he did not see the prosecution's witness (PW1) at the time the policemen accosted him. The Court asked the prosecution witness if he had any proof to substantiate his presence at the time. He insisted that the policemen there were witnesses to his testimony. After this, he was discharged by the Court.⁴⁷

The second prosecution witness (PW2), Attahiru Tungar Tudu, also swore to tell the truth and gave his witness report:

What I, Attahiru, know in this matter is that the policeman, Ali, came to Tungar Tudu together with his colleague. He inquired from me about the head of the village. I told him that he was absent. He asked further for the deputy. I told him that I am the one. He then requested that I take him to Safiyatu's house. On reaching there, he sent for Safiyatu. He told her they had an intelligence report that she got pregnant after her previous divorce. He inquired of her to tell him who was responsible for her pregnancy. She reported that Yakubu Abubakar was responsible for her pregnancy. Yakubu was interrogated in my presence. Ali informed him of Safiyatu's claim. When asked if it was true?" He kept quiet. Ali repeated the question. Yakubu then spoke to Safiyatu saying: "By Allah, have you not known any other man apart from me?" Safiyatu replied, "By Allah, you are the only man that I know I had sex with." From there on, the police interrogated Yakubu about the number of times sexual union occurred. Safiyatu maintained it was four times, but Yakubu maintained that it was three times. That is all that I know.⁴⁸

The Court proceeded to ask Yakubu if he agreed with the witness's report? He disagreed. He alleged that Attahiru had close ties with Abdullahi, the brother to Safiyatu. The Court inquired from PW2 if it is true that he is a friend to Abdullahi? PW2 said that Abdullahi is his in-law. He also insisted that he is not Safiyatu's brother nor neighbour.⁴⁹

Both witnesses were released, and jurisprudence was adjourned to 14th August 2001. However, the proceeding scheduled for 14 August 2001 was cut short because the primary witnesses, two police officers responsible for the accused's arrest, were on another duty outside Sokoto at the time. The case was adjourned to 11 September 2001.

⁴⁷ Cf. *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Cf. *Ibid.*

On 11 September 2001, the Court sat. Both the accused persons were present, and the prosecutors had the two police witnesses: the name of the third witness (PW3) is Aliyu Yusuf with batch number 113724. He is a Muslim man and was 32years old. The name of the fourth witness (PW4) is Joseph U.T. He is 38years old with the batch number 113600. Both men served under the Area Commander's Office Gwadabawa, Local Government.

The third prosecutor witness (Aliyu Yusuf) affirmed that he would tell the truth.

Below is a further excerpt of the proceedings:

The Court asked Aliyu about his knowledge of Safiyatu and Yakubu? He testified:

I know between Safiyatu and Yakubu that on 23/12/2000, we were told that one Yakubu Abubakar had impregnated one Safiyatu Hussaini out of wedlock. The incident occurred at Tungar Tudu Chimmola Gwadabawa Local Government. We informed our boss, the Area Commander, who instructed us to go and investigate. We went, but the village head was not around. However, his representative took us to the accused persons. During our interrogation, Safiyatu confessed that indeed Yakubu Abubakar committed *zinā* with her on four occasions. Nevertheless, Yakubu Abubakar denied ever committing *zinā* with her. However, he said she is his cousin, and he used to joke with her. That is all that I know.⁵⁰

The Court asked the 1st accused if he agreed with the report or wished to ask any questions. Yakubu said that he heard the evidence and retorted that he accepted it. The Court further asked the 2nd accused, Safiyatu Hussaini, if she heard the testimony and had any objections? She submitted that, the testimony of the Aliyu is valid. She explained her position, insisting that she had said that Yakubu had sexual relations with her in four different occasions, but Yakubu had acknowledged that it happened three times. Thus, the testimony of Aliyu was false concerning Yakubu.⁵¹

The Court further interrogated the fourth prosecutor witness, Joseph U.T. He stated:

⁵⁰ *Ibid.* p. 21.

⁵¹ *Cf. Ibid.*, p. 22.

On 23rd December 2000 at about 2:00 p. m. Yakubu Abubakar was reported to have impregnated Safiyatu Husseini. We were deployed to investigate the matter at Tungar Tudu. While there, we interrogated Safiyatu who confessed that she was pregnant and that Yakubu was responsible. Upon interrogating Yakubu on the matter, he refused responsibility.⁵²

After the reported evidence of the witness, Yakubu affirmed the testimony. Safiyatu, However, said that she heard the evidence but refused to agree with it. She insisted that Joseph's testimony was false about Yakubu's claims.

Concluding its investigations, the Court asked Yakubu Abubakar (the first accused) if he had any other defense he wished to state before the Court's judgment. He held that the police's evidence was true and correct when they stated that he never said that he committed *zinā* with her, not even once. However, he insisted that the first witnesses were mischievous and did not agree with their evidence. The same opportunity was given to the second accused, Safiyatu Hussaini. She insisted that the police did not tell the truth and was persistent in claiming that Yakubu (the first accused) impregnated her. The Court further inquired from Safiyatu for the duration she was out of wedlock before she had sexual relations with Yakubu? She said it was for two years.

The court inquired from Safiyatu, if she had a "sleeping pregnancy"⁵³ from her previous marriage before committing adultery? She responded that she knew that Yakubu is responsible for her pregnancy because at the time of her divorce, she had gotten a whole circle of her menses before sexual activities between her and the accused.⁵⁴

⁵² *Ibid.*

⁵³ This is the literal translation from Hausa language "*Kwatacen ciki*" (sleeping pregnancy) to mean "dormant embryo".

⁵⁴ I personally find this affirmation of Safiyatu interesting. I might be over reading into the matter but it is my subjective view that the Court in its wisdom tried to offer Safiyatu a window for getting off the hook of being found guilty for the crime of *zinā*. This is a path she will take in the *Shari'a* Appeal Court as we will discover later. Could it be that she was not informed properly about the seriousness of such a crime and about the provision given in Maliki jurisprudence to appeal for "sleeping embryo"? Probably the fact that she was not given any lawyer nor informed of her rights to get one to represent her might have been the reason for her ignorance on the matter.

After this, the judge called on further witnesses. Alhaji Mode, a Muslim man, and Sarkin Fawa, a Muslim, aged 75 years old, both declared that they were witnesses to the confession that Safiyatu made before the Court.⁵⁵

The judge of the Upper Shari'a Court Gwadabawa proceeded to give his charge:

“I, Muhammadu Bello Sanyinnawal, do hereby charge you Yakubu Abubakar and you Safiyatu Hussaini with the offense of *zinā* based on the complaint made against you by the police, alleging that you committed *zinā* whereby you Safiyatu became pregnant and gave birth to a baby girl when you are not married. I convict the accused of *zinā* as defined by Section 128 of the Shari'a Criminal Procedure Code Law 2000 of Sokoto State, which is punishable under section 129(b). Its punishment is death by stoning with moderate size stones.”⁵⁶

The Court inquired from the accused if they understood the conviction? They both said that they did not understand.

Given their response that they did not understand the charge against them, the charge was then explained to them that the Court charges them with committing the offense of *zinā*. Moreover, if they were found guilty, they would receive hadd punishments as prescribe by Maliki jurisprudence because they were Muslims and both were once married. The accused persons both affirmed that they understood the charge and understood what it meant.

The Court asked whether the accused persons had other objections? Yakubu stated in his defense that he never engaged in sexual relations with Safiyatu. He insisted that the earlier witnesses were her relations and wanted to ruin him. In her defense, Safiyatu stated that the argument was not logical since she could not have impregnated herself. She insisted that Yakubu was responsible for her pregnancy.⁵⁷

In his judgment, Muhammadu Bello Sanyinnawal (judge of the Upper Shari'a Court) explained that according to Maliki jurisprudence, the testimony of two witnesses is not sufficient for

⁵⁵ Cf. *Ibid.*, p. 22.

⁵⁶ *Ibid.*, p. 23.

⁵⁷ Cf. *Ibid.*, p. 23.

conviction of *zinā*, and since Yakubu did not confess to committing the crime, he could be acquitted. Substantiating his position, he relied on The *Risala* which states that the assigned penalty of adultery is given to the individual who confesses to it, or on the proof of four witnesses, or through the manifestation of pregnancy.⁵⁸ He submitted that these criteria do not meet up in the charge against Yakubu Abubakar. Therefore, he is acquitted of the crime. He noted that Yakubu's revocation of his earlier confession sets him free. In order to substantiate this position, he quoted *Mukhtasar* where it says:

“The *ḥadd* punishment should be inflicted on the one who confesses to the commission of *zinā* in all circumstances save where he later retracts such confession. Such retraction should be accepted, and the *ḥadd* punishment would then not be inflicted.”⁵⁹

However, Safiyatu Husseini was convicted for the crime of zina on account of the evidence of her pregnancy. He substantiated his verdict using *Mukhtasar* Vol. 2. p. 285 where it states that adultery is established based on pregnancy. Upon this fact, Safiyatu Hessaini was found guilty of *zina*. However, her punishment was prolonged until she finishes to wean her baby.

Following the sentence, she brought before the *Shari'a* Appeal Court her case for redress which was heard in October 2001. The case file to the Shari'a Court of Appeal Sokoto reads:

I, Safiyatu Hussaini T/Tudu, appeal against the Upper Shari'a Court Gwadabawa in case No. USC/GW/CR/TR/010/001 dated 9/10/01 wherein the Court sentenced me to *rajm* for committing *zinā*.⁶⁰

The appellant presented the following charges:

⁵⁸ Cf. *Matn ar-Risala* by Ibn Abi Zayd Al-Kairawani, English translation by F. Amira Zrein Matraji. Revised by Mahmoud Matraji, Vol. I, (Beirut: Dar al-Fikr, 1994), p. *Risala* p. 592.

⁵⁹ Mukhtasar Khalil. *Mukhtasar al-Allama Khalil fi Fiqh al-Imami Malik*, Vol. 2 (Beirut: Dar al-Fikr, 1999), p. 285. For the use of British administrators in charge of the Northern protectorate prior to independence, this work was translated into English language in 1916.

⁶⁰ *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook: Vol. V.*, p. 26

1. The Lower court's conviction is erroneous for it had built its case on that claims that Safiyatu confessed to *zinā* where actually she had not.
2. The judgement of the previous court contravened the proper interpretation of *Shari'a* in regards to using the birth of a child as proof of adultery. She presented the following particulars to substantiate her position. Firstly, that she is divorced; secondly, she was not divorced for more than five years. Thirdly, she claimed that her spouse from the previous marriage was responsible for her child birth in accordance to the principles of sleeping embryo.
3. Good comprehensive explanation was not provided her concerning the meaning of the offense and its punishment.
4. The court had breached her rights to a fair hearing by not educating her on the possibility of her getting a lawyer to represent her during the trial.⁶¹
5. The legitimacy of the court is called to fore since its establishment was after the date of her pregnancy, that is on 23/12/2000. The penal codes came into effect a month later, 25/1/2001.

The four judges⁶² of the *Shari'a* Appeal Court overturned the former judgement on 25th March 2002, overturned the death sentence. The judges noted that the Upper *Shari'a* court's conviction on the grounds of Safiyatu's confession is speculative and invalid. The only data available in the trial records is that on 23rd December 2000, the police were informed that the accused committed adultery and as a result, she became pregnant. Therefore, it is invalid to posit that Safiyatu allegedly committed the offense. The *Shari'a* Appeal Court accepted their argument accusing the lower *Shari'a* court of failing to explain *zinā*'s nature satisfactorily to the accused person. *Sabulus*

⁶¹ I had earlier observed that Safiyatu's lack of access to a legal representative could possibly be a reason for her poor understanding of the severity of the case and ignorance about the plea of a "sleeping embryo" provided in Maliki jurisprudence.

⁶² The Four judges concerned are: Hon. Muhammad Bello Silame (Grand *Qadi*), Hon. Muhammad Tambari Usman (*Qadi*), Hon. Abdulkadir Saidu Tambuwal (*Qadi*), Bello Muhammad Rabah (*Qadi*).

*Salam*⁶³ and *Al-Tashri'u al-Jina'i*⁶⁴ were quoted to substantiate this point. The Court submitted that from the trial court's record of proceedings; in this case, it never asked the accused if she was sane or not.

The *Shari'a* Court of Appeal further went on to uphold the ground of appeal that the trial court is in error by relying heavily on the evidence of pregnancy while Safiyatu was divorced. The Appeal Court submitted that the Upper *Shari'a* Court failed to understand that under Islamic law, women can have gestation that last up to five years even after being divorced from her husband. The appeal court substantiated this citing the *Tuhfa*, p. 47, which submits that the maximum for gestation five years.⁶⁵ However, the *Shari'a* Appeal Court was unwilling to address the question of the affiliation of the paternity of the child? The Court held that this is a new issue now being raised; therefore, it is not within the Court's jurisdiction to call for evidence to establish the truth on the matter. This matter raises a *shubha* (a doubt) which is in itself sufficient grounds to remit the *hadd* punishment sentenced by the Upper *Shari'a* Court.⁶⁶

Finally, Safiyatu Hussein was acquitted of the charges based on the illegitimacy of the lower court to hear the case in the first place since her pregnancy occurred prior to the enactment of the *Shari'a* penal laws.

⁶³ "It is binding on a judge to explain satisfactorily to a person accused of committing an offense the punishment of which is *hadd*, the meaning, and nature of that offense." Cf. *Subulus Salam* Vol. 5, (Cairo : *Dar al-Diyan li al-Turath* 1987), p.1676.

⁶⁴ Cf. *Al-Tashri'u al-Jina'i al-Islami*, by Abdulkadir Oudah, (Beirut : *Dar Kitabi al-Arabi*, Vol. 2), p. 434. The English version is used in Nigeria: *Criminal Law of Islam*, Translated by S. Zakir Aijaz (New Delhi: Kitab Bhavan, 1999, 4 vols.).

⁶⁵ *Tuhfa; Tuhfatul Hukkam. Matn al-Asimiyya al-Musamma (Tuhfat al-Hukkam fi Nukat al-Uqud wa al-Ahkam)*, (Zaria: Hudahuda Publishing Co. Ltd., 1996, 1 vol).

⁶⁶ The *Shari'a* Appeal court referred to *Mugni*, Vol. 9 p. 52: "Al-Daru Qudni reported this *hadith* with *isnād* from Abdullahi bin Mas'ud and Mu'azu bin Jabal and Uqbatu bin Amir. The Prophet (SAW) said: Where a *hadd* matter becomes doubtful to you, do your best to avoid the *hadd*."

2. 2. 2. Case Against Amina Lawal (Katsina State)

Amina Lawal (37 years and divorced) was charged with *zinā* on 15 January 2002 for giving birth to a child when she was not married. A lower Shari'a Court tried her in Bakori, Katsina State. A single *qadi* constituted the court and consequently convicted her for the crime of *zinā*. According to the *Shari'a* court, her confession and testimony were enough pieces of proof to charge her with the crime. The man alleged to be the baby's father is Yahaya Abubakar. He denied his involvement in the affair. Amina Lawal was not educated about her rights, such as the right to have contract agreements with lawyers to oversee her defense. She was not informed about the severity of *hadd* crime of *zinā*. She was convicted on the evidence of the birth of her child and that she had confessed to crime.

Several lawyers took up her case, and it was lodged in the Upper *Sharia* court on 28 March 2002. However, the judges of the court (Alhaji Umar Ibrahim, Alhaji Bello Usman, Alhaji Aliyu Abdullahi, and Alhaji Mamuda) upheld the death sentence on 19 August 2002. They insisted that she could not retract her confession.

After this preceding, redress was filed to the *Shari'a* Court of Appeal.

When the Katsina State *Shari'a* Court of Appeal heard Amina's appeal, it considered several issues erred by previous courts on the matter:

1. Statutory composition of the Court that tried Amina at first instance (that is the lower *Shari'a* Court).
2. The gestation period for fertilized embryos.
3. Circumstances and methods of apprehension of alleged offender(s).
4. Violations on *Shari'a* principle for the right of retraction of confession.

Eventually, the Katsina State *Shari'a* Court of Appeal acquitted Amina Lawal on these grounds:

Firstly, concerning the statutory composition of the Court of the first instance, one judge was present during Amina Lawal's initial conviction instead of the two judges required under Islamic Law.⁶⁷ Therefore, the Court was not properly constituted. Secondly, under a proper interpretation of *Shari'a* law, gestation period for pregnancy can last for up to five years, therefore, creating the possibility to assign paternity of the baby to the previous husband.⁶⁸ From the preceding, it would appear that the second reason touched on substantive law. It states that embryos could be in gestation for periods of up to five years with the consequence that a previous husband is liable to accept paternity of a child born due to this pregnancy unless he refutes by swearing the oath of *li'an* (*Curse*).⁶⁹ The *Shari'a* Court of Appeal observed that substantive Maliki Islamic jurisprudence (*fiqh*) would have been satisfactorily applied and implemented to acquit Amina Lawal by the previous courts. Thirdly, the Court submitted that the policeman who first arrested Amina in 2002 violated Islamic law requiring four witnesses to the crime. This requirement was not met before her arrest. Fourthly, the Court held that Maliki jurisprudence allowed for the possibility of accused persons to retract their testimonies at any point prior to final ruling. The court insisted on this by taking the example of the Holy Prophet who rejected Ma'iz's claims of *zinā* on several occasions. He would not accept his confession not after inquiring and establishing the sanity of Ma'iz during the time of his first confession. Therefore, the Qadis of the Appeal

⁶⁷ Section 4 (1) of the Katsina State law No 5 of the year 2000 states that Shari'a lower Court is properly constituted when two judges preside over it.

⁶⁸ The Court observed that the appellant is a divorcee. A divorcee under the Maliki School of jurisprudence can have gestation for five years (known as a "sleeping embryo") from the time of her divorce. Hence, her pregnancy cannot provide sufficient reason for convicting her of *zinā*.

⁶⁹ Getting data on the prevalence of the use of *li'an* during post-Colonial Northern Nigeria would have enriched our paper. However, I found no materials on the matter. Such a field interest will make for good contributions to the study of shari'a principles used in *zinā* related issues in Nigeria.

Shari'a Court submitted: No *Shari'a* court of law could convict anyone based on the narrative of a single confession, and without establishing the mental state of the individual.

The *Shari'a* Appeal Court found that the *Shari'a* lower court, Bakori, convicted the appellant based on a single confession before the Court. The *Shari'a* Appeal Court, therefore, overturned the initial judgement. The judges submitted that the previous court had contravened *Shari'a*'s provision for retraction of confessions. They referred to the Hadith of Ma'iz⁷⁰.

The State *Shari'a* Court of Appeal, on 25 September 2003, abrogated the death sentence on Amina Lawal. The lead judgment led by Hon. Grand Khadi A. I. Katsina, and three other judges (Hon. Qadi I.M. Umar, Hon. Khadi S. M. Daura, Hon. S. M. Dan-Musa) submitted that the case had insufficient evidences to sentence Amina Lawal. They also submitted that it was within her rights to withdraw the previous confession. However, there was the minority report by Hon. Qadi Sule Sada Kofar Sauri who did not agree.⁷¹

2. 3. Consideration for the Question of Who is eligible to bring Charges of *Zinā*

We observed that in the *zinā* cases treated above, the police brought both Safiyatu and Amina. In both cases, upon receiving information from unspecified persons about both women becoming pregnant out of marriage, the local police went into investigation and brought charges of *zinā* against the men and women. Is the police force a proper agent to bring *zinā* charges?

The *Sharia Criminal Procedure Codes*, 2000, (CPC) used by the 12 Sharia States has no provisions for defining this matter. Its precedent CPC, 1960, provided limited categories of persons permissible to bring charges of *zinā*: In the case of married persons, the husband of the woman, or

⁷⁰ In this Hadith, the Prophet was angry at his associates for denying Ma'iz the opportunity to retract his confession when he requested to be taken back to Prophet.

⁷¹ Cf. *Op. Cit.*, Ostien: *Sharia Implementation in Northern Nigeria 1999 – 2006: A Sourcebook*: Vol. V, pp. 98 – 107.

an adult in charge of her in his absence, are the principal agents to bring such charges when it occurs to the Court. In the case of an unmarried girl, complaints should be made by her father or another adult in charge of her.⁷² Unfortunately, this omission empowers the police to bring charges of *zinā* before Sharia courts. Evidently, this is the reason why the police charged both Saffiyatu and Amina.

⁷² Cf. *Criminal Procedure Code* (1960), section 142.

Chapter Three

3.0 Procedural and Substantive Evaluations of *Zinā* Cases to Ascertain Areas Bothering on Women' Human Rights Issues

Introduction: During the juridical processes of the convictions of Safiya Husseini and Amina Lawal *Zinā* (adultery) cases and their eventual acquittal by the upper Sharia courts, observers identify indices indicating that some aspects of *Shari'a* were biased and prejudiced against women. There are scores of pieces of literature highlighting the perceived *Shari'a* gender bias against women. For instance, Hauwa Ibrahim, a counsel in the defense team of Amina Lawal, submits that she considered her work as a gender-specific assignment.⁷³ Her published reflections after Amina's acquittal illustrate how much pressure she said she was under while challenging what she considers a gender bias in the adjudication of sexual offenses under Islamic law.⁷⁴

The fact that the *Shari'a* judicial system adopted in Nigeria⁷⁵, in its attempts to be close to the spirit of *Shari'a* (*Shari'a* provides protection and dignity of every human being, and seeks to elicit for repentance and conversion rather than punitive actions) adopted a three strata *Shari'a* court system, is neglected. The courts are the Lower or Local *Shari'a* courts, the Upper *Shari'a* court, and the *Shari'a* Appeal court. In an ascending order, these courts help to re-evaluate cases and ensure that *fiqh* and the interpretation and application of *Shari'a* are appropriately applied to individual cases to best bring about justice in every case brought before them.

⁷³ Ibrahim, Hauwa, Lyman Princeton, 'Reflections on the New *Shari'a* Law in Nigeria' Africa Policy Studies Program with the Council on Foreign Relations, (New York: American University Washington College of Law, 2004)

⁷⁴ *Ibid*

⁷⁵ In Nigeria, Islamic jurisprudence (*fiqh*) is that of the Maliki madhab of Sunni Islam. Mālikī *madhab* constitutes one of the schools of Islamic *fiqh*. It is referred to as the School of Hejaz or Medina School.

Amina and Safiyyatu were both charged for the offense of *zina*. The pieces of evidences used for their convictions was the fact that they were found pregnant and gave birth their children when they were not in any form of marriage. When their cases were referred to the *Shari`a* Appeal Courts of Katsina and Sokoto states, respectively, judgments of the lower *Shari`a* courts which was hinged on the position that unmarried pregnancy is proof of *zinā* by itself was overturned. Both Appeal courts held that the case of pregnancy in an unmarried state is not *ipso facto* justification of *adultery*. The judges also spotted out jeopardized procedures of *fiqh* in the lower courts.

The Courts of Appeal did their utmost to examine the cases repeatedly and present the accused with provisions within the law to circumvent the *hadd*. The *Shari`a* Court of Appeal checked the errors of *fiqh* by the lower courts and eventually provided conviction for the accused. It did this by meticulously and wholistically applying Qur`anic contexts and examples from *sunna* in leaving doors for repentance and acquittal, especially for women.

Uniquely, Judges of the *Shari`a* Appeal Courts employed substantial and procedural requirements to promote a spirit that upholds human dignity and promotes repentance, mercy, and justice. Analyzing the decisions of the Appeal courts *fiqh* stances regarding evidences for *zina*, it is safe to submit that the Courts of Appeal have laid down admirable exemplar in these matters.

In our considerations on the amount of gender-centric concerns which the Safiya Hussein and Amina Lawal *zinā* cases generated, this chapter shall evaluate through the lenses of both the procedural and substantial contents used for convictions and acquittal in *zinā* cases and as used by the three statuses of *Shari`a* Courts: The lower *Shari`a* courts (which sometimes may be the Upper *Shari`a* courts) and the *Shari`a* Court of Appeal. We do this to establish areas of Women`s rights concerns that the lower courts propagated and illustrate how and where the *Shari`a* resolves these

issues, especially by the *Shari' a* Court of Appeal. In other words, there is a built-in mechanism to help check for abuses, grey concerns, and issues of human rights concerns ingrained in the *Shari' a* application.

3. 1. Arguments for Women Gender Bias in *Zinā* Cases

A specific perceived bearing on gender bias against women in the *zinā* cases studied in this research is the discharge of their male accomplices in the alleged crimes. In both cases, the men involved simply accused Sufiyatu and Amina of impugning (*qadhf*) their integrity. Yakubu, the alleged man responsible for committing *zinā* with Sufiyatu had two witnesses who corroborated that he had confessed to having committed *zinā*. Nevertheless, this was insufficient proof for conviction since the testimony of four adult persons is needed. A similar situation arises in the dismissal of Yahaya Abubakar, the alleged accomplice in Amina Lawal's case. He was acquitted simply on denial of being involved in the matter since the provision for four witnesses corroborating his involvement in the case was not met.

This "seeming" ease of acquittal of men in *zinā* related matters irks pain in women considerations. Getting four corroborating witnesses for the offense of adultery is the primary condition for accused men. In contrast to women cases, evidence such as pregnancy and the birth of a child are also used to establish the crime of *zinā*. While it is improbable to have accused persons (both male and female) convicted of *zinā* based on the requirement of four witnesses, this is not so for convicting women of *zinā*. Pregnancy could be a *prima facie* ground for proof and possible conviction. The evidence via pregnancy is the condition most women easily fall into.

In addition, there is a lop-sided issue for women with regards to the four-witness requirement.⁷⁶ In the absence of four witnesses, the denial of an alleged man (or male) accomplices

⁷⁶ It is imperative to note here that that four-witness rule is a safe measure to guarantee the strongest possible direct evidence before any allegations might be made against a woman's chastity.

in cases of *zinā* consequentially put the accused women within the crime of defamation (*qadhf*). For instance, the fact that Yahaya Abubakar had maintained that he never made a confession to the crime of *zinā* meant that a second charge of *qadhf* (that is, a charge for defaming) of his character is added to her *zinā* case.

These concerns continue to provide reasons for complaints about the treatment of women in *zinā* related cases by the new *Shari'a* criminal and penal laws in Nigeria. The new *Shari'a* Penal Codes have produced such heightened public debates and involvements of some Nigerian Civil Society organizations and non-governmental groups such as the BAOBAB for Women's Human Rights, who have been very involved in these matters.⁷⁷

In both cases, the provision of four witnesses, or lack of this, to corroborate an alleged crime of *zinā* was highly considered. Safiyya Husseini and Yakubu Abubakar on 23 December, 2000 were arrested and trialed for *zinā* at the Upper *Shari'a* Court in Gwadabawa, Sokoto State. They were charged to Court under the new *Shari'a* Penal Codes. Yakubu Abubakar was released for denying the charge for lack of the required evidence of four witnesses. According to Muhammadu Bello Sanyinnawal, (Grand judge of the Upper *Shari'a* Court), having two witnesses who affirmed Yakubu's confession to committing *zinā* is not satisfactory evidence. The offense of *zinā*, in this case, needs to be proved by the evidence of four witnesses. However, Safiyatu Husseini was judged guilty of *zinā* because of her pregnancy and eventual birth. She was given the *hadd* punishment of *rajm*.

Amina Lawal was jointly charged alongside Yahaya Mohammed for illicit sexual relations together in the cause of their relationship. She eventually got pregnant and was delivered of her baby. The case was first heard on 15 January 2002. After swearing an oath with the Qur'an, Yahaya

⁷⁷ Cf. BAOBAB

Mohammed was set free. On the exhibit of child birth, the local *Shari'a* court charged Amina Lawal with the offense of adultery. An appeal lodged on 28 March 2002 with the Upper Shari'a Court in Funtua did not revert any decisions but upheld the death sentence on 19 August 2002.

Could there be some procedural and substantive considerations in these matters of jurisprudence that could help isolate areas of gender bias issues in both cases?

3. 2. Some Procedural and Substantial Considerations of Safiyatu Hussein's and Amina Lawal's Conviction in the Lower Shari'a Courts

Firstly, we shall look into the procedural circumstances around Safiyatu Hussein's case in the lower Court (in this case, the Upper Shari'a Court, since this was the first Court of instance used for her trial) which convicted her of *zinā*.

We do this in order to ascertain areas where judicial litigation, according to the Maliki *madhāb*, may have been bridged. This helps us to focus on possible grey areas in women bias concerns.

3. 2. 1. Procedures Around Apprehension of the Accused:

The police apprehended the accused (Safiyatu Hussein and Yakubu Abubakar) upon reports made to them by anonymous persons. She was apprehended without the evidence of four witnesses to the alleged crime of *zinā*. According to the record of the trial court proceedings held on 23/12/2000, it is stated that at about 2 p.m., the police were informed about the case of *zinā* between Safiyatu Hussaini and Yakubu Abubakar. No information is garnered about specifications of the place or time that the accused allegedly carried out the offense. In order words, the apprehension of the accused goes contrary to Shari'a's requirements.

3. 2. 2. Procedures in Establishing status of *Mohsan*⁷⁸:

Al-Tashri`u al-Jina`i⁷⁹ states that confession to the crime of adultery is not sufficient prove for passing *hadd*. He adds that it is necessary for judges to ascertain the state of sanity of such confessors in order to give value to their confession. This is done by asking the following of the accused: What is *zinā*? How is it done? To whom and with whom is it done? The judge is expected to ascertain if the accused is a *Mohsan* or not? In situations where the accused claims to be *Mohsan*, it is obligatory for the judge to interrogate further by asking, “What is *ihsan*⁸⁰ in *Shari`a*?” He emphasizes that even when the judge establishes sanity of the accused, he is advised to inquire further from the accused: What *zinā* is? How is it committed? To whom is *zinā* committed? Where these questions are satisfactorily answered, they must inquire further, “Are you a *Mohsan*? or not?” If the purported declares that he is *Mohsan*, the *qadi* should query him, “What is *Ihsan* in *Shari`a*?”⁸¹

The repetitive series of questions are meant to help guarantee proper understanding and appreciation for the gravity of the crime of *zinā* from the accused. It is also done to give room for providing proper counsel where there might be some misunderstanding in order to ensure justice for the accused person(s).

In the documents of the lower *Shari`a* court proceedings that tried Safiyatu, the meticulous procedures for ascertaining and establishing a proper understanding of the accused regarding the gravity of the crime, her faith, and willful consent to the matter was not followed.

⁷⁸ A man (or *mohsinat*, woman) who is in the state of *ihsan*

⁷⁹ Cf. *Al-Tashri`u al-Jina`i* Vol. 2 p. 434

⁸⁰ This is the state of being a freeborn, rational, adult person who is or was a partner in lawful marriage, lawfully consummated, with a person who is (was) also in the state of *Ihsan*. *Op. Cit.*, p. 434.

⁸¹ *Op. Cit.*, p. 434.

3. 2. 3. Unsatisfactory Reliance on Pregnancy:

Safiyatu presented the following particulars to substantiate her position to the Upper Sharia Court. Firstly, that she is divorced; secondly, she was not divorced for more than five years. Thirdly, she averred that paternity of her child lies her former husband under the Maliki *fiqh*. Despite these particulars presented, the Upper *Shari`a* Court convicted Safiyatu of the offense of *zinā*. She was sentenced to *rajm* because of her pregnancy and eventual birth of a child while she was not married. This does wrong according to Maliki *fiqh*.

Secondly, we shall consider the procedural and substantive matters that ensued during Amina's conviction in the lower *Shari`a* Courts. The litigation process that manifested throughout Amina Lawal's trial will help isolate areas that could lend themselves to interpretation as gender-biased against women.

3. 3. Substantive and Procedural Considerations Around Amina Lawal's Conviction in the Lower Shari`a Courts

Amina admittedly submitted that she had sexual intercourse with Yahaya. On his path, he denied it. The Court set him free on this account and on the inability to present four witnesses to the crime. Amina however was found guilty based on the evidence of her pregnancy out of wedlock.

3. 3. 1. Inadmissibility of Retraction as means for conviction:

Confession to the crime of *zinā* is one of the requirements that could be used for judgement and exercise of the *ḥadd* penalties. It is required that the individual confessing must be an adult and in full and complete mental health. In this situation, one confession (*Iqrar*) is often sufficient to convict⁸², but the confessor may be persuaded to withdraw such confession in any way whatsoever

⁸² Sanusi, S. L., 'The Hudood Punishment in Northern Nigeria: A Muslim Criticism,' available at www.uga.edu/islam/sanusi.htm p.6, citing Ibn Qudamah, *Al-Mughmi*, Vol. 10, esp. pp.191 ff; Al-Jazairi, *Kitabul*

(*mutlaqan*) or even run away during the implementation of the *ḥad* punishment.⁸³ Withdrawal of the confession is acceptable on its own and will lead to acquittal. However, some Maliki jurists have maintained that for the retraction to help a defendant, it ought to go along with arguments or facts that could amount to some doubt (*shubhah*).⁸⁴ Malik is reported to have said:

As for an individual who confesses committing fornication and then says, they did not do so and said it was for certain reasons, that it would be accepted from him and he will not be punished because this punishment is for Allah, it (conviction) cannot be done without either vivid proof on whosoever does so, or by his confession.⁸⁵

In the case of Amina Lawal, she had confessed to the crime of *zinā* with Yahayya in the Local Shari'a court, Bakori. However, since the required four witnesses needed to convict them were not met, Yahayya simply denied the charges against him and accused Amina of defaming (*qadhf*) his name. He was released. Amina was convicted of *zinā* based on her confession, but also on account of her pregnancy and eventual birth of her daughter (who was delivered outside of marriage) and of the crime of defamation (*qadhf*). Hoping for redress, she applied for a second judgment on the matter in the Upper Shari'a court in Funtua. In the bid to unwrap herself from the charges of *qadhf*, she retracted her claims about Yahayya and appealed that her pregnancy and the birth of her baby were a result of her previous marriage. In other words, she appealed to the argument of "sleeping embryo." The judges of the Upper Shari'a court ruled in favour of the Local Shari'a court in

fiqh ala 'l-Madhahib al-Arba', Vol 5 75, 94 and passim; M. Abu Hassaan, *Ahkam al-Jareemah wa 'l-Uqubah fi 'l-Shariah al-Islamiyyah* 255-257; Ibn Hazm, *Al-Muhalla*, Vol II, 155-157
[12] *Ibid.*

⁸³ *Ibid.*

⁸⁴ Uthman, M.B., 'Protecting the Rights of Accused Persons through the Proper Implementation of the Shari'a Procedural Guarantees in Northern Nigeria', in Joy Ngozi Ezeilo, Muhammed Tawfiq Ladan, Abiola Afolabi-Akiyode (eds.) *Shari'a Implementation in Nigeria Issues & Challenges on Women's Rights and Access to Justice*, Women's Aid Collective (WACOL), 2003, p.186

⁸⁵ *Al-Muwatta' (The Approved)*, supra note 100, hadith no.14 (1563)

submitting that her initial confession stood as proof for conviction and insisted that she could not retract.

3. 3. 2. Abnormalities in Interpretation of Gestation Period for Fertilized Embryos:

Amina Lawal appealed to the Maliki jurisprudence on the matter of the duration of gestation, which could be up to five years, thereby creating the possibility for the former spouse to be the responsible.⁸⁶ In cases of a divorced woman, whose husband has died and found to be with child, or has a child without first remarrying, Maliki law holds that the pregnancy and child belong to the divorced husband or deceased spouse. Unless if he is willing to go through the process of *Li'an*.⁸⁷

This Maliki position is explained thus:

And if the woman gives birth to a child after (the waiting period) before the expiry of the full gestation for pregnancy it is attached to the (former/dead) husband unless the husband (if still alive) rejects it with the oath of *Li'an*.⁸⁸

The quotation above emphasizes that in situations where the divorced woman is found to be pregnant or with child within the gestation period (five years following Maliki jurisprudence) by *ipso facto*, paternity is linked to the previous husband. This position is challenged if takes a *li'an*.

Amina's former husband did not repudiate the pregnancy or child through *Li'an*, a provision provided in such matters.⁸⁹ Yet, the judges upheld the judgments passed by the lower Shari'a court, Bakori, insisting that her pregnancy and her daughter's eventual birth were a result of *zinā*.

⁸⁶ My subjective opinion is that the far-reaching flexibility and position of gestation duration allowed for by the Maliki madhāb of jurisprudence tells of the magnanimous spirit and desire of Shari'a to preserve the lives and dignity of women facing *zinā* cases

⁸⁷ *Li'an* is an oath taken four times before a court stating that the woman is lying and guilty of illicit intercourse. He completes the oath by saying: "Allah's curse be upon me if I am a liar in my accusation of *Zina* against my wife". To avert the hadd of *zinā* the woman also swears four times with her own conclusion like this: "Allah's wrath be upon me if he is truthful in his accusation of *zinā* against me."

⁸⁸ *Ibid.*, citing Muhammad Ulaysh, *Minah al-Jaleel, Sharh 'ala Mukhtasar Sayid Khaleel*, 4:307

⁸⁹ Sanusi, L.S., *Op. Cit.*, note 23.

Certain aspects of abnormalities give weight to the gender issue concerns of women from the various procedural and substantial contents examined from the lower *Shari`a* Court's handling of both Safiyatu and Amina *zinā* cases. In both *zinā* cases, the women were unable to get off the accusation of *zinā* on account of their pregnancies. Their male counterparts were released for lack of four witnesses to corroborate the claims of *zinā* with these women.

Safiyatu and Amina were caught up in the second crime of *qadhif*. In order to rectify this problem, they both pleaded for a Sleeping embryo. In doing so, their pregnancies would no longer be used as pieces of evidence for the crime of *zinā*, for their husbands from prior marriages would be responsible for their pregnancies. This legal principle within the Maliki jurisprudence was denied. Worst still was that the lower *Shari`a* Courts denied the women the possibility of retracting their first confession about committing *zinā*.

3. 3. 3. Statutory composition of the Court that tried Amina at first instance:

The lower *Shari`a* Court of Bakori where Amina Lawal was first tried and found guilty for *zinā*, was led by a single judge. This is a practice that is contrary to an adequately constituted *Shari`a* court in accordance with the Katsina State Law.⁹⁰ The statutory standard for legal *Shari`a* Court was not properly constituted because one judge was present during Lawal's initial conviction instead of the two required under Islamic Law.

3. 3. 4. Method of apprehension of alleged offender(s):

Maliki jurisprudence requires four male witnesses who saw the act occur for proof of *zinā* by evidence.⁹¹ Proof should be jointly or consecutively taken within short intervals.⁹² However, the

⁹⁰ Section 4 (1) of the Katsina State law Number 5, 2000 explains that properly constituted courts are those with at least two judges presiding over them.

⁹¹ Uthman, M.B., *Op. Cit.*, note 25, p.186

⁹² *Ibid.*

policeman who first arrested Amina in 2002 did so in violation of Islamic law, which requires four witnesses to the crime.

Conclusively, it is logical to submit from the derivation of procedural and substantive issues (concerning women's gender biases in *zinā* matters) highlighted from the lower Shari'a Courts above that there are plausible concerns. However, we also observe that most of these concerns do not necessarily stem from Shari'a itself, but from abuses of procedural systems and the lack of proper interpretation and application of the contents and spirit of Shari'a and the principles of Maliki *madhāb* in these cases.

In response to these concerns, the Shari'a Court of Appeal addressed both *zinā* case studies. Therefore, within the submissions of the Shari'a Appeal Courts, we can adequately understand and deduce the position of Shari'a with regards to women's gender concerns around the crime of *zinā*.

3. 4. The Grounds for Acquittal of Amina Lawal and Safiyatu Hussein by the Shari'a Courts of Appeal

The conditions under which Amina Lawal and Safiyatu Hussein triumphed are founded on substantive and procedural applications wrongly applied by the *Shari'a* lower courts. *Shari'a* has the means to defend justice by inherent qualities within fiqh. For this reason, upon hearing Amina Lawal's, and Safiyatu Hussein's appeals, the *Shari'a* Court of Appeal in Katsina and Sokoto identified the following errors:

1. The statutory composition of the Court that tried Amina Lawal at first instance (that is, in the lower Shari'a Court) was wrongly constituted.
2. The lower courts contravened the proper application for the argument of the gestation period for fertilized embryos in the cases of Amina Lawal and Safiyatu Hussein.

3. Circumstances and methods of apprehension of alleged offender(s) were contrary to Sharia submissions in both cases.
4. There were violations of the Shari'a principle for the right of retraction of confession in the case against Amina Lawal.

Therefore, the Shari'a courts of Appeal of both Katsina State and Sokoto acquitted both Amina Lawal and Safiyatu Husseini of the charges of *zinā*, respectively.

“What primarily constitutes women-gender discrimination in *zinā* issues considered above?” “Is this hinged more on substantive or procedural matters?” We observe that the *Shari'a* Courts of Appeal corrected the procedures followed by the lower courts and their detailed interpretation of the evidence of pregnancy in both cases.

Three issues are pertinent for our consideration of gender bias against women in *zinā* cases. First, insistence and predication of prosecution on the evidence of gestation as proof of adultery; second, the absence of an accomplice in charge of *zinā* due to an initial discharge of the co-accused; and third, the presumption that women are denied access to justice under Islamic law.

The question of gender biases against Safiyatu Husseini and Amina Lawal depended on pregnancy as a means of evidence in the absence of four witnesses. Pregnancy (a substantive element) was used in both cases for proof and conviction of *zinā*. The men were acquitted of their charges for the lack of four witnesses in both cases; whereas the women were found guilty by evidence of pregnancy. These women were found guilty based on circumstantial or substantive reasons.

3. 5. Circumstantial concerns of pregnancy as the Crux of Women Gender Bias Argument

The main argument proposed is that the standards of evidence used for women in *zinā* related cases is higher and different from the standards required of men. Pregnancy as *prima*

facie evidence that could support a charge of *zinā* against a woman applies only to women. A man cannot get pregnant. He cannot be charged for *zinā* on the evidence of a pregnancy, even where the woman claims the man is responsible. It will be thought unjust the application of Shari'a to the crime of *zinā* as practiced in Nigeria, where the pregnancy was used solely as a basis for the prosecution of the offense. For *zinā* to occur, there must be two persons, a male, and a female, since the female who eventually becomes pregnant cannot be said to be the single architect of her pregnancy. This argument applies to the consideration of non-consensual sex (rape) cases too. Logically, it follows that convicting a woman of *zinā* in the absence of a male accomplice goes logically and biologically against the act itself.

We will examine further the Court's consideration on the matter of male accomplices in the matter of *zinā*.

3. 5. 1. Women Gender consideration in the absence of Male accomplices in the Offence of *Zinā*

Amina Lawal's purported accomplice, Yahayya, was not charged and prosecuted beyond the Court of the first instance because he said he did not have illegal sexual intercourse with Amina.⁹³ The way and manner in which Yahayya was discharged and acquitted were frowned at by the Katsina State *Shari'a* Court of Appeal. The lower *Shari'a* Court had only asked Yahayya to swear to an oath, supposedly, an oath of suspicion. In its reaction to the oath taken, the Katsina State Court of Appeal submitted:

No authority says that a person accused of *zinā* should take an oath in the absence of evidence. The *Shari'a* Court Bakori erred when it administered the oath of suspicion on Yahaya Mohammed. It is wrong to administer the oath.⁹⁴

⁹³ *Amina Lawal v. Katsina State*, Supra note 6

⁹⁴ *Ibid.*, p.103

The Court explained that in the absence of evidences such as the testimony of four witnesses, or pregnancy, or confession to the crime, or pregnancy, the conviction for *zinā* is not confirmed. In other words, no single piece of evidence from the three proofs of shreds of evidence stated above is sufficient for the legal charge of a case of the crime of *zinā* in the first place. In the absence of this evidence, the accusers (police) and their informants should receive punishment for *qadhf*. ‘Therefore, it was wrong to administer an oath in this case.’⁹⁵ Conclusively, the absence of any male accomplice in the offense of *zinā* is not enough reason for arguments indicative of women's gender bias in *zinā* cases.

Furthermore, to insist that an accused person (in this case, the male accomplice) for the crime of *Zina*, who has also availed himself for defense under the law, should necessarily be charged because biologically, there must necessarily be a male participant for *zinā* to occur, goes contrary to the purpose of *Shari'a* “presumption of innocence” before proven guilty. Such an argument loses the motive behind the spirit of *Shari'a*. The fact that *zinā* offense necessarily needs a male accomplice does not mean that every accused male in a case is guilty.

3. 5. 2. Considerations for Cases of Non-Consensual Sex (Rape) in *Zinā*

Safiyatu had submitted that Yakubu raped her and she gave a vivid description of what happened.⁹⁶ Rape is an inclusive content used in *fiqh* considerations around adultery claims. *Shari'a fiqh* already has arguments for defense against a charge of *zinā* for a woman’s pregnancy due to non-consensual sex outside marriage. One of the ways to do this is to claim that she was raped. According to Imam Malik:

⁹⁵ *Ibid.*

⁹⁶ Okorie Uguru interviewed Safiya, ‘Amina Lawal: Let Off the Hook’ in *The Comet* 27 September 2003. p. 11.

The established practice with us concerning the woman who is pregnant and without a husband, who claims that ‘I was raped’ or ‘I got married’ is that these defenses will not be admissible. The *ḥad* penalty will be applied upon her except she can advance evidence to support her claim of marriage or rape, such as her turning up bleeding if she is a virgin, or screaming until she is found defiled or similar corroborative evidence that establishes her claim of her defilement.⁹⁷

Thus, Malik has acknowledged the chance that pregnancy can occur from rape. Therefore, setting up several standards to preserve rape victims from *hadd* penalty of *zinā*. *Fiqh* principal safeguards physical evidence as undeniable proof of rape.⁹⁸ Another measure is establishing the timeframe within which the matter is reported.⁹⁹ The character of the alleged rapist is to be examined,¹⁰⁰ and that of the woman making the allegation too.¹⁰¹

In an event, for instance, where the man alleged to have committed the rape is witnessed by people when he forces himself on his victim, such a case is treated differently,¹⁰² and presumption is established to support the woman’s plea of rape automatically. This was not the case with Sufiyatu Husseini. Even though she alluded to the fact that Yakubu Abubakar raped her, her claims could not be corroborated by witnesses, nor were there any bad cases of both accused called to question before this event. Evidence such as bleeding could not be verified since she was not a virgin. She had been divorced two years before her first sexual encounter with Yakubu. The Court had to deal with the matter as an accusation of *zinā* between two adults regardless.

⁹⁷ Uthman, M. B., *Op. Cit.*, note 25, p. 187, citing Abdul-Baqi, M.F. (n.d.) *al-Muwatta li Imamil A’immati Malik bin Anas (R.A)*, Maktabah Anas bin Malik p. 647

⁹⁸ Al-Zurqaani, *Hashiyat Al-Zurqani Ala Muwatta’ Al Imam Malik*, Beirut, Dar Al-Ma’rifah, 1989, Vol. 4, p.150

⁹⁹ Uthman, M. B., *Op. Cit.*, note 25, p.187, citing Ibn Rushd, *Bidayatul Mujtahid wa Nihayatul Muqatsid*, Vol I, pp.353-354.

¹⁰⁰ *Ibid.*, p.188, citing Ibn Juzay, *al-Qawanin al-Fiqhiyya*; Tasuliy, *Bahjah*, Vol II, p.356

¹⁰¹ *Ibid.*, citing Al-Tasuliy, *Bahjah*, Vol II, p.35.

¹⁰² *Ibid.*, p.189

There is the proposition that an unmarried woman, including divorced women, should not be charged with adultery in the first place.¹⁰³ This presumption appears to be predicated on the reasoning that since sexual intercourse is intrinsically a regular human activity, there are no rational bases for “criminalizing” the act amongst consenting adults. This is especially important where the alleged persons have already acquired a taste for the act. This taste, the argument would continue, having been imbibed as it were, within the legal marital relationship before these marriages were legally broken, the estranged spouse(s) should not be burdened by any guilt of *zinā*. Therefore, the Shari’*a* courts had no case to treat in the first place, nor the jurisprudence in this affair. This argument is inconsistent with Islamic law.

All schools of Islamic jurisprudence qualify for extra-marital sexual relations resulting in intercourse as either fornication or *zinā*. Though both are implied in the *Quranic* prescription,¹⁰⁴ hadith law establishes a distinction between the illegal sexual activities of a married person and that of an unmarried person. In the evidential rules for proof of the offense and whether the penalty upon conviction is appropriate and fair, scholars of the various schools of Islamic law and even scholars within the same School of Islamic law have continued to engage.

The prosecution team, in the Amina Lawal *zinā* case built its arguments on the *Quranic* prescription for illegal extra-marital consensual sex and the codification of the offense

¹⁰³ Cf. Oh, Francis E. “Amina Lawal and the Nigerian Constitution and Shari’*a* legal system: A battle for Supremacy?”, in M.M. Gidado, C.U. Anyanwu and A.O. Adekunle (eds.), *CONSTITUTIONAL ESSAYS* [Nigeria Beyond 1999: Stabilizing the Polity through Constitutional Re-engineering] *In Honour of Bola Ige*, 2004, Chenglo Limited, Enugu., note 17, p.313

¹⁰⁴ *Qur’an* 17:32

in the Katsina State *Shari'a* Penal Code Law. The Qur'an, says: "Nor come close to *zina*, for it is a shameful and an evil act, opening the way to other evils."¹⁰⁵

In his commentary on this verse, Abdullah Yusuf Ali maintains that:

Adultery is not only shameful, but it opens the road to other evils. It destroys the family's foundation; it works against the interests of children born or to be given birth to; it may cause murders and fights and the loss of one's reputation and belongings and weaken the associations of society.¹⁰⁶

Ibn Kathir's commentary on the same verse is also illuminating. According to the exegete, he posits that Allah forbids adherents to participate in adultery, nor desire and carry out actions that could lead towards it.¹⁰⁷

He then proceeds to state:

Imam Ahmad recorded Abu Umamah saying that a young man came to the Prophet and said, "O Messenger of Allah! Permit me to commit *zinā*." The people surrounded him and rebuked him, saying, "Stop! Stop!" But the Prophet said, (Come close). The young man came to him, and he said, (Sit down) so he sat down. The Prophet said, (Would you like it (unlawful sex) for your mother) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their mothers.) The Prophet said, (Would you like it for your daughter) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their daughters.) The Prophet said, (Would you like it for your sister) He said, "No, by Allah, may I be ransomed for you." The Prophet said, (Neither do the people like it for their sisters.) The Prophet said, (Would you like it for your paternal aunt) He said, "No, by Allah, O Allah's Messenger! May I be ransomed for you." The Prophet said, (Neither do the people like it for their paternal aunts.) The Prophet said, (Would you like it for your maternal aunt) He said, "No, by Allah, O Allah's Messenger! May I be ransomed for you." The Prophet said, (Neither do the people like it for their maternal aunts).¹⁰⁸

The *Qur'anic* exegeses on the subject of *zinā* (adultery) are pretty extensive. They conclude that the prescribed punishment for the offense is a deterrent. However, the crime is still being

¹⁰⁵ *Qur'ān* 17:32, Abdullah Yusuf Ali (trans.), Amana Corp., 1983

¹⁰⁶ *Ibid.*, Footnote 2215, at p.703

¹⁰⁷ *Qur'ān* 17:32, *Tafsir Ibn Kathir*, (Abridged) Volume 1, Parts 1 & 2, Darussalam Publishers, available online at <http://www.tafsir.com>

¹⁰⁸ *Ibid.*

committed, and interaction and living in a community with non-muslims who do not criminalize adultery has opened up avenues of criticism of the Islamic legal system in this respect. More so when the Universal Declaration of Human Rights has pitched its system of purportedly non-religious human rights schemes against Islamic Human Rights Schemes throughout the world.¹⁰⁹

Another circumstantial concern in regards to *zinā* and women gender issues is the complaint about access to justice

3. 6. A proposition that women are denied access to justice under Islamic law

Various claims that women and the poor are at the receiving margins of the *fiqh* justice system because they lack the wherewithal to access justice and that ‘the *zinā* laws are far more difficult for uneducated and poor women to counter’¹¹⁰ only reflects the inherent contradictions within all modern legal systems. No modern legal system has perceptible ready-made inbuilt mechanisms that ensure all persons have equal and unfettered access to justice. To claim that such a system really will be further from the truth.

There are established courts and procedures to be followed in all legal systems to institute and maintain causes. Almost all judicial systems provide for an education process that ensures that practitioners receive some legal training to participate in the system. Today, legal representation is *sine-quo-non* to access to justice. It is presumed that only those who are knowledgeable in the workings of the judiciary and the judicial system can speak comprehensively of the law and represent the interest of the plaintiff. This is no different from *Shari’a* court systems.

¹⁰⁹ See for instance An-Na’im, A.A., *Op. Cit.*, note 1

¹¹⁰ Von Struensee, Vanessa M.G., “*The Punishment of Death by Stoning for Offence of Zina (Adultery); Sharia in Nigeria and its Impact on Muslim Women,*” abstract at http://papers.ssrn.com/so13/papers.cfm?abstract_id=570148, accessed 13 April 2021.

The Islamic legal system admits of legal representation and places the obligation on judges of Sharia courts to guide litigants where they have no legal advisers.

Contrary to the position that women lack the resources to have proper representation in *shari'a* court cases and therefore cannot gain justice for their causes in *zinā* related cases is negated by the final investigation and rulings of the *shari'a* Appeal courts in the cases of Amina Lawal and Sufiyattu Husseini.

This is proof in itself that despite the sentences passed by the Shari'a lower courts, both women sought for acquittal in the *Shari'a* legal system of the Appeal courts. According to her counsel, Aliyu Musa Yawuri, he said that she is a Muslim and believes that the *Shari'a*, under which she was convicted, should have mechanism to allow her appeal the ruling of the lower Court, thereby guaranteeing the attainment of justice.

The entire processes of trials and convictions, the appeals, and acquittal of Amina Lawal and Safiyattu Husseini off the charges of *zinā* by the State *Shari'a* Appeal Courts demonstrate that the Shari'a Penal Codes (2000) are not gender biased.

3.7 Some General Remarks

The restoration of *zinā* laws has been met with lots of pushback. This is due to the presumptive gender biases drawn from lower *shari'a* court misplaced interpretation and applications of Maliki opinions in Safiyatu Husseini and Amina Lawal cases. Where in, the men were simply acquitted of *zinā* based on the fact that the required number of witnesses was unattainable. On the other hand, pregnancy was used as evidence against the women.

Contrary to this position, it is important to state that *shari'a* promotes the egalitarian right to both male and female defendants in *zinā* cases. The presumption of innocence for defendants is at the core of *shari'a*. The presumption of innocence and not reserved for men alone but for women

inclusively. The use of pregnancy as evidence is limited to Maliki jurisprudence. However, Maliki jurisprudence requires that other considerations such as the gestation period of pregnancy are associated with the use of pregnancy as prima facie evidence. This is done to reduce the threshold for finding any woman guilty of *zinā*. The principle of doubt (*shubha*) is another threshold used for preventing the punishment of stoning (*rajm*). Doubt is attained through confession of rape (unwilful participation of the woman). Where doubt in a *hudūd* crime is ascertained, the punishment of *rajm* is not applied. Consequently, it could be evidently claimed that the interpretation and application of *Shari'a* jurisprudence, according to Maliki's opinion in the lower *Shari'a* courts, were poor and reductionist in approach.

Chapter Four

4.0 Plausible Recommendations for Areas of Reform

Introduction: This chapter challenges the proposition that *Shari'a* penal laws are incompatible with international human rights. In refuting the position that *Shari'a* penal codes are not dynamic, this chapter shall build on the notions of “principles and objectives” behind the Universal Declaration of Human Rights (UDHR) and those of the *Shari'a* ideology *maslaha* and *maqasid al-shari'a*. Furthermore, it shall demonstrate the sense in which the *Shari'a* Appeal Courts in Nigeria being saddled with the responsibility of safeguarding *Shari'a* from a reductionist approach which the lower *shari'a* courts applied, to a holistic consideration of the law, therefore demonstrating *Shari'a* shared value with the international standard of human rights. It is within the multi-valued and teleological ends of *Shari'a* that its dynamic nature is applied. The considerations of the rulings of the *Shari'a* Appeal Courts demonstrate the bridge between *Shari'a* and international Human rights norms for all human rights, especially in as it relates to *zinā* cases with regards to women's rights. Pedagogical shot to accomodate *Shari'a* rules with international norms are confused for misguided trials to simply subjugate *Shari'a* to international standards. Ours attempts to identify and advance the objectives of theses subject matters (that is of both UDHR and *Shari'a*) and provide a scientific and moral satisfactory leverage of complementarity between the two systems.

Conclusively, our research proposes that the *Shari'a* Courts of Appeal rulings could be set as a benchmark forum for further evaluative projects of the *Shari'a* criminal and penal codes procedures. Adhering to such reforms will follow the legacy of the *Shari'a* committee of 1958-1962, which was set at bridging *Shari'a* law in the penal code of 1960 with human rights concerns.

The 1999 *Shari'a* committee failed to meet this salient mark already discussed (confer chapter I for discussion).

4. 1. A Background Consideration of the New Sharia Penal Code

It took about six months to study and implement the *Shari'a* Penal Code and Criminal Procedure 2000. It was quickly and incompletely rushed. These flaws in the legislation are caused by the limited time used during the formation of the work. Another possible factor contributing to the disorganized composition of the codes was the apprehension that they were of lesser significance. They are simply tools for establishing *Shari'a* and only useful for consultations in cases of silence or ambiguity of the enacted law. Codes were not introduced with an explanatory memorandum for the choices and provisions. They all seem to have been prepared in haste. The hasty procedure explicates the substandard quality of codes and constant incorrect wordings.

4. 2. The Universal Declaration of Human Rights (UDHR)

Several atrocities against humanity from the two world wars necessitated reformed conceptions of human rights not limited to Western objectives¹¹¹, but one that hopefully adopts international objective as collective responsiveness to crimes of concern to the world. Sets of constitutive norms to emphasize inviolable human rights founded on moral standards were reached in the Universal Declaration of Human Rights (UDHR) in 1948 articulate.¹¹² Attaining an international agreement was imperative for the legitimacy of the universal human rights

¹¹¹ In the article, "Human Rights, Natural Rights, and Europe's Imperial Legacy", Padgen writes: "It departs from a Western model of political rights held by persons under their citizenship in a specific territory or country." A popular notion during the European colonial expansion. He avers that this form of ideology "became increasingly useless as a notion in international or intercultural relations." Cf. Pagden Anthony, *Political Theory* 31, no. 2 (April 2003): 190.

¹¹² Johannes Morsink explains that the declarations were made as an immediate response to abrogate Nazism and her policies.

declaration. The UDHR enjoined an active participation and input of delegates from Muslim states.¹¹³ The correspondence of universal human rights and Islamic principles remained a concern after adopting the UDHR and the two covenants. There are contributions of thoughts of the Islamic tradition to the development and considerations of the UDHR.

4. 3. Islamic Human Rights Declaration (IHRD)

The UDHR is a declaration. This means that it does not have imposing power, rather articles from the declaration serve as incentives for adaptation and localization. This idea is important in considering the application and use of human rights discourse in Muslim contexts. The UDHR therefore, provided Muslim states norms used for engagement in their own formulations of human rights.¹¹⁴ Thus, in 1972, the legitimacy of international human rights and laws was approved by the Organization of the Islamic Conference (OIC), and in 1990 enacted the Cairo Declaration of Human Rights (CDHR). The CDHR developed its conceptualization of human rights which was supported from Islamic teachings and sources (Qur’ān, ḥadīth).

The point of departure in the CDHR alludes that the “historical and civilizing role” of the Islamic world, paved models for upholding human rights for all peoples. This idea is encapsulated in the notion of *maslaha*.¹¹⁵ Both the Cairo Declaration and the UDHR used conciliatory statements in illustrating how innovations of universal human rights norms were upheld when

¹¹³ Susan Waltz recorded the participation of Muslim states in creating not only the UDHR but all the two covenants[3] comprising the International Bill of Human Rights. Waltz identified five objectives for delegates from countries with the Islamic tradition: Religious freedom and the right to change religion; Indivisibility of rights and social justice, gender equality in marriage; the right to self-determination; and implementation tools Cf. Waltz Suzan, Universal Human Rights: “The Contribution of Muslim States”, *Human Rights Quarterly* n. 26 (2004): 799–844.

¹¹⁴ Muslim states engaged in their own formulations in two aspects: both as a way of resistance to western powers and as a constructive assertion of Islamic values.

¹¹⁵ This is an important concept that we will get back to later when we consider the common grounds for both Sharia and the UDHR

“Islamic civilizations was at its heights.¹¹⁶ The foundation for human rights and freedom, the document goes on to posit, is founded upon the instructions of justice and freedom in both the Qur’an and in the *shari’a*. In other words, human rights concerns are not estranged from Islam.¹¹⁷

Legal scholars in Islamic studies provide contrasting positions in the considerations of codified *Shari’a* and *shari’a* in its essence or ideal.

4. 4. Distinction between *Shari’a*, *Fiqh* and Codified Law

Abdullahi An-Na’im’s thoughts help to illustrate the possible branching of *Shari’a* into two halves: In one hand, when *Shari’a* is considered as a social construct for practical living it could be enforced by the State. On the other hand, when it is sort for its spiritual and religious underpinnings, we find its essence. *Shari’a* consist of sources from the Qur’an and the Sunna. Divine revelation and exemplars of the Holy Prophet are found there in respectively. These sources are left to human rationale and interpretations *fiqh* (jurisprudence). *Fiqh* is carried out sometimes by applying the sources literally to particular subjects being investigated. This approach is reductionist in its manner and fails to take into consideration the context of the *Shari’a*. In order to avoid this pit hole, classical Islamic jurists came up with the concept of *al-maqasid*. An-Na’im notes that the categorization of *shari’a* into codes by present governments of states produces abuses. This is evident in many histories. He opines that it is a religious obligation for Muslims to follow *Shari’a*, and this is done best when the government is not involved. Any interference by

¹¹⁶ Mawdudi positions is that Islamic conceptions of certain rights supersedes conceptions in the western tradition, such as freedom of expression. He averred that the qualitative difference is inherent in Islam’s refusal to “propagate evil and wickedness”. Mawdudi corroborates this principle to the Islamic duty of commanding right and forbidding wrong. Cf. Abu A’la Mawdudi, *Human Rights in Islam* (London: The Islamic Foundation, 1976), p. 31

¹¹⁷ Shannon Dunn observes that the position of the document presented in this way illustrates that both Islamic and secular human rights frameworks are scarcely separated of philosophical or theological considerations about the purpose and relationship of the human person with her community. Shannon Dunn, “Islamic Law and Human Rights” in *The Oxford Handbook of Islamic Law* Ed. by Anver M. Emon and Rumea Ahmed. Date of Online Publication: Oct 2015 DOI: 10.1093/oxfordhb/9780199679010.013.26 (Accessed 10 July 2021).

governments on religious doctrine automatically has an influence of the hegemony of such society. Such religious law loses its essence. The historical events of *al-Mihna* in Islamic history is a vivid example.

Mashood Baderin argues that *fiqh* could be advantageous for advancing human rights. He writes: “The legitimizing force of Islamic law in Islamic societies can be positively impactful through maturity and accommodation, for the enforcement of international human rights law in the Muslim world.”¹¹⁸

4. 5. *Shari`a*'s Relatedness with International Human Rights Law

The general objectives of international human rights encourage states laws to acknowledge the inherent dignity of human beings and to ensure norms that promote this position. Based on this factor, there shall be no discrimination of persons on account of their religion, race, political status, and the likes. The universal good of every human being is a common denominator for dealing with people. This is not far from the Islamic concept of ‘*al-ma`rūf*’ (common good). Essentially, *Shari`a* charges under the doctrine ‘*amr bi al-ma`rūf wa nahy `an al-munkar*’ (encouraging the good and discouraging evil).¹¹⁹ The objective of international rights concerns are in consonance with the *maqāsid al-shari`a*,¹²⁰ which is the promotion of human well-being. Therefore, the idea

¹¹⁸ Cf. Mashood Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2005), p. 219.

¹¹⁹ This phrase is “[u]sed in the Quran nine times, referring to the collective duty of the Muslim community to encourage righteous behaviour and demoralize immorality, as established by reasoning in the application of Islamic moral thoughts and legal procedures. It aims to remove oppression from society and instead establish justice. Applied to moral, social, political, and economic facets of life. It is, preferably, the distinguishing trait of the Muslim nation”, confer John L. Esposito (ed.), *The Oxford Dictionary of Islam* (Oxford: Oxford University Press, 2003), p. 19.

¹²⁰ Baderin writes: “The concept of *maqāsid* is a normative principle of Islamic law formulated by classical Islamic jurists to promote a contextual understanding of *Shari`a* provisions. The full Arabic terminology for the principle is ‘*maqāsid al-Shari`a*,’ which has been translated variously in the English language as “objects and purposes of the *Sharia*.” Confer Mashood A. Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), p. 40.

of *maslaha* have strong ties with human rights and should be discussed in the context of *maqasid al-Shari'a*. Such an intellectual route better illustrates the ties between human rights tradition and *Shari'a* traditions. Divine revelation in Islam alludes to the dignity and honour bestowed on every human by Allah. The Quranic text 17:70¹²¹ reiterates this. It is therefore an obligation for government institutions to respect all lives.

Islamic law is a human-made norms as an interpretation of the principles and objectives of revealed (divine) law. Therefore, these norms are applicable to human living. The necessitation for sharia therefore is the moral applications that laws obliges of us bound by our consciences. *Shari'a* is an inherent law in the hearts of all people and is more than mere codified laws. Therefore, *Shari'a* embraces both private and public lives.¹²² *Shari'a* is classified into the categories of *hudūd*, *diya*, *ta'zir*.

From the above analysis, it is evident that the same objectives (promotion of the common good) are shared by international human rights norms and *Shari'a*. Therefore, it is undeniably erroneous to assume that *Shari'a* has no point of connection with human right concerns. A greater appreciation for the complementary roles that *Shari'a* and internal rights bodies share will help promote a better humane world for all to live in.

Regarding the *zinā* cases of Safiyatu Husseini and Amina Lawal, why were the lower *shari'a* courts unable to meet the conclusive standards of human rights while the higher court succeeded?

¹²¹ Quran 17:70 reads, "We have honoured the children of Adam [that is, human beings], and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those We created."

¹²² Cf. Malik Sayed, 'Shari'a: A Legal System and a Way of Life,' in Oloyede Abdul-Rahmon (ed), *Perspectives in Islamic Law and Jurisprudence* (Ibadan: Polygraph Venture, 2001) 25–26.

4. 6. Proffered Consideration for the inability of the Lower *Shari`a* Courts to meet Human Rights Standards

The convictions passed by the lower *shari`a* courts in both *zinā* cases of Safiyatu and Amina have left doubts about the claims of the *maqāsid al-shari`a* being compatible to the general goals of international human rights law, that is, promotion of human well-being. Closer analysis reveals that the lower *shari`a* courts had applied reductionist understandings and applications of the *Shari`a*'s principles in many facets on the crime of *zinā*. Some of these areas include their poor understanding of the principle of doubt, withdrawal of confession, interference of fair investigation and trial practice by the interpretation of slander (*qadhf*), limited understanding and application of *rajm* penalty for *zinā*.

4. 6. 1. The Principle of Established Doubt in *Zinā* Crimes.

On the authority of Al-Mirghinani, it is submitted that *zinā* is “sexual intercourse between a man and a woman without legal right or the semblance of legal right.”¹²³

Zinā is defined as follows:

Whoever, [being a man or a woman] fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights, and in the circumstance in which no doubt exists as to the illegality of the act, is guilty of the offense of *zinā*.¹²⁴

Zinā falls under the category of *ḥad*. The definition of zina may differ from one school of fiqh to the other. However, Islamic law experts posit that the essential point is the idea of “willful intercourse”. Therefore, in cases where doubt is established by the lack of willful participation of either of the parties *ḥadd* is not administered.

¹²³ Al-Mirghinani (n 9) III, 344.

¹²⁴ The Zamfara Sharia Penal Code, 2000, Section 92. Also, confer Ruud Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum, 2003), p. 62.

4. 6. 1. 1. The Lower *Shari`a* Court's Treatment of Doubt in Safiyatu Husseini's Case

Safiyatu Husseini had reported that Yakubu raped her. In her words, she said:

He met me in the bush; the whole thing turned to madness. He subdued me with his power and assaulted me. There was also a time I went to a nearby village. He subdued me again and had carnal knowledge of me. It happened three times.¹²⁵

The jurisprudence of the lower *shari`a* court simply convicted Safiyatu as a perpetrator of *zinā* on account of her pregnancy. The judges did not evaluate the case from the stand view of her claims of being raped, which would have substantiated Safiyatu's unwilling participation in the act, and would have helped in building a case on *shari`a* principle of doubt. Imam Malik acknowledged the chance of a woman getting pregnant in an unwilling act of sexual intercourse and has made several standards that aim to protect any innocent party from *hadd*.¹²⁶ Rather, the lower court simply carried on with the case and established the crime of *zinā* against Safiyatu based on the fact of her pregnancy. The actions of the lower sharia courts posit a false presentation and lack of understanding of the Maliki principles. Maliki jurisprudence accepts pregnancy as a matter of principle but not as conclusive evidence for the crime of *zinā*.

Some considerations for safe guarding innocence of women even when they are found with child in *zinā* cases are based on the principle of doubt (*shubha*). One of the principles is the application of the concept of gestation duration. This is linked to the idea within Maliki madhabs that it is possible for gestation of a child to last for five years. It is referred to as a "sleeping fetus."¹²⁷ . Al-Dardir's commentary on Mukhtasar states: "If a woman during her waiting period

¹²⁵ Okorie Uguru interviewed Safiya, 'Amina Lawal: Let Off the Hook' in *The Comet* 27 September, 2003. p. 11.

¹²⁶ Cf. Al-Zurqaani, *Hashiyat Al-Zurqani Ala Muwatta' Al Imam Malik*, Beirut, Dar Al-Ma'rifah, 1989, Vol. 4, p.150.

¹²⁷ Ruud Peters, *Islamic Criminal Law in Nigeria* (Ibadan: Spectrum, 2003), p. 4 (n. 24)

(*idda*) is not sure whether or not she is pregnant, she must wait the maximum period of gestation which is according to some scholars five years and according to others four.”¹²⁸

Another form of establishing doubt is where there is the element of rape. Circumstantial pieces of evidence are needed for establishment. Evidences for such a case requires four witnesses who saw the act happen and the place where it took place. Evidence of bruise and blood from forced penetration are also required. In the absence of evidences such as these, the case automatically constitutes doubt and as such the accusation of *zinā* should be dismissed.

This court failed to consider the concept of doubt (*shubha*) on the fact of Safiyatu’s report of rape.

4. 6. 1. 2. Lower *Shari’a* Court Poor Interpretation of Retraction of Confession (*Ihizari*) in Amina Lawal and Safiyatu Husseini Cases

Amina Lawal was convicted for *zinā* based on account of her pregnancy and the eventual birth of her daughter (who was delivered outside of marriage). Also, she had confessed to the crime with Yahayya in the Local *Shari’a* court, Bakori. This was partly attributed to the fact that the word “adultery” covered by the Arabic word “*zinā*” and its penalty had not been explained, so she did not understand the charge and its implications before her. The provision for *izari* which enables the accused to comment on the matter was hardly given to her. She appealed for a second judgment on the matter in the Upper *Shari’a* court in Funtua where she retracted her claims about Yahayya and appealed that her baby’s pregnancy and birth were a result of a “sleeping embryo” from her previous marriage. The judges of the upper *shari’a* court had ruled that her initial confession stood as proof for conviction and insisted that she could not retract. The lack of the provision of *izari* is a similar phenomenon in Safiyatu’s case. The pregnancy and birth of her child, Adamah, was

¹²⁸ Sidi Ahmad Al-Dardir, *Sharh al-Kabir ala Mukhtasar Khalil* (Dar Ihya’ al-Kutub alArabiyyah, Cairo 1980) II, p. 474.

already used as *prima facie*, proof for *zinā*. The provision for *izari*, which allowed her to make remarks such that changing her plea at any stage, meant the change in the proceedings too, was not afforded her. Instead of *izari* the judges of the lower courts merely ensured that the women were informed that their offenses were *zinā*. Amina and Safiyatu were not given a chance to reform (*ihizari*). In Amina's case, the judges of the Upper *Shari'a* court ruled in favour of the Local *Shari'a* court in submitting that her initial confession stood as proof for conviction and insisted that she could not retract.

4. 6. 1. 3 Limiting Sharia's Reach for Justice via Restrictive Reliance on the Use of Maliki Jurisprudence

Methodologically, selecting legal opinion from one school or another should not be in violation of conclusive principles of *Shari'a*, including human rights. Rather, it enriches the ends of *shari'a*, which is to promote the well-being of the human person. The negligence of thinking that every case could simply be resolved by recourse to the orthodox books of Maliki *fiqh* added weight to the poor impression of the deficiency of sharia rulings in the lower courts. Despite the availability of the sources of *fiqh* for consultation, it appears that the judges of the lower court give greater and sometimes sole adherence and reliance on Maliki *fiqh*. The logic behind this practice, it seems, is in order to ensure some level of consistency and accountability for judges against being accused of being biased. This conservative attitude to Maliki jurisprudence, A. A. Gwandu observed, had been the approach to Maliki jurisprudence texts in matters of administrative application of justice since the time of the Sokoto Caliphate:

The confusion that could arise if judges would be permitted to base their rulings on more than one school of law would be apparent. The possibility of some judges using that to give conflicting verdicts on identical cases brought before them is strong. In order to forestall this, Sheikh Abdullah, in particular, insisted that all decisions of a judge must be rooted not only on the Maliki School of law but solely on the most widely accepted view of the school in cases where there is more than one view.¹²⁹

Evidently, the above quotation hints that most likely these qadis were hindered from exercising *ijtihad* all in the bid to maintain judicial consistency. In Islamic jurisprudence, it is not an absolute law to restrict *shari`a* within the confines of a particular school. Regardless of personal affiliation to a particular school of jurisprudence (in the Nigerian case, Maliki *madhab*), juridical processes through the ages allowed for flexibility. Judges of one *madhab* could also apply supportive principles from established rules of other Islamic schools, especially in the attempt to apply *maqasid al-shari`a*.

Ongoing education of Qadis in Islamic law must be put in place to guarantee up-to-date knowledge of *Shari`a* stipulations and applications, not only in Maliki jurisprudence but the other *madhābs*. Islamic jurisprudence does not restrict *shari`a* of other madhabs. Qadis should be required to study in-depth¹³⁰ and be supported with the time and resources required. Such requirements help to ensure that those who eventually get to be *The principle of al-maslahah, should be incorporated into in judicial dealings*. Qadis are intelligent enough to apply the principles of *ijtihad* properly, especially in cases presented before them for which there are needs for modern considerations. The principle of *al-maslahah*, should be incorporated into in judicial dealings. Such a task requires good funding for proper training. Therefore, state governments in

¹²⁹ AA Gwandu, "Aspect of Administration of Justice in Sokoto Caliphate and Shaykh Abdullahi Ibn Fodio's Contribution to It," in Syed Khalid Rashid (ed) *Islamic Law in Nigeria: Application and Teaching* (Islamic Publication Bureau, Lagos 1988), p. 24.

¹³⁰ Placing higher standards for studies will help discern that only the best of pupils gets to succeed, thereby ensuring that qadis are not only religious men but intelligent and fit to apply reason properly to novel cases of modern times.

which Shari'a law abide should be supportive via financial supports for the recurring training of judges assigned to Sharia courts of the three strata.

The state government should establish advisory boards and supervisory bodies made up of new and existing officials and experts of *fiqh* with the mandate to assist the implementation of *Shari'a*.

These explanations mentioned above for the poor application of *shari'a* tend to postulate an irreconcilable status with human rights concerns. Yet, within the considerations of the rulings on the matter by the *shari'a* appeal court, we establish *shari'a* relationship with conventional human rights principles.

4. 7. The Rulings of the *Shari'a* Appeal Courts as bridges for compatibility with UHRD

In these cases, the proceedings in the *Shari'a* Court of Appeals provide an interesting understanding of the essence of *shari'a* since they serve as a sanitizer of the judicial systems of the lower *shari'a* courts. Evaluating the cases of appeal, the judges of the *Shari'a* appeal courts submitted that the faults are not inherently in *shari'a* but with lies with the interpretation and execution by the lower courts.

They *Shari'a* appeal court submitted that the way of *shari'a* is to inquire different ways in order not to apply *hadd* in accordance with the Qu'rān which enjoins: "Do not kill a soul which Allah has made sacred except through due process"¹³¹; "The greatest sin is to associate something with God and to kill human beings"¹³²; "And whosoever saves a life it is as though he has saved the lives of all mankind"¹³³.

¹³¹ Qur'an 6: 151.

¹³² As found in the Hadith of the Holy Prophet.

¹³³ Qur'an 5:32.

Regarding retraction of confession, the *Shari'a* appeal court's rulings held that *shari'a* legal tradition allows for the possibility of changing one's confession. With regards to Safiyatu Hussein, her request for redress by the Appeal court was necessary because there were abnormalities carried out by the lower courts. The judgement of the previous court was overturned because Safiyatu did not comprehend the charges laid against her since she had not learnt Arabic language. The court established that the explanation of the offense made by the judges in the lower court was deficient in helping her to understand. The *Shari'a* appeal courts posited that the judges of the lower courts failed to garner salient pieces of information like the places and times when the crime occurred. These judges also failed to offer her *izari*.

As the judges explain, "Where a situation gets confused with respect to *ḥadd* punishment, you should leave the *ḥadd* at any opportunity because there is no doubt that *ḥadd* punishment can be set aside by *Subha*".¹³⁴ Such is the situation with Safiyatu Hussein.

The attitude of the *Shari'a* jurisprudence is in circumventing *hadd* punishment and seeking the conversion of life via mercy.

4. 8. Reevaluation of *Ḥudūd* and its Interpretation and Application to the *Zinā* Cases

Ḥudūd (sing. *ḥadd*) is the penal law of *shari'a*. *Ḥadd* laws are restrictive decrees in respect to lawful and unlawful things.¹³⁵ It is observable that the word *ḥudūd* is restrictively applied to "fixed penalties established to be the right of Allah."¹³⁶ In other words, it is fixed as the right of God by the Qur'an, and as observed in the Sunna. Reacting to the restrictive perception of the definition of *ḥadd* as solely fixed without nuances in its application, Imran Nianzee argues that the

¹³⁴ Transcript of Sharia Court of Appeal, p. 44.

¹³⁵ Cf. JM Cowan, *The Hans Wehr Dictionary of Modern Written Arabic* (Modern Language Services, New Delhi 1960) 159

¹³⁶ Cf. Al-Mirghinani' Ali Ibn Bakr, *Al-Hidayah Sharihu Bidayatul Mubtadi* (Beirut: Dar Ihyau Al-Turath Al-Arabi, 1995), II, 339.

term *ḥadd*, is historically upheld as penalties for certain offenses and not fixed punishment when we consider how the closest companions to the prophet administered it. Furthermore, it is discernable that contrary to variant punishments applied for *ḥadd* according to the sunna only few of these are categorized as *ḥadd*. It is plausible that *ḥadd* as assumed today are constructs of judges. These disparities question the “fixed” sense applied to *ḥad* as held by jurists.¹³⁷

An element substantiating the degree of culpability in the crime of *zinā* is the idea of “willful intercourse”. The penalty for zina in the formative annals of Islam was home arrest. The culprit was left in solitude in their homes till their eventual demise. Soon afterward, the Quranic revelation averred some further legislation. Allah said:

The fornicators (male and female), flog each of them with a hundred stripes. In their case, do not let pity stop you in a punishment ordered by Allah if you believe in Allah and the Last Day. Let one of the believers witness their punishment.¹³⁸

Following this revelation is the verse that prohibits Muslims from getting married to anyone formally guilty of *zinā*.¹³⁹ By inference, this will mean that death was not *ipso facto* used for *zinā*.

Conclusive Remarks

This chapter identified that it is within the consideration of *ḥudūd* that *Shari`a* is perceived to be at cross purposes with international human rights norms. The consideration of *ḥudūd* to mean immutable and gross inflicting punishments for certain crimes disagrees with the principles of the Universal Declaration of Human Rights which forbids enforced charging of death punishment. Thus, the convictions of the crime of *zinā* in the cases against Safiyatu Hussein and Amina Lawal by the lower *Shari`a* are justifications of sharia incompatibility with human rights.

¹³⁷ Cf. Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Kuala Lumpur: Islamic Trust, 2002) (n 1) p. 110.

¹³⁸ Qur`ān 24:2

¹³⁹ Cf. Qur`ān 24:3

Contrary to this view, the chapter postulated that there are commonly shared principles of the well-being of human life, founded on the notions of “principles and objectives” behind both the UDHR and the *Shari’a* ideology *maslaha* and *maqasid al-shari’a*. It went on to demonstrate how the rulings of the *Shari’a* Appeal Courts demonstrate the bridge between *Shari’a* and international Human rights norms for all human rights, especially in as it relates to *zinā* cases with regards to women rights.

A recommendation to help foster better development of the *Shari’a* Penal code is to emulate the model of the *Shari’a* committee of 1958-1962: The committee took successive stages (study, implementations, reevaluations, and eventual draft of *shari’a* legislations) at developing and applying the *Shari’a* in their attempt at bridging *Shari’a* law in the penal code of 1960 with human rights concerns.

Recently, in Ahmadu Bello University, in Zaria, the Institute for Islamic Legal Studies has begun a project backed by the federal government together with *fiqh* jurist and specialist, together with civil lawyers, including representatives of the relevant states, to work on the penal codes.¹⁴⁰ This is a praiseworthy task.

¹⁴⁰ Its particular objective is to harmonize *Shari’a* Penal Code in order to strengthen *fiqh* and aid proper formation of all individuals involved in *fiqh* exercises. Those participating in this task are Qadis from the *Shari’a* Appeal Courts and other experts of law to help consider and improve a holistic view of the *shari’a* penal codes.

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