Improving Women’s Access to Justice and the Quality of Administration of Islamic Criminal Justice in Northern Nigeria

Abdumumin A Oba, University of Ilorin

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Shari’a Implementation in Nigeria

Issues & Challenges on Women’s Rights And Access to Justice
Shari’a Implementation in Nigeria
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And Access to Justice

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Shari’a Implementation in Nigeria
Issues & Challenges on Women’s Rights
And Access to Justice

The proceedings of a two-day conference on Women’s Rights and Access to Justice under the Shari’a in Northern Nigeria

Organized by WACOL, Enugu and WARDC, Lagos in collaboration with A.B.U Zaria with support from Heinrich Boll Foundation at Rockview Hotel, Abuja (25 – 28th February 2003)
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## ABBREVIATIONS

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<td>A.H./A.D.</td>
<td>After Hijira/Anno Domini</td>
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<tr>
<td>ABU</td>
<td>Ahmadu Bello University, Zaria</td>
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<tr>
<td>BUK</td>
<td>Bayero University, Kano</td>
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<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination of all forms of Discrimination Against Women</td>
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<td>CRC</td>
<td>The Convention on the Rights of the Child</td>
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<td>DFID</td>
<td>Department for International Development</td>
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<tr>
<td>FIR</td>
<td>First Information Report</td>
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<tr>
<td>HIV/AIDS</td>
<td>Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome</td>
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<tr>
<td>HOD</td>
<td>Head of Department</td>
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<tr>
<td>JIWNAJ</td>
<td>Women Network for Access for Justice</td>
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<td>JNI</td>
<td>Jama’at Nasrîl Islam</td>
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<tr>
<td>JSC</td>
<td>Justice of the Supreme Court</td>
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<tr>
<td>LASU</td>
<td>Lagos State University</td>
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<td>LRN</td>
<td>Law Report of Nigeria</td>
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<td>MLR</td>
<td>Monthly Law Report</td>
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<td>NAMLASS</td>
<td>National Association of Muslim Law Students</td>
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<td>NCLR</td>
<td>Nigerian Constitutional Law Report</td>
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<tr>
<td>NGO</td>
<td>Non Governmental Organisation</td>
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<tr>
<td>NJR</td>
<td>Nigerian Juridical Review</td>
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<tr>
<td>NRNLR</td>
<td>Northern Region of Nigeria Law Report</td>
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<td>NWLR</td>
<td>Nigeria Weekly Law Report</td>
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<tr>
<td>OFR</td>
<td>Order of the Federal Republic</td>
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<tr>
<td>OSIWA</td>
<td>Open Society Initiative for West Africa</td>
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<tr>
<td>SAN</td>
<td>Senior Advocate of Nigeria</td>
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<tr>
<td>SAW</td>
<td>Peace and Blessing of Allah be Upon him</td>
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<tr>
<td>SCNJ</td>
<td>Supreme Court of Nigeria Journal</td>
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<tr>
<td>SOAS</td>
<td>School of Oriental and African Studies</td>
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<tr>
<td>SPCL</td>
<td>Shari’a Penal Code Law</td>
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<tr>
<td>STD</td>
<td>Sexually Transmitted Disease</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>SWT</td>
<td>Glory is to the most High</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNDHR</td>
<td>United Nations Department of Human Rights</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>UNESCO</td>
<td>United Nations Educational Scientific and Cultural Organisation</td>
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<td>UNFPA</td>
<td>United Nations Fund for Population Agency</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<td>UNIFEM</td>
<td>United Nations Fund for Women</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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<td>WACA</td>
<td>West African Court of Appeal</td>
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<td>WACOL</td>
<td>Women’s Aid Collective</td>
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<td>WARDC</td>
<td>Women Advocates Research and Documentation Center</td>
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<td>ZAPA</td>
<td>Zamfara Agency for Poverty Alleviation</td>
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ACKNOWLEDGEMENTS

The genesis of this book springs from the papers and proceedings of the two- day conference on Women’s rights and Access to Justice under the Sharia in Northern Nigeria held at Abuja February 25th – 28th 2003. Each participant at that conference has contributed significantly either by authorship of the papers contained in this book or by commentary, stimulating and provocative discussions and challenge of ideas which had all gone in to make up the book.

We are indebted to the Heinrich Boll Foundation for supporting the conference and this publication. Particularly we are very grateful to Axel Harneit-Sievers of Heinrich Boll Foundation for his sustained interest, advice and assistance throughout the preparation of the book. Several people read the manuscript and helped in the improvement of it. We are especially grateful to Ngozi Nwodo for her professional assistance in the preparation of the index, glossary and tables; Ndudi Iruetugo who read the manuscript and provided feedback that influenced the development of the book. We are also indebted to the WACOL staff who worked diligently on this book; Onyinye Ohia who read the manuscript more times than she may care to remember and made many detailed improvements based on editorial review; Mohammed Shodipo who checked the transliteration and Eunice Ifetoye who typed the manuscript to its final printing by formatting and arranging the various sections of the book for unaccountable times. Finally, to Oliver who concretized our concept and designed the cover page.
INTRODUCTION

The three-day conference on Women’s Rights and Access to Justice under the Shari’a in Northern Nigeria organized by Women’s Aid Collective (WACOL) and Women Advocates Research and Documentation Centre (WARDC), in collaboration with the Department of Public Law, Ahmadu Bello University (ABU), Zaria, with support from Heinrich Böll Foundation, held at Rockview Hotel, Abuja from February 25-28 2003. The conference had as its main thrust to assess and evaluate the implementation of Shari’a Penal Law and Justice System in Northern Nigeria and its impact on Women’s Human Rights with the aim of determining issues, challenges and prospects in the protection of women’s rights and access to justice for women, subject to Islamic law or Shari’a.

In Nigeria, the introduction of Shari’a has raised serious questions about sources of laws, hierarchy and position of the constitution in a democratic state. It has further exposed the complexities of our legal system and the lacunae in the constitutional and legal framework for enforcement of human rights of citizens in particular the rights of women and girls. Thus, the proceedings at the conference that constitute the main body of this book were aimed at assessing the three years implementation of Shari’a Penal Law and justice system in Nigeria. This book refuses to be drawn into or concern itself with over flogged and highly emotive debates about the legality of application of Shari’a criminal justice in Nigeria. It rather focuses on identifying procedural gaps that will impact on ability of the emerging penal system to give justice to even persons subject to the law particularly women already circumscribed by social, religious and cultural determinants from accessing justice. The conference would be the first with largest assembly of legal scholars, jurist and judicial commentators poised to constructively discuss the legal framework for Shari’a application in Nigeria.

This book grapples with several issues: whether there exist the socio-economic conditions for the enthronement of full-fledged Islamic state, which some view as a condition precedent? What is the implication of Shari’a application in the light of secularity proclamation of the 1999 Constitution of the federal Republic of Nigeria? Can there be justice if the procedures for implementation of the Shari’a penal system are not enacted, coherent and comprehensive enough? Do we have a competent and effective Shari’a Court system to adjudicate effectively on matters bordering on breaches of the Shari’a penal system? Should there be minimum qualification for Shari’a
court judges for example requiring them to possess a law degree and to have studied Islamic law? What would be the place of ratified human rights treaties and the bill of right under the constitution that recognizes women’s rights to equality before the law, right to representation and legal aid, fair trial rights and rights to be tried by a competent and independent tribunal or court of justice? How do we ensure as contended by women activists/feminists that the emerging Shari’a penal system does not become a vehicle for the violation of women’s rights? How do we reconcile the burden of evidence in proving *zina* [adultery/fornication] that are heavily weighted against women- the case of pregnancy and childbirth becoming irresistible inference for assumption of commission of *zina* and prosecution thereon? Where is the stand of the principle of equality and non-discrimination in this complex pluri-legal system?

The conference provides an overview in open discussions by legal luminaries, activists and women’s rights advocates to share the different implications they draw from the width of experience of the citizenry on the Shari’a question in a constitutional democracy with particular reference to women’s human rights in the administration of Justice. The proceedings documented in this book yield a fascinating abundance of general articles on the Shari’a penal systems currently applicable in Northern Nigeria.

The idea of justice in contemporary Islamic life and law is a jurisprudential question that has engaged scholars, activists and jurists. Recent cases on the Shari’a penal law problematize the concept of justice particularly for women in the face of heavily weighted laws against them. In order to prove *zina*, for example four male witnesses are required instead of normal two, and they must testify as eyewitnesses not merely to the act of intercourse but to “unlawful intercourse” (*zina*) as such.

1 As has been argued the major part of the present epistemological crisis in Muslim jurisprudence over women’s issues is due to the blatant absence of female voice in Islamic legal discourse. Thus, it is difficult to speak about equality of sexes particularly when women are accused of infringing the Shari’a penal law. The inferiority of evidence of a woman as compared to that of a man reinforces the growing consensus that a woman’s evidence is half the man in Islamic jurisprudence. Yet, in administration of justice, testimony or admission of evidence or issues relating thereto is very crucial to

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determination of cases. Although, the Qur’an and the Sunna provide the fundamental principles of the fixed kind which admits of no change or transformation in human ideas or evaluations, the details and means of application have been left to individual interpretation (ijitihad) to fit developing temporal needs or interests, and the potential demands of time and place. This individual effort at interpretation is seen both as a problem and also way forward in improving access to justice for the poor and vulnerable. Ghada Karmi, observed that the major tenets of Qur’anic family law which govern the lives of Muslims were subjected to very little ijtihad—which have led to reform. She suggests that solution to the conflicting issues on women could be found in a more objective study of the Qur’an in its historical and social context. Further, she observed that, “whereas Shari’a laws governing many aspects of life have been reformed or withdrawn altogether in many countries, for example, the hadd punishments of beheading and amputations of limbs, the laws which affect women have scarcely been altered at all. Why is that?”

A discussion on women in Shari’a can never be complete without taking a retrospective look at the reactions on judgement for zina, which is a huudud [capital punishment] offence, have elicited in Saffiyya Hussani and Amina Lawal’s cases. According to the Qur’an, adulterous men and women should be flogged, while women found guilty of fornication should be put under house arrest until death or “God ordains for them another way”. This last phrase, along with anecdotal records of its use during prophet Muhammed’s time, are justifications that are used to justify stoning to death. Although, some Muslim countries still condone stoning in their penal system only a few actually carry out the punishment. The Taliban’s interpretation of the code was the most extreme; crowds of Afghans were forced to witness the stoning of couples. In Sub-Saharan Africa, Sudan, Somalia and recently Nigeria introduced the penalty of death by stoning for the huudud offence.

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4 Ibid. p.28
6 Ibid.
7 Qur’an 24:2
8 Iran, Yemen and Afghanistan (under the Taliban government) amongst others condone stoning in their statutes books and enforce the punishment. Pakistan adopted stoning when military dictator, Zia ul-Haq introduced Shar’ia in 1979. While there are no confirmed cases of the punishment’s being carried out, however, Pakistan women complain that rape victims are routinely charged with adultery, sentenced to death, and left to languish in jail. See “Casting Stone”, in Time magazine (September 2002).
9 Ibid.
of *zina*. It must be noted though that the Qur’an says nothing about stoning. The distant look of baby Wasilla (Amina Lawal’s daughter) arrests one’s attention immediately. Up to her final acquittal by the Kastina State Shari’a court of Appeal on September 25, 2003, her mother faced death by stoning once the baby was weaned. Why was this mother facing death? What are the problems with the implementation; what are the political revaluations of reactions to its implementation; what is the vital role of the judiciary in a constitutional democracy? Although, safeguards exist that charge for commission of *zina* may never ground a conviction, the possibility of that ever happening opens a floodgate of criticisms. Muslim Women are caught at the centre of the politicization of Shari’a debate in Nigeria and in most cases would become the real victims. Ladan and Oba and some others in this volume have argued for re-structuring of Shari’a courts in Nigeria and in most cases would become the real victims. Ladan and Oba and some others in this volume have argued for re-structuring of the justice system so that it is not far removed from the pristine ecology upon which it was founded. Elsewhere, Muslim scholars have stated that the Islamic past was not the enemy of change and intellectual innovation. It is the duty of jurists to interpret legal norms to protect women’s right. This may involve review of promulgated Shari’a legislation to ensure that men are not given preferential rights above women in Shari’a courts. As Justice Tanko of the Appeal Court opined in his presentation, the expectations from the judiciary in a constitutional democracy are very demanding and central to survival of democracy. The concept of guilt and criminal responsibility is little developed under existing Shari’a laws and the procedure for enforcement is also not properly articulated. Hence, the call for review and harmonization of the Criminal procedure codes for the Shari’a implementing states in Nigeria. Other Muslim scholars elsewhere have also called for progress in the reinterpretation of Islamic law to adapt to modern circumstances with regard to women. As Asma Mohammed Adel Halim and Abdullahi An-Na’iam have argued: “It is clear that the fundamental sources of Islamic law can be interpreted in a manner supportive of equality for women, and that the patriarchal system established in the nature of Islam can likewise be changed in the name of religion”.

10 Since the on set of democracy in 1999 about 12 states in Northern Nigeria has adopted Shari’a penal system. The states are: Zamfara, Bauchi, Kebbi, Jigawa, Yobe, Sokoto, Katsina, Kano, Gombe, Kaduna, Borno and Niger.

11 “One of the major challenges that faced Muslim legal Scholars was to formulate a jurisprudence that maintained continuity with the legacy and at the same time addressed the modern context and changed social realities”. See R. S. Khare, Perspectives on Islamic Law, Justice and society, Op. Cit. at pp. 165-166.

This book consists of twelve papers presented and three powerful keynote and welcome addresses delivered at the conference covering four broad thematic areas.

Theme 1 of the book merely sets the scene for the three-day conference proceedings. Joy Ngozi Ezeilo welcomes participants to the conference and states that the main goal of this conference is to identify issues, challenges and prospects in the protection of women’s rights and their access to Justice in the context of the implementation of Shari’a Penal Law and Justice System in Nigeria.

Professor M. Tabiu argues in his Keynote address titled “Towards a Strategy for Protection of Women’s Rights under Shari’a in Nigeria”, that there is no support in the Qur’an, the main sources of Shari’a, or any other source of Shari’a, for the notion of a deliberate policy of bias against women. The position rather is that if any rule or judgement appears to be unjust to women then explanation will be found in one of two ways: either the rule of judgement is not a correct statement of the law, or its real implications have not been properly grasped. He concludes that the improvement of education and dialogue, ensuring proper understanding and interpretation of Shari’a, establishing effective mechanism for communication of women’s interests and concerns, should play a vital role in designing a strategy for giving women better access to justice under the Shari’a.

In another keynote address Justice Ibrahim Muhammed Tanko examines the application of Shari’a in Northern Nigeria and the role of the judiciary in a constitutional democracy and states that application of the Shari’a in Northern Nigeria dates back to the period of the Sokoto Caliphate and therefore predates colonialism. The paper also goes in-depth into the constitution to seek legitimacy for the full-scale application of Shari’a as exemplified by the Zamfara State Government. The paper classifies the judicial role in a democracy into two roles: the traditional and conventional. The paper dwells on adjudication, interpretation and judicial review and finds the role as being challenging, too demanding and critical for the survival of our democracy.

The paper glorifies Shari’a vis-à-vis women rights protection and access to justice. In this regard, it says women enjoy all the rights as men do and many more exclusive rights, a situation that favors women’s role.

Theme 2 of the book focuses on the scarcely arguable interrelated concepts of women’s human rights protection in the administration of Justice and their access to Justice under the Shari’a in Nigeria. Dr. M. T. Ladan
examines the nature and scope of administration of Justice in the context of women’s rights protection under Shari’a. He analyses the issues, challenges and strategies for improving women’s access to justice under the Shari’a in Northern Nigeria. He concludes that the judiciary, especially lower Shari’a courts, must be bold, imaginative, and purposive in their interpretation of human rights norms and in the administration of justice.

Mr. A.A. Oba takes a pivotal stance by screening the term “worldview” and its corollary appendages; that is, value systems, culture, religion and ideology. Reviewing the Shari’a legislations recently adopted by three northern Nigerian States of Zamfara, Kano and Sokoto, he elaborates on the importance of improving women’s access to Justice and the quality of administration of Islamic justice in Nigeria. He argues that whilst Islamic Law or Shari’a does not discriminate unfavourably against women as regards access to justice, persons administering the law may do so out of cultural, personal biases or even purely selfish reasons. He calls for continuous re-evaluation of society and application of law so that law attains its rightful objectives as an instrument of justice and social change. In this regard, the paper advocates for the use of qualified practitioners of Islamic law rather than making spurious judicious appointments on avenues that only confer patronage to the detriment of Shari’a law. The paper concluded by blaming the problem of Northern women on other cultural barriers rather than shari’a as a penal code. It proffers widespread education and strong economic empowerment as antidote to the problem.

Abdelsalam Hassan Abdelsalam contribution provides for a comparative Muslim states practices in the protection of women’s rights under Shari’a using Sudan as a case study. The paper traces the practice of Shari’a law from the 19th Century when it operated uninhibited to the period of modification in the Ottoman Khilafa where out of pressure of modernization, in particular commerce legal reforms became necessary. This reform he argues however, was achieved out of compromise and due to exigencies of commerce and the need to cure the economic and social stagnation in the Islamic societies then. Thus, Abdelsalam disagrees with the common belief that the decline of the Shari’a law in the old Islamic states was merely a result of colonialism. The paper examines application of Islamic criminal law as it relates to status of women, crime of pregnancy and protection against rape and calls for implementation of Shari’a that would promote respect for human rights standards in particular the right to freedom from inhuman and degrading punishments and treatment. The paper draws from documented cases where women were handed grisly sentences
of death by stoning while the male defendants were set free for just denying any involvements in the offence of *zina* (sexual intercourse outside marriage). *Fiqh* (Islamic jurisprudence) permits such detachedness in male offenders—four reliable witnesses must testify to having seen the sexual act or penetration of the male genital.

Joy Ngozi Ezeilo asserts that universal norms or standards are applicable to all human societies irrespective of their socio-cultural or religious backgrounds. Yet, situations of women worldwide, particularly in Nigeria and elsewhere in Africa, have shown gaps between formal guarantees of human rights especially to women and what obtains in practice. She observes that the way women's rights are treated in all areas of Nigeria, not only Muslim societies, is not fair and clearly violates the principle of equality and non-discrimination. The paper places responsibility on the Nigerian state as a member of the international community to protect women's rights within its borders and urge important stakeholders to work towards elimination of conflicts by offering new interpretations of the Islamic sources that accommodate a modern rights philosophy and recognize the rights of women in a constitutional democracy. She concludes that the more we engage in cross-cultural dialogue, the more we can see connections among people/feminists across borders, connections which link us in working toward societies in which women’s rights are respected both in law and in practice.

Theme 3 of the book addresses contending perspectives and challenges in the implementation of Shari’a penal law and justice system in a constitutional democracy. Barristers Bala Babaji and Yusuf Dankofa assess the performance of lower courts and States Shari’a courts of Appeal in the implementation of Shari’a Penal Law and Justice System in Northern Nigeria. This paper is a reappraisal of the Shari’a penal code in content, procedure and through the case law. Their verdict is that the lower Shari’a courts especially in cases of adultery or fornication (*zina*), and other *Hudud* related offences their performance has not been encouraging due to a number of factors raised and discussed in the paper. In examining some decided and highly contentious cases including Safiyyatu Hussaini and Amina Lawal, the paper observed that these cases by their character and consequences threatened not only to undermine the right and dignity of women but portends very rough terrain to the future of the polity. The paper identifies however, the long absence of practical application of Shari’a criminal justice, untrained and inexperienced legal practitioners as well as political insincerity of state governments to implement Shari’a properly as constraining factor. They recommend to the Shari’a compliant states the need to intensify efforts at a
continuing judicial education for Judges for a better administration of Shari’a Penal Law and Justice. The paper concludes by reiterating the call to all stakeholders and concerned adherents of this faith especially NGO’s to improve on these identified impediments via conferences and workshops. The paper also advocates continuous training and retraining of Shari’a judges and lawyers who are indeed saddled with the task of interpreting and implementing the law in question.

B. Y. Ibrahim paper seeks to address the legitimacy or otherwise of the Shari’a penal code already in operation and explores the provisions of the 1999 Nigerian Constitution with a view to determining the extent to which the recent introduction of the Islamic criminal Justice system into the Nigerian Legal system conforms to or is in conflict with the constitution. He establishes the compatibility with the constitution and concludes that the Shari’a is both Nigerian people and constitution friendly in so far as its letter, spirit, intent and purposes are concerned.

B.A Haruna argues that the adoption of the Shari’a penal system was done haphazardly and without setting out the basic pre-conditions necessary for that new order to be set in place. He opines that the provisions of basic amenities and other social services is a paramount condition for the establishment of a Shari’a penal justice system in Nigeria. His analysis of the Shari’a justice system enjoins that in order to establish the main ingredients of the system, the inherent contrast in social status of the citizens must be addressed. The moral plight of the society, the empowerment of the masses through education, concerning how to adjust to life in Shari’a, and all are anchor points that should not be ignored.

A.B. Ahmed holds the view that a state under the current democratic dispensation is quite competent to enact laws that result in the re-introduction of the Islamic Criminal Law and Justice System in Nigeria. The shari’a penal code is favored ironically for its peculiar tendency of guaranteeing court and prison decongestion by the dispatch it employs in attending to cases. Ahmed observes that in Shari’a implementation, stringent conditions and safeguards are provided in order to ensure Justice and fair play for any person subject to the system. The paper underscored serious challenges bound to be faced by the states that have adopted the Islamic criminal justice system. Some of these problems may arise where, for example, an appeal is made from the decision of the Shari’a Court of Appeal to the Court of Appeal. In this case there is bound to be serious conflict of law. Other problems are the reaction of non-Muslims and proper implementation of the Islamic criminal justice as they are contained in the statutes.
M.B. Uthman explains with elaborate nuances of meaning the general nature of the operation of the Islamic criminal justice system, and how this philosophy has been blended into modern legislative initiatives in Northern Nigeria. There is a profuse description of the sentences and their commensurate compensations. With specific regard to Zamfara, Uthman outlines rights of fair trial recognized by the Shari’a Criminal Procedure Code of Zamfara State to include: the right to legal practitioner; the right to an interpreter; the right to be present throughout the trial. And if the accused is insane or pregnant or otherwise ill, the Code provides for special process in carrying out investigations and in execution of judgments. However, the procedural safeguards remain to be seen as regards how they accommodate adequately the rights of women.

Uthman concludes that our governments wishing to take to the Shari’a system at all tiers should brace up and set up some administrative body that will supplement the criminal law and support it.

Theme 4 of the book considers perspectives on the application of Shari’a in Nigeria. Sheikh D. Keffi’s paper sheds light on the reciprocal duties and obligations of the vice-regent, the government and the governed. It articulates various strategies in improving the quality of life of Muslims through the implementation of socio-economic aspects of the Shari’a in Nigeria. He submits that understanding the socio-economic perspectives of Shari’a helps in establishing socio-economic Justice in a Muslim society and that the welfarist communal providence of the Shari’a system acts as an incentive to good citizenry. The article does not set out to be what it is not; that is, being pedantic. The guiding principles for living are enumerated; they include marriage, property, settlement, profit accruing from date, etc. Zamfara State has given a model for promoting such Islamic welfarist institutions as zakat (compulsory charity from Muslims), wasiyyah (bequest or gift inter vivos by a Muslim), and waqaf (endowment according to Shari’a).

Professor A. Zubair provides some fresh perspectives on the application of Shari’a in Nigeria and concludes that the Shari’a is a universal and dynamic legal system where nothing is lacking and nothing is superfluous. According to the paper the High Court entertains unlimited jurisdiction on Shari’a matters in states that do not have Shari’a Court of Appeal. In States where there are Shari’a Courts of appeal its jurisdiction is limited to “Islamic personal law” matters. Discussing the appointment of judges of Shari’a courts, the paper noted the lack of uniformity of qualification of the judges. On the issue of pregnancy as proof for adultery or fornication, Zubair stated

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that this principle is supposed to be based on the Maliki School of law. However, according to him, there is nothing in the maliki school suggesting that whenever a woman is caught pregnant without a husband the conclusion is zina and the punishment is rajm. The kadi’s of the Shari’a Courts would have avoided all the controversy generated by the cases of Amina and Safiyyatu if they have strictly followed the tenet and practice of the prophet rather than the stereotyped dictum of a school. The paper suggested a way out of the present problems created by the introduction of the Shari’a such as constant dialogue between Muslims and non-Muslims and the recognition of Nigeria as a pluralist society that is united in diversity.

Lastly, Justice Abdul Qadir Orire provides an overview of the application of Shari’a in Nigeria and argues that Shari’a has been with us as far back as the 19th Century A. D. during the Sokoto Caliphate. He posits that Shari’a compliant States saw the re-introduction of criminal aspects of Islamic law as a measure to reduce crime and bring security to all its citizens. Although, the focus of the conference is mainly the Shari’a penal justice system, the presenter outlined some rights of women under Islamic personal (family) law.

We have captured also the responses from the participants at the end of each thematic presentation. The discussion of these papers is also part of this volume and would give a reader the feel that he or she was part of the meeting. It was highly revealing, participatory, engaging and sometimes engender controversial debates. However, it serves to enrich the discourse hence the decision to include it in this publication. Also, annexed here is the report from the different working group set up during the conference to work out strategy for intervention that seeks to improve the Shari’a justice system particularly, for the benefits of stakeholders willing to intervene to re-position or restructure the Shari’a penal system.

Some of the most important changes in society are made at the grassroots level. Yet, that is the level where poor people are denied justice, the courts do not provide for their special and at times basic needs. The zakat debate that came up during the open discussion illustrates this point. Some women attendees working with the grassroots women who wanted clarity on the subject matter raised the issue of zakat as a way of improving the lots of poor Muslim women. Because women possess the ability to see the big picture, they can transcend crises situations and hopefully become proactive in the emerging Shari’a penal justice system. Mere legislation of rights is not a sufficient in itself rather, providing the actual enabling environment for the laws to operate should be the ultimate goal. This as clearly argued in
Introduction

this book could be by way of making adequate budgetary provision towards realizing the objectives set out and formulating policies that allocates commensurate resources towards women cause. The socio-cultural and economic inhibitions women face even in the Shari’a States and levels of impoverishment and underdevelopment make it difficult for them to access justice, and therefore cannot exercise their fundamental right fully. As observed by the conference communiqué “equal access and opportunity to justice machinery for all without distinction is of paramount importance to any viable justice system. Thus, it recommends: the improvement of women education and enlightenment about their rights as enshrined in Shari’a; stimulating cross-cultural dialogue; establishing effective mechanisms for communicating women’s interests and concerns; establishing institutions that will further enable women to access justice, such as legal aid services and access to counsel without discrimination.

Other important recommendations includes: that Shari’a implementing states should intensify efforts in continuous training of Alkalis or judges on matters of Shari’a, especially on procedure and evidence for effective discharge of their duties; the establishment of powerful Islamic “mazalim” an institution that would tackle complaints against official misdeeds, including corruption and official breach of trust; that Shari’a court judges should be learned in Islamic law and possess a minimum qualification of LL.B. degree with specialization in Islamic law; that Muslim jurists should embark on improvement of implementation of Shari’a through the process of “ijtihad”

This conference overrates itself by trying to digest articles mainly by men on an issue that concern women, sadly so. It is not the place of this introduction to discuss the make-up of the participants. However, we must bear in mind that the cast could have been different with greater involvement of women as paper presenters and legal analysts.

In the final analysis, we are all concerned women and men working to ensure existence of an Islamic legal practice that takes account of human rights of women in Nigeria as nationally, regionally and internationally recognized.
FURTHER READINGS

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<td>25.</td>
<td>Women’s Aid Collective</td>
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THEME 1

Setting the Scene for the Conference
“Gender does influence a woman’s right to access the justice system from making a decision to take action, having the means to take such action (money issue), being able to continue the action, and getting justice at the end of the day. It is not an easy decision for women to make, whether to litigate or not’’.

Distinguished guests, participants, scholars, and activists I profoundly welcome you on behalf of the coordinating organizations to this conference on “Women’s Rights and Access to Justice Under Shari’a in Northern Nigeria”. This conference, which is a follow up to the earlier strategic conference on Islamic Legal System and Women’s Rights held in October 2002 seeks to assess and evaluate the implementation of the Shari’a penal law and justice system in Northern Nigeria, and its impact on women’s human rights with the aim of determining issues, challenges, and prospects in the protection of women’s right and access to justice under the Shari’a.

The conference is borne out of a dire need to ensure that Women’s Human Rights are equally guaranteed and respected under the emerging Shari’a penal system. You would recall that since the inception of our democracy and the fourth republic, at least 12 states of the Federal Republic of Nigeria have adopted and started the implementation of the Shari’a Penal Justice System. While disparate interest groups have argued for and against such introduction of Shari’a penal justice system, we would rather not concern ourselves with such discussions but move to engage the justice system as it is now in operation and examine relevant and pertinent issues on Access to Justice.

Access to Justice is essential for a legitimate justice system. A democratic state is hinged on rule of law and on maxims such as:

- Equal access to justice for all
- To no one we deny justice (justitia nemini negenda est)
- Everyone is equal before the law
Welcome Address

- Where there is a wrong there must be a remedy (ibi jus ibi remedium). The principle of equality and non-discrimination is well entrenched in national and international laws. Where justice is available to all, it strengthens public respect for the law and gives people confidence in the legal system. In a democracy such as ours we should lay emphasis on the fact that: “access to justice is a right not a privilege”.

When we talk about this we are looking at the whole gamut of law enforcement machinery: the court, the police, the prison, etc. All these mentioned institutions affect individual and community access to justice. At individual level, issues that may impact on access to justice may include: legal aid, legal representation, and confidence in the justice system: how user friendly is the system? What sort of justice does it produce? The economic standing of the individual and other cultural and environmental determinants. Here, I would like to mention specifically how gender impacts on women’s access to justice. Gender does influence a woman’s right to access the justice system from making a decision to take action, having the means to take such action (money issue), being able to continue the action, and getting justice at the end of the day. It is not an easy decision for women to make, whether to litigate or not.

Let us openly engage in constructive discussion and eschew fruitless and meaningless engagements that will bear no result. We would like to emphasise people’s inalienable rights to freedom of thought, conscience and religion. These rights also includes the freedom to have a religion or whatever belief of a person’s choice. What we anticipate is an open dialogue that will lead to better understanding of Shari’a and its implementation and justice for women whose rights will be determined under that system. We believe our distinguished resource persons will do justice to the varying topics of the discourse.

I want to reiterate in this welcome address that the main goal of this conference is to assess and evaluate the implementation of the Shari’a Penal Law and Justice System in Northern Nigeria and its impact on women’s human rights.

Furthermore, the conference’s specific objectives include:
- To identify issues, challenges, and prospects in the protection of women’s rights and their access to justice
To improve women’s access to justice through exchange of information on what has worked and what has not worked in similar justice systems.

Make concrete suggestions and consider outlined strategies on how to promote, protect, and ensure women’s rights under the Shari’a Justice System.

Strengthen networking for social and legislative advocacy for the promotion of women’s rights in Islamic societies.

We thank you all immensely for finding time out of your very busy schedule to be here, we have esteemed regards for your presence and encourage you to participate actively with very broad and critical minds that are also sensitive to other peoples rights and feelings.

We thank the Heinrich Boll Foundation, in particular Dr. Axel Harneit-Sievers for his immense support, and for giving us the space to drive this process without undue interference. We consider this an empowering aid towards improving access to justice for all Nigerians, in particular women.

Welcome and thank you.
“There is therefore no support in the Qur’an, the main source of Shari’a, or any other source of Shari’a, for the notion of a deliberate policy of bias against women. The position rather is that if any rule or judgement appears to be unjust to women then explanation will be found in one of two ways: either the rule or judgment is not a correct statement of the law, or its real implications have not been properly grasped”.

One of the signs of the wisdom of organizers of this conference is their decision to invite Muslim women groups as well as Islamic jurists, judges, and intellectuals to participate. I have often wondered at the wisdom of some NGOs that would organize exclusive meetings on Shari’a, at the end of which they issue high-sounding communiqués, without any participation by the real stakeholders. An NGO that does that is obviously not concerned with improving women’s rights, but probably more interested in using the issue of ‘women under Shari’a’ as a means of seeking fame.

Since Zamfara State in 2000 re-established Shari’a as the basis of its legal system, and many other states followed suit, supported overwhelmingly by the people, intense controversy has dogged the Shari’a. The controversy has raged over numerous issues: ranging from nomenclature (is it Shari’a ‘re-introduction’, ‘implementation’, ‘adoption’, ‘restoration’ or ‘reform’?), to legality (was the action done within or in violation of the constitution), to motive (was it to reform society or to gain partisan political advantage), to strategy of implementation (should the Shari’a codes be a literal reproduction of Maliki fiqh, or should their provisions be informed by the richness of the fiqh heritage and by renewed ijtihad? Should initial emphasis be on implementing the criminal law or the socio-economic aspects, such as the collection and distributions of Zakat).

Even among opponents of the Shari’a there has been controversy as to what should be the appropriate strategy of containment: how is the Shari’a tide to be stemmed? Numerous options considered or tried, which have come to public notice, include the following: constitutionality challenge in the courts, propaganda in the media, threat of federal declaration of state of emergency over ‘Shari’a States’ Federal Military-style directive to ‘Shari’a States’ to abandon the Shari’a codes and revert to status quo ante, threat of
withholding of revenue allocation to ‘Shari’a States’ from federation account, and lastly, the sober strategy of allowing the ‘real Shari’a’ to endure while waiting for the political Shari’a’ to wither away.

A frequently aired view of opponents of Shari’a, which forms an important niche in this arena of controversy, is the view that the Shari’a is biased against women, that it violates their rights and is unjust to them. An ostensibly dramatic vindication of this view came when some Shari’a courts accepted the evidence of pregnancy as proof of the offence of *zina* (adultery). This argument then came to be promoted that this evidentiary rule was deliberately formulated to convict women. Since only women could be convicted for *zina* on the basis of pregnancy, while in reality no woman gets pregnant without the complicity of a man, that evidentiary rule was bandied about as clear evidence of Shari’a’s bias against women.

But those who believe in the intrinsic justice of the Shari’a find the accusation that it is biased against women unimaginable. How can any one entertain the notion that the law of God, the Shari’a, is unjust to women? How can that be while the Qur’an expressly declares that God stands high above being unjust to His servants, including both men and women?

One point that is obvious from acquaintance with the Qur’an, the main source of Shari’a, is that its legislative provisions mark a remarkable departure from the traditional attitude that demeans the status of women. Many religious and traditional cultures deny women legal rights, and in fact treat women as chattel. The Qur’an, on the contrary, declares both men and women as sharing the same human nature (Qur’an 4:1; 7: 189; 42:111), vests both with the same inherent dignity, and recognizes both jointly as the trustees of God on Earth (Qur’an 17: 70; 2: 30).

The Qur’an does not merely propound theories about the status and dignity of women. It takes essential steps to translate this status into concrete legal rights. At that early state when the Qur’an was revealed, from a position of no rights at all (including denial of the right to life, since female infanticide was a prevalent practice) women acquired legal rights on the civil, political, economic and religious planes. A rule of interpretation was adopted by Muslim judges, which said declarations in legislative verses of the Qur’an created equal rights and obligations for both men and women, unless otherwise expressly stated.

With the Prophet’s support some of the women of his time keenly claimed, asserted and promoted these newfound freedoms. Umm Salama, wife of the Prophet (S.A.S.), one day heard him calling “O, you people”, inviting the populace to some matter of public concern. She quickly
abandoned her pre-occupations in response to this general summons. Those who were used to the old usage, whereby in the chauvinistic society of 6th century Arabia ‘people’ did not include women, expressed surprise at her action. She did not hesitate to tell them: “I’m one of the people”.

To protect the new status of women and dispel the widespread belief about the inferiority of women, the prophet popularized this dictum: “Surely women are the full siblings of men” (Ahmad; Tirmidhi; Abu Dawud; Darami). While granting equal reward to men and women for their labour, the Qur’an offered the following justification: ‘each of you (man and woman) is the issue of the other (Al-Imran, 195).

In promoting women’s status of equality with men, it is nowadays demanded that women be specifically mentioned in legislation, rather than being content with the traditional assumption that the word ‘men’ includes ‘women’ and ‘he’ includes ‘she’. This aspiration was not achieved in Nigeria before the end of the last millennium and may have to be part of the legislative agenda of the present or some future National Assembly. But the Qur’an deliberately promoted that model of legal drafting centuries before the last millennium. It came about as a result of another initiative of Umm Salama. She once wondered why the Qur’anic legislation addressed men and women collectively by using pronouns indicative of ‘men’ and not ‘women’. The Almighty did not ignore her inquiry, or reprimand her for effrontery. On the contrary, the next verse of the Qur’an revealed (Ahzab, chap. 33, verse 35) addressed her concern. That verse expressly addressed her concern. That verse expressly addressed men and women using both words – men and women – telling them that they shared the same religious and moral qualities, and would consequently receive equal reward for their devotions.

There is therefore no support in the Qur’an, the main source of Shari’a, or any other source of Shari’a, for the notion of a deliberate policy of bias against women. The position rather is that if any rule or judgement appears to be unjust to women, then explanation will be found in one of two ways: either the rule or judgment is not a correct statement of the law, or its real implications have not been properly grasped.

Let me briefly illustrate the point with the following homely example of practices that Aisha Lemu noted when she arrived in Nigeria years ago. She said: ‘I met women who were so ignorant of their rights in Islam that they took it for granted that in the event of their being divorced, their dowry and the husband’s present would be taken back from them; that their children would be taken from them, that they could be kicked out of the house without any baggage; and they believed that was in accordance with Islamic
law.’ All these practices mentioned probably still exist in Muslim communities and are seen as sanctioned by the Shari’a. Yet each one of them is a violation of the Shari’a.

To me, the lesson from all this is that the improvement of education and dialogue, ensuring proper understanding and interpretation of Shari’a, establishing effective mechanism for communicating women’s interest and concerns, should play a vital role in designing a strategy for giving women better access to justice under the Shari’a. I have attended numerous forums where women activists who are well acquainted with the Islamic law met to discuss the subject. Invariably what I hear is essentially expressions of confidence that if the Shari’a is properly implemented, if the judges are sufficiently learned, if corruption is controlled women will feel protected; that Muslim women consider themselves better off where the Shari’a reigns because it guarantees them rights that would otherwise not be available. Women also tend to see tremendous benefit in the moral force that underlies the rights and obligations created by the Shari’a – a moral force that renders rights real and tangible.

Action must be taken to ensure that this confidence of Muslim women in the justice of the Shari’a is turned into real dividend of concrete protection of rights and access to justice for women. It is a task that women should fully participate in discharging with the support of other well-meaning citizens. It is around this deep yearning of Muslim women for justice, and their declared confidence in realizing it with the help of Shari’a, properly understood and implemented, that any useful strategy regarding the protection of women’s right under the Shari’a should be constructed.

In Jigawa State, where I am justice adviser to a DFID/British Council programme of Access to Justice, the women have begun organizing themselves to discharge this duty. Last year a coalition of 15 women NGOs formed themselves into the Women Network for Access for Justice (JIWNAJ) with the objective of promoting and enhancing the access to justice of women and children. I am impressed by their ability to take abroad view of issues of access to justice. Their vision is not limited to legal issues. Rather it encompasses a wide spectrum of issues of economic and social justice. They are now in the process of developing an elaborate 4-year strategic plan that includes awareness raising, education, legislative advocacy, and economic empowerment. They will certainly be happy to cooperate and share experience with other groups that have similar objectives.
APPLICATION OF THE SHARI’A IN NORTHERN NIGERIA: ROLE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

Keynote Address by Justice (Dr.) Ibrahim Tanko Muhammed
JCA Court of Appeal, Abuja Division

“The judiciary is in a unique position to create in people the respect for the Constitution and for human rights, a commitment to legality and stability generally. The attitude of the people, both rulers and the ruled alike, towards the Constitution is conditioned to a large extent by the way in which the Constitution is interpreted and applied by the courts”.

Praise be to Allah who creates. He created a woman from the ribs of a man. He sanctions equality between them in several respects: reward and punishment, acquisition of wealth, education, honour, etc. and differentiated them in several others, such as biological differences and tenderness.

Ladies and gentlemen should appreciate why I had to lay the above preamble. It is for the simple reason that the theme of this conference deals primarily with Women’s Rights and Access to Justice under Islamic Law (Shari’a) in Northern Nigeria. I commend the organizers of this Conference for a theme well chosen because of its relevance to the current political developments in the country generally and in the northern states in particular.

My assignment, Ladies and Gentlemen, has to do with the application of Shari’a in these states with particular reference to the role of judiciary in a constitutional democracy/democratic society. A quick recapitulation of the application of Shari’a in northern Nigeria vis-à-vis the political history of this sub-region reveals that this Law (Shari’a) had been in full operation before the arrival of the colonialists. Artifacts and historical anecdotes are still available, jealously preserved in the older Islamic civilizations such as KANO, SOKOTO, KATSINA, ZARIA, BORNO, BAUCHI, ZAMFARA, etc. One can still find in such places minutes and correspondences of the emirate councils to or from the sultanate; court proceedings; revenue documents, etc., all conducted in the Arabic language which is the official language of the Shari’a. Thus, the application of Shari’a in the north is as old as Islam itself. Islam according to some historical sources came to the north as early as the 14th century A.D. Some suggest an earlier period.
It thus predated the colonial administration in this sub-region. Prof. Anderson of the London School of Orientation Studies did observe in 1955, while writing his survey of Islamic law in Africa that as far as the northern provinces of Nigeria were concerned.

“Islamic law is in fact applied more widely than in any other part of the British Empire except the Aden Protectorate”

In a more graphic expression, Hon. Justice M. Bello, CJN (rtd) put it this way:

A clearly defined system. The Alkali Courts administered the Shari’a, which included the all embracing civil code of Islam and some specific criminal offences… These Alkalis were often men of great prestige and learning. The law they administered and the rules of evidence and procedure by which they administered it were well defined in writing of the Muslim jurists of the Maliki school and were backed by the injunctions of the Holy Qur’an and Sunnah”.

The Sokoto caliphate spearheaded by Sheikh Usman bin Fodio in 19th Century, led the revival of Shari’a as the governing law in all aspects of life throughout the caliphate, which covered substantially present day West African sub-region, and most of present day Northern Nigeria.

The courts then had the jurisdiction and power to try all cases whether civil or criminal. They could hand down punishments for offence committed and proved, ranging from ordinary battery, theft, criminal misappropriation, brigandage and robbery, fornication and adultery, and homicides of all types, etc. Some of these offences were of capital nature, and they attracted death sentences.

When the colonial masters properly enthroned themselves, they made several enactments albeit gradually, declaring the application of some aspects of the Shari’a such as capital punishments – repugnant to natural justice or morality, or inconsistent with any provisions of any other ordinance. They thus substituted death by hanging for the offence of homicide and adultery with beheading and stoning to death; imprisonment as punishment for theft instead of amputation of hands, and payment of Diyyah (blood money) in lieu of capital punishment was abolished. This has been the position of Shari’a, a law truncated, despite our attainment of independence and democracy, throughout the political journeys, up to October 27th, 1999, when Governor Ahmed Sani of Zamfara State re-introduced the full scale
application of Shari’a in his state by assenting to a bill to that effect. It is this re-introduction of “full scale” application of Shari’a by Zamfara State, followed by most of the northern states that has of recent, generated heated debates not only within the confines of this geographical entity, the Federal Republic of Nigeria, but even abroad. This opened a pandora’s box affording the opportunity to some people both from within and outside the country to fuel the embers of disaffection, mutual distrust, and animosity amongst a people who hitherto were though divergent in tribes, languages, culture, and religions in brotherhood. This is one of the challenges facing the Nigerian society. It is our hope that this conference will at the end of its deliberations proffer a solution to such an issue.

The phrase “constitutional democracy” presupposes a government of the people, by the people and for the people or their representatives. It is one that is run in accordance with the provisions of the constitution, which spells out the rights and limitations of every individual citizen and the relevant arm of government. Abraham Lincoln’s definition of democracy receives universal acceptance not because America was the mother of democracies but because Lincoln believed that true democracy could only thrive where the people were allowed to be the architects of their own polity. Democracy must evolve from the people and must serve the interest of such people. It ceases to be a democracy where the citizens will have no say in who should govern them and how they should be governed. It ceases to be a democracy where the arms of government are not controlled and checkmated by the in-built mechanisms of checks and balances. Democracy is thus an antithesis of a gerontocratic, authoritarian, oligarchic or feudalistic system. The preamble to all our federal constitutions, especially the constitution in operation, presupposes that Nigeria is a country where democracy thrives:

“WE THE PEOPLE of the Federal Republic of Nigeria: HAVING firmly and solemnly resolved; TO LIVE in Unity and harmony as one indivisible and indissoluble Sovereign Nation under God, dedicated to the promotion of Inter African Solidarity, Peace, International cooperation, and understanding: AND TO PROVIDE for a Constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of Freedom, Equality, and Justice, and for the purpose of consolidating the Unity of our people:
One of the dividends of democracy is that each of the federating units (states) in our country now enjoys autonomy in many of its affairs, especially in the formulation of laws. Each state has its own autonomous Executive, Legislature and Judiciary. The Constitution has specific functions and roles to each of these arms. The Governor is the Chief Executive of the state; he is in control of the state’s affairs generally, assisted by his Executive Council and officers in the public services of the state. The legislature (State House of Assembly) has been vested with powers of making laws for the peace, order and good government of the State of any thereof with respect to matters specified in Section 7(a) – (c) of the constitution. The structure of the State judicature is provided by Section 6(3), (4) and (5) of the constitution. The Judicial powers of such courts are provided by section 6 (2) of the Constitution and shall extend to all matters between persons, or between government or authority, and to any persons in Nigeria, and to all action and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of the person. This is an onerous role vested in the Judiciary which makes the Judiciary the “Mother” of all supervisors. Section 4(8) of the constitution supports this assertion:

“Save as otherwise provided by this Constitution, the exercise of Legislative powers by the National Assembly or by a House of Assembly shall be subject to Jurisdiction of Courts of Law and of Judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or a Judicial Tribunal established by law.”

The judiciary is in a unique position to create in people the respect for the constitution and for human rights, a commitment to legality and stability generally. The attitude of the people, both rulers and the ruled alike, towards the constitution is conditioned to a large extent by the way in which the constitution is interpreted and applied by the courts. This necessarily implies that the people who shall man the judiciary (judges) must be people of proven integrity, fearless, uncompromising, God fearing, and upright. In his opening address at the 1995 All Nigeria Judges Conference held in Kano (30th October – 4 November) Hon. Justice Bello then Chief Justice of the Federation observed:
“Judges should endeavour to abide by the oath of their offices to administer justice without fear or favour, affection or ill-will and to do their utmost to interpret the law to enhance the corporate existence of Nigeria as a united nation on the principles of democracy, justice and fairness”.

The rule of law forms the bedrock of a democratic system of government. The central role of a judge is in upholding the rule of law. This is the method by which justice is achieved. To perform its task, the judiciary must remain independent of any influence or pressure from the executive, from the parties to litigation, and from all forms of lobbying. The Hon. Chief Justice of the Federation, M.L. Uwais, reminded judges at the 1995 All Judges Conference that:

“Judges do not have an easy job. They repeatedly do what most people seek to avoid, that is, making decisions. In this regard, judges are expected and must give reasons to justify their decisions. The judges have the responsibility of sitting day, and week after week in order to resolve lone succession of issues. Each of such issues is capable of occupying academic critic for a long period of months, and some times, years of specialized study.”

Generally speaking the role of the judiciary in a democratic dispensation can broadly be classified into two: Traditional Role and Conventional Role: Time may not permit me to say much, but the traditional role of a judge in Nigeria is to exercise judicial power in adjudicating over disputes between citizens inter se, between citizens and other residents in the state, between citizens and the state or its agencies, between the Federation and any state, and between state inter se. These rights as seen supra, relate to the civil rights and obligations and were expressly conferred on the courts by the constitution. A proper exercise of this power is a sine qua non for peace and stability for the state. Several millennia ago, Plato and Aristotle did observe:

“Man, when perfected, is the best of animal, but when separated from law and justice, he is the worst of all.”
Interpreter and Watchdogs of the Constitution: The courts serve as watchdogs over the other arms of government. It limits them through interpretation and confirms them to their legitimate constitutional roles. It checks executive exercises in a number of decisions. The case of *Shugaba Abdur Rahman Darman vs. The Federal Ministry of International Affairs*, is a case in point.\(^{10}\)

The courts also check legislative abuse. See the case of *Attorney General, Bendel State vs. Attorney General of the Federation and Ors.*

There may as well be similar cases stemming from the 4th republic in our various courts awaiting decisions.

Judicial Review of Administrative Actions: The position and role of the judiciary in a democratic state make it obligatory that its machinery has to be, from time to time called, in aid of administrative actions. When reviewing such an action, that is, seeing whether any branch of government, a functionary, or official thereof has exceeded his powers under the law, the judge is only carrying through the general commands of the legislature through the laws. Yet it can decide whether the legislature, the executive, or its delegate had exceeded or abused its powers.

These, in general, ladies and gentlemen are the onerous task the judiciary is expected to discharge. It is in the process of discharge of these responsibilities that the general public as well judges the judiciary. The public has various criteria of judging the judiciary. Some of these criteria are based on facts; some are sensational, and others are mere conjectures. Our position as judged generally, and Nigerian judges in particular, is that all we do is only to apply the law as it is, no matter whose ox is gored. Recent pronouncements by the Supreme Court on some sensitive issues, e.g. on revenue allocation; on-shore off-shore dichotomy, local government councils chairmen tenure of office, liberty of public officers/civil servants to identify with political parties etc. are of particular relevance to these points. See case of *Attorney-General of the Federation vs. Attorney-General, Abia State and 35 Ors. (No. 2) (2002)* 6 NWLR (pt. 764) 543;


These decisions and many others have convinced some of the media organizations such as the Weekly Trust, to make some favourable comments in favour of the judiciary:
“Since the advent of the present political
dispensation, the Judiciary through the courts has
handed down some bold courageous judgements,
which seemed to allay the fears in some quarters
that the courts will not be allowed to perform their
role as impartial arbiters in a civilian
administration.””

Since the re-introduction of full scale application of Shari’a in the north,
many states have taken a number of steps such as reforming some of the
existing state laws; reorganization of state courts structures, quality of the
staff, including the judges that administer such laws, etc. A general analysis
conducted by some concerned groups shows that there is a drastic fall of
criminal/immoral offences committed in the society such as theft, adultery or
fornication, consumption of alcohol in public, etc. In some states, standard
weights, scales and measures have been introduced. The Hisbah (public
ombudsman) has been re-introduced, all with a view to instilling moral
rectitude in the society.

The standard set by the Shari’a for it’s judges in terms of moral probity,
learning, and comportment is unparalleled. A person is not qualified to become
a judge if he is not learned. Equally, a person convicted of any of the major
offences cannot hold the office of a judge.

With regards to the modifications effected in the existing laws by some
of the states where execution of punishments have taken place or are about
to take place, it is premature for me to make any comment. This is for the
simple reason that such modifications are yet to be tested by the Court of
Appeal and the Supreme Court. There may be appeals pending right now.

Considering the importance of the theme of this conference, I think it is
pertinent for me, ladies and gentlemen, to say a word on the rights of women,
including their right to have access to justice under the Shari’a. The Qur’an
and the Sunnah of the Prophet are quite clear on the rights of a Muslim
woman. The summary of these rights is that she enjoys all the fundamental
rights enjoyed by man such as the right to life.

She equally enjoys:

1). Marital Rights such as the right to maintenance, including free feeding,
accommodation, clothing, medical care, etc.
2). Kind and equal treatment by the husband – “the best of you is he who behaves best to his family” (Holy Prophet [SAW]).

3). Economic rights: The Shari’a grants a wife economic rights as granted to her husband.

The Qur’an provides:

“Do not covet the bounties which God has bestowed more abundantly on some of you than on others. Man shall have a benefit from what they earn and women shall have a benefit from what they earn.” (Q. IV: 32).

Thus, all the wealth a woman acquires are entirely her own. She possesses full proprietary right over it without any right of interference by her father, husband or any other person. So all legal avenues open to a man for acquiring wealth are equally made available to a woman.

4). Right to Education: The injunction of Islam is that every Muslim must be educated. Islam lays premium on acquisition of knowledge and has even declared it compulsory on both male and female. Under no circumstance should a Muslim woman remain ignorant and illiterate. If her husband refuses her access to knowledge, she can have access to courts to enforce her right. This is the view held by one of the great jurists Ibn Al-Hajj in his book, Al-Madkhal vol. I pages 276 – 277. We have examples of noble women of great learning. They were lecturers/teachers of international repute. Aisha, the wife of the Prophet and here in northern Nigeria, we had Asma’u the daughter of Sheikh Usman bn. Fodio.

It is therefore wrong to say that a Muslim woman does not enjoy such rights and liberties. What Shari’a does not encourage is the promotion of immorality. I think the paper presenters for this conference will do justice to all such topics scheduled for the conference.

Finally, it is our hope that meaningful suggestions, which will facilitate the development of human society, will emerge at the end of this conference.

I wish you good deliberations.
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3. Hon. Justice Mohammed Bello, CJN (rtd) in his Keynote Address titled “Shari’a and the Constitution” at the National Seminal on Shari’a in Kaduna held on February 1 – 12, 2000 as contained in a booklet; *The Shari’a issue: Working papers for a Dialogu Publisher* by a Committee of Concerned Citizens, Academy Press Plc, Lagos page 5.


5. See *Native Courts (Protectorate) Ordinance No. 44 of 1933*. See also *Native Courts Proclamation No. 5 of 1900; Tsofo Gwabba vs. Gwandu Native Authority (1947) XII WACA, page 141, is the locus classicus on this issue.*

6. See Section 5(2) of the Constitution of the Federal Republic of Nigeria, 1999. Paragraph (b) thereof provides that such powers exercisable by a State Governor: “Shall extend to the execution and maintenance of this Constitution, all laws made by the House of Assembly of the State and to all matters with respect of which the House of Assembly has for the time being power to make laws”.

7. Section 6(a) – (d) of the Constitution.


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THEME 2

Women' Human Rights in the Administration Of Justice
WOMEN’S RIGHTS, ACCESS TO AND ADMINISTRATION OF JUSTICE UNDER THE SHARI’A IN NIGERIA

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“Women’s rights sanctioned by the Almighty God are rooted in the Shari’a or Islamic law, which is essentially a ‘Believer’s law’, in the sense that it is primarily binding on those who believe in it.”

1. Introduction

This paper primarily aims at examining the nature and scope of administration of justice in the context of the protection of human rights of women under the Shari’a in Northern Nigeria.

Further, the paper analyses the issues, challenges and strategies for improving women’s access to justice under the Shari’a in Nigeria.

Finally, the paper concludes with some viable options for Nigeria.

2. What constitutes Access to Justice?

Access to Justice means that where people particularly the poor, women and children do need help, there are effective solutions available. Justice systems, which are remote, unaffordable, delayed, or incomprehensible to ordinary people effectively, deny them legal protection.

3. What is Justice under the Shari’a?

Under the Shari’a, the term justice has its own meaning. It is likened to a sacred trust, a duty imposed upon man to be discharged most sincerely and honestly. This is to identify one’s own interests with those of others and administer the trust in all sincerity as an act of devotion. Justice, therefore, is the quality of being morally just and merciful in giving to every man his due.

This idea of justice is expressed in the Qur’anic verse (4.58): - “God has command you to render back to your trusts to those to whom they are due; and when you judge between man and man, to Judge with fairness.” In a related verse, the Qur’an states: - “We have sent down thee the Book in truth, that thou mightiest Judge between men as guided by God; so be not (used) as an advocate by those who betray their trust” – (4:105).

Justice is thus the duty imposed by God, and we have to stand firm for justice though it may be detrimental to our own interests or to the interests...
of those who are near and dear to us. This is repeatedly asserted in the Qur’an—

“O ye who believe, stand out firmly for God, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from Justice. Be just, that is next to piety and fear of God”
– (Qur’an 5:9).

So, Justice is a virtue in which there is neither transgression, nor tyranny, nor wrong, nor sin. In sum, to do justice is to undo injustice. (See Qur’an 2:59, 4:64, 42:41, and 10:54).

4. Nature and Scope of Administration of Justice in the context of Human Rights under Shari’a

Under the Shari’a, like in most legal systems, human rights means that the citizen’s freedom of worship, expression, movement, association and other forms of self-development, are not restricted or disturbed unnecessarily, except in accordance with the due process of law. It ensures that even when the citizen falls foul of the law, he or she is treated with some respect and restraint. The concept of human rights continues to guarantee his/her humanity and limits the excesses to which ordinary individuals serving, as representatives of the State might be tempted. This last point is of particular importance, especially in relation to the citizen who comes in contact with the criminal justice system in the disadvantaged position of an offender.¹

It is in such contexts that the citizen is most vulnerable to the disregard of his/her human rights by the operators of the criminal justice system. This is because the breach of the laws of society not only carries penalties such as incarceration that limit the rights of the citizen, but they also carry within them a moral position. This labels the offender and puts him/her at a disadvantage even before trial, and seems to provide a justification for an official treatment that can deny and/or abuse his/her human rights. Furthermore, the ordinary citizen is more often than not, unfamiliar with the complexity of the procedures and operations of the legal system and with the law and its provisions for his/her rights, even as an offender. He/she is, therefore, not even aware of what constitutes a breach of his/her human rights and what are the normal characteristics and operations of the criminal justice system. Such ignorance is often more widespread in societies such as Nigeria’s with a low literacy rate.²
Human rights in the administration of criminal justice, therefore refers to what institutional arrangements exist for protecting the rights of the citizens in his most vulnerable circumstances, that is, as a suspect or offender or accused person. This is irrespective of whether he is aware of such rights or not. However, the citizen’s awareness of his/her rights is an extremely important element in ensuring the observance of such rights.\(^3\) this is the concern of this part of the paper.

4.1 The Importance of Administration of Justice
The administration of justice is always regarded as one of the most important functions of any Muslim government. It is an incumbent duty upon the caliph, the leader of the Muslim Community, to establish and maintain justice among the members of the community. The caliph discharges his duty, partly by himself, but mainly through a number of officers he appoints. The most important of these officers is the qadi or judge whose main, though not necessarily total, function is to administer justice in accordance with the law of God.\(^4\)

Given the importance of the administration of justice in Islam, Sheikh Abdullahi bin Fodio showed particular interest in the subject throughout his life. He treated the issue at length in a number of his works. The settling of disputes, the suppression of the injustices of the wicked and the protections of the weak against the powerful. These functions of the qadi (judge) –are essential to the preservation of the Ummah, the Muslim community.\(^5\)

The qadi must follow the proper legal procedure in trying cases. He must make sure that all his decisions are based on the provisions of the Shari’a as laid down in the Qur’an, the Sunnah of the Prophet and the ijma (consensus) of the Muslim community. It is only when no clear provisions on the case at hand are available in these sources that the qadi is justified in resorting to ijtihad - the derivation of details of law from the sources of law.

Amr bin al-as reported that he heard Allah’s Messenger saying “When a judge gives a decision having tried his best to decide correctly and is right, there are two rewards for him; and if he gives a judgement after having tried his best to arrive at a correct decision but erred, there is one reward for him.”\(^6\)

The administration of justice is a very important subject to Islam, so much that an Islamic state can be defined as one where Shari’a, both in the substantive form and in the form of procedure must, according to Islam, be adhered to, and administered on all Muslims. The Qur’an insists that justice must be imposed upon people even by force. The Holy Qur’an reads, verily,
we have sent out messengers with clear signs, and revealed with them Book and the scale (of judgement) so that people may be firm in justice, and we provided iron, wherein is might power and many uses for mankind, and that Allah shall know who will help him and his messengers in the Unseen.7

A great Islamic scholar, Imam Ibn Taymiyya while elaborating on the sacred verse said that the aim of commissioning the Prophets and of revealing the Books, therefore, is to have people administer justice in the cause of Allah and in the rights of his creatures.8 Thus, he who deviates from the book shall be corrected by iron (force of arms).

4.2 Basic Types of Legal Justice
Law and justice may coincide, as some elements of justice may be embodied in the substance of the law; but law may or may not have justice as an objective, depending on whether the law was laid down to achieve justice or some other goals. In Islam law is closely intertwined with religion, and both are considered the expression of God’s will and justice but whereas the aim of religion is to define and determine goals – justice and other – the function of law is to indicate the path (the term Shari’a indeed bears this meaning) by virtue of which God’s justice and other goals are realized.9

The law provides no specific measure to distinguish between just and unjust acts. It delves therefore upon the scholars to indicate the underlying principles of justice, which would serve as guidelines to distinguish between just and unjust acts. Although these principles have not been brought together correlated into a coherent theory of legal justice, they may be grouped into two categories, each embracing a distinct aspect of justice. These aspects may be called substantive and the procedural, and the meaning of justice in each necessarily varies from one to the other.10

The first category consists of those elements of justice that may be contained in the substance of the law. But it is not the law, which is only a set of regulatory rules that determines how much of the elements of justice its substance must contain; the lawmakers decide how much (in quality and quantity) it must contain. Islamic law consisting of the laws drawn from revelation and wisdom (Qur’an and Hadith) as well as from derivative sources (consensu and analogy), is considered to contain the justice laid down by the Divine legislator. The scholars, in the great debate about justice, indicated the elements of justice which the elements of justice which the law contains.11

22
The second aspect of justice is procedural. It is conceivable that a certain system of law may be completely devoid of elements of substantive justice, yet it possesses rules of procedure which are observed with a certain measure of coherence, regularity, and impartiality constituting that which is called formal justice. Procedural rules of justice, however, vary from one system of law to another but each system, if ever to be acceptable to a given society, must develop its own procedural rules, including their impartial application, in accordance with the norms and social habits of that society. Whenever these rules are ignored or inappropriately applied, procedural injustice arises. Legal injustice might also result from a decision considered contrary to the letter or the spirit of the law. But this kind of injustice falls, strictly speaking, in the category of substantive justice.  

(i) Substantive Justice

According to Professor Majid Khadduri in his book, the Islamic conception of Justice, substantive justice is the internal aspect of the law, and the elements of justice contained in the law constituted a declaration of “rights and wrongs”. In the Islamic vocabulary the “rights and wrongs” are called the “permissions and prohibitions”, (al-Halal wa al-Haram) and form the general particular rules of the Islamic corpus juris (Shari’a). The law does not specify under the categories of permissions and prohibitions what is the measure, which distinguishes just from unjust acts; it merely states that believers must fulfil their duties under the first category and abstain from others under prohibitions. It was taken for granted that all obligatory act must be just, since they are the expressions of God’s will and justice, and that all prohibited acts are unjust, on the grounds that the revelations cannot possibly inflict an injustice on believers – Qur’an 8:53. In their inquiry into the nature and scope of legal obligations, the scholars were able to discern the underlying principles governing the distinction between just and unjust acts. Taken together, these principles determine what the ultimate goals or purposes of the law (maqaasid-al-Shari’a) ought to be.

Further, Khadduri stated that the first and foremost purpose is the principle of “general good” (Al-Khayr al-’Am) which is indeed implied in the revelation and intended to promote the public welfare of believers – (Qur’an VLVII, 18-19), the law is the path to guide men to do the good and to avoid evil. More specifically, the law is designed to protect the public interest (maslaha), since man is not always aware of what is good for him and his people – (Qur’an 2:16), only God knows that which is in the best interest of all. Although there is no specific reference to maslaha in the
Qur’an, there are several references as to how to do the good and how to avert the harm (*mafsada*) and other evils (Qur’an 2:200-205).

Moreover, the Prophet is reported to have said in a tradition that “no injury should be imposed nor an injury be inflicted as a penalty for another injury” – *(laa dara wa laa dir’ar)*, presuming that the general good and public interest must be protected.\(^{15}\)

The caliphs, from the early Islamic period, often made decisions on the basis of the general good and the precedents established by them were followed by their successors. In the modern age, under the impact of western law, jurists take it almost for granted that *maslaha* is a source of legal decisions and the grounds on which reform has been justified. Muhammad bin ‘Ashur, former rector of the Zaytuna mosque in Tunis, insisted that *maslaha* is the primary purpose of legislation and should therefore be the basis for all legal decisions.\(^{16}\)

One of the fundamental purposes of the law universally agreed upon are the general principles of good character – *(makaarim al-Ahhalaaq)*, and the believers are commanded by God to observe them with good faith – *(Qur’an 31:16; Qur’an XLIX, 13)*. Although the rules of conduct before Islam, often described as harsh and rugged, continued to be honoured after the rise of Islam (especially such customs as personal honour, hospitality, and courage), the Prophet stressed such values as kindness, mercy and justice, which gradually modified and eventually superseded earlier customs and practices. The Prophet’s moral teachings are summed up in a tradition ascribed to him, in which he declared that he was “sent to further the principles of good character.” Moral and religious values became in time important elements of the law and were often used as a basis for legal decisions.\(^{17}\)

Khadduri further pointed out that in addition to ultimate goals, a set of general principles might be regarded as corollary maxims of justice. Perhaps the very basis is the principle of “intent” – *(niya)*, which presupposes that the law must be observed in good faith. A religious sanction to this principle was invoked by a tradition of the Prophet, which stated that human acts must be judged by that for which they are intended. The *niya* implies the animus that produces legal effects, and it is expressed in a declaration of intention. In legal theory, the *niya*, not the form or the written word of the law, must first be taken into consideration; only if the implicit meaning is not clear, the literal or the explicit meaning of the text must be considered.\(^{18}\)

Furthermore, Khadduri states that the ideas of freedom, equality, brotherhood, and toleration are often stated as goals in the authoritative
sources, and they find literacy expression in the works of philosophers and ethical writers. Although these ideas have close bearing on justice, jurist and theologians have not, strictly speaking, considered them as fundamental purposes of law. However brotherhood and toleration have been considered as important moral religious obligations. That in the chapter of the law on devotional duties – (ibad’at), defining the relationship between man and God, man can claim no specific right against God; he has only duties towards him which he must fulfil in order to be rewarded with Paradise. Above all, man is under obligation to worship God. (Qur’an LI: 56), and to associate no other god with him (Qur’an 4:51 and 116). But in his relationship with other men, man’s rights and duties are defined and determined in accordance with a scale of justice consisting of a set of principles in which freedom, equality, toleration, and brotherhood are included. With regard to his status as a member of the community, the basic principles are freedom (Ibaaha) and innocence (bara’a). Man is free to act unless forbidden by the law, and he is considered not a wrongdoer unless he breaks the law; ‘nullum crimen sine lege.’ However, beyond the scale of legal justice, individual freedom is scarcely defined in terms of political and theological justice.

Professor Majid Khadduri finally pointed out that moderation and toleration are not the only principles of legal justice; there are also moral and religious obligations. The first reveals the flexibility of the law and the conditions under which the believers can discharge their duties; the other defines the attitude of Islam towards non-Muslim communities whether within or outside Islamic lands. Designed to protect the believer’s interest and promote the general good, the law is not intended to impose obligations beyond the capacity of believers to fulfil them. A certain relaxation of the law is deemed necessary. This relaxation is permitted in accordance with the principles of moderation, consisting of equity and justice, by virtue of which the individual would be able to maintain a balance between an obligation and his capacity of fulfilment (Qur’an 2:185; 22:78). The principle of toleration requires the state to grant protection to other communities that share belief in one God were they to live in the Islamic state, and to refrain from the use of force whenever negotiations and peace were entered into between Muslims.19

ii)  **Procedural Justice**

Indeed, no legal system, whether ancient or modern, could claim endurance were it to be found wanting in procedural justice, not withstanding that the modes of its manifestation vary from one system to another. Procedural
justice, according to Khadduri, is the external aspect of the law by virtue of which substantive justice is realized. This aspect of justice, often called formal justice, is manifested in the degree of regularity, meticulousness, and impartiality in the application of the law. Without it, the elements of justice would become of academic value, just as a hidden treasure loses its value unless it is put into use. Even if little or no elements of justice were to be found in the law, the individual could derive satisfaction if the law were applied with regularity and impartially.20

The experience of Islam in procedural justice demonstrates again the truth that man in earlier societies was more habitually inclined to trust the judge who enjoys a good reputation than to trust the judicial system. This truth is perhaps nowhere more clearly revealed than in the emphasis paid to the status and the qualifications of judges and witnesses in the Islamic judicial system. Although the structure of the court was relatively primordial, the qualities of the judge were defined with particular care. The judge was the central figure in the judicial process.21

In the letter of instructions to Abu Musa Al-Ash’ri, the guidelines for decision-making have been set forth, but these seem to have been the product of a later date. Perhaps one of the earliest authoritative statements on the subjects may be found in Sha’fii’s answer to a question on the subject, in which he said: -

I should make a decision against a person either on the basis of my knowledge that the accusation made against him was right, or on his (own) admission. If neither had the knowledge or if he did not confess, I should decide against him on the basis of (the testimony) of two witnesses (of just character). Since witnesses may make errors or be confused by knowledge and the (defendant’s) admission would be stronger (evidence) against him than the (testimony) of two witnesses. I should (also) decide against him on the strength of (the testimony of) one witness and the plaintiff’s oath; but (such evidence) is weaker than the (testimony of) two witnesses. I should also decide against him if he refused to take an oath whereas the plaintiff did take an oath; but (such evidence) is weaker than the testimony of one witness and the oath, since the accused’s refusal might have been the result of his fear for his reputation or his feeling that the matter was too insignificant for an oath, whereas he who did swear an oath on his own behalf might be a covetous or debauched person.22

This process, described by Shafii, as it existed in the third/ninth century A.H./A.D., continued in its essentials to the modern age, though not without refinements, as a model of judicial procedure.23

26
According to Professor Khadduri, the standard of substantive justice in Islam, consisting of a set of religious and moral values highly esteemed in the public eye is far from being realized by the judicial process, despite the stress laid on the qualifications for the office of judge and the meticulousness of the law of evidence. Moreover, the development of the judicial structure is confined to the establishment of subsidiary judicial organs operating independently from the court system. Above all, no uniformity or consistency in procedural justice exists, partly because the judges were not required by such rules as the rule of *stare decisis*, which would make their decisions consistent with one another.24

As a consequence, procedural justice was maintained not by a unitary judicial process but by a complex system, partly judicial and partly administrative in character. Nor was the law codified (in the modern sense of the word) and applied uniformly as a coherent system throughout the land. Differences in judicial Islam- the *Sunni* and *Shii*; also between the schools of law. And differences on creedal and legal grounds necessarily led to difference in the administration of justice from one locality to another.

Procedural justice, needless to say, proved inadequate for the requirements of justice under the Islamic legal system. Neither in structure, nor in working were the courts fulfilling the purposes of procedural justice. In structure it was not unitary, since the judicial system was not correlated and the *Qadi* was handicapped. Conflicts necessarily ensued. In its working, the judicial process was subject to political pressures, though in principle the *qadi* (judge) was immune and the Imam was charged with the duty to ensure the achievement of justice in accordance with judicial processes. Men in high authority often tried to interfere in judicial procedure, and the appointment and dismissal of the *qadi* was often subjected to increasing political pressures when local governors became either fully or semi-independent from the central authority. Only in the modern age, when Muslim states became fully sovereign, did the judicial system begin to change. In most Muslim states, the rulers have accepted the principle of separation of powers, although the courts have not yet become immune to political pressures.

According to Professor Khadduri, it was not only rulers and men in high authority who were responsible for procedural deficiencies. The scholars – *qadis*, *muftis*, and others – were perhaps no less guilty for that sorry situation, since they considered themselves the custodians of legal justice. At first the scholars were in favour of *ijithad* - independent legal reasoning which helped to maintain the flexibility of the law and the official.
decrees where gradually absorbed into the law. Their position against injustice and political pressure was defensible, as they were united in their efforts to uphold the rule of law, despite differences on legal doctrines, which were considered necessary for legal decisions in accordance with the truth (the path of right and justice). But after the fourth/tenth century, A.H./A.D. when the *ijtihad* was gradually abandoned in favour of *taqlid* (conformance to the canons of one of the recognized schools of law), their position became defensible differences on the degree of conformity to the law aggravating their subservience to political pressures. When Muslim states finally accepted the principle of the separation of powers, the judiciary began to reassert procedural justice and challenge political pressures. Though they have not yet become fully independent, the courts, however, make it clear that unless the judicial process acts freely legal justice cannot be achieved.\textsuperscript{25}

Hence, in accordance with legal justice, each man is entitled to his legal rights, and he is obliged to pay the penalty for the injustices that he may commit. No other aspect of justice can advance a similar claim unless it is integrated or correlated with legal justice which consists of only those elements that society has accepted as binding; those elements which society has not yet considered as binding may be regarded either as ethical or philosophical aspects of justice. Legal justice is thus the criterion of the immediate needs of society, whereas ethical, philosophical, or other aspects of justice are an expression of expectations. Legal justice is the channel through which the elements of other aspects of justice are gradually absorbed before they become binding.

4.3 **Principles of Natural Justice**

It has been a phenomenon that western lawyers and legal academicians are fond of attributing whatever development related to law generally and administration of justice in particular to themselves.

At the end they come out to the whole world announcing that if not because of their endeavours and discoveries, humanity wouldn’t have gotten this blessing, and the whole universe would have been in total ignorance and absolute darkness. In refutation to these unfounded pretences, the need arises to trace the genesis of some principles of natural justice in Islamic law.\textsuperscript{26}

\textit{i) Rule of Law}\textsuperscript{27}

In its different perspectives meant in western legal systems, which could be generally construed to mean smooth running of the three arms of government...
according to law, represents the concept of *Mashru‘iyyah* in Islamic law. *Mashru‘iyyah* in its jurisprudential usage which is of a more encompassing connotation, means the authoritative ground supporting the legality or illegality of any conduct. As such, *Mashru‘iyyah* categorizes acts of a person or group of persons into, *Fard* (an obligation the omission of which is punishable), *Haram* (a prohibition the commission of which is punishable), and *Mubah* (a permissible thing). To exemplify these three terms the Qur’an says in respect of an act which is *Fard*: “O you who believe! Fulfil your undertakings.” This verse mandatorily enjoins the believers to honour their contracts and get hold to their letters.

Regarding an act, which is *haram*, the Qur’an says: - “O you who believe! Eat not up your property among yourselves in vanities, but let there be amongst you, traffic and trade by mutual consent”. The Qur’an here enunciates the prohibition of squandering wealth belonging to other persons unjustifiably.

As for *Mubah*, the Qur’an tells us that: - “Except for these, all others are lawful”. Here the Qur’an after enumerating the prohibitions tells us that all other unmentioned things have been made permissible.

Therefore, rule of law in Islam could be said to mean all Shari’a embodied regulations for man’s conduct in all circumstances of life – justice inclusive because it constitutes the bedrock of human existence.

ii) **Fair Hearing**

In pursuance of fair hearing, other principles of natural justice are not over-emphasized. Their historical background, particularly that of fair hearing is traceable to time immemorial. The Holy Qur’an concedes right to fair hearing and attributes it to the time of Prophet Adam’s creation and the incident that they were allowed to eat the plenteous food available in the Garden except the fruits of one tree which they were not even allowed to approach let alone eat it, being seduced by the devil, they ate the fruit of the tree which they were forbidden to eat. In doing so, they committed a great sin by violating the command of Allah. Yet, they were not out rightly convicted without being furnished with the opportunity to defend themselves. Hereby the Qur’an narrates the story:

“We said: Adam: dwell you and your wife in the Garden, and eat the bountiful things therein, as where and when you will, but approach not this tree, or you run into harm and transgression.”
This verse shows both, the permission and restriction given by God to Adam and his wife.

“Then did Satan make them slip from Garden and get them out of the state of felicity in which they had been”

“So by deceit he brought about their fault when they tasted of the tree, their shame became manifest to them, and they began to sew together the leaves of the Garden over their bodies. And their Lord called unto them: “Did I not forbid you that tree, and tell you that Satan was an avowed enemy to you.”

These two verses show that Adam and Hauwa being misled by the devil acted beyond the restriction, and neglected the advice given to them not to trust the devil. Consequently, they were charged with the offence of violating the command of Allah. The charge was put to them in a question form where the Qur’an says: - “Did I not forbid you that tree, and tell you that Satan was an avowed enemy to you” Adam and Hauwa pleaded the case saying: -

“Our Lord! We have wronged our own souls: - If you forgive us not and bestow not upon us your mercy we shall certainly be lost.”

Adam and Hauwa in their reply to the charge following the opportunity given to them to defend themselves, confessed to the commission of the offence. As a result of that, they asked for concession and forgiveness. After Adam and Hauwa were appropriately heard, the judgement was passed upon them in the following two verses: -

“Then learnt Adam from his Lord words of inspiration and his Lord turned towards him for he is oft-returning, most Merciful”. We said, “Get you down all from here, and if, as is sure, there comes to you guidance from. Whoever follows my guidance, on them shall be no fear, nor shall they grieve.”

This is how the concept of fair hearing in Islamic law, becomes an article of faith, a solemn command from the creator, as natural right of mankind, a spiritual privilege and above all, a religious duty.
(iii)  **Equality before the law**

Islam has given to justice an eminent position in its legislation. For the Qur’an urges and enjoins Muslim to keep the principles of natural justice even against one’s nearest relatives, the rich or poor, “Follow not the lust of your hearts, lest you swerve – and if you distort justice or decline to do justice, verily Allah is well – acquainted with all that you do.”

The Qur’an further commands the Muslims to keep the principles of justice even with their enemies – “O you who believe! Stand out firmly for Allah as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart form justice. Be just: that is next to piety. And fear Allah. For Allah is ell – acquainted with all that you do.”

The above passages evidently shows that the foundations of concept of equality before the law are deeply rooted in the structure of Islam; this is simply because the Islamic lawgiver is just to all his creatures. He is not partial to any race, colour, region or religion. He being the best of all judges’ judges and decides upon every individual on his own merit and in accordance with his own deeds.

Believers are therefore, strictly urged to do justice even to one’s detriment and in favour of one’s adversary. Litigants are to be treated on equal footing, either of them and the judge, and regardless to their social status in the society. When this Divine ordinance is thoroughly implemented, there will be no place for prejudice or persecution. And no room for segregation or oppression.

The Prophet of Islam in his utterances and deeds, whose function is to translate the ideology of Islam and put it in practical shape, made it abundantly clear that equality before the law is one of the basic ingredients of fair adjudication. It is pertinent indeed, to recall the case of the Makzumiyya lady who committed theft and the Quraish tribe was very much worried about her. Usama bin Zaid who was asked to speak on her behalf before the Prophet implored him not to cut off the lady’s hand because she was of a noble family and her family would be dishonoured in consequence. Prophet Muhammad replied to Usama that how he dares to intercede to suspend a penalty imposed by Allah That the power of the children of Israel was destroyed because when the most noble of them stole, they forgave him and when the weak or humble amongst them stole, they executed the penalty on him. By him in whose hand the life of Muhammad is, if Fatima the daughter of Muhammad should steal, I shall cut off her hand.
Umar bin Khattab, the second caliph had once a lawsuit against a Jew and both of them went to the *Qadi* who on seeing Umar rose in his seat out of deference. Umar considered such an unpardonable weakness on the part of the *Qadi* – judge that he dismissed him at once.

After the death of the Prophet when Abubakar the first caliph assumed the leadership of the Ummah, he said in his acceptance speech “… the weak among you shall be strong until I restore their rights and the strong shall be weak in my view until I take away the rights of others from them, Allah so wills.”

Certainly the above case of the Makhzumiyya lady reflects very important values of justice in Islam. It inspires a sense of confidence in the aggrieved person, so long as the judiciary believes in the supremacy of the sacred law. It proclaims that the stock of man, the colour of his skin, the amount of wealth he has, and the degree of prestige he enjoys have no bearing on the character and personality of an individual charged before a court of law. It warns judges, who are committed with the responsibility of enforcing the Divine law that violation of such law will end up with them into footsteps of the previous nations who went astray, because they conceded such discriminatory respects and innovated a notion of superiority of one man or colour to another.

From the foregoing textual authorities and conventions of the caliphs, it is obvious that supremacy of the Divine law and equality of all people before it is not a matter of compromise. And the notion that king or head of state cannot be sued is quite alien and untenable to Islamic law.

5. **Women’s Human Rights in the Administration of Justice under Shari’a**

As human beings, women are entitled the certain basic rights under the Shari’a. This is so because, under the Shari’a, every person irrespective of his/her country of origin, religion, sex, age, race or colour, has some basic human rights simply because he/she is a human being who should be respected by every muslim. These basic human rights are:- the rights to life, justice, equality of human beings, and freedom from discrimination, respect for the chastity of women, freedom from slavery and inhuman treatment, co-operation and non cooperation, and freedom from want and deprivation.

As citizens of an Islamic state, women are entitled to the following fundamental rights guaranteed by the Shari’a. These are the rights: - security of life and property, protection of honour, privacy of life, personal liberty,
freedom of expression, freedom of association, freedom of religion, and equality before the law.  

5.1 **Specific Rights of Women Under Shari’a**  
Under the Shari’a, women are guaranteed the following specific rights because of their special responsibilities and status in the eyes of Islam. These rights are: -  

A. **Right To Equality in Status, Worth and Value**  
The Qur’an teaches us that women and men are all creatures of Allah, existing on a level of equal worth and value, although their equal importance does not substantiate a claim for their equivalence or perfect identity. According to the Qur’an, male and female are created *min nafsin wahidatin* (“from a single soul or self”) to complement each other.

Women and men are clearly equal in terms of religious and ethnical obligations and rewards. The Qur’an provides: - “And who so does good works, whether male or female, and he or she is a believer, such will enter paradise and they will not be wronged the dint in a date-stone.”

B. **Right to Education**  
Although the more specific commands for the equal rights of women and men to pursue education can be found in the hadith literature, the Qur’an does at least imply the pursuit of knowledge by all Muslims regardless of their sex. For example, it repeatedly commands all readers to read, recite, think, contemplate, as well as learn from the signs (*ayat*) of Allah in nature. In fact, the very first revelation to Prophet Muhammed (Peace be upon him) was concerned with knowledge. In a Quaranic society, there can never be a restriction of this knowledge to one sex. It is the duty of every Muslim and every Muslim woman to pursue knowledge throughout life, even if it should lead the seeker to China, we are told. The Prophet of Islam even commanded that the slave girls be educated, and he asked Shifa’ bint Abdillah to instruct his wife Hafsa bint Umar. Lectures of the Prophet were attended by the time of the prophet’s death; there were many women scholars.

C. **Right to Own And Dispose of Property**  
The Holy Qur’an, for over 1400 years, proclaims the right of every woman to buy and sell, to contract and to earn, and to hold and manage her own property and money. The Qur’an provides: - “Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned…”
D. **Right to Inheritance and Dower**

The Holy Qur’an grants a woman a share in the inheritance of the family, warns against depriving her of that inheritance, specifies that the dower (*mahr*) of her marriage should belong to her alone and never be taken by her husband unless offered by the woman as a free gift. The Qur’an reads: - “O you who believe, it is not lawful for you to inherit forcibly the women (of your deceased kinsmen) or (that) you should put constraint upon them that you may take away a part of that which you have given them, unless they be guilty of flagrant lewdness. But consort with them in kindness, for if you hate them it may happen that you hate a thing wherein Allah has placed much good.”

It is clear that the Qur’an not only recommends, but also is even insistent upon the equality of women and men as an essential characteristic of a Qur’anic society. The claim of the non-Muslim critics that Islam denigrates women is denied emphatically by the Qur’an. Similarly denied are the arguments of certain Muslims that women are religiously, intellectually, and ethically inferior to men as Jewish and Christian literatures had earlier maintained.

E. **Right to Maintenance**

The Qur’an, recognizing the importance of complementary sexual roles, grants women the right to maintenance in exchange for her contribution to the physical and emotional well being of the family and to the care that she provides in the rearing of children.

Despite the fact that a woman has full legal capacity in proprietary matters, and the possibility that she may be wealthier than her husband, the Shari’a provides that the husband has to maintain her to a reasonable standard taking into account her social position, the husband’s means and all other relevant circumstances. This means that the husband has to provide her with all her needs: - food, clothing, shelter and even cosmetics, as well as all other things including even a cook, a steward, etc, suitable to a lady.

The right to maintenance is absolute and does not depend on the wife’s means. Even if she is the richest woman on earth her husband must maintain her. If the husband becomes indigent and unable to maintain her, then she becomes entitled to a divorce on that ground.

When the marriage is dissolved, Islamic law requires the wife to wait for a period generally of three months before she remarries. During this period, as a general rule, her former husband has to continue maintaining her and her right to inherit him subsists so that if he dies before the end of
the waiting period she can inherit him. The purpose of this waiting period is to ensure that the woman does not remarry before it is established beyond reasonable doubt that she is not pregnant with the previous husband’s child. If it transpires that she is pregnant then the waiting period continues until she is delivered of the child; and so does the right to maintenance.

F. Right to Custody of Children

Dissolution of marriage immediately raises the question of the right to the custody of the minor children of the marriage, if any. The rule under Islamic law is that the right belongs to the wife, subject to certain conditions, e.g., that she is mentally and physically capable of taking care of the child and that she is not of bad character. If the wife becomes disqualified to be given the custody of the children or if she dies, then the right is transferred to her mother if the mother is alive and capable, and failing that, her grandmother, etc. In short, the right belongs to the woman and her female relatives. Only if these are not in existence or are incompetent that the husband’s mother and then grandmother, etc, can be resorted to. The husband himself is only entitled to the custody as the very last resort. But he has to bear the cost of maintaining the children and educating them.

G. Right to Obtain Divorce

Under Islamic law a married woman can insist that the husband’s unilateral right to divorce (talaq) be shared so that she too can end the marriage at her will. Indeed, she can even get the contract to empower her to divorce herself or to divorce any other wife the husband might marry subsequent to their marriage. In short, the wife can equalize her right with her husband’s in matters of divorce.

But in addition to whatever contractual safeguards she may have built into the marriage contract, she has a legal right to obtain a divorce on any one of the three grounds: - (a) her husband’s physical or mental cruelty towards herself. Mental cruelty includes such insufferable behaviour as the husband’s drunkenness, licentiousness, taking undue liberties, e.g., being persistently late in home-coming at night, etc. Physically deserting her or abandoning conjugal relations with her. Desertion is a ground for divorce even though the husband continues to provide maintenance. Failure to provide maintenance is, of course, another ground for divorce even if the husband has not deserted the wife; and (c) if the husband becomes afflicted with an intolerable disease, physical or mental, the wife, if she chooses, can obtain a divorce on that ground.
6. **Improving Women’s Access to Justice**

This part of the paper is divided into two parts:

(a) Identification of problems associated with women’s rights and access to justice in the Shari’a compliant states of northern Nigeria;

(b) Examination of the key issues and strategic objectives in improving women’s access to justice.

(a) **Women’s Rights and Access to Justice in Northern States of Nigeria: Problems and Challenges**

The following have been identified as the main obstacles to the effective realisation of women’s rights and access to Justice in the Shari’a compliant States:

(i) **Poverty of Women**

Women and other poor people in the North-West Zone of Nigeria (Sokoto, Kebbi, Zamfara, Kano, Jigawa and Kaduna States), otherwise known as the Shari’a Compliant States, are among the people in Nigeria who cannot exercise their fundamental rights and freedoms fully and effectively because they are poor or have low social status. It is in this regard that Dr. Tijjani Bande rightly raised some pertinent issues relating to the conditions of the North-West Zone and the implication of that to human rights:

“That a quarter of Nigeria’s population lives in the zone. This notwithstanding, the presence of infrastructural facilities such as health service, education, water, electricity, etc is grossly inadequate in relation to the size of the population. The incidence of poverty, ignorance, disease, squalor, poor diet and poor shelter is more pronounced in this zone than in all the other zones of Nigeria. The poverty level is also striking. The zone came only second on the scale with the percentage of poor being 55.2%. The North-East Zone came first only with a merging of 0.4% i.e. 54.8%. The level of illiteracy generally could be seen in the fact that 95% of all household heads in the zone are without functional education. Unemployment figure is also high while majority of the inhabitants of the Zone are peasant farmers, with many not actually able to produce enough for their subsistence. The picture of the zone depicted does not, make for possible realisation of human rights by the people.”

The gender disparities in economic power sharing are an important contributing factor to the poverty of women in the zone. While poverty
affects households as a whole, because of the gender divisions of labour and responsibilities for household welfare, women bear a disproportionate burden, attempting to manage household consumption and production under conditions of increasing scarcity. Poverty is particularly acute for women living in rural households.

Women’s poverty is directly related to the absence of economic opportunities and autonomy, lack of access to economic resources, including credit and land ownership. Hence women cannot access justice and their rights when they are poor and their voices are not heard, when they are discriminated against, or when the state is not accountable for its human rights obligations.

(ii) **Lack of Education or Illiteracy**

Discrimination in girls’ access to education persists in many areas, owing to customary attitudes, early or forced marriages and pregnancies, inadequate gender-biased teaching and educational materials, sexual harassment and lack of adequate and physically and otherwise accessible schooling facilities. Girls/Women undertake heavy domestic work at a very early age. Girls and young women are expected to manage both educational and domestic responsibilities, often resulting in poor scholastic performance and early dropout from the educational system. This has long-lasting consequences for all aspect of women’s lives especially access to justice and their rights.

(iii) **Lack of access to Legal Aid/Advice**

Due to lack of access to legal aid/advice, a large number of women in this zone whose fundamental human rights have been or are being violated by both individuals and state authorities, could not or find it difficult, if not impracticable, to seek for redress in a competent court of law. As indigent citizens of Nigeria, they lack the capacity to seek for effective protection of their fundamental rights and pursue the establishment of justice in their favour.

It is worth noting that section 46 (4) (b) (i) of the 1999 constitution has omitted an important phrase namely “and ensure that opportunities for securing justice are not denied.” This glaring omission is an important constitutional obligation of the National Assembly and enhances the capacity of an indigent citizen of Nigeria to seek for effective protection of his or her fundamental rights and pursue the establishment of Justice in his or her favour. This observation is consistent with the provisions of section 49 (4) (b) (i) of the aborted 1995 Draft Constitution of Nigeria:
Lack of Observance of Procedural Guarantees or Procedural Justice under Shari’a by Trial Court Judges.

Between the year 2000 and now, in all the notorious criminal cases decided by the Shari’a trial court judges in respect of adultery or fornication (Zina) namely, Safiya, Amina Lawal, and a host of others, with regards to theft or the offence of Sariqa, the procedural guarantees where not observed in favour of the accused persons, thereby resulting into denial of justice and violation of human rights. The procedural guarantees are mainly the basic rights of an accused person before, during and after trial, and provide conditions for the imposition of hujudud punishments or sentences such as stoning to death and amputation of hands.

The importance of procedural guarantees or procedural justice is adequately reflected in the judgement of the Sokoto State Shari’a Court of Appeal in the case of Safiya Hussaini V. Attorney General of Sokoto State (25-3-2002), where the court unanimously allowed the appeal of Safiya and quashed her conviction of stoning to death on grounds of procedural irregularities.

This aspect of justice, often called formal justice, is manifested in the degree of regularity, meticulousness, integrity, and impartiality in the application of the substantive law. Even if little or no elements of Justice were to be found in the law, the individual could derive satisfaction if the law were applied with regularity and impartiality.

Lack of observance of procedural guarantees/procedural justice by Shari’a Court Judges is partly due to the absence of Shari’a Criminal Procedure Codes (containing these guarantees) in many of these states, e.g. Katsina.

Lack of Training of Shari’a Court Judges in Comparative Human Rights and Administration of Justice in Nigeria.

Continuing judicial education of all judges is very critical to the effective enforcement of women’s rights and administration of justice. Most Shari’a Court Judges were appointed to man these courts without any training at all in comparative human rights and the administration of Justice in Nigeria. The resultant consequence of some judgements delivered by these judges is nothing but a denial of justice and violation of citizens’ rights.

Strategies in Improving Women’s Access to Justice

The Voices of the Poor study conducted by the World Bank in 2000 provides evidence as to how the poor (including women in Nigeria) have identified
lack of security and access to justice with their understanding of poverty and ill being. Lack of financial means to pay for basic cost such as filing fees and transport to court, as well as illicit payment, such as bribes to the Police of filing clerk, and the time required to use the institutions and constitutions constitute a first denial of access to justice. Cultural and psychological barriers to access to justice also include the use of English language and the technicality and formality of court proceedings.

The Nigerian formal justice and legal system is very user-unfriendly. The poor, including women, are less well equipped than others to use the system effectively, lacking the resources in terms of education, knowledge of rights or availability of advice. Public perception is that there are very few rich people in prisons, and the common understanding is that if one is rich one can buy justice. The justice system does not cater for the poor and women who are likely to be its principal criminal clients, complainants, and witnesses.

All state structures that are the first line of access to the poor, such as the Legal Aid Council, the Police and the Customary or Area Courts are considered to be either barely functional or exploitative of the poor, and usually not easily accessible in the rural area.

Given the patriarchal nature of Nigeria society, virtually all the authority figures and mediators in dispute resolution are male, from family heads, to religious authorities, chiefs, emirs, magistrates up to the Chief Justice of Nigeria. There are few women judges in the Area/Customary Courts, even though most cases involving women as plaintiffs or defendants are to be found in such courts. Their poorer levels of literacy and access to resources affect women’s access to justice in the higher courts. Judges’ attitudes, biases, and background affect the types of Judgement they render in such cases, with women’s testimony devalued as gossip, and violence and discrimination against women seen as socially acceptable.

The extent to which Nigerian women can rely on the provisions of CEDAW to promote and protect their rights is debatable. However, international standards can be influential (even without domestication) through their standard-setting and persuasive influence in establishing precedents in case law. Through judicial activism, international human rights instruments and standards can have an impact on the lives of the poor in Nigeria by providing more liberal and flexible interpretations of outdated and discriminatory laws, thereby reducing statutory discrimination and injustices.
Furthermore, any programme such as the on-going 7-year British Council/DFID Access to Justice Programme in Nigeria that aims at supporting initiatives to improve access to justice for the poor through fair and equitable lower court outcomes, is welcome. This will include supply-side strategies such as state level improvements in judicial professionalism (including gender and human rights training), better management of cases between the courts, prosecution and prisons, or pilots to test alternatives to imprisonment. Because of the inaccessibility to the poor of the formal institutions, any supportive programme should also focus on improving access to fair and equitable outcomes through alternative mechanisms (such as mediation services or enhancing traditional justice systems) and the provisions of legal and paralegal advice. Demand-side strategies should include literacy and other methods to empower women and other poor people to make better use of formal institutions when they have no other options. A policy and innovations fund should also support nation-wide coalition building to advocate for pro-poor reforms at Federal level and influence policy makers.

(c) Other Strategies to be employed

1. Review, adopt and maintain macro-economic policies and development strategies that address the needs and efforts of women in poverty.

2. Revise laws and administrative practices to ensure women’s equal rights and access to economic resources.

3. Eradicate illiteracy among women by the year 2010 by improving the quality of education and equal opportunities for women and men in terms of access in order to ensure that women of all ages can acquire the knowledge, capacities aptitudes, skills, and ethical values needed to develop and participate fully under equal conditions in the process of social, economic, and political development.

4. Promote women’s economic rights and independence, including access to employment; appropriate working conditions, and control over economic resources.

5. Embark on law reform, which removes discriminatory laws, policies, and practices affecting women’s rights, and incorporate rights conforming to international standards.
6. Promoting the use of public interest litigation by advocacy groups and others to challenge the legality of discriminatory government measures.

7. Promote paralegal schemes offering legal aid and assistance and advice to poor citizens.

8. Improve access to legal aid so that poor people, particularly women, can afford legal representation.

9. Promote practical, problem-based legal rights education, which helps poor people to protect their livelihoods.

10. Courts can be made more accessible, providing better service through the use of local languages; allowing people to give evidence in narrative form; appointing more people from the community to sit as lay judges in some cases or as muftis in the case of shari’a courts; improving case-flow management by computerisation of court records and strengthening court administration; awareness raising or continuing judicial education for judges in new developments affecting juvenile justice, alternatives to prison, gender and human rights in the administration of justice.

11. Encourage the use of alternatives to litigation such as mediation, arbitration, and conciliation to resolve some family or commercial disputes.

CONCLUSION

In conclusion, it is evident from the above that human rights standards such as CEDAW mean that governments have obligations to address social, economic, religious, and political discrimination through effort to promote rights awareness and attitudinal changes as well as reform of the justice sector, legislations and policies.

Legislation alone is not sufficient to ensure the realisation of human rights. Constitutional commitments often remain as abstract principles because governments fail to address their obligations through budget and policy formulation processes which allocate resources to particular sectors and define the levels and standards of provision that all citizens can expect. At the local level, people need a clear understanding of what particular rights mean in terms of concrete entitlements in order to be able to claim them.
Above all, the judiciary must be bold, imaginative, and purposeful in their interpretation of human rights norms and in the administration of justice.

NOTES AND REFERENCES

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5. Ibid, Chapter 3.
6. Ibid, Chapter two
7. Supra note 1.
8. See Holy Qur’an 3:100, 106, 110; 9:72, 113 etc.
10. Ibid, P. XCV.
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17. Ibid, P. 141
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19. Khadduri, supra note 13, at Pp. 142-4
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22. Ibid, at Pp. 147-8
23. Ibid, at P. 146.
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32. Ibid, at Pp. 52-60.
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IMPROVING WOMEN’S ACCESS TO JUSTICE AND THE QUALITY OF ADMINISTRATION OF ISLAMIC CRIMINAL JUSTICE IN NORTHERN NIGERIA

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“Access to courts in Nigeria is generally poor and access to justice poorer. The reputation of our courts, especially the lower courts, the Area and Customary courts, which are the courts closest to people at the grassroots, are not good. They have been accused of corruption and perversion of justice ...The Islamic criminal system operates within the Nigerian environment and cannot be immune from the problems of the society”.

Introduction

This conference is about women’s rights. Definitions can sometimes be difficult and we have to make several in this paper. For example how do you define a woman? When the term “woman” is used in a generic form, then the term must be viewed as meaning the female sex, that is, the partner, counterpart or opposite of man. How one view the relationship between man and woman is very important. If you look at women as rivals of men, then one enters inevitably, a complex field of conflicts and tensions. A more useful approach perhaps, is to look at women as partners of men. Even then, this may not be the whole picture. For a woman may also be viewed from a family perspective as a mother, aunt, wife, cousin, niece, daughter, and so on, and a woman can again be viewed from a political perspective as a citizen. One major reason for the confusion about women rights stems from the imagined rivalry between man and woman. What struck me immediately I read the invitation to this conference was: Is there any real justification for limiting the theme to women? Why not simply: “improving access to justice and quality of administration of Islamic criminal justice in northern Nigeria”?

Another important preliminary matter is that of worldviews. Worldviews depend on a number of factors such as culture, religion, and ideology. There are many different worldviews in the world. These worldviews sometimes embody conflicting and irreconcilable value systems. Any discussion about women must be placed within specific worldviews.
and value systems. The Western worldview is that man is the master of himself. He can do whatever he wants with himself provided he does not hurt another. It is the duty of the State to enact laws, which will facilitate the achievement of his desires, and to avoid laws, which will restrict this objective. Islam does not accept the western view. Neither man nor woman is a totally free agent. Islam subjects man and woman under the command of his Creator – Allah. Again, a woman in the Islamic perspective is under the protection of a man throughout her life, starting from her father, then her husband, and then her eldest son in the event of the husband predeceasing her. Nonetheless, she has full legal capacity as a person to own property and to litigate.

Now the world has become a global village. The means of communications are getting faster with every passing day. A lot of information and cultural practices are available now in the age of cable and satellite television, Internet, video cassette players, videodisk players, and digital videodisk players. However, this information flow has been one-way, consisting of flow from the developed countries. These developed countries are not spread across the world. They are with a few exceptions, concentrated in Europe and America. Collectively they are generally referred to as the Western world. What has occurred in the past few decades is a cultural bombardment of the less developed countries to which Nigeria belongs. There are two distinctive reactions from less developed countries. There is the group that accepts everything from the Western with uncritical acceptance. To them, the West represents what they want their country to become. This group takes western version of human rights as the universal standard to which all societies should conform. Indeed, in the intellectual arena, this attitude is expressed in the theory of universality of human rights. Human rights, they say, are the same for all peoples and in all eras. Of course, there are rival theories. The relativist school perceives human rights as relative, depending on societies and the era. Another school, the pluralist school says human rights are as pluralistic as there are different cultures. To them, the notion or content of human rights differs from community to community.

The other reaction to this cultural imperialism rejects the domination of the West. They prefer other worldviews. Some of the proponents of this school argue in favour of preservation of the distinctive features of their
own culture. The greatest challenge to western supremacy has come from Islam. Scholars such as Huntington believe that the world moves towards a clash of civilisation.\(^3\) This theory championed by Huntington, is premised on the irreconcilable differences between Western civilisation and Islamic civilisation. His theory has suffered a lot of criticism. Nonetheless, there is a lot of truth in some of his assertions. Nobody can deny the fundamental differences between Islamic and Western worldviews.

Islamic law is a divine law. It is important to remind us about this for two reasons. The first is that it will make one understand the passion and tenacity with which proponents of Islamic law hold the law. Secondly, it will make Islamic law proponents understand why opponents of Islamic law question some of the legal verdicts passed under Islamic law. They merely want to be sure that the particular laws enforced are actually consistent with Islamic law as ordained by their creator. Criticisms are not necessary antagonism. A lot of tolerance, open-mindedness and patience is required on the part of those actually operating Islamic law whether as members of the executive, lawmakers, or judges. They have to contend with ‘criticisms’ from two groups – anti-Shari’a elements and zealous pro-Shari’a elements.

The four issues – the relationship of women to men, cultural imperialism, human right theories, and the nature of Islamic law - discussed above, form the background of the discussion in this paper. There are also the fundamental issues of how one perceives “justice”, “criminal justice”, “access to justice”, and “quality of administration of justice”. These will be tackled as we go along. Conferences are about learning and rubbing of minds. I propose in this paper, as much questions as suggestions in the hope that some of the issues that have nagged one’s mind may perhaps find answers here.

This paper is based on a motley collection of statutory materials from three states: the Zamfara State Shari’a Penal Code Law\(^4\); the Kano State Shari’a Courts Law, 2000\(^5\); the Kano State Criminal Procedure Code (Amendment) Law, 2000\(^6\); and the Sokoto State Shari’a Courts Law, 2000.\(^7\)

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\(^{4}\) No. 10 of 2000 (Zamfara State).

\(^{5}\) Assented to by the Governor on 25/11/2000.

\(^{6}\) Assented to by the Governor on 27/11/2000.

\(^{7}\) Assented to by the Governor in February 2000.
With this introduction, one can now proceed to the two broad issues of improving access to justice and quality of administration of Islamic criminal justice in northern Nigeria.

I. Access to Justice

Justice is difficult to define. We will avoid here that philosophical exercise and adopt a practical approach. I suspect that access to justice in this context means, “access to the courts” or “access to judicial adjudication of dispute”, and “access to justice in court”. Access to justice in terms of access to the courts is a very important component of democracy and rule of law. It is more important under the Islamic legal system because the privileges and immunities, which the common law permits some to hide under, are not available in Islamic law. Everyone has access to justice under Islamic law.

Judicial adjudication is not the best means of resolving disputes, especially those concerned with domestic or matrimonial matters. Arbitration is better. Islamic law insists on arbitration before judicial pronouncement of divorce. Nonetheless, the judicial forum is sometimes unavoidable. Access to courts in Nigeria is generally poor and access to justice poorer. The reputation of our courts, especially the lower courts, the Area and Customary courts, which are the courts closest to people at the grassroots, are not good. They have been accused of corruption and perversion of justice. Again, the litigation process can be an agonisingly slow, extremely expensive, and unduly technical process. The result is that unless one is wealthy one cannot afford the luxury of litigation.

The Islamic criminal system operates within the Nigerian environment and cannot be immune from the problems of the society. For women, there are additional cultural barriers. A lot has been said about the plight of Muslim women in the north. What is clear is that many are denied the rights guaranteed to them by Islam, and some men use religion to exploit their women. What one will add here is that many of these problems will

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10 See the details given in B. Aisha Lemu, A Degree Above Them – Observations on the Condition of Northern Nigerian Muslim Woman (Minna: Islamic Education Trust, undated)
disappear with education and economic empowerment of women. Karimatu successfully challenged her father’s alleged power of *ijbar*, that is, power to marry her off without her consent.\footnote{See Karimatu Yakubu and Anor v Yakubu Paiko and Anor (1961 – 1989) 1 Sh. L R. N. 126} Her move was facilitated by her education and the wherewithal to pursue a court case. A better solution is perhaps an increased Islamisation of the society. The more Islamic a society is, the more recourse there will be to arbitration rather than litigation.

Now when a woman has access to courts, does it mean she will have access to justice? This depends on the law and the quality of the judges. The administrators of law often discriminate against women even under the Penal and Criminal Codes where law does not. For example, women are not accepted as sureties in bail matters.\footnote{M. Odili, “Women and the Law: Discriminatory Practices” *Port Harcourt Law Journal*, Vol. 1, 1999, 208 at pp. 211 - 212.} At the same time, the courts often discriminate in *favour* of women, for example by sentencing women offenders to lighter punishment than their male counterparts.\footnote{Ibid, p. 211.} It is easy to see that both attitudes are due to gender stereotyping where women are seen as in need of protection as the weaker sex. There is some discrimination that does not fall within this category. Why is it, for example, that women complaining of domestic violence are not taken seriously unless grievous bodily injury is inflicted? From the police station to the courts, the women complaint will be deluged with pleas, even from person who ought to prosecute her case, that she drops the matter. A woman who can afford the services of a lawyer or who has the backing of a powerful Non Governmental Organisation can obtain judicial redress. It is doubtful if the ordinary woman can.

Some women are not happy that Islamic law does not accept their evidence in *huduud* and *huduud* related cases.\footnote{It is no clear whether this rule is statutorily enacted under the new dispensation in northern Nigeria. For example, section 396 of the Criminal Procedure Code (Kano), op cit, merely says, “4 unimpeached witnesses” where it ought to have said “4 unimpeached male witnesses”.} It is difficult to understand the basis of this complaint. A woman does not suffer any disadvantage therefrom. In the first place, the rule is for the protection of accused persons. Secondly, no one can say he or she has any human right to give evidence. There is certainly no such right under the constitution. Thus, there is no right infringed upon when one is not acceptable as a witness. Thirdly, as a litigant the woman has no disadvantage. Unlike the common law, Islamic law does not accept parties as witnesses. Whatever a party says is an allegation required to be proved. The scenario where a male litigant gives
evidence in his own favour and the female litigant is debarred from giving evidence in her own favour cannot arise in Islamic law.

Women are particularly aggrieved with the law and its administration in respect of rape cases. This complaint is a universal one in common law countries. The complaint is that a woman victim is treated with indifference and rarely gets justice. Starting from the police station when she lodges her complaint, to the court, she is continually embarrassed. In court, she is exposed to cross-examinations designed to further increase her embarrassment. At the end of the day, the accused person is likely to be acquitted on technical grounds, or when convicted, receives a nominal punishment, although the law says that the punishment for rape may extend to life imprisonment.

The attitude of Islamic law to rape is that such offence should not exist in an Islamic society. It is the duty of the government to protect the lives and honour of the citizens whether they are Muslims or not. The society is organised on lines within which opportunities to commit rape is virtually non-existent. Persons who are used to life in Western countries where the incidence of rape is alarmingly high will find it extremely difficult to conceptualise a rape-free society. The Shari’a Penal Code punishes rape with zina (adultery and fornication) punishments, and in addition, imposes on the culprit, compensation equal to the victim’s sadaqa mithli (dowry of her equal) in favour of the victim. Under Islamic law, emphasis is on the proof of the offence rather than on impugning the victim’s chastity. The standard of proof is the same as in zina discussion later in the paper.

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16 Section 357, Criminal Code and section 283 Penal Code. Nonetheless, courts sometimes impose ridiculously inadequate punishment on persons convicted of rape, see the examples in C. O. Okorkwo, “Sentencing for Rape: The State v Bolivia Osigbemhe” Nigeria Law Journal, 1977-1980, Vol. 11, p. 121 where the convict was given the option of a nominal fine of N600 and N400 upon conviction for six counts of aggravated and repeated rape of two young girls and Muktar Yerima Mustafa v Bornu N. A. (1968) SCOPE 14, Muktar Yerima v Bornu N. A. (1968) SCOPE 36 where a fine of £20 was increased by the appellant court to an imprisonment for five years upon consideration of a report from an inspector of Area Courts, and more recently, Oludotun v Ogunbajo (unreported decision of the Court of Appeal, Ibadan, Appeal No. CA/I/109/95 decided on 22/5/02, see summary in The Guardian, December 10, 2002, at p. 8) where the court affirmed a sentence of 7 years imprisonment or a fine of N5, 000.00.
17 Op cit.
18 Ibid, section 129 (a) and (b).
19 Ibid, section 129 (c).
It is important to point out here that a truly Islamic society does not attach any stigma to a rape victim. There is no fault attributable to her and thus, she is not looked upon with ignominy. Under Islamic governments, the emphasis is on eradication and prevention of rape rather than on “access to justice” for rape victims. The countless incidence of unsolved rape cases in Western countries testifies to the wisdom of the Islamic approach. Hugh Clapperton the British explorer (or more accurately, British spy) who visited the Sokoto Caliphate at the time of Muhammed Bello gave this testimony of the peace and security emblematic of truly Islamic communities:

“The law of the Qur’an were in this time so strictly out in force that the whole country when not in state of war was so well-regulated that it is a common saying that a woman might travel with a casket of gold upon her head from one edge of Fellaha dominion to the other without any molestation.”

Islamic and western communities are different communities. No western society has been able to guarantee this level of security. On the contrary, they have to endure a situation where the society is under siege from within by its criminals. So what is important: peace and security or “access to courts”?

In many western countries, a new offence of “marital rape” is finding its place in their statute books. The “offence” is not recognised in all the criminal codes applicable in the country. In Islamic law, a husband may be liable for any injury caused or occasioned by forced sex with his wife, but he can never be liable for “rape”, so long as there is a valid subsisting marriage between them. There is no doubt here that the West has trivialised the serious offence of rape in its quest for “justice” for its women.

II. Administration of Islamic Criminal Justice in Northern Nigeria

Three types of criminal codes are in operation in Nigeria. These are the Criminal Code, the Penal Code, and the Shari’a Penal Code. The

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23 For example, the Criminal Code Law, Cap. 32, Laws of Lagos State, 1994.
24 For example, the Penal Code Law, Cap. 116, Laws of Kwara State, 1994.

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Criminal Code was introduced to Nigeria by the colonial authorities and first used in the northern Nigeria. It was in operation in northern Nigeria between 1904 and extended to the south in 1916. The Code was replaced in the north by the Penal Code in 1960. The reason being that the Penal Code is more “suitable for predominantly Muslim communities”. The North was not particularly impressed by the Penal Code because they were not deceived by its superficial concessions on Islamic ethics. The Penal Code was promulgated into law in the face of considerable Muslim opposition. The truth is that apart from the cosmetic improvements, the Penal Code is not any different from the Criminal Code. As Karibi-Whyte, aptly pointed out:

“It is indeed an easily forgotten and ignored fact that the two codes of criminal law in this country have a common origin: namely, the English common Law. The fact that the Criminal [Code] traces its origin directly to Queensland, Australia, and the Penal code to the Sudan and ultimately to India should not obscure the fact that both codes are codifications of English common law of crimes to suit the circumstances of the respective countries.”

The position today in northern Nigeria is that the Penal Code still applies in some states while the Shari’a Penal Code applies in others states.

What is Islamic Criminal Justice? Islamic criminal justice system derives from Islam. It is the legal expression of Islamic values, concepts, and ideals regarding criminal law. It is important to point out here that there are some differences in the Islamic and western conception of crimes. Criminal law under Islamic law consists of the offences for which the punishments are divinely ordained. These are called the *huduud*. The *huduud* and *huduud* related offences consist of theft (*sariqah*); alcohol drinking (*shurbul-khamar*); false accusation of adultery or fornication (*Qahdf*), assault; robbery (*hirabah*), adultery or fornication (*zina*), murder (*jinayat*), apostasy (*riddah*), rebellion (*baghyy*) and sodomy (*liwat*). Apart from these, other

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27 See the differences highlighted in Okonkwo, op cit, and p. 9 – 10.
30 See chapter VIII, Shari’a Penal Code.
crimes are *ta‘zir* offences, that is, offences for which punishment has not been fixed by divine command but are left to the discretion of the State.\textsuperscript{31}

The Shari’a Penal Codes were introduced recently in some states in the north with the intention of giving effect to Islamic law of crimes. Codification of Islamic criminal law is not an easy matter because Islamic law of crimes exist already in a written form. What codification does is to put these crimes in another legal language – the language of the common law. Codification of Islamic law within the current Nigerian legal environment, and in this form and style as done in the Shari’a Penal Code, may mean that the Code will be interpreted in the common law manner, especially if the final appellate court is a common law one like the Supreme Court. The drafters of the Shari’a Penal Code are aware of this problem. Hence, they found other ways of ensuring the enforcement of a more pristine Islamic law of crimes. The Shari’a Courts Law of Sokoto State lists all that is applicable in both civil and criminal cases, including the well known sources of Islamic law\textsuperscript{32}, and specifically mentioned some well-known textbooks of Islamic law of the Maliki School as “reference books” to be used by the courts.\textsuperscript{33} Kano State simply provides that “Islamic and Muslim Laws shall be deemed to be statutory laws in all existing laws in the State.\textsuperscript{34}

The Shari’a Penal Code is administered at trial court level by the newly created Shari’a Courts, which replaced the Area Courts. Area courts had a bad reputation for corruption, laziness, and perversion of justice.\textsuperscript{35} Most of the personnel of the Shari’a Courts are just the same old hands from the defunct Area Courts.\textsuperscript{36} This raises a lot of questions. Many of these judges as rightly pointed out elsewhere, have forgotten the religious character of their office and look at themselves solely as civil servants.\textsuperscript{37} Could this have changed over-night?

Another major innovation in the post 1999 era in northern Nigeria is that the Shari’a Court of Appeal is empowered to hear appeals in criminal cases from the Shari’a Courts. The legal validity of this has been examined elsewhere.\textsuperscript{38} What concerns us here is that this move has implications for

\begin{itemize}
  \item Section 57, Shari’a Penal Code, op cit and Doi, op cit, pp. 226.
  \item Section 6, Shari’a Courts Law (Sokoto State), op cit.
  \item Ibid, section 7. This list includes *Al-Risala, Muhtasar, Tuhfah* and *al-Adawi*.
  \item Section 29 (3), Shari’a Courts Law (Kano State), op cit.
  \item Mahmud, op cit, pp. 33 - 34 and generally, Odinkalu, op cit.
  \item Sokoto State specifically include “serving or retired members” of the Upper Area Court and Area Court (without specifying any further requirement for them) as those qualified to hold office as alkali in the newly created Shari’a Courts; section 4 (1) (a) and (2) (a), Shari’a Courts Law (Sokoto), op cit.
  \item Oba, “Shari’a Court of Appeal in Nigeria: The Continuing Crisis of Jurisdiction” (Paper presented at a Department of Jurisprudence and International Law Seminar held in on 17/11/02 at the Faculty of Law, University of Ilorin, Ilorin.
\end{itemize}
administration of justice. It brings into contact Islamic and common law concepts of crimes for adjudication in a forum that is supposed to be essentially Islamic. Another feature is that legal practitioners appear to argue cases in the court.\(^{39}\) It has been argued elsewhere that though legal representation is available under Islamic law as specie of agency (\textit{wzikalah}), lawyers in the common law mould are not known to Islamic law.\(^ {40}\) The status and role of legal agents, and rules covering legal representation are markedly different under both systems.

However, the reality on the ground in northern Nigeria is that lawyers in the common law fashion appear in courts administering Islamic law in both civil and criminal cases. Thus, the focus should be how to make these lawyers advocates that are more useful in Islamic criminal law matters. Lawyers therefore should be familiar with Islamic law before they can effectively defend persons accused of crimes under the code.

Thus, we talk of improving the system; let us see the possibilities the present situation under the Shari'a Penal Code holds using the offence of \textit{zina} (adultery and fornication) as an illustration. Our choice of this crime is formulated by the controversies that has dogged it in Nigeria in recent times and by its special relevance to women.

### III. Possibilities for the Defence under the Shari’a Penal Code

Section 126 of the Shari’a Penal Code defines \textit{zina} (adultery and fornication) thus:

> Whosoever, being a man or a woman fully responsible, has sexual intercourse through the genitals of a person over whom he has no sexual rights and in the circumstances in which no doubt exists as to the illegality of the act, is guilty of offence of \textit{zina}.

\(^{39}\) In \textit{Uzodinma v Police} (1982) 3 NCLR 325, it was decided that the statutory prohibitions that prevented legal practitioners from appealing before Area Court are not consistent with the constitutional provisions given accused persons right to defend themselves through lawyers of their own choice. The same case is applicable now in case of the Shari’a Court of Appeal. In any case, the Court of Appeal has held in \textit{Karimatu Yakubu and Anor v. Alhaji Yakubu Paiko and Anor}, \textit{op cit}, that the right to counsel extend to civil cases. See criticisms of this decision as being \textit{per incuriam} in M. Tabiu, “The Right of Audience of Legal Practitioners in Shari’a Courts in Nigeria” \textit{Journal of Islamic and Comparative Law} Vol. 15 – 17, 1985 – 1987 p. 17 - 26 and A. A.Oba, “Do Lawyers have a Right of Audience in the Shari’a Court of Appeal? Karimatu Yakubu and Anor v. Alhaji Yakubu Paiko and Anor Revisited,” \textit{LASU Law Journal}, Vol. 4 No. 2, 2002, pp. 183 – 197.

Now, a common law practitioner can argue from the common law perspective that at least the four ingredients must be proved before a person can be convicted under the section.

i. ‘Fully responsible’

The Shari’a Penal Code provides that there shall be no criminal responsibility except upon a Mukallaf.\(^{41}\) A **Mukallaf** is defined, as “a person possessed of full legal and religious capacity”.\(^{42}\) Again, there is no criminal responsibility “unless an unlawful act or omission is done intentionally or negligently”.\(^{43}\) *Zina* is an intentional offence. It cannot be committed through negligence. Intention must be proved.

ii. ‘Sexual intercourse through the genitals of a person’

This ingredient of the offence requires actual sexual intercourse through the genitals. There are other ways of getting pregnant these days, so proof that an unmarried woman got pregnant without more, cannot satisfy the requirements of this clause.

iii. ‘Over whom he has no sexual rights’ and

iv. ‘In the circumstances in which no doubt exists as to the illegality of the act’

The matter of “sexual rights” and “doubt as to the illegality of the act” are very important. If a man intending to marry a girl impregnates her before the formalities of marriage were performed, what is the position? The man is known to the parents of the girl who are aware of his intentions and who allows him to visit her and allow her to visit him.

A legal practitioner who has knowledge of the Shari’a has advantages when conducting cases under the Shari’a Penal Code. He can adopt the defences traditionally available in Islamic law. As we have pointed out, such defences are also available in the northern states. He cannot only consult authoritative books in Islamic jurisprudence and advance arguments discussed therein; he can cite those books as legal authorities.

The issue of proof is also very important. The offence of *zina* can be established by three means: by evidence, confession and by pregnancy. Proof

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\(^{41}\) Section 63 (i), Shari’a Penal Code.
\(^{42}\) Ibid, section 48.
\(^{43}\) Ibid, section 63 (ii)
by evidence is virtually impossible. For it requires four unimpeachable male witnesses who must testify to seeing at the same time culprits at the act, and must testify at the same sitting of the court. Should one witness refuse to testify or withdraws his evidence, the other three witnesses who had testified are liable to punishment for slander (Qadhf). For practical purposes, this mode of establishing the offence is virtually non-existent. When a party confesses to committing zina, the confession does not bind the other party. The party who confessed can be punished, but the alleged partner cannot be punished based solely on the confession of the other party.

One important matter is the position of Islamic law regarding proof of zina by pregnancy. From a common law perspective, one can argue that zina as defined under section 126 does not admit proof by pregnancy alone. The onus is on the prosecution to prove all the ingredients of the offence. Pregnancy at most constitutes a circumstantial evidence, which admits of countless explanations. If the pregnant woman does not confess, the onus is on the prosecution to prove that she got pregnant illegally. Pregnancy and unmarried status does not erase the doubt referred to in section 126. The advocate should however note section 36 (5) of the 1999 Constitution which having upheld presumption of innocence proceeds to validate law that shifts to the accused person the burden of proving particular!

From the Islamic law perspective, there are matters that should be considered in relation to unexplained pregnancy as proof of zina. In Islamic law of evidence, there are presumptions. Some are conclusive others are not. Of all the four Sunni schools, only Maliki School accepts pregnancy of an unmarried person as conclusive proof of zina if she cannot offer reasons to exonerate herself. In Al-Muwatta of Imam Maliki, the Imam was quoted thus:

*The position with us about a woman who is found to be pregnant and has no husband and she says, “I was forced,’ or she says, “I was married,” is that it is not accepted from...*
her and the hadd is inflicted on her unless she has a clear proof of what she claims about the marriage or that she was forced or she comes bleeding she was a virgin or she calls out for help so that someone comes to her and she is in a state or what resembles it of the situation in which the violation occurred… If she does not produce any of those, the hadd is inflicted on her and what she claims is not accepted from her”. 48

The Maliki School relies on companions of the Prophet who punished based on unexplained pregnancy. 49 The other schools that disagree with this position rely on the Prophet’s hadith that says:

*Prevent the application of the hadd punishment as much as you can whenever there is doubt* 50

One - neither being a mujtahid nor making any pretensions to “expertise” in Islamic law - cannot pronounce any legal verdict (fatwa) on these matters. One can only make comments, which can be considered by the experts. The first is that though there are pronouncements of the Supreme Court to the effect that the Maliki school is the applicable school in Nigeria 51, the “Islamic law” incorporated in the criminal law of the States cited goes beyond any particular school. The second is that in contemporary times, pregnancy no longer necessarily connotes sexual intercourse. Artificial insemination and other means are available. The third is that the view of Imam Maliki quoted above refers to a situation where a woman alleges rape. What if she claims ignorance and simply says: I do not know how I got pregnant? Is it not possible for her to be fertilized one way or the other without her knowledge? Again, security is worse now than it was at the Imam’s time. Rape is now prevalent. Rape is now very possible even within cities. Rape confronts the Nigerian woman with frightening vividness. Rape in schools, rape in official custody, rape during robberies, rape during riots and rape during “quelling” of riots, sexual harassment at work, school, and everywhere. The stigma attached to and embarrassed attendant to being

49 El-Umairi, op cit, p. 108.
50 Quoted from Doki, op cit, p. 224.
raped, coupled with the inherent weakness in the law and practice relating to rape in which a trial is another ordeal for the victim, and the chances of securing convictions are very low, make many rape victims very reluctant to disclose their ordeal. It appears that the circumstances have so changed that pregnancy of an unmarried woman alone can no longer be conclusive proof of zina. The views of other schools may be more apposite to the contemporary Nigerian situation. One may suggest that the learned Islamic scholars Ulama who have the ears of those in government take another look at the position adopted in Nigeria.

The punishment for zina is provided in section 127 of the Shari’a Penal Code:

- With caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year; or
- If married, with stoning to death (rajm).

For the common law perspective, the validity of the two punishments prescribed has not been judicially tested. Some have argued that those punishments fall below the constitutional requirement that “no one should be subjected to torture or to inhuman or degrading punishment”\(^\text{52}\). Okonkwo and Aguda argued long before the revival of Islamic penal sanctions in the Zamfara State, that judicial whipping violates similar provisions in the 1979 Constitution.\(^\text{53}\) This view has been upheld in some countries with similar constitutional provision.\(^\text{54}\) The same objections have been raised with regard to rajm. These matters have not been judicially settled in Nigeria. It is likely that the issues will eventually reach the Supreme Court, that is, if an appeal even gets there - some have argued that no appeal lies from the decision from the Shari’a Court of Appeal in criminal cases because the Constitution does not provide for such appeals from the Shari’a Court of Appeal to the Court of Appeal.\(^\text{55}\) If the Shari’a Court of Appeal is the final

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\(^{52}\) Section 34 (1), 1999 Constitution.


\(^{55}\) See detailed examination of this argument in Oba, “The Shari’a Court of Appeal…” op cit, pp. 31 - 32.
appellate court in this regard, there is no doubt that the Qadis will always uphold the validity of these punishments. If appeal lies to the Court of Appeal and eventually to the Supreme Court, the Supreme Court will surely be put to a sore test. The questions of validity of whipping (jadal) and rajm entail value judgements, which depend entirely on subjective tests. Anyone opposed to these punishments should ask himself whether he loves Muslims more than Muslims love themselves, and more than God who created them and who decreed the punishments does.\(^{56}\) No genuine Muslim will declare a hakm (a law) of Shari’a invalid. Christians too will have a dilemma. Rajm for adultery is a punishment recognised by the Bible (the Old Testament)\(^ {57}\) even if some will say the New Testament has abrogated it. No one can be sure of what the Supreme Court will say, but those against these punishments should not be too hopeful.

There is also another unresolved issue. Section 406 of the Criminal Procedure Code\(^ {58}\) provides inter alia that the court shall as soon as possible after passing a death sentence or a sentence for amputation of hand report to the Governor through the Attorney General and the sentence “shall not be carried out unless it is confirmed by the Governor within the period of 90 days”. Now, section 408 (1) of the same code provides that “after exhausting all avenues of appeal if utilized by the convict the governor shall make an order for execution of any sentence...” When do the 90 days start to run?

There are other possibilities from the Islamic law perspective regarding rajm. Islamic law has a flexibility, which resides in the leadership. It is a very important safety valve in Islamic communities. A leader is supposed to be perpetually vigilant, knowledgeable about the Shari’a, its purpose and administration, and he is expected to consult learned scholars on important or novel matters. The enforcement of any of the huduud can be put at abeyance if circumstances so demand.\(^ {59}\) There is the example of the Caliph Umar (RA) who refused to cut hands of thieves in time of famine.\(^ {60}\) Any governor faced with ordering an execution for zina must ask himself a lot of questions. Can he authorise stoning where the sexes have almost unrestricted access to each other? Are there adequate facilities for legitimate

\(^{56}\) This question was posed by the Attorney General of Zamfara, in Ahmed Bello Mahmud, “Shari’a and Democracy: The Zamfara State Experience” (paper presented by at a Seminar of Shari’a organized by the Kwara State College of Arabic and Islamic Studies, Ilorin between 16th – 18th January, 2000), p. 4.


\(^{58}\) Zubaïr, Exigesis of Legislative Verses... op cit, pp. 41 – 42.

\(^{59}\) Doi, op cit, p.224.
sexual expression in terms of marriage? Does the economic environment exclude the temptation of prostitution? Are the judges administering the law really qualified for the task in terms of integrity, piety, knowledge of Islamic law, and knowledge of contemporary world so that they have the ability to do *ijtihad* or properly administer Islamic law? And many other pertinent questions.

**IV What should be done?**

There can be two different approaches to improving the quality of administration of Islamic criminal justice in northern Nigeria depending on how one perceives Islamic criminal justice system. The first is to want the administration of Islamic criminal justice to be more compliant with Western systems of criminal justice such as the common law and the civil law. This is the approach likely to be adopted by those who see Islamic criminal system as primitive, barbaric and retrogressive, in other words a law “more suited to the 13th century than 21st”. Another approach is to want it to be closer to the Islamic ideals of criminal justice. This is the approach which proponents of Islamic law, having accepted the Islamic system as the best system for man, are likely to adopt. This is the approach adopted in this paper. There can be a world of difference between Islamic criminal system in its pristine form and the Islamic criminal law as practised in communities. From the Islamic perspective, the best way of improving the administration of this criminal system anywhere and at any age is to bring the practice closer to the pristine form. Islamic criminal system in northern Nigeria is now operated in an environment where supremacy and sovereignty belong outside Islam. In Nigeria, supremacy and sovereignty belongs to the Constitution and the people of Nigeria respectively. The governments of the states in northern Nigeria like the governments of other states in the country were elected under a system that subject the decision as to who forms the government to the whims and caprices of the people. Thus, improving the administration of Islamic criminal system in northern Nigeria therefore, within the context of this paper, must of necessity be subject to these limitations. If one accepts these limitations, then one cannot be talking of an “Islamic” criminal system in the strict sense.

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61 See the editorial comment captioned “Death Sentence on Amina Lawal” in *The Guardian*, Tuesday, 10 September 2002 at p. 22.

62 See sections 1 (1), and (3) and 14 (2) (a), 1999 Constitution respectively.
No one can deny that the reforms carried out by Uthman dan Fodio are closer to pristine than the recent reforms in northern Nigeria. There are many testimonies to the quality of justice administered in the courts in the Caliphate from European and Nigerian non-Muslim commentators. The Sokoto Caliphate was an Islamic State. The political authority not only resided in the leaders of the caliphate, the caliphate was also the dominant power in the sub-region. The state ideology was exclusively Islamic. Islam had the prime place in the education system. The social system and values of the society was dominated by Islamic values. All these had profound effect on the extent of Islamic criminal law enforceable, the quality of judges, and the cooperation of the citizenry. Though the situation in northern Nigeria has not attained the lofty heights, which the Sokoto Caliphate reached. Nonetheless, the recent developments represent a major development in Islamic criminal justice in Nigeria. The contemporary situation can be improved upon and some suggestions are advanced hereunder.

a. The Quality of the Law

The crimes in the Shari’a Penal Code are neatly and appropriately divided into three groups, namely, the *huduud* and non- *huduud* offences, and *Qisas* (bodily harm) and *Qisas* related offences, and lastly *ta’azir* offences. This is no doubt that commendable. The first two groups of offence reflect the drafters’ professional expertise and knowledge of Islamic law. The last group however calls for further reflection, for the crimes contained therein were lifted wholly from the Penal Code. Crimes reflect societal values and ethics. It is not likely that the values of the English society as reflected in the Penal Code are co-terminus with those of Islamic societies. Codification of *ta’azir* offences is better done from the scratch, independent of codes

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65 See chapter 8, *Shari’a Penal Code*, op cit.


derived from non-Islamic sources. There is therefore, the need for a comprehensive overhaul of the *ta’azir* crimes contained in the Shari’a Penal Code to bring it closer to Islamic ethics, standards and values. There is also another important reason to do this. If it not done, the affinity of the Shari’a Penal Code with the Penal Code and ultimately with English law will not be severed, and the whole of the code runs the risk of being construed in a common law fashion.

Another area of concern is the excessive or routine use of imprisonment as a form of punishment. Imprisonment as a penal policy has not achieved much, whether in terms of reformation of offenders, deterrence, or even crime reduction. The use of imprisonment in an Islamic criminal system deserves caution. Although imprisonment as a routine punishment was not used in the prophetic era, there is juristic consensus as to the permissibility of this form of punishment in Islamic law. Some scholars argue that, imprisonment should not exceed one year because they believe that *tazir* punishment should not exceed a *hadd*. The prevalent view (to which Maliki school adheres) however places no limit as to the years of imprisonment permissible. A prisoner is not only deprived of his or her freedom of movement, he is deprived of much more. Take conjugal rights for example. The absence of facilities for this has led to sexual perversions such as homosexuality and lesbianism in our prisons. Imprisonment imposes additional burden on a woman because if she is imprisoned in her reproductive era, she is deprived of her right to procreation – an opportunity if lost, unlike a man, is lost forever. We are not entering here any debate as to validity of, and the maximum period of imprisonment as a punishment under Islamic law - we leave that to others more capable. It suffices here to ask whether our prisons meet the Islamic standard of humanness and human dignity to point out that the Shari’a Penal Code provides for other forms of punishments. Some of those listed under section 93 (1) of the code include reprimand (*tawbikh*), public disclosure (*tash-heer*), boycott (*hajar*), exhortation (*wa’az*), and warning. It appears these punishments have no practical use, as there are no offences punishable by these punishments under the code. Imprisonment, canning and to some extent, fines, are the dominant punishments under the code. Our submission here is that a Shari’a Penal Code, if it makes use of imprisonment as punishment at all, should

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69 They used the analogy of imprisonment for *zina* (in addition to lashes) which they fix at one year: *ibid*, p. 171.
keep it to the minimal. It serves no purpose to copy blindly what is done in non-Islamic countries.
Lastly, any attempt to interpret the Shari’a Penal Code from the common law perspective should be resisted. Decisions of English and English style courts are not relevant to Islamic law - so also the methodology and personnel of the common law. Islamic law is Islamic law, common law is common law, and there is no meeting point between the two.

b. Quality of the Administrators of the Law
The educational qualification required for appointment as Judge of the Area Court is not terribly high. Compared with its common law counterpart, the Magistrate courts, it is easy to see the deficiency in the qualification of most judges of Area courts and now Shari’a courts. Magistrates possess the highest professional qualifications in their line of law. There is no gainsaying that Islamic legal education has been neglected officially for so long that hardly anything remains of it apart from learning acquired from private sources.71

The situation is not very different now even with the introduction of Islamic criminal justice. A person can be appointed an Alkali of the Shari’a Court or Upper Shari’a Court if he possesses a “recognised qualification in Islamic law from an institution acceptable to the Judicial Service Commission” or if he is “a legal practitioner with sound knowledge of Islamic law and has been so qualified for a period of not less than 7 years [or 5 years in the case of Shari’a Court]”.72 “Recognized qualification” is defined to include a Degree, and Diploma or Certificate in Islamic law.73 Some states add “Certificate of a School of Arabic or Higher Islamic Studies Certificate” and even “sufficient knowledge of Islamic law and practical training”.74 It is still easy for persons with no more than a passing acquaintance with Islamic law to be appointed as judges of Shari’a Courts.

The qualification required of Qadis of the Shari’a Court of Appeal is knowledge of Islamic law or a combination of knowledge of both Islamic law and common law. It is no secret that ‘expertise in Islamic law’ required by Constitution for appointment into superior courts which hears Islamic

71 Private instructions in Islamic law is better that what the famous School of Arabic Studies, Kano offered: A. H. Yadudu, “Colonialism and the Transformation of Islamic Law in the Northern States”, op cit, pp. 126 - 127, the combined Law degree program have not still attained the level of scholarship available in informal sources: ibid, pp. 128 and 130.
72 Section 11 (1) (b) and (d), Shari’a Courts Law (Kano), op cit.
73 Section 11 (2), Shari’a Courts Law (Kano), op cit.
74 See section 4 (3) (d) and (e), Shari’a Courts Law (Sokoto State), op cit.

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law matters is a subjective one determined entirely by the National Judicial Council, a body of about 23 persons with only one “expert” in Islamic Law.\(^{75}\)

Our case here is that the enormous responsibility of administering Islamic criminal justice should not lie on persons with inadequate education and exposure to the world. We must also express our apprehension of appointing persons with common law background to administer Islamic law. This is because the law, the procedure, and practice under both systems differ materially. A good illustration is the role of judges.\(^{76}\) Criminal justice under the common law system is based on the accusatorial system. This is not entirely the case under Islamic law. The Islamic system is also not exactly like the inquisitorial system practised in civil law countries. The Islamic system has features of both systems.\(^{77}\) There is presumption of innocence but the judge is a blind umpire. A judge plays the dynamic role of guiding the parties, examining the witnesses, and making sure that no party or witness is disadvantaged by his (witness’s) lack of knowledge of law. It is very important that only competent persons are appointed as judges in Shari’a Courts and Shari’a Courts of Appeal. Otherwise, ignorant persons will rush to impose the stiffest of punishments thinking it to be a religious duty in circumstances where more learned and pious persons will exercise caution, and give the benefit of doubt to accused persons.

c. Reorienting Lawyers about Islamic law

Though lawyers have a right of audience in Islamic courts and cases, many have no knowledge at all of Islamic law. Even persons like the late Justice Aguda who wrote prolifically on improvement of law in Nigeria, confessed his total ignorance of Islamic law. At least his lordship was honest in confessing his ignorance.\(^{78}\) Some are much worse. Like Nwabueze the


\(^{76}\) See Doi’s summary of the role and place of judges in Islamic legal system in Doi, op cit, pp. 2 – 15.


\(^{78}\) His Lordship confessed: “…my knowledge of Islamic law and procedure is so woefully inadequate that I dare not say that is anything more than a smattering….”; T. A. Aguda, A New Perspective in Law and Justice in Nigeria (National Institute for Policy and Strategic Studies, Kuru Distinguished Lecture Series, 25th October, 1985)

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acclaimed leading constitutional lawyer in Africa, former Chairman of the Constitution (1979) Drafting Committees subcommittee on National Objectives and Public Accountability, and an outspoken opponent of Islamic law, condemns Islamic law in an uncompromising manner\textsuperscript{79}, even though, they have no knowledge of Islamic law. Some of us have a smattering knowledge of Islamic law. Others have a working knowledge. All this does not qualify “expertise in Islamic law” in any reasonable sense of the phrase. There cannot be fair comment based on untrue premises. As Lord Denning rightly pointed out in another context, “no comment is fair if it is based in a mistake of fact”\textsuperscript{80} and one will add “nor on distorted facts”.

The legal education in Nigeria today is dominated by the common law.\textsuperscript{81} Legal education at university level in most cases ignores Islamic and customary laws completely while some universities pay a nominal attention to Islamic law through a combined common law and Islamic law degree program. The professional training at the Nigerian Law School ignores Islamic law and customary law. The position is not really surprising, for legal education in Nigeria is patterned after the position in England, notwithstanding that Islamic law and customary law which are very important and relevant in Nigeria were almost totally unknown in England at that time.

The ignorance of our lawyers contributed in no small measure to the crises that have trailed Islamic law in Nigeria. Many lawyers have no idea at all of any law or legal system apart from the common law. This deficiency should be remedied in future lawyers. Law students should be educated in a manner to enable them appreciate the pluralistic nature of law in Nigeria in particular, and law in the world generally. They should be exposed to customary law and Islamic law. It is important that Islamic law courses are taught by those who see Islamic law as a viable legal system and not by persons who see nothing good in it.

d. Islamic Legal Education

Now that many states have adopted Islamic law as their basic law and are committed to maintaining it as such, and given the worldwide resurgence of Islamic law, it is time we take Islamic legal education seriously. The


\textsuperscript{80} Lord Denning, \textit{The Closing Chapter} (London: Butterworths, 1983) p. 8

traditional Islamic legal education system which consisted of rote learning of major Maliki texts will have to give way to a more dynamic, relevant and responsive system of studying Islamic law. Judges and members of the executive involved in the administration of Islamic law should be able to respond effectively to the challenges of our era. They can only do this if they are properly educated. The classical Maliki texts relied upon may no longer be wholly adequate in this regard.

Administrators of Islamic law at whatever level, be it Shari’a Court of Appeal or even the Supreme Court must have quality Islamic law education of at least bachelor’s degree level. We have suggested elsewhere for the creation of a Bachelors Degree program in Nigerian universities similar to that offered by the International Islamic University, Medina that can be domesticated with the inclusion of courses in constitutional law and Nigerian legal system.82 This degree program should then be followed by a one-year professional program followed by ‘call’ to the Nigeria Islamic Bar, that is, they should be given licence ijaz to practise Islamic law in Nigeria.83 Only those so qualified should have the exclusive right to practise Islamic law. It is time we put unregulated practice of Islamic law behind us. It follows from the foregoing that the creation of a “Shari’a Bar” is another inevitable step if we want to improve the administration of Islamic law in Nigeria.

Islamic legal education should be in Arabic language and candidates admitted for the program should also have proficiency in English language. Arabic is the language of Islamic law and its importance in this regard has been repeatedly emphasised though apparently to little or no effect. Arabic should be adopted as one of the national languages and should be taught from primary through secondary schools levels.

e. Public Enlightenment
Many comment adversely on the Islamic criminal system without having any knowledge at all of Islamic criminal system or even knowing what is

82 The program can be summarized thus: After acquisition of basic learning in Arabic language, history and other preliminary courses, Islamic education at university level can be summarised as consisting of advanced study of the preliminary courses and particular in-depth study of foundations of law (Usul al-Fiqh), consisting of the nature and sources of Islamic law, its scope and applicability; and the branches of law (Furu’ al-Fiqh) consisting of substantive, procedural and evidentiary laws; and knowledge of contemporary world so that they have the ability to do ijtiha and properly administer Islamic law, see the syllabus of the International Islamic University, Medina in Syed Khalid Rashid (ed), Islamic Law in Nigeria (Application and Teaching), Lagos, 1986, Appendix IX, p. 284.
83 This author has repeatedly called for the creation of professional body of Islamic law practitioners and the establishment of an “Islamic Bar”, see: Oba, Lawyers, Legal Education and Shari’a Courts”, op cit., and Wahab Gbadamosi, “Varsity teacher seeks Shari’a Bar” The Comet, Friday, December 8, 2000.
going on in the northern states where the Islamic criminal justice is being operated. In fact, the most vehement critic of the newly revived penal sanctions come mostly from the south! Many fear Islamic criminal law for what it is not! Islamic criminal law evokes for many images of amputated hands, indiscriminate flogging and stoning to death. Of course, the press and other enemies of Islam deliberately fanned this macabre image, but ignorance compounded the gullibility of their readers.

Materials on administration of Islamic law in the northern Nigeria are simply not widely available. This author travelled to Ibadan during the last Nigerian Bar Association Conference in August purposely to purchase statutory materials relating to the administration of Islamic law in northern Nigeria. Of course the bookstands were there in large numbers (you can hardly count them), but these materials were not anywhere to be found. Book vendors complain that customers do not ask for such materials. Is that not surprising given the controversy the revival of Islamic criminal sanctions in the north has generated? And even where materials are available some persons just don’t care. Otherwise, how can you explain a scholarly article dealing with the “constitutionality of Islamic Law” written by a learned person, published in a reputable journal yet it did not contain any reference to statutes enacted by the relevant states.

A basic knowledge of Islamic law is essential especially for human rights activists for they too misunderstand Islamic law concepts and rush into faulty conclusions. For example the matter of pregnancy as a means of establishing zina. This is a much-misunderstood concept as the discussion that has trailed the revival of Islamic criminal sanctions in northern Nigeria has shown. The two convictions for zina under the Shari’a Penal Code were proved by pregnancy. The often made reproach is that Islamic law discriminates against women by making the impregnated woman liable to punishment while allowing the men responsible go scot free. The argument is that it takes two to tango. The position is that pregnancy offers proof against the woman, and at best, an unknown man, it does not by itself incriminate any particular man. The woman, in allegation that a particular man is responsible for the pregnancy, falls short of the evidence of four reliable male witnesses required to prove zina by evidence. It is not that Islamic law favours the man; it only has no proof in the circumstances to proceed against any particular man.
f. Learning Tolerance

Since its contact with Islam, the West has persistently fanned all sorts of propaganda against Islam. This campaign of calumny has not in any way abated in intensity. Today, many non-Muslims simply hate Islam. Regrettably, the clergy are to be blamed largely for this. This hatred sees nothing good in Islam at all. They are committed to stop what they perceived as the Islamisation of Nigeria although some of them are equally committed to the Christianisation of Nigeria!\(^{84}\)

The press too has not been fair to the Islamic criminal justice operated in some states in northern Nigeria. The sort of negative publicity, which the media fanned against Islamic criminal justice in northern Nigeria, is simply disappointing and irrational.\(^{85}\) Facts were distorted and falsehoods were presented as facts. The press in their report of the Islamic criminal justice in northern Nigeria have done no credit to themselves.

Islamic law is for Muslims. Professor Yadudu rightly questioned the interest of a non-Muslim in far away Cross Rivers State in the application of a religion-based law to Muslims in Zamfara State.\(^{86}\) Such concerns remind one of what Dickens described in *Bleak House* as “telescopic philanthropy”. Many of these concerns are orchestrated by avowed enemies of Islam mainly from outside the country. There has been conferences where ignorant, prejudiced, and biased persons lampooned Islamic law. It is not always that conferences such as this are organized where proponents of Islamic law too have their say. Any genuine concern must bring all the parties together under an atmosphere where free exchange of ideas can be possible.

It is now becoming apparent that there cannot be peace in the world if the West insists that Muslims abandon their divinely entrenched law in favor of the Western notion of justice. The West and their allies have a lot to learn about tolerance. The West has nothing to feel arrogant about save their technological strength, which, after all said, and done, they are merely heirs (for now) of the collective efforts of other peoples and civilizations. In any case, as Solzhenitsyn rightly pointed out, mere technical progress, “not the same as the progress of humanity as such”, and that in the West, “along with the development of intellectual life and science, there has been

\(^{84}\) See the advertisement by the Congress on Christian Ethics in Nigeria (COCEN) titled “Enough is enough” in The Guardian, Thursday, April 24, 1997 at p. 12.


a loss of the serious moral basis of society’.\textsuperscript{87} The Nobel literature laureate condemned the arrogance of the West:

\textit{The mistake of the West… is that everyone measures other civilizations by the degree to which they approximate western civilization. If they do not approximate it, they are hopeless, dumb, reactionary and don’t have to be taken into account. This view is dangerous.}\textsuperscript{88}

Solzhenitsyn is very apt. For how can one place the honoring of Safiya by a town in Italy\textsuperscript{89} - an unabridged hatred of Islam or an inordinate love for sexual immorality? This act is another evidence in support of the view that the West is now a post-Christian and a neo-pagan society.

\textbf{g. Rethinking the Place of Islamic law in Nigerian Legal System}

Most of the improvements suggested will be meaningless unless there is a radical difference in the place of Islamic law within the Nigerian legal system. The colonial authorities assume that Islamic and customary laws will be eventually supplanted by the common law. If customary law has justified this assumption concerning it, the experience with Islamic law has proved the contrary. Islamic law cannot disappear in Nigeria. It is time we accept the existence of Islamic law in the country as an inevitable fact. We have examined elsewhere the resurgence of the civil aspects of Islamic law from the irrelevant position of “personal law” and lowly status of “customary law” which the colonial authorities had banished it to.\textsuperscript{90} We are now talking about the criminal aspects. It is inevitable that this change of attitude takes place about Islamic law.

Islamic law and common law cannot be effectively administered by the same judges in the same court. In the first place, the mastery of both laws requires diligent study for the better part of a lifetime. In the second place, both laws present so many fundamental differences. One fundamental difference lies in the position and role of judges in court. Judges in Islamic law are not the indifferent ‘unbiased’ umpires that common law judges are. Judgship under Islamic law is not only a profession it is a religious duty. It is the duty of judges in Islamic law to ensure that justice according to the law is done on the merits of the case. Thus, judges advise the parties on law

\textsuperscript{87} See “Russia’s Prophet in Exile” in \textit{TIME}, July 24, 1989, p. 58.
\textsuperscript{88} Ibid.
and procedure and help them put their case in the proper legal perspective. The technical victory over opponents which common law practitioners gloat over with so much relish is impossible in Islamic law system

There are other significant and irreconcilable differences between common law and Islamic law. Islamic law frowns at *ex parte* applications. Evaluation of evidence does not depend on the arbitrary choice of the judges in Islamic law as it does under the common law. The principle of *res judicata* does not apply in Islamic law - a judge is never *funtus officio* as regards cases decided by him, he can re-hear and review his own judgement if he discovers for example that it was erroneously made. The doctrine of *stare decisis*, which is so indispensable to common law, does not exist under Islamic law even where there is a hierarchy system of courts. An appellant court is not limited to the issues formulated by the parties as in the common law, rather, under Islamic law, an appellate court can *suo motu* reconsider any aspect of the decision of the lower court.

The most permanent solution to Nigeria’s legal pluralism can only be found within a parallel system of administration of justice wherein there is a total separation of common law and Islamic law in terms of legal education (both academic and professional), administration of judges, courts, and controlling bodies such as Council of Legal Education, National Judicial Council and so on. The administration of customary law can be merged with common law and administered by the same courts while Islamic law has its own separate, distinct and autonomous institutions. It is only when this is done that the administration of Islamic criminal justice will attain the highest standards.

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92 *Ex parte* applications are not tolerated or allowed in Islamic law. A judge is forbidden from hearing a case in the absence of the other party: The Islamic law attitude is based on the prophetic tradition which says: When two persons come before you for judgement, do not give judgement until you have heard what the other party will say. For judgement becomes clear upon hearing what the two parties say: see, Hafiz al-Asqalani, *Bulugh Marami* (Beirut, Dar al-Fikr, 1994) at p. 289.
96 See Gwarzo’s dissenting decision in *Chamberlain v Abdullahi Dan Fulani* op cit, at p. 62.
h. Reforming the Society

It is a moot question whether or not an ethical revolution must precede the adoption of the Islamic criminal justice system. It suffices to say that a society in which the fear of Allah is not deeply entrenched cannot operate the Islamic criminal justice for long. The Prophet (SAW) inculcated this into his companions. Hence, they voluntarily complied with the law. They worked conscientiously for both this world and hereafter. This is the pattern whenever an Islamic revivalism takes place. Uthman Dan Fodio and his companions too had this and the Sokoto Caliphate prospered. Some scholars say that the successors of this legacy deviated from Islamic ideals, especially at the latter part of the Caliphate when its leaders and nobility were accused of becoming obsessed with material acquisitions.97 We seek the protection of Allah (SWT) from such errors.

Apart from ethical reformation, there must be Cultural Revolution too. For example, you cannot talk of Islamic criminal system in a place where people live in close quarters devoid of privacy, such as in what is commonly described as “face me, I face you” apartments. While the traditional areas of the north given their Islamic antecedents are socially and culturally Islamic law compliant, the new neighbourhoods in the Sabon Gari may not be. Architects and draftsmen too have a quota to contribute in the matter of design of houses.

The concept of uniformity as a means of national integration espoused in the 1999 Constitution calls for a revision.98 We cannot all be the same in terms of culture, social values, and religion. The reality is that our towns should be planned in a way as to allow quarters with distinctive characters so that one will have a choice of which part of a town one wants to live in. Many conflicts have resulted from the indiscriminate living arrangements. The examples are almost limitless: the noise that emanates from Churches and Mosques are nuisance to some but worship to others; someone’s religious doctrine is heresy to others; pork is a delicacy to some, a prohibited meat to others; alcohol is part of divine service for some, forbidden haram for others and so on. If towns are properly planned many unnecessary conflicts will be avoided.

i. Co-operation from the Federal Government

It is quite clear that many of the reforms suggested here are not feasible without the co-operation of the Federal government. The absence of Islamic law and Islamic ethics at federal level invariably affects the quality of Islamic criminal justice in northern Nigeria. For example, the police, prisons, and professional occupations are within the Exclusive Legislative List. This means that the control of the staff and policy formulation for these bodies rests in the federal government.

The federal government has a duty to create a favourable atmosphere for effective administration of Islamic criminal justice in northern Nigeria not only in terms of fortifying the legal institutions and making them more Islam compliant but also in terms of policy, improved social security, and an even distribution of the nation’s resources. The Federal government should not pursue a policy injurious to Islamic ethics. It is not fair for example, that the federal government in a country where some states have adopted the Islamic criminal justice system with stiff penalties for zina should in the name of family planning and prevention of AIDs encourage unlawful sexual intercourse through free distribution of condoms, subsidisation of ‘family planning’ pills, and easy access to pregnancy prevention facilities for both single and married persons.

CONCLUSION

Islamic law is not an isolated thing. It is part of the Islamic scheme of life, which extends to all aspects of life. Islam presents a comprehensive worldview. It is not realistic to consider women rights in vacuum, or with standards borrowed from societies, which are completely different from Islamic societies. Whilst Islamic law does not discriminate unfavourably against women as regards access to justice, persons administering the law may do so out of cultural, personal biases, or even purely selfish reasons. It is so in every legal system for practice is sometimes different from the theory. Administrators of Islamic criminal justice in northern Nigeria should remember this. We are not convinced why women should be singled out for consideration in this conference, although we had looked at some crimes, which have peculiar significance for women. Perhaps there will be enlightenment on this from other participants in the conference.

We emphasised repeatedly the need to take formal education in Islamic law seriously again. We had warned of the danger posed to Islamic law if its administration was dominated by legal practitioners who were not experts in Islamic law and the greater dangers posed by those whose knowledge of Islamic law does not reach an acceptable standard. We have insisted in the appointment of persons of not less than Bachelors’ degree in Islamic law (not combined law) as Alkalis of Shari’a Courts at all levels. Islamic courts are not supposed to be flooded with litigants, and therefore do not require an avalanche of judges. Quality must be maintained. Judicial appointment should not be treated as an avenue to confer patronage.

We are equally convinced that law is dynamic, even in Islamic law. It can only be administered by pious highly learned persons. We have advocated for continuous re-evaluation of society and application of law so that law attains its rightful objective as an instrument of justice and social change.

We had emphasised the need for tolerance and the spirit of live and let live. The truth is that no amount of pressure – foreign or local – can divert Muslims from their religiously ordained law. We had wondered at the genuineness of the “concern” of non-Muslims in administration of Islamic law”. Others can have their own worldviews but they should allow Muslims theirs too. We had advocated co-operation and respect for Islamic ethics at the federal level. The federal government should realise that the Islamic worldview is a dominant view in the country. It deserves respect by policy formulators at federal level. Islamic law suffered during the colonial era. The oft-touted allegation of “Islamisation of Nigeria” should not be used to stultify Islamic law in the same manner in the post independence Nigeria.

We had directed our attention too to the implementation Islamic criminal justice in northern Nigeria. There is no doubt that they have taken very commendable giant steps in the revival of Islamic criminal justice. They had exhibited courage, steadfastness, and patience even in the face of tremendous pressure from national and international opponents of Islamic law. Yet, they should remember that the struggle is a continuous one. They should constantly remember that some opponents of Islamic law argue that the best method to curb what they call Islamic fundamentalism is to allow proponents of Islamic law to operate the law because the group believe that the attraction of Islamic law will fade with mismanagement of it by the operators of the law! Islamic proponents should therefore strive to achieve

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100 See Fareed Zakaria, “How to Save the Arab World” NEWSWEEK, December 24, 2001, p. 29. This too is perhaps the attitude of the Federal Government.
the highest standard of Islamic justice. They should be vigilant and must watch the law, the society, and the judges closely. Complaints against administrators of the law should be promptly investigated and effectively tackled. Corrupt and incapable judges should be removed. The laws should be constantly monitored to ensure its proper implementation. Political leaders should ensure that the masses are not driven to crimes by their leaders’ indifference to their welfare and harsh economic conditions. We pray for Allah’s continual guidance and succour – wa kafa billahi waliya, wa kafa billahi naseera.
ISLAMIC LAW AND WOMEN’S RIGHTS: SUDAN’S EXPERIENCE AS A MODEL
By Abdelsalam Hassan Abdelsalam, Justice Africa, London

“The huudud punishments in general violate the basic human rights as enshrined in the universal declaration. The punishments of flogging, amputation, stoning to death and crucifixion fit the criteria of cruel, inhuman and degrading punishment.”

INTRODUCTION
The call for the implementation of Shari’a is usually proposed as a call of implementing God’s laws in place of man made laws as the divine duty and obligation of every Moslem. Those who call for the application of Shari’a often confuse consciously and, some times unconsciously the provisions brought by the Qur’an or Suna (prophet’s sayings or deeds) with the provisions developed by the Islamic Ulama (scholars) in what is known as Fiqh (Islamic jurisprudence). The aim is to give the Ulama’s findings the same moral authority the Qur’an and Suna have among Moslems. This paper argues that there is no Islamic legal system parallel to the modern legal system. The recent experiences of re-applying Shari’a (with the exception of family laws) have actually kept the laws borrowed from the Europeans and inserted some Shari’a provisions into it. The laws as applied in Sudan are in violation of Sudan’s human rights obligations under the international law, and it has violated in particular women rights. This paper will study the effect of criminal (Islamic) law and family law on women rights.

The Situation of Shari’a Law in the Nineteenth Century
The closure of Ijthad (interpretative thinking) in the ninth century after the establishment of the four Suna schools to jurisprudence, coupled with economic, social, and scientific stagnation that marked the Islamic world has stopped the development of the Islamic legal system. The Islamic legal system was and remained the same from that period, until the contemporary attempts to draft modern statutes based in the teachings of Shari’a.
The legal provisions developed by the Fuqha (Islamic Jurists) were detailed in the field of family law: marriage, divorce, inheritance, will and Waqf. The other aspects of civil law were very detailed. They covered the civil transactions, which were known to the Arabs in the ninth century.

In the criminal law they have specified three types of crimes: *Huudud*, *Qisas* [retribution] and *Ta’azir*.

The first are certain crimes determined by Qur’an or Suna [prophet’s sayings of deeds] (i) *hadd al-zina* adultery or fornication (ii) *hadd al-qadaf* false accusation of adultery or fornication (iii) *hadd al-sariqa* theft (iv) *hadd al-haraba* robbery or rebellion (v) *hadd al-shurb* drinking of alcoholic drink (vi) *hadd al-ridda* apostasy

The *Qisas* covers homicide and personal injuries; in these crimes the plaintiff has the right to choose between retribution and *dia* (fixed amount of compensation).

The *Ta’azir* actually ad-hoc punishments inflicted by the judge, acts other than those defined in the tow. Many modern Islamic scholars tried to name the other crimes known in the modern penal codes as *ta’azir*, in attempt to make the whole act look Islamic. The Iranian parliament enacted the *qisas* and *huudud* in separate codes and enacted the other crimes in a code and they named it *ta’azir*. The religious council, which examined the compatibility of any legislation with the Shari’a, refused to pass the law because the *ta’azir* could not be fixed, and it would be left to the judge to identify the crime and set the punishment. The parliament insisted on the act because of the rule of the illegality of retrospective prosecution. The conflict was so strong, and it was solved at the end by Khomeini’s interference and the *ta’azir* act was passed.

We have to add that Shari’a legal system did not have an inclusive system of procedure both in the criminal matters and in the civil. It has only few rules of evidence, and the oath plays a significant role in deciding the case especially in civil matters. The provisions are in Fiqh book, which deals with the rules of the *fiqh*.

**Modification of Shari’a law in the Ottoman Khalifa:**

The end of Shari’a law in the Islamic countries has always been attributed to the European colonisation of these countries, which replaced God’s law with man-made laws. This is not the whole truth, or at least it understates the complexity of the whole question of modernisation, which was introduced to the Islamic world as a consequence of the relationship with the European capitalist states.
The turn from the Shari’a started in the reign of the last Islamic Khalifa of the Ottoman Empire. Due to the pressures of international relations, the need for legal reform was seen as a way of building a modern state capable of coping in the modern world. The Christians were also agitating for reforms because their status under Shari’a was not equal to that of Moslems, especially in giving evidence before courts. “Thus the drive for modernisation, the pressure of Western states and nationals, and clamouring of Christian Ottoman subjects forced action towards legal reform”\(^1\)

The reform targeted both the law and the courts. Conservative elements within the Sultanate opposed the reform and resisted it fiercely. The conflict between the conservative and supporters of reform was a reflection of the fact that the Ottoman state was founded on Shari Sharif (the noble Shari’a) and the practical necessity of legal reform which ought to have some degree of departure from Shari’a. Compromise was the only way out. The summary of that compromised reform is as follows: In the field of commercial law, the reform started with the establishment of a commercial commission in 1839 responsible for cases that involved a foreign party. The commission acted under the supervision of the new ministry of agriculture and commerce, with the “assistance of a commercial advisor and the interpreter of a foreigner concerned in the case”. And in 1851, the commissions were replaced with commercial courts in accordance with the new commercial code, introduced in the same year, and ten years later a new procedure code, based on French usage, was introduced for those courts\(^2\).

In the domain of criminal law, a new criminal code was introduced in 1840, which was Turkish in inspiration and content. The code had some reference to Shari’a, and no separate tribunal was set up at the beginning to enforce it. In 1847, new courts under the supervision of the ministry of Police were set to enforce the code. These courts, which were confined to the capital, accepted the evidence of non-Moslems, irrespective of the Shari’a conditions. In 1854, an imperial decree extended the system of criminal courts to the provinces and confirmed that the testimony of any competent person, regardless of religious sect was admissible.

If the establishment of the commercial courts is to be ascribed to foreign influences and pressures, the promulgation of criminal code and the establishment of criminal courts can be regarded as a conscious effort on

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1 “Legal Reform in the Ottoman Empire and Egypt”, Farhat J. Ziadah, an essay filled in SOAS library in London under 268283, page (1).
2 Ibid. Page (2)
the part of enlightened Ottomans to modernise, even though such modernisation should completely disregard the Shari’a.3

In Egypt the reform took a different path, with the autonomous power of Mohamed Ali Pasha, the Khedive of Egypt and his heirs over Egypt and Sudan.

Mohamed Ali’s great desire to encourage the European and European enterprises to stay in Egypt led him to offer protection. The Consuls’ court was the protection they needed. The consuls gradually assumed jurisdiction over all criminal and civil matters that involved their citizens. An attempt was made to extend the system of commercial courts of the Ottoman Empire to Egypt in 1856, but the apathy of the then Egyptian Khedive, Sa’aid Pasha and the resistance of the foreign consuls prevented that reform. However, the Egyptian government accepted the system in 1861, and Merchants Councils were set up. The court membership was a mix of Egyptians and foreigners. The law to be followed was the Ottoman law of commerce; local customs; and the French civil codes, when the two were inadequate.

The real reform was achieved by Ismaiel Pasha’s foreign minister Mr. Nubar, who introduced the system of Mixed courts in 1875. In 1883, the native courts were organised. They were modelled after the mixed courts with jurisdiction over cases involving Egyptians only. These courts applied translated French codes, which was modified a little to suit the Egyptian society. Shari’a was applied only on marriage, divorce, inheritance and waqf (Islamic Trust).

**Huudud Punishment and Women’s Rights**

The *Huudud* punishments in general violate the basic human rights as enshrined in the universal declaration. The punishments of flogging, amputation, stoning to death, and crucifixion fit the criteria of cruel, inhuman, and degrading punishment. For the purpose of this paper, we will concentrate on the effect of the application on women’s rights. The *huudud* punishment and its evidence as codified in Sudan’s penal code and Sudan Evidence Act affect women rights in three aspects: the status of women in testimony, pregnancy as evidence of *zina*, and the protection against rape.

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3 Ibid. Page (3). The paper depended entirely on this reference in regard to the law reform in the Ottoman Empire and Egypt.
1. The Status of Women as Witnesses Before the Court

The current law of evidence made the testimony of a woman completely inadmissible in the adultery case. In other *huudud* punishments, the testimony of a woman is accepted as the exception, not the rule. Provided that two women should substitute one man.

2. The crime of Zina and Pregnancy

*Hadd al-zina* is the punishment for a sexual intercourse committed by a sane adult outside marriage or lawful concubinage. The classic Suna jurists are in agreement that the crime of *zina* is proved by four judicious witnesses to testify that they saw the actual act of penetration “*just as the collyrium enters the container or the robe enters the well***. They had also agreed that it can be proved by admission, and that the punishment is 100 lashes for the *non-muhsan* (unmarried) and stoning to death for the *muhsan*. They differed however, on pregnancy as evidence of adultery. The majority of *Fuqha* are of the opinion that pregnancy in itself does not constitute a “*zina***” offence automatically and they have also agreed that the woman do not need to prove the coercion and only her testimony that the sex occurred without her consent is sufficient to drop the charge. *Maliki* whoever, argued that the woman in question should be treated as guilty of *zina*** unless there was evidence of rape or compulsion (such as a virgin bleeding, or evidence of her attempts to shout for help4).

Sudan’s evidence act position in this regard is closer to *Malike’s* viewpoint. Article 62/c of the 1991 evidence act stipulates that the offence of *zina*** may be proved by: “the pregnancy of unmarried women in the absence of *shubha* (doubt). Note that article 77/c of 1983 act also states that *zina*** may be proved by” pregnancy of the woman if she is not married”.

The two acts do not stipulate the standard of evidence required for proving that the act of adultery was a result of duress. The phrase, “in the absence of doubt”, in the new act simply clarifies that pregnancy of an unmarried woman is not an absolute proof of *zina*.* The precedents do not clear that point. In his essay5, Abdel Salam Sidahmed analysed three cases of women who were accused of *zina*** on the grounds of pregnancy. The three cases were tried under the previous code of 1983.

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5 Abdel Salam Sidahmed Ibid.
In the first case (Sudan Government vs. Mariam Ahmed Abdallah\(^6\)), the husband of the defendant filed a complaint to the court accusing his wife Mariam Ahmed Ablallah\(^6\) of becoming pregnant in his absence by another man. She was charged with zina. Mariam admitted the zina, and named a man as her sexual partner. The alleged male partner denied the zina and was released. The trial court found her guilty and sentenced her to stoning to death and eighty lashes for qadaf [false accusation of adultery or fornication] against her alleged sexual partner. The Supreme Court confirmed the finding of the trial court and the sentence of stoning, but dismissed the flogging. The Supreme Court ignored the defendant’s allegation that she had committed zina against her will. This may lead us to believe that the court did not care about the defendant’s allegation of rape, and wanted more evidences to accept coercion, but the court’s decision, as quoted, relied on the defendant’s admission and did not accept the retraction because the defendant kept that admission “throughout the stages of investigation and the trial”. Both the 1983 and 1991 evidence act states that zina may be proved by “an express admission in court which was not retracted before the commencement of the execution of the sentence.”

The second case is the case of (Sudan Government vs. Kaltoum Ajbana\(^7\)). In that case the defendant a divorcee, became pregnant from a man with whom she had no legal marital bond, and she subsequently bore a child. She was accused of committing adultery, convicted by a criminal court and sentenced to death by stoning.

In her appeal to the Supreme Court, the defendant claimed that she was tricked into having a sexual relationship with a police officer (known to the court only by his first name al-Taj), and became pregnant accordingly. She maintained that the police officer threatened to use his influence to put her in prison if she disclosed his identity or initiated legal proceeding against him. She claimed that her alleged partner al-Taj promised her marriage but then went back on his word, and resorted instead to threats when she became pregnant. She added that [the interrogators] promised her release if she confessed. She also stated that she was living with her mother in a state of utter poverty and destitution.

The Supreme Court rejected the trial court verdict. The Supreme Court reasoned that although the defendant had confessed to committing adultery throughout the stages of investigation and trial, she had in effect

\(^6\) The Sudan Law Journal and Reports, 1985, pp. 91-103. Taken from Abelslam Sid Ahmed\' essay.

\(^7\) The Sudan Law Journal and Reports, 1985, pp. 102. Taken from Abelslam Sid Ahmed\' essay.
retracted that confession in her appeal claiming that she had been tricked or coerced into the act. Accordingly, the Supreme Court dismissed the *hadd* sentence, and ruled that the defendant should receive a two years prison sentence as a *ta’azir* punishment. In this case the Supreme Court clearly states that any doubt about the consent of the pregnant woman should be considered. This means that the Sudanese law follows the opinion of the majority of Fuqha. I am not sure about which one came after the other but none of the two mentioned the other decree. The second point in the second decision is that the court imposed *ta’azir* punishment as an ad hoc punishment.

The third case is the case of (*Sudan Government vs. Hajja Suliman*):

Hajja, a divorcee went with her stepmother to collect dates from their farm. According to her testimony two men raped her while she was on another side of the farm, away from her stepmother. About four months later she realised that she was pregnant. Subsequently, she gave herself up to the police out of fear of her family turning against her for becoming pregnant outside marriage. The police however, charged her with adultery and brought the case to the criminal court. The court found Hajja guilty of adultery on the grounds of her pregnancy, disregarded the defendant’s allegation of rape, and sentenced her to death by stoning. In rejecting the rape allegation, the court argued that it was very difficult, if not impossible, to have full sexual intercourse with a woman against her will! The Supreme Court upheld the allegation of rape and ordered the acquittal of the defendant.” The Supreme Court however did not make any effort to clear the contradiction between the previous two rulings and the first one.

The legal effect of article 62/c is that it shifts the onus of proof from the prosecutor to the defendant. In this case, the accused women who have to prove the existence of *shubha* (doubt), that is, proof that the sexual intercourse had occurred without her consent as a result of coercion, deceit, etc, while the flat denial of the partner, if named, is sufficient to guarantee his release. This is a clear discrimination on the grounds of gender. On the moral side, it also creates questions against Shari’a supporters claim that the application of Shari’a upheld morality within society. The partners of the accused women in the cited cases escaped prosecution because only women could get pregnant. If the Sudanese courts resort to the ruling of the majority of Fuqha, that pregnant woman’s allegation that the sexual intercourse occurred against her will is sufficient to dismiss the case; the

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fact that the woman had to be brought to court to assert that is a discrimination in itself. Most of those who become pregnant outside marriage are women of poor background who know nothing about contraception. The cited cases are clear evidences of that. In the case of Kaltoum Ajbana, the accused was not just poor, but she was a victim of abuse of power by a police officer. Note that he does not appear at any stage in the case. Such abuse of power to gain sexual pleasure is not rare in Sudan and indeed in most countries where poverty is prevalent, or where the rule of law is weak. The development of the DNA technology made the identification of a male partner beyond reasonable doubt possible, but the suggestion of using the DNA tests as evidence in zina cases, even if it were accepted by Shari’a supporters, would mean that many men and women will be flogged and stoned to death. The non-proportionality between the act of zina and the punishment of stoning to death are strong deterrents. Some Shari’a supporters argue that it is because of that severe punishment that the evidence was made so difficult: four witnesses are required to see the actual act of penetration. They argue that it was meant only for those who want to purify themselves by admitting the wrong doing and taking the punishment in this life and gain pardon in the after life. But this raises the question of why do we enact a law that is not going to be implemented. The law could have been confined to those who wished to confess.

Protection Against Rape

The Fuqha did not differentiate between rape and other forms of zina. Rape is considered as defence for the victim. Sudan penal code of 1991 took the same position. Article 149 reads:

(1) There shall be deemed to commit the offence of rape whoever makes sexual intercourse by way of adultery or homosexuality, with any person without his consent.

(2) Consent shall not be recognised where the offender has custody or power over the victim.

(3) Whoever commits the offence of rape shall be punished with 100 lashes and with imprisonment for a term not to exceed ten years, unless the rape constitutes the offence of adultery or homosexuality punishable with death.

Considering rape as a form of zina entails that the evidence of zina is required to incriminate the culprit, which is four men or admission. It is almost impossible to envisage four men witnessing rape and not try to stop it. Moreover, if the four men witnessed the rape, did nothing, and waited to
give evidence in court, they should be charged as accessories to the crime. This level of evidence will leave the victims of rape who are women in majority of cases without protection. This is not a hypothetical assumption, in the case mentioned above of Hajja Suliman, we saw that Hajja was released by the Supreme Court, and the Supreme Court did not initiate criminal procedures against the perpetrators. In fact the rape was totally ignored by both courts in the first case of Kaltoum and by the trial court in the last case. The trial court in the case of Hajja went as far as stating in a machismo manner that “it is very difficult, if not impossible to have full sexual intercourse with a woman against her will.”

The full catastrophic consequences of defining rape as form of *zina* is illustrated in the following case: (*Sudan government vs. al-Sir Muhammad al-Sanussi*)

The summary of this case, which took place in December 1986, runs as follows. A man reported to the local police station the case of a 6 year-old child whom he found lying unconscious nearby a football stadium with clear indications that she had been sexually assaulted. Authorised medical examination confirmed that the 6 year-old child had indeed been raped. The police launched an investigation, which led to the arrest of the suspect al-Sir al-Sanussi on charges of rapping a minor. It was revealed that the suspect had picked the victim who was playing with her siblings and other playmates in front of their house. Pretending that he wanted to buy her sweets, the suspect took the girl to a remote spot where he sexually assaulted her and left her unconscious.

The criminal court found the accused al-Sir al-Sanussi guilty as charged on grounds of compelling evidence gathered by investigators, which comprised of:

- the medical evidence that the victim had been raped;
- the testimonial evidence account of the victim which confirmed the events leading to her ordeal, while also pointing at the accused;
- the fact that the victim and her playmates easily recognised the accused in an identity parade;
- the fact that the blood stains which was found on the suspect’s clothes belonged to the same blood group of the victim.

The court accordingly found the accused guilty of the crime of rape stipulated in article 317 of the 1983 penal code (sexual intercourse with a minor) and sentenced him to 10 years imprisonment and 100 lashes.

Yet the Supreme Court overturned the trial court verdict on the grounds that there were no sufficient evidences to substantiate the charge

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1 The Sudan Law Journal and Reports, 1989, pp. 108-115. Taken from Abelslam Sid Ahmed’s essay
of committing a *zina* with minor as stipulated in article 316 and 317 of 1983 penal code. The Supreme Court in correct application of the existing law concluded that the evidence needed was four witnesses or an admission. In the absence of the two, the Supreme Court ruled to return the case to the trial court to apply penalty pursuant to article 319 (committing an indecent act on the body of another).

The current penal court followed the previous one as we have shown over, in considering rape a form of *zina*. Women all over the world are usually skeptical in reporting their rape for the fear of the graphic cross-examination they would face during the trial. They had to be encouraged by women groups, who would usually give them moral and psychological support to face the challenge of bringing their rapists to trial. The social and psychological obstacles are much greater in Sudan. The current laws in Sudan added the almost impossible evidence to getting of four witnesses. And as we have seen in the case of Hajja Abdallah, the complaining woman could be arrested, tried, and convicted of *zina*. The law has in fact eased things for the rapist, to say the least. This also raises a strong concern about the Shari’a laws’ – as codified in Sudan – promotion of morality.

**Shari’a Personal Law in Sudan.**

We are going to examine in this section the law of personal affairs for Moslems of 1991, from the perspective of women rights as enshrined in the international human rights instruments.

The 1991 personal affairs for Moslems act is in fact a codification of what was the law since the condominium rule of Sudan at the end of the 19th century. The matters of marriage, divorce, inheritance, will, and *waqf* for Moslems remained under the domain of *Shari’a* courts. The *Shari’a* court was following the dominant opinions within the *Hanfi* school of Fiqh, unless decided otherwise by the circulars of grand Qadi [the head of the *Shari’a* courts].

The codification of the law is a welcome development, since the browsing through of the many big books of *Fiqh* to determine what is dominant in the *Hanfi* School is an exhausting task. It has given the residing judge a huge discretionary power, which amount to giving the judge the power to legislate in each case. The current law has partially kept the same situation; article 4/1 states that “the judge will follow the dominant opinions within the *Hanfi* School in matters, which are not covered by the provisions of this act. In matters covered in this act which need interpretation, reference should be made to the historical source from which the principle was taken.”
The main violations to women rights are:

- A Sudanese woman cannot marry without her guardian’s consent. According to section (24), her guardian is entitled to terminate her marriage on the grounds of incompatibility [the husband should be compatible to the wife in religion, freedom in the individual and his ancestry, and ethnicity], and on the grounds of mahar al-mithel [the bride-price of an equivalent, i.e. the pride-price paid should be equivalent to what could be expected for a similar woman in terms of background, beauty, age, etc.]. The guardian can terminate the marriage contract any time before pregnancy or birth of child. It is worse mentioning that the Hanfi Fiqh allows the mature woman to marry without the guardian’s consent, but both the current act and the old law shifted to the Maliki Fiqh in this particular issue. A Shar’a court terminated the marriage of two teaching assistants at Shambat Agricultural high institute in the sixties upon the request of her guardian. The reason given was that the husband was the grand child of a freed slave.

- Divorce is the sole right of the husband that he can exercise for any reason or for no reason without the consent of the wife; article 127/a. The wife can only get divorce through the court for reasons like impotency of the husband [articles 153 to 162], severe harm [article 162-167], or the husband’s failure to support the wife financially [174-184]. The onus of proof on all these cases is on the wife. The procedures are usually lengthy and costly. The wife however, can put a condition in the marriage contract to have an equal right of divorce. This is very rare except within a certain group [the Republican Brothers]. The group is now banned; their leader was executed for apostasy in 1985.

- The wife should obey her husband article 91 to 95
- The husband had right to marry four wives, article 19/b
- The female usually inherits half of the male share. The rules of inheritance are obligatory and cannot be changed. The will can only be within a third of the left wealth (maximum article 287). The inheritor cannot be included in the will (article 297/1).

CONCLUSION

The recent application of Shari’a in many Islamic countries has raised great controversy. Centred on Moslems beliefs, the subject is indeed highly sensitive. But the consequences have a serious impact on basic rights and freedoms. We have tried in this paper to look objectively on those
consequences over the women rights. We have concluded that the huudud punishments have adverse impact on women rights.

The legal sciences have undergone a long process of improvements and changes in order to address the many complicated transactions and interests brought by the progress in technology in economics. The ongoing struggle for justice and equality has also affected those developments. It is on that background that many Islamic countries felt the need to shift from the law as developed by the Fuqha in the ninth century. The great part of Shari’a as developed by the Fuqha are man made laws, just like other laws including modern laws. The so-called Islamic penal laws, including those of Zamfara State and Sudan are in fact the same modern penal codes. The only difference is the inclusion of huudud punishments. The onus is on those who believe that the huudud is applicable at any time and place to work out a formula by which countries with Moslem majority can apply the huudud and uphold its obligations under international human rights law.

Personal law for Moslems as codified in 1991 personal law in Sudan contains many provisions that violate women’s rights. Many can be avoided by adopting other opinions from Shari’a itself; like the right of mature woman to perform her own marriage contract, and by making it a condition in law that the wife should have the right to divorce on signing the contract. It is true that the majority of Moslem women will chose to marry according to Shari’a despite its impact on their rights. We recommend that the option of civil marriage should be open to those who wish to marry according to it.
TOWARDS A CROSS-CULTURAL APPROACH TO WOMEN’S HUMAN RIGHTS

By Joy Ngozi Ezeilo

“The challenge of crafting human rights norms that fit both international, religious and customary law criteria has made a discussion on the need to engage in cross-cultural dialogue and understanding of human rights imperative. In an ethnically and religiously divided society like Nigeria it is in the best interests of states and subjects to pursue a cross-cultural dialogue on how to use the constitutional frameworks to safeguard rights of all citizens irrespective of religious and ethnic affiliations.”

INTRODUCTION

Modern human rights movement championed by the United Nations started in response to gross violations of human rights perpetrated during the World War II. First, amongst the international norms developed to protect the dignity, rights, and freedoms of women and men of the world is the Universal Declaration of Human Rights (UDHR: 1948) still regarded as the bedrock for development of other international human rights instruments.

One of the principles that emanated from over six dozens of such human rights norms since UDHR is the principle of equality and nondiscrimination, which basically reiterates the equal worth of human person and equal rights of men and women. As I have argued elsewhere, this principle has formed part of customary international law for which no derogation is permissible.

These human rights treaties: the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW);

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2 See the first paragraph of the Preamble to the United Nations Charter (1945).
4 This was adopted on 16th December, 1966 but came into force on 23rd March, 1976
5 This was also adopted in 1966 by the United Nations General Assembly and it entered into force on 3rd January 1976.
the Convention on the Rights of the Child (CRC); the Convention Against Torture (CAT); the Convention Against Racial Discrimination, and many others emanating from the United Nations are taken to have universal application because they are multilateral treaties. Whether the fact that a human right treaty adopted by the United Nations General Assembly composed of all the sovereign states ipso facto makes it applicable and achievable in all cultures remain to be seen. Article 15 of the CEDAW guarantees women equality with men before the law and legal capacity identical to that of men in civil matters, but he status of women before religious tribunals or secular courts applying religious law is not clarified by this guarantee. Religious laws governing personal status obviously determine not only the religious rights of women, but also important legal rights, including those regulating economic resources.

The Situation of women worldwide; in Nigeria in particular, and elsewhere in Africa have shown the gaps between formal guarantees of human rights especially to women and what obtains in practice. The question of what is meant by a “right” is itself controversial and the subject of intense jurisprudential debate. The non-observance of human rights of women has resulted in re-echoing of the still controversial slogan “Women’s Rights are Human Rights” about 55 years after the adoption of the Universal Declaration of Human Rights that recognized that “all human beings are born free and equal in dignity and rights…” The World Conference on Human Rights held in Vienna in 1993 also reiterated that: “the human rights of women and of the girl-child are an inalienable, integral, and indivisible part of universal human rights…”

The troubling issues raised by failure to ensure, protect, and fulfill women’s human rights center around universal cultural legitimacy of human rights and State responsibilities to enforce human rights as internationally adumbrated. This paper will be concerned with finding responses to two main questions: first, to what extent does our traditions, religions contradict the international standards? Second, can we craft human rights that fit both international, religious, and customary law criteria? In realization that resolving the second issue may appear a Herculean task or rather idealistic, I lend my support to earlier proposition championed by Abdullahi Nai’m to engage in cross-cultural approach in addressing human rights challenges posed by religious and customary laws.

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11 See Article I of the UDHR.
12 See paragraph 18 of the Vienna Declaration and Programme of Action June 1993.
It is clear that existing models and values must be questioned and traditional theories, foundations and boundaries, interrogated in our search for solutions.

Human Rights of Women Versus Culture, Community and the State

The right to culture is recognized as part of the international human rights norms, so also is the responsibility of State to enforce human rights. The international Covenant on Civil and Political Rights thus provide that “in those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.  

The divide between Western conception of human rights and African, Asian or Arab perception has always been on individual autonomy versus communitarianism to reinforce the argument that rights are culturally specific. Within the Western framework of human rights individual autonomy is emphasized, whereas the rest of the world tends towards collective rights placing the community rights before the individual. Undoubtedly, international human right law has moved from the narrow conception of individual rights to recognizing community and groups rights regarded as the collective rights. The right to ones culture which include customary and religious practices and self- determination fall within the collective right category. However, the problem arises when there is conflict between the individual and the collective rights, and when in particular recognizing the later will amount to violation of nationally recognized human rights as may be contained in the national constitutions bill of rights provisions or in other regional and international instruments. Cultural justifications, use of stereotypes, customs, and religious norms are all potential barriers to women’s enjoyment of equality. Of course, we know that culture is male-patrolled in the way that it is created and transmitted. As Barbara Crossette rightly opined “ People who control culture tend to be the people in Power,

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13 See Article 27. Also the International Covenant on Economic, Social and Cultural Rights in Article 1 provides that “ All peoples have the right of self- determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

14 According to Xiaorong Li, “The so-called Asian value of ‘community harmony’ is used as an illustration of ‘cultural’ differences between Asian and Western Societies, in order to show that the idea of individuals’ inalienable rights does not suit Asian societies. This ‘Asian communitarianism’ is a direct challenge to what is perceived as the essence of human rights, i.e. its individual- centered approach, and that it suggests that Asia’s community-centered approach is superior”. See “‘Asian Values’ And The Universality of Human Rights” In Martha Meijer (Ed) Dealing With Human Rights: Asian and estern Views on the Value of Human Rights(Greber/WorldView/Kumarian Press: 2001) In collaboration with The Netherlands Humanist committee on Human Rights (HOM).

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and who constitutes that group is important. Until we can break through that, we can’t take the measure of what is really representative.”

Women have barely been visible in systems that create, interpret, and apply laws because of their subordinate status in the society. Thus, some women’s groups and activists tend to place less emphasis on collective or community rights in the belief that it undermines particularly advocacy for women’s rights. In the international sphere, implementers of human rights will not hesitate to uphold individual human rights in cases of conflict with culture and traditional practices. In the case of Lovelace v. Canada, the Human Rights Committee, a United nation treaty body held that the law requiring that only Indian Women, but not Indian men, lose their status and rights when they marry a non-Indian amounts to a denial of their right to enjoy their own culture. The golden rule is that collective rights are recognized so long as it does not violate human rights of others. Thus, even where a State may justify a particular violation of human rights based on cultural particularities, the decision may not suffice at international level based on application of human rights norms.

Some African States have boldly questioned customary laws and practices that violate women’s human rights using the international standards as basis for their decisions. Recent development in Nigeria have shown that some appellate courts are willing to recognize the human rights of women even where customary practices dictate otherwise. In the very

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16 See my paper on Feminism and Human Rights At Cross- Roads in Africa? Reconciling Universalism and Cultural Relativism Forthcoming publication.
19 See the Tanzania and Botswana cases of Ephrahim v. Pastory (1990) LRC (Const) 757 and Dow v. A.G. Botswana, (1991) LRC (Const) 574, (1992) LRC (Const) 623, CA. In the Dow case reference to the international obligations of Botswana was made to support the court’s decision that sex based discrimination was forbidden under the Constitution. The court made it clear, that it is the duty of the judge to change or give purposive interpretation to the constitution, which promotes equality and social justice. See Joy Ezeilo, “ The Influence of International Human Rights Law on African Municipal Legal Systems” NJR Vol. 6 1994-1997 P. 50-87 @ P. 76-77 for a discussion of the cases.
20 See the cases of Mojoekwu v. Mojekwu [1997] 7 NWLR 283 and Muojekwu v. Ejikeme [2000] 5 NWLR 402. Both cases recognized the equality of all sexes in cases of inheritance under the Igbo customary law that denies women the right to inherit. It was also the first time the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was cited in a judicial decision in an appellate court. In the Case of Use v. Iro [2001] 11NWLR 196, the Court of Appeal, Port Harcourt Division held that the rights of all sexes are protected under the constitution, which is the organic law of the land, therefore any assertion or argument that a woman cannot give evidence in relation to land matters is oblivious of the constitutional provisions which guarantee equal rights and protection of all sexes under he law. Further, the Court stated that any law or custom that seeks to relegate women to the status of second class citizens thus depriving them of their invaluable and constitutionally guaranteed rights are laws and customs for the garbage and should be consigned to history. See also Joy Ezeilo, Laws and Practices Relating to Women’s Inheritance Rights in Nigeria: An Overview NJR Vol. 7 (1998-1999). P. 131-152.
popular case of Saffiyatu\(^{21}\) sentenced for stoning based on the offence of *zina* (adultery), the Shari’a Court of Appeal recognized her right to privacy although, this was foregrounded in Islamic tenets rather than the Nigerian Constitution. The Shari’a Court of Appeal quashed the conviction and death sentence passed on Saffiyatu by the upper Shari’a Court in Gwadabawa stating that the trial and conviction was contrary to section 36(8) and 4(9) of the 1999 Constitution that prohibits retrospective application of the law.\(^{22}\) While the recent Shari’a cases in northern Nigeria has unarguably raised an important question about universal cultural legitimacy of human rights, it proved also that human rights norms have been male centered and rarely do carry the female voice.\(^{23}\) Of course, this raises questions about women’s rights under a constitutional democracy and the responsibilities of the Nigeria State as a member of the international community to ensure and protect women’s human rights within its borders. Furthermore, it raises doubt about international human rights law, its efficacy and effectiveness in relation to women’s concerns, particularly in religious and customary societies. The way women’s rights are treated in all areas of Nigeria not-only Muslim societies are not fair and clearly violate the principle of equality and non-discrimination. We need to work towards eliminating potential tensions/conflicts by offering new interpretations of the Islamic sources that accommodate a modern rights philosophy and recognize the right of women in a democratic State.


\(^{22}\) The contention which was upheld by the Shari’a Court of Appeal is that the upper Shari’a Court lacked jurisdiction to try and convict Saffiyatu since the Shari’a penal code was promulgated in the year 2000 and signed into law on 31/1/02 and the offence with which the appellant was charged, tried and convicted was committed in the year 2000, as such she can’t be tried under that law as it is contrary to Islamic law as well as S.4 (9) and S. 36 (8) of the 1999 Constitution. Section 36 (8) of the Constitution provides that “No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence heavier than the penalty in force at the time the offence was committed.
The Concept of Human Rights in Africa: Reconciling Universalism versus Cultural Relativism Debate.

The question whether human rights concept is universal and also alien to African Culture has been the subject of political and legal debate that has engaged scholars, activists, and jurists for more than two decades. Although, not many outside the Western hemisphere would agree that human rights are a universal concept, very many, including Africans have argued that the concept of human rights is not alien to us.24 Some argue against the notion particularly African Muslims- that human rights originated in modern Europe saying that “ Islam was the very first culture on earth to which God imparted complete set of human rights values”25 Kwasi Wiredu26 writing on universalism and particularism in religion from an African Perspective opined that “ it is hard to imagine more fertile grounds for breeding universals, both genuine and spurious, and particulars, both complementary and countervailing”. He argues that the impression that there is necessary incompatibility between the perspectives of universalism and particularism is illusory.27 In other words, we can reconcile the universal and the particular. Jack Donnelly reinforces that when he said “The problem of cultural relativism and universalism of human rights cannot be reduced to an either-or choice. Claims of cultural relativism show a great diversity in meaning, substance, and importance”.28 While, many African and Third world writers have argued that the philosophy and conceptions of human rights existed in other cultures as well, counter-claimers have, albeit forcefully, argued that human rights conception per se simply did not exist in the pre-colonial African societies.29 According to proponents of this view, what are usually put forward as African human rights conceptions are nothing more than notions of human dignity. Assuming one concedes to this argument, is it not the notion of human dignity and worth that is the basis for modern human rights movement and for all the human rights norms adopted under the auspices of the United Nations? The issue here will be not about the destination, which appears in the end to be the same but

27 Ibid. 1
about the route. How do we get there? That’s where and how promotion and protection of human rights get contextualized and the divide between the universalism and relativism become manifest. Human dignity as far as I’m concerned is imperative for the promotion and protection of human rights. The fundamental value underlying the universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights is the notion of the inherent dignity and integrity of every human being. In South Africa, the traditional concept of “ubuntu” was creatively used by the Constitutional Courts to reach a conclusion that death penalty is cruel, inhuman, and degrading punishment and treatment. I agree with Howard and Donnelly submissions on validity and applicability of human rights conceptions that: “Although they originated in the West and have a philosophical basis there, human rights conceptions have universal validity and applicability in Africa as elsewhere” Kannyo equally argued that:

To the extent that the Western model of the state has spread to other parts of the world, the factors which gave rise to the need for constitutional guarantees and led to the evolution of the philosophy of human rights in the West have become equally relevant in other parts of the world. Moreover, the core elements of the concept of human rights are not alien to non-western cultures. Traditionally, most of the cultures have given the greatest importance to the preservation of life and the promotion of human welfare.

In Nigeria today we operate a constitutional democracy and our constitution contains a bill of rights that recognizes the fundamental human rights of the citizens as well as proclaiming the secularity of the Nigerian state. The government has ratified a good number of international human rights instruments including the Women’s Convention and the African Charter on Human and Peoples Rights. The fact that many countries including Nigeria of their own accord have ratified or acceded to International standards on human rights as developed within the multilateral system of the UN and also at regional/continental levels to some extent demonstrates universality

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28 See note no. 25 at P. 342
29 See Issa Shivji, op.cit. P.10
31 State v. Makwanyane (1995) BCLR 665. The Court held per Chaskalson P. delivering the lead Judgement that death penalty was cruel, inhuman and degrading and as such unconstitutional. In that case the Constitutional Court observed that: the death sentence is a form of punishment, which has been used throughout history by different societies. As societies became more enlightened, they restricted the offences for which this penalty would be imposed. The movement away from the death penalty gained momentum during the second half of the century with the growth of the present abolitionist movement…” See P. 685
32 Ibid P.11.
33 Ibid.
34 See CAP IV of the 1999 Constitution- Sections 33-46. Also section 10
of human rights principles. The principle of equality and non-discrimination is another implication of the inherent dignity and integrity of the human being and has formed part of customary international law for which no derogation is permitted. Torture for example and acts amounting to torture are among the non-derogable standards that form part of the evolving international culture. Torture has become despicable internationally and no justification is acceptable even if committed in war times. Global Women’s rights movements are battling to include certain acts against women for example female genital mutilation as amounting to torture. Women’s rights are the most contested terrain in the universalism and cultural relativism debate. Thus, feminist have argued that the universal human rights as framed is male- oriented, thus their struggle for equality culminated in the reiteration during the second world conference on human rights held in Vienna that “human rights are women’s rights” and the human rights of women and girl- children form an integral part of the universal human rights. Some Islamic countries and others in exercise of the right to make reservation when ratifying international treaties have subjected domestic application of international human rights norms to their religious and cultural particularities.

Consequently, emphasizing that there are contradictions between our traditions, religions and the international standards. The context and contexture(s) of human rights including categorization and prioritization of rights; which category of rights takes first, is it civil and political or socio-economic and cultural?- prompted the Vienna Declaration to the effect that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The concept of Legitimate Expectations of Citizens whose countries have signed and ratified international treaties presupposes that it is the duty of the state to ensure and protect human rights within its boundaries. The

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35 The African Charter is part of our domestic law now following incorporation into our legal system. See CAP 10 Laws of the Federation 1990. The Charter in Article 18(3) Placed an obligation on state parties to ensure elimination of all forms of discrimination against women and children as recognized in international declarations and conventions.

36 Under Article 199(c) of the Vienna Convention on the Law of Treaties (1969) Reservation that goes contrary to the object and purpose of the treaty would be declared inadmissible.
State will still be held responsible at International level for the conduct of its judiciary when the use of its legal doctrine violates human rights norms? As has been rightly argued by James Silk “… denying the universality of human rights may effectively destroy the meaning and value of the entire concept of human rights: there can be no basis for international protection if each society can determine its own list of human rights. The very significance of international human rights is in their universality”.38

The Need for a Cross-cultural Understanding of Human Rights: The concept of ‘same’ but different?

The international human rights movement has succeeded in establishing universal human rights standards for religious minorities based on moral as well as pragmatic arguments. Faced with these arguments, modern Muslim countries have had to participate in the formulation and adoption of the standards, not only at the international level, but also at the regional and national levels. Nevertheless, extremely serious tensions exist between these standards and the Muslims cannot and should not be allowed to justify discrimination against and persecution of non-Muslims on the basis of Islamic cultural norms. The Muslims themselves must seek ways of reconciling Shari’a with fundamental human rights. The choice of the particular methodology for achieving these results must be left to the discretion of the Muslims themselves. A cultural relativist position on this aspect of the problem is, in my view, valid and acceptable. I should argue, however, that no cultural relativist argument might be allowed to justify derogation from the basic obligation to uphold and protect the full human rights of religious minorities, within the Islamic or any other cultural context.39

The challenge of crafting human rights norms that fit both international, religious, and customary law criteria has made a discussion on the need to engage in cross-cultural dialogue and understanding of human rights imperative. In an ethnically and religiously divided society like Nigeria it is in the best interests of State and subjects to pursue a cross-cultural dialogue on how to use the constitutional frameworks to safeguard rights of all citizens irrespective of religious and ethnic affiliations. Section

10 of the 1999 Constitution recognizes the secularity of the State while giving rule of recognition to Shari’a and customary law as sources of Nigerian law. The Constitution contains the supremacy clause\(^{40}\), meaning that in cases of conflicts or incompatibility between the customary law and Shari’a they will yield to the Constitution of the land. This is hardly the case in matters concerning women’s rights. The challenge is therefore how to protect and enforce women’s rights under a secular, democratic Nigerian State where women should be treated as full citizens? Promoting respect for women’s rights often bring to bare the tension between the universal and a particular culture, hence the need to engage in cross-cultural dialogue. The chief protagonist of the cross-cultural approach Abdullahi Ahmed An- Na’im posits that contextualized cultural approach is the appropriate means by which to promote universal recognition of the concept of human rights. In his view, alternative sources and interpretation within any given tradition may prove useful in overcoming the problems raised by a particular tradition.\(^{41}\) He was at pain to explain that cross-cultural approach to universal human rights does not mean adoption of the relativist definition of human rights; rather it shows that human rights are grounded in every culture. In his example, human rights stands and are, by no means, alien to Africa traditions, and could be defended on the basis of traditional African value systems and institutional practices.\(^{42}\) Abdullahi Ahmed An –Na’im and Francis M. Deng in Human Rights in Africa, Cross-Cultural Perspectives made the following observations about cross-cultural approach to human rights:

“Some People, however, think that this approach actually retards the evolution of international standards. They argue that the cultural approach fosters a relativism that is opposed to universalism, whether it is because of a sincere commitment to local cultures and traditions or a purposeful manipulative effort to justify violations of human rights at the local and national level. Whatever the case, it is nearly always the elite who interpret the culture and use it or abuse it for their own political ends. Those who fall victim to such abuse can hardly be expected to reject


\(^{40}\) See Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria.

\(^{41}\) Ibid. P.357.

international human rights standards by invoking local cultural values can indeed be invoked to check the leaders who violate human rights and seek shelter behind cultural relativism.\(^{43}\)

Undoubtedly, a cross-cultural approach may provide the appropriate balance between the relativism and universalism of human rights, but we need to address our minds to what the approach entails and how it can be used to enhance the cultural legitimacy of human rights? According to Eva Brems\(^{44}\), methods for resolving conflicts between the perceived rights of women and the perceived rights of culture inside particular cultures would include: consciousness raising, reinterpretation of religious laws, and selecting the “positive aspects” of culture.\(^{45}\) As she rightly argued, achieving this ideal of truly universal human rights will not be brought about by working from within cultures alone;\(^{46}\) thus the need for constructive approach to the concept of ‘same’ but different. Cross-cultural dialogue would require openness, respect, and sensitivity to various religious and ethical values, cultural background and philosophical convictions of individuals and their communities. Although an acceptable methodology has not been developed for cross-cultural analysis, Abdullahi An-Na’im has cautioned that the golden rule for undertaking cross-cultural work to provide the necessary internal legitimacy for human rights standards is the need for relativist sensitivity in developing universal standards. “Each culture has its share of problems with human rights as well as the potential to resolve those problems. In working within the culture, and receiving guidance and support from without, external standards should not be imposed to enhance cultural legitimacy.”\(^{47}\)

As has been argued elsewhere, the greatest reformers of Islam are adherents and it comes from within. Those who seek to pressure them from outside only make the modernizing process more difficult. In situations of polarization and perceived threat to one’s identity, a group turns upon itself and may refuse to change with times.\(^{48}\)

\(^{43}\) Ibid, P.1
\(^{45}\) Contextual understanding of religion/Islam is required as part of engagement strategy. Joy Ezeilo and Abiola Akiyode Afolabi (Eds) Shari’a & Women’s Human Rights in Nigeria, Strategies for Action. 2002 publication of WARDC and WACOL
\(^{46}\) Ibid, P.158
Conclusion

Cultural diversity even within Islam itself presupposes that we engage in cross-cultural dialogue to fashion out how best to ensure human rights of everyone and resolve the apparent tensions between some part of religious and customary laws with the universal human rights regime. As Charrad observed, “We must remember that Islam has intermingled with many other factors such as local custom, politics, economics, and historical conjuncture to shape the status of women in different ways in different times and places. Should one overlook the diversity within the Islamic world, one runs the risk of sliding toward a monolithic, essentialist, and static conceptualization”.

We must not treat Islamic culture as frozen as this will obscure the process by which gender is historically, socially, and politically constructed. Tunisia’s adoption of code of personal status and liberal reforms in the family law sphere that affords women greater protection does not make Tunisia less Islamic in the Arab-Islamic world. In fact, the family law reforms that abolished polygamous marriages, divorce by talaq, provide for equal right of men and women in filing for divorce as well as raise the age of marriage to seventeen for women and twenty for men to avoid child marriage were described by the government as Islamic in nature. Senegal, Mali and other Islamic countries in West Africa have adopted legislative measures amounting to reform of some aspects of Shari’a law that impinge on internationally recognized human rights of women. We cannot continue to justify discrimination against women based on cultural and religious particularities, the duty falls on us to work toward reconciling the Shari’a and fundamental human rights, bearing in mind the caution of Abdullahi Ahmed An-Na’im that the choice of the particular methodology for achieving these results must be left to the discretion of the Muslims themselves. As stated earlier, Muslims themselves are the most effective modernizers of their own religious institutions. Perceived external pressure particularly in the light of the feeling of marginalization and persecution by the Muslims worldwide would lead to resistance and insistence on conservative and traditional interpretations far removed from the pristine ecology upon which they were founded. The victims as usual will be women and girl-children.

49 M.M. Charrad “Cultural Diversity Within Islam: Veils and Laws in Tunisia” In Women in Muslim Societies, Diversity Within Unity, Edited By Herbert L. Bodman and Nayereh Tohidia (Lynne Rienner Publishers: Boulder/London) 1998, P.63
50 Ibid. P. 69-70.
51 See note no. 39.
RESPONSES AND COMMENTS BY PARTICIPANTS

THEME 2-
Women’s human rights in the Administration of Justice

Shari’a Implementation in Nigeria: Issues and Challenges
On Women’s Rights and Access to Justice.
By M. T. Ladan

The Islamic law in Nigeria is of the Maliki school of thought because that was what the forefathers handed over to the present generation. However, according to the participant, there is no need to stick to the Maliki School. It is the strict adherence to this system that has worked hardship for the people.

On the human rights movement, it was noted that this is not new to Muslims. The right recognized by the UN Declaration of Rights was already recognized by Moslems ages before. There is need however to look at the issue of rights from the cultural perspective since what the Western world regards as a right may not be a right in Nigeria country.

It is difficult to set the age of Takelif or majority in Islam since there are a lot of jurisprudential issues surrounding this. According to the participant however, it is still relevant to set this age and Ijtihad (that is the human initiative) can be applied in this regard.

It was also noted that maizali (that is public complaints commission) is lacking in today’s Islamic world. This maizali is part of the human initiative (Ijtihad) and that at no point in the history of Islam was this human initiative closed. It is still open, and the Ulamah should take advantage of this.

Improving Women’s Access to Justice and the quality of Administration of Islamic Justice in Nigeria.
By A. A. Oba.
A participant took on the presenter to task about what she referred to as his patronizing attitude towards women. According to her, the presenter had not shown any respect for women hence his jaundiced view of the rights of women under Islam.
On Amina Lawal’s case a participant stated that the long adjournment granted in Amina Lawal’s case was unreasonable, considering the death penalty hanging on her neck. Also, he remarked that the maliki law on *zina* (adultery/fornication) was harsh. The law he said was organic, and should develop. This law requires physical proof in the case of rape, and this may be impossible to prove where the woman was drugged or was unconscious. There is need to go outside the *maliki* law to see that the law is properly applied and justice given to both the accused and the victim.

A participant also pointed out that a lot of issues affecting women have been developed by men because of women’s ignorance and illiteracy, she noted that it was not easy for women to come forward when raped because of the stigma attached to it, hence under Islam they may be convicted for having consensual sex where the rape manifests into pregnancy, since this is regarded as evidence of adultery/fornication.

Another participant disagreed with the presenter’s view that rape is not prevalent in our society but in the western world. According to her, he did not really address the issue at stake by this assertion. Being punished in Islam for fornication where they become pregnant doubly jeopardizes women who are raped. Moreover, rape is used as a weapon of war and intimidation and used by men to show power over women. Also on the presenter’s assertions that others cannot tell us what to do in our country, she stated that this view is not quite right, considering the fact that there has been a lot of cross cultural engagement in the world since we all have picked up something from other cultures, and that international human rights have progressed to the stage of collective right for all.

Islamic Law and Women’s Rights:
Sudan Experience as a Model
By A.H. Abelsalam

There is need to educate women as to their rights under the marriage contract and according to the participant things considered Islamic are actually culture.

On the pathetic situation of a divorced woman in Islam, a participant pointed out that most often, the man without a dime pushes out the woman after she has spent several years in the marriage. She stated that this was not
right because the law provides that the man should, if he divorces his wife, provide for her to the best of his means.

A participant stated that women provoke rape by parading about half naked, such an attitude is unheard of in a true Islamic state therefore society has to bear the consequences. Also commenting on the offence of rape and its proof, he stated that where the offence is not established, the woman is not punished but if found guilty (that is there was consent on her part) she will be stoned to death or given 100 strokes of the cane this is quite just.


Commenting on the presentation, a participant remarked that international laws and instruments still discriminate against women. African culture needs to acknowledge the fact that human rights are universal. The provisions in the African charter to uphold tradition and culture contradicts women’s rights, and its protocol on women’s rights did not take care of the peculiarities of women’s rights. She also noted the need to take another look at the aspects of the Shari’a that have been generating controversy. To buttress her point, she quoted Mohammed Bello of the old Sokoto caliphate who asserted that the state should examine economic and social conditions of people and review Shari’a continually, emphasizing aspects that have become important and shelve, for the mean time, aspects that have become less important. The state should ignore the letters of the law if the occasion so demands.

Some other observations from the participants were that Islam does not believe in universalism, and that there is need for caution when using words by the Moslems so as not to incite. Also the mode of evidence as regards to rape in Islam should not be applied in all cases. Moreover there is need to acquaint the populace with the principles of Shari’a to correct the current misconceptions.

Still on the universality of human rights, it was noted by a participant that societies differ and these differences affect what is supposed to be human rights for that society. Human rights cannot be universal and according to him the concept should be discarded because it would get the world nowhere.
Some of the participants also disagreed with the view that women provoke rape because even babies and tender children were being raped. Men she stated should learn how to restrain themselves instead of claiming that a woman provoked the rape by the way she was dressed.

Another participant however remarked that he would not dismiss the concept of universality of human rights because of our diversity and culture. There are things that are basic and natural to all human beings. All should respect certain values. However, he stated that although there ought to be a universal, one has to ask whether what we have now is truly a universal. Muslims doubt whether this universal represents their values. The question human rights activities should be asking themselves is how to make what is on the ground universal. Apart from Muslims, some other people may as well have reservations about the content of the international instruments.

Commenting on cross-cultural issues as raised in the paper by the presenter, he stated that the cultures in the present political setup of the world are not equal. There is hierarchy everywhere, and this hurts women and other disadvantaged persons.
THEME 3

Implementation of Shari’a Penal Law and Justice System in a Constitutional Democracy
“The substantive Shari’a criminal law as embodied in the Shari’a penal code laws of the Shari’a states of northern Nigeria in view of the provisions of section 36[8] and 12 of the 1999 constitution could be legally justified. However, when one carefully analyses the conduct of the criminal proceedings by the lower courts, especially in cases of adultery or fornication [zina] and other huudud related offences, the performance of such courts is not encouraging. This is because the courts tend to disregard rules of procedure and evidence as provided even under Islamic law….

INTRODUCTION

The task of this paper is not a small one; it is indeed a very difficult one for that matter. This is so, in view of the fact that some sort of judgement is expected to be passed on the performance of Shari’a courts in the implementation of Shari’a penal laws in Northern Nigeria. Everyone knows that the application of Shari’a penal laws in some states of Northern Nigeria about three years ago since the inception of the present democratic regime of president Olusegun Obasanjo has generated a lot of debate, criticisms, and condemnation by some human rights activists both within and outside Nigeria on one hand. While on the other hand the issue received considerable support of a vast spectrum of Muslims both within and outside the country. Notwithstanding, this paper will make an attempt to discharge its task. In order to achieve the objective of this paper, it is important to state here that for the purposes of this presentation, lower courts means Shari’a courts, higher Shari’a courts, and upper Shari’a Courts. However, where necessary, reference would be made to decisions or judgments of the Shari’a court of Appeal for fair and equitable assessment of the performances of the said lower courts. Furthermore, the paper would first identify and briefly comment on the various legislations made by some states of northern Nigeria towards an effective implementation of the Shari’a penal laws, then the
lower courts or Shari’a courts established are going to be examined briefly, especially on their jurisdiction and grades, law to be administered, qualification of the judges, and the practice and procedure.

Thereafter, the paper is going to examine some decided cases by the lower courts especially cases that touch on “Women’s Rights”. Consequently, general observations and comments would be made on the issues raised by those decided cases and some of the problems that militate against the smooth implementation of the Shari’a penal laws. In short this paper hopes to examine the performance of the lower Shari’a courts in the implementation of Shari’a penal laws in Northern Nigeria, and to proffer suggestions on how some of the problems identified and associated with the implementation, especially as they touch “Women’s Rights”, could be remedied and amended for just administration of the Shari’a criminal justice system in Nigeria.

**THE ZAMFARA STATE EXAMPLE**

On the 12th day of July 1999, the Governor of Zamfara state, Alh. Ahmed Sani constituted an 18-member law review committee with the following terms of reference.¹

- a) To examine and review all existing laws and edicts with a view to conforming with the traditions, cultures, values, and norms of our society,
- b) To examine and review the administrative structures and control of the Shari’a courts in the state,
- c) To facilitate the effective administration of justice.

On the 4th day of Oct 1999, the committee submitted its reports and the highlights of its recommendations were:²

- a) That the committee considered sections 10, 33, 34, 38 and 277 of the 1999 constitution and found that Shari’a law can be fully enforced without violating or offending its provisions.
- b) Where an accused person or a suspect is a Muslim, Islamic criminal law shall apply and this will include
  - i. Defamation (*Qadhf*)
  - ii. Drinking of alcohol (*shurb al-khamr*)
  - iii. Adultery or fornication (*zina*) etc.
- c. Islamic courts should be established for the state to have jurisdiction over Muslims only.

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² Journal of Muslim forum, Faculty of Law, A.B.U. Zaria, Vol. 2 2000 p. 27.
d. Administrative control of the courts should be left with the state chief judge.

Subsequently, the Zamfara state Government published a white paper on the Review Committee’s Report and it accepted among others the following:

a) To implement Shari’a fully since no provision of the 1999 constitution will be violated.

b) To review all the existing laws of the state and revise, amend, or modify those that do not conform with Islamic law traditions and tenents

c) That Shari’a law shall apply only to Muslims,

d) To create two courts, that is, lower Shari’a courts and upper Shari’a courts.

Thus, the Governor of Zamfara state in conjunction with the state House of Assembly, pursuant to the above reports and government decision thereof, passed into law several legislations (herein after called Shari’a legislations), which provide for the effective implementation of Shari’a penal law in the state by the Shari’a courts. In fact, these Shari’a legislations later became a subject of adoption by other Shari’a states in Northern Nigeria. The highlights of some of the said Shari’a legislations are now to be stated and briefly examined.

SOME RECENT SHARI’A LAW LEGISLATIONS

In line with the above white paper, Zamfara State enacted into law some legislation for the smooth and effective implementation of Shari’a Penal Law in the State. These legislations include:

a) Shari’a Courts (Administration of Justice and Certain Consequential changes) Law No. 5, 1999

This Law provides for the establishment, composition, and jurisdiction/grades of Shari’a courts, and makes general provisions for the administration
and implementation of Islamic Law in the State. Also this law provides for the practice and procedure including rights of legal representation by lawyers.

b) Shari’a Court of Appeal Amendment) Law No. 6, 2000\(^5\)

This law provides for the jurisdiction of the Shari’a Court of Appeal to hear and entertain appeals from the decisions of the Shari’a courts in both civil and criminal matters decided on Islamic Law.

c) Area Courts (Repeal) Law No. 13, 2000\(^6\)

This law mainly repealed the Area Courts Law in the state and makes transitional provisions for the take off of Shari’a courts.

d) Shari’a Penal Code Law. 1999\(^7\)

This law provides for the substantive Shari’a Penal Law and or criminal law to be applied in the state in cases involving Muslims only. It can broadly be divided into four parts creating several offences and their punishment in a defined way as required by the provision of section 36 (12) of the constitution of the Federal Republic of Nigeria 1999. Equally, this Law was never made to take effect retrospectively, so it was in line with the constitutional provision of section 36(8) of the 1999 constitution of Nigeria.

Then first part deals with preliminaries, such as general explanations and definition, criminal responsibility, punishments, and compensation, joint acts, abetment crimes and conspiracy.\(^8\) The second part provides for *Huudud* and *Huudud* Related offences such as Zina (adultery or fornication), Rape, sodomy, incest, lesbianism, false accusation of zina (*Qadaf*), Acts of gross indecency, theft (*sariqah*), robbery (*Hirabah*) Drinking alcoholic drinks (*shurb al-khamr*) etc.\(^9\)

The third part covers *Qisas* and *Qisas* related offences. It provides for offences against life and human body such as culpable homicide, that is, intentional and unintentional homicide, causing miscarriage, injuries to unborn children, exposure of infants, cruelty to children, concealment of

\(^5\) See Shari’a Court of Appeal (Amendment) Law NO. 13 2001, Kaduna State. Note-Jigawa State is yet to make a similar amendment.

\(^6\) See also Area courts (Repeal) Law No. 11, 2001 Kaduna State.

\(^7\) See also saharia Penal Code Law, 2002, Kaduna State and Shari’a Penal Code Law No. 12, 2000, Jigawa State etc.

\(^8\) See for example Chapters i – vii of the Kaduna State Shari’a Penal Code Law 2002 (SPCL) and sections 1-124 of the same SCPL.

\(^9\) See Chapters viii and sections 125 to 197 of SPCL Ibid.
births; hurt and grievous hurt, criminal force and assault, kidnapping, abduction and forced labour. It is also under this part that some offences for the protection of women are clearly provided, such as procuration of minor girl or woman, importation of girl or woman, traffic in women etc.\textsuperscript{10} Finally part four of the Shari’a penal code law creates Ta’azir offences. The offences here constitute the bulk of the Shari’a penal code; It covers offences like criminal intimidation, forgery, wrongful restraint, wrongful confinement, property and other marks, criminal breach of contract of service, breach of official trust, offences against the public peace, offences by/or relating to public servants, contempt of the lawful authority of public servants, false evidence, and offences relating to the administration of justice, screening of offenders, resistance to arrest and escape, fraudulent dealings with property, miscellaneous offences, public nuisance, vagabonds, mischief, cruelty to animals, offences relating to religion, and offences relating to ordeal, witchcraft and juju\textsuperscript{11}. There are however some offences punishable by Ta’azir but generally stated under the Huudud related offences, such as extortion, criminal misappropriation, criminal breach of trust, receiving stolen property, cheating, and criminal trespass.\textsuperscript{12}

Huudud offences mean offences and/or punishments that are fixed under Shari’a and include offences or punishments in section 126 to 141 of the Shari’a penal Code. Qisas means punishments inflicted upon the offenders by way of retaliation, or payment of Diyya (i.e. compensation) for causing death of or injuries to a person.\textsuperscript{13} Ta’azir denotes any punishment applied or fixed by the state in which discretion is given to the judge for an offence, the punishment of which is not specified or fixed by the Holy Qur’an or traditions of the Holy Prophet.

e) Shari’a Criminal Procedure Code Law no. 18, 2000\textsuperscript{15}

This Law was enacted to provide for the rule of procedure to be followed and applied by the Shari’a courts established in the state and vested with powers and jurisdiction among others in criminal cases involving

\textsuperscript{10} See Chapter ix and sections 198 to 238 SPCL. Ibid.
\textsuperscript{11} See Chapter X and sections 239 to 409 SPCL. Ibid.
\textsuperscript{12} See Sections 155 to 197 SPCL. Ibid.
\textsuperscript{13} See Section 1, Shari’a Criminal Procedure Code Law No. 18, 2000, Zamfara State.
\textsuperscript{14} See Section 57, Shari’a Penal Code Law, 2002 Kaduna State.
\textsuperscript{15} See also Shari’a Criminal Procedure Code Law No. 7 2000, Jigawa State and the Shari’a Criminal Procedure Code Law, 2002, Kaduna State.
Muslims as provided under the Shari’a penal code law. The Law provides for the constitution and powers of Shari’a criminal courts; arrest and processes, means to secure the production or discovery of documents or other things, and for the discovery and liberation of persons unlawfully confined; the prevention of crime, information to the police and their powers to investigate. The Law also covers proceedings in prosecution such as place of trial sanctions necessary for the initiation of certain proceedings, initiation of judicial proceedings before Shari’a courts. There are also provisions on trials and other judicial proceedings before Shari’a court, charges, previous convictions, general provisions as to trials, and other judicial proceedings in Shari’a courts and judgement. Similarly, it caters for proceedings subsequent to judgement such as Appeal Review, and execution. Again, there are provisions on special proceedings like offences affecting the administration of justice, persons of unsound mind, proceedings relating to corporations. Under the supplementary provisions, the law provides for the compounding of offences, bail, disposal of property, miscellaneous and irregular proceedings. This law definitely if properly observed and applied by the Shari’a courts conducting criminal proceedings for Shari’a penal law would ensure justice and equity to both the complainant and the accused. It safeguards the rights of the accused as done by any code of criminal procedure in the country.

It is to be observed here that the above-cited Shari’a legislations constitute the most important laws for the implementation of Shari’a penal laws in northern Nigeria where Shari’a Penal Law is being applied. Hence, it can be said that the Shari’a penal code law becomes the substantive criminal law for the Muslims in the Shari’a states as it has incorporated virtually all known Islamic Law offences. While the Shari’a criminal procedure code law becomes the procedural law to be observed and enforced by Shari’a courts in conducting criminal proceedings. These two codes, namely Shari’a Penal Code and Shari’a Criminal Procedure Code are extremely important for the assessment of the performance of Shari’a courts in implementing Shari’a Penal Laws in Northern Nigeria, hence the need to expatiate a little further on their provisions.16 The efficacy of criminal justice system under any legal system, including Islamic law is hinged on the quality of procedure it lays for the achievement of justice. This security can only be measured by

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16 The Northern States that do implement Shari’a criminal justice system and enacted the earlier identified Shari’a legislations and commonly called ‘Shari’a States’ in this paper are: Zamfara, Sokoto, Kebbi, Kano, Jigawa, Katsina, Yobe, Borno, Bauchi, gombe, Kaduna and Niger State. However, Niger State adopted a different approach from the rest of the states in the legal reforms.
the means of the sustenance of the subject’s or person’s rights to life, respect for the dignity of his person, personal liberty, private and family life, freedom of thought, conscience and religion, protection of his property, honour or reputation and intellect. This makes the law to hold man responsible for his deeds and utterances. Hence where a man intrudes upon the rights of others, it then becomes necessary to have a deterring means to curb these excesses. Islamic criminal law therefore serves this purpose, in which justice is ensured for both accused persons and the complainants or the victims.17

THE SHARI’A PENAL CODE LAW OF ZAMFARA STATE
This code defines offences under Shari’a Criminal justice system. All Muslims are bound by it. Thus section 3 of the code provides that:

“Every person who professes the Islamic faith and or every other person who voluntarily consents to the exercise of the jurisdiction of any of the Shari’a courts established under the Shari’a courts (Administration of justice and certain consequential changes) Law, 1999 shall be liable to punishment under the Shari’a penal code for every act or omission contrary to the provisions thereof which he shall be guilty within the state.”

Chapter I of this code is a kind of introductory chapter in that it makes provisions for General explanations and definition. According to section 7 of this chapter, ‘Court of Justice’ includes every civil or criminal court established by any Act or Law or deemed to be so established and every person or body of persons exercising judicial functions in the state by virtue of any Act or law in force in the state.”

Again this chapter provides clarification on other number of issues; for example, Zina means adultery and fornication, even though their punishment varies. Rajm means the penalty of stoning or pelting to death of a Muslim convicted for the offence of zina, while Taklif is the age of attaining legal and religions responsibilities. This chapter contains a host of other definitions, which might not be easily reflected in this paper.

Chapter VIII of the Zamfara State Shari’a Penal Code Law, 2000 defines *Hudud* and *Hudud* related offences. One of the most important offences under this chapter and which touches on women’s right is the offence of *Zina* (Adultery or fornication).

Thus, section 126 defines *Zina* as “Whoever, being a man or a woman fully responsible and of Islamic faith, 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 offence of *Zina*.”

Then section 127 provides for the punishment of *zina* as:

“Whoever commits the offence of *Zina* shall be punished:

(a) With caning of one hundred lashes if unmarried and shall also be liable to imprisonment for a term of one year, or

(b) If married, with stoning to death:

It is the provision of this Shari’a penal code that the Shari’a (lower) courts do implement in the administration of Islamic criminal Justice system in the Shari’a states of Northern Nigeria. The provisions of this code are strictly made in conformity with the injunctions of the Holy Qur’an traditions for the Holy prophet and other sources of Islamic Law. The next issue to be examined is the classes, grades, jurisdiction and composition of Shari’a courts vested with criminal jurisdiction.

**SHARI’A COURTS VESTED WITH CRIMINAL JURISDICTION**

According to the provision of section 3(1) of the Shari’a courts law 1999 Zamfara State, three grades of Shari’a courts were established in the state. They are; Shari’a court, higher Shari’a court and upper Shari’a. A Shari’a court shall be properly constituted if presided over by a single Shari’a court Alkali. However, if it is an upper Shari’a court, then it can be properly constituted by a single Alkali, sitting alone in its original jurisdiction but if it sits in its appellate jurisdiction, an upper Shari’a court can only be properly constituted by at least two Shari’a court Alkali for the hearing and determination of the appeal.

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18 See also Section 3(1) Shari’a courts Law, No. 7, 2000, Jigawa State.
19 See S. 4, Shari’a courts Law, 1999 Zamfara State. But in Jigawa State, Upper Shari’a court sitting in appellate jurisdiction can only be constituted by at least three alkalis. See S.4(1) & (2) Shari’a courts Law No.7, 2000, Jigawa State.
Concerning the jurisdiction of Shari’a courts, the law establishing the courts provides for three types of jurisdiction all, however, subject to the provisions of the constitution. Thus, Shari’a courts are vested with jurisdiction and powers to hear and determine both civil and criminal cases and matters in Islamic Law. Section 7 of the Shari’a Courts law of Zamfara State provides for two sets of persons subject to its jurisdiction. The first and without any condition is any person professing Islamic faith. The second, but subject to his written consent and same recorded in the proceedings, is any other person(s) who do not profess the Islamic faith but who voluntarily consent to the jurisdiction of the court.

The problem with this subsection is that where parties are not of the same faith in either civil or criminal matters Shari’a courts are likely to face difficulties especially when one insists that his matter must be determined by Shari’a courts and the other object to that.

For example, in a case involving inheritance, where deceased happens to be a Muslim, three of his children are Muslims while one is not. The children who are Muslims took the one who is not a Muslim before a Shari’a court for withholding the estate of their late father. Certainly the Shari’a courts will have difficulty in solving this case if the one who is not a Muslim refuses to consent to its jurisdiction, and since the matter is that of Islamic personal law, no any other court has jurisdiction to determine it. If the deceased died as a Muslim, save a Shari’a court.

Again, in a situation where a Muslim commits an offence against a non-Muslim in a Shari’a state where the provisions of the Shari’a penal code law applies on every Muslim, and the police that investigating the matter files an FIR against the Muslim before a Shari’a court, but the non-Muslim complainant at the police station objectes to the trial of the case by the Shari’a court and the Muslim insists on being tried by Shari’a court under Shari’a penal code law, how can the problem be resolved?

Generally, the law, practice and procedure of Shari’a courts shall be as prescribed under Islamic Law comprising the primary sources, namely the Holy Qur’an and traditions of the Holy Prophet and the secondary sources, such as Ijma (consensus of Muslim jurists) Qiyas (Analogy) etc.

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20 See section 5(1), (2) and (3), Shari’a Courts Law, 2000 Jigawa State.
21 Section 7 Ibid.
22 This issue was raised by the Hon. Upper Shari’a court Judge, Zaria City, Kaduna State, Alh. Tanimu Umar in our verbal discussion on the issues.
23 It may be suggested here that, Shari’a states should reconsider this section of the law and possibly create another tribunal vested with jurisdiction to resolve this type of conflicts.
The Shari’a Courts are also to be bound by the provisions of Shari’a criminal procedure code law of the state in criminal matters and any civil procedure rules made for the courts in the state concerning civil proceedings.\textsuperscript{24} Thus, the law to be administered in criminal and civil cases in Kaduna State shall be Islamic law and the provisions of any written law, which the court may be authorized to enforce by any order made pursuant to the Shari’a courts law of the state.\textsuperscript{25}

In order to ensure fair hearing and equal opportunity for parties to prosecute and defend their cases, the Shari’a courts law permits legal practitioners to appear before Shari’a courts. Hence, section 10(3) of the Jigawa Shari’a courts law provides:

\begin{quote}
\textit{“Every person who is charged with a criminal offence before a Shari’a court shall be entitled to defend himself in person or by a legal practitioner of his choice.”}\textsuperscript{26}
\end{quote}

This provision and the one provided under the Shari’a criminal procedure code law do clearly show that the rights of accused persons are adequately protected in criminal proceedings.

Under the Shari’a criminal procedure code law, Shari’a courts vested with criminal jurisdiction are stated as follows: the Shari’a court, Higher Shari’a Court, Upper Shari’a Court and Shari’a court of Appeal.\textsuperscript{27}

It is trite that in trying criminal cases, Shari’a courts must be bound by the Shari’a criminal procedure code. This is supported by the provisions of section 4 (1) and (3) of the Zamfara State Shari’a Criminal Procedure Code Law.

Section 4(1) reads:

\begin{quote}
\textit{“All offences under the Shari’a penal code shall be investigated, inquired into and otherwise dealt with according to the provisions contained in the Shari’a criminal procedure code.”}
\end{quote}

And Section 4 (3) says:

\begin{quote}
\textit{“In any matter of a criminal nature a Shari’a court shall be bound by the provisions of this Shari’a criminal procedure code.”}
\end{quote}

\textsuperscript{24} Section 6 and 10, Shari’a Courts Law, No. 7 2000 Jigawa State, Shari’a Courts are also to administer Shari’a penal code law in criminal matters.

\textsuperscript{25} Section 24, Shari’a courts law No. 11, 2001, Kaduna State.

\textsuperscript{26} See also section 194, Shari’a Criminal Procedure Code Law, No. 18, 2000, Zamfara State. It permits legal practitioner right to appear in Shari’a courts in accordance with the provisions of the legal practitioners Act, 1990.

\textsuperscript{27} Section 4 of Chapter 4 Shari’a Criminal Procedure Code Law, 2000, Zamfara State.
The powers of Shari’a criminal courts are provided in section 12(1) of the Shari’a criminal procedure code, Zamfara State. It says that subject to the other provisions of this code, any offence under the Shari’a penal code, may be tried by any Shari’a court by which such offence is shown in the sixth column of Appendix A to the table. Again, section 12(2) of the same code say that ‘any offence under the Shari’a penal code may be tried by any Shari’a court by which such offence is shown in the seventh column of Appendix A with greater powers. Thus, by the provision of section 14 of the criminal procedure code, the Upper Shari’a Court is empowered to pass any sentence authorised by law. Therefore, only upper Shari’a court has jurisdiction to pass death sentence and sentence of amputation of hands of a convicted thief.

As regards the qualification of the Shari’a court judges, they need not be qualified legal practitioners. However they must be learned in Islamic law and in some states, they do require that they should possess a minimum qualification of Diploma in Shari’a law or its equivalent. Again, a Shari’a court judge shall be a Muslim, male, sane and possess an impeccable character.28

Whoever is dissatisfied with the decision of a Shari’a court or Higher Shari’a court may appeal to the Upper Shari’a Court sitting in its appellate jurisdiction and appeals from the upper Shari’a court in criminal matters shall fall to the Shari’a court of Appeal of the State.29

However, in Jigawa State, there is a slight difference with regards to appeals from upper Shari’a courts. Section 245 of Jigawa State Shari’a criminal procedure code law seems to have curtailed the right of appeal of a person dissatisfied with the decision of the Upper Shari’a Court in criminal matters.

It provides that:

“Appeals from the Shari’a courts in criminal matters shall lie to the Upper Shari’a Court and the decision of the Upper Shari’a Court shall be final.”

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28 See S. 7 (1) and (2), Shari’a Courts Law No. 11, 2001, Kaduna State.
29 Sec. 242 (2) (a) and (b), Shari’a criminal procedure code law, 2000, Zamfara State. See also section 240 (2) & (b) Shari’a Criminal Procedure code law, 2002 Kaduna State.
Contrary to the above, in Zamfara State appeals from the Upper Shari’a Court in criminal matters shall lie to the Shari’a Court of Appeal.\textsuperscript{30}  
In the final analysis it can be seen that, Shari’a courts vested with criminal jurisdiction have adequate enabling legislations for the implementation of Shari’a penal laws in Shari’a States of Northern Nigeria.

AN EXAMINATION OF SOME DECIDED CASES BY SHARI’A COURTS.

As earlier stated, Shari’a Penal Code Law of the Shari’a states can broadly be divided into four parts namely: preliminaries, \textit{Hudud} and \textit{Hudud} related offences, \textit{Qisas} and \textit{Qisas} related offences and \textit{Ta’azir} offences. The most relevant part of the Shari’a Penal code for this paper is \textit{Hudud} and \textit{Hudud} related offences because they directly touch on the women’s rights in one way or the other.

HUUDUD AND HUUDUD RELATED CASES

Hudud offences under the Shari’a penal code law are many. However, the one that has received serious attention of Human Rights Activities and organisations in Nigeria and elsewhere is the offence of \textit{Zina} (Adultery or fornication). Now let us look at some important cases decided by Shari’a Courts for the offence of \textit{Zina}.

\begin{enumerate}
\item[a)] Commissioner of Police Sokoto State - Complainant and  
\item 1. Yakubu Abubakar Tungar Tudu - Accused persons.\textsuperscript{31}  
\item 2. Safiyyatu Hussaini Tungar Tudu}  
\end{enumerate}

This case was decided by Upper Shari’a Court Gwadabawa, in Sokoto state as the court of first instance. It was presided and decided by Hon Judge. Muhammed Bello Sanyinnawal. The case commenced on 3/7/2001 and judgment was delivered on 9/10/2001. The offence charged against the two accused persons by the complainant was for \textit{zina} (i.e. adultery or fornication) contrary to section 128 and punishable under section 129 of the Sokoto State Shari’a Penal code Law, 2000.

\textsuperscript{30} See Section 247 of Zamfara State Shari’a Criminal Procedure code law, 2000; See also s. 245, of Kaduna State, Shari’a Criminal Procedure Code Law, 20002.  
\textsuperscript{31} (Unreported) Case No. USC/GW/CR/F1/10/01, judgement delivered on 9/10/2001.
Facts of the Case
On the 3/7/2001, the accused persons were arraigned before the upper Shari’a court Gwadabawa Sokoto State by the complainant on First information Report (F.I.R) alleging that on 23/12/2000 at about 2.00 pm., the police got an information that Safiyiyatu Husaini (i.e. the 2nd accused) had illegal sexual intercourse with Yakubu Abubakar (i.e. the 1st accused) which resulted into the unwanted pregnancy and later delivery of a child by the 2nd accused. Both accused persons had been married before. Thereafter the police arrested them and after their investigation, filed this complaint against them for the offence of zina contrary to sections 128 and 129 of Sokoto State Shari’a Penal Code Law 2000.

The F.I.R. was read over to the accused persons, whereof, the 1st accused denied committing the offence of zina with the 2nd accused while the 2nd accused “confessed” the commission of the offence in her words.

“Yes it is true that Yakubu Abubakar had sexual intercourse with me and impregnated me. I later delivered a girl six months ago.”

The police prosecutor, Sgt Idris Abubakar was called upon by the trial upper Shari’a to produce witnesses to prove the allegation against the accused persons, more especially the 1st accused who denied committing the offence of zina. The trial court then granted the accused persons bail pending the determination of the substantive case.

The prosecution called four witnesses, two civilians namely Abdullahi Tungar Tudu as Pw1, Attahiru as Pw2 and two policemen, to wit: - Cpl. Aliyu Yusuf as Pw3 and Pc. Joseph U. T. as Pw4. In their testimonies, both Pw1 and Pw2 said that the 1st accused confessed in their presence, and to their hearing to having sexual intercourse with the 2nd accused three times.

The trial court gave opportunity to the 1st accused to cross-examine and or challenge the testimonies of the said Pw1 and Pw2. However, the 2nd accused person was not given similar opportunity granted to the 1st accused (presumably because according to the understanding of the court she had confessed the commission of the offence).

When Pw3 and Pw4 testified for the prosecution, they all stated that the policemen who investigated the alleged offence of zina by the accused persons went to Tungar Tudu village and invited the accused persons for investigations. During the interrogations, the 2nd accused i.e. Safiyiyatu contested or stated that she was impregnated by the 1st accused person. But

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294 See the Record of proceedings of the trial court English Translation Ibid P.2.
the 1st accused in his response to their question on the alleged offence, denied having any sexual intercourse with the said Safiyyatu.\textsuperscript{33}

Subsequently, the trial court gave opportunity to the 2nd accused person to cross-examine and/or challenge the testimonies of the said Pw3 and Pw4. The 1st accused was equally given similar opportunity granted to Safiyyatu.

The trial court then called upon the two accused persons to make any statements they wanted before judgement was passed. The 1st accused restated his denial of committing sexual intercourse or zina with the 2nd accused. While the 2nd accused in her statement maintained that it was the 1st accused who impregnated her. Thereafter the court asked Safiyyatu as to when was she divorced last? How many times she had sexual intercourse with the 1st accused that resulted into her pregnancy.? The 2nd accused said that she was divorced 2 years ago.

However, before preparing charge, the court took what it called ‘evidence of admission’ of the 2nd accused. This is what the 2nd accused said in the presence of two male witnesses in the trial court.

\textit{“For my knowledge it is Yakubu’s water that entered and became pregnancy. Because after I left my husband’s house, I had 3 menstrual periods and I cleaned up before Yakubu Started reaching me.”}\textsuperscript{34}

The charge read and explained to the accused reads:

\textit{“I Mohammadu Bello Sanynnawal Upper Shari’a Court Judge Gwadabawa, I hereby charge you Yakubu Abubakar and Safiyyatu Husaini with offence of sexual intercourse in this case that is presented by police that you committed an offence of sexual intercourse, while you Safiyyatu got pregnant and delivered a baby, without being married, which is contrary to Shari’a law, section 128 in Shari’a Criminal procedure Code Law of 2000, Sokoto State, which is punishable under section. 129 (b), the punishment is death to any person committed of the same offence, he should be stoned to death.”}\textsuperscript{35}

\footnotesize{
\begin{itemize}
\item \textsuperscript{33} Ibid P. 5-6
\item \textsuperscript{34} Ibid P.7 the witnesses of Admission of Safiyyatu in the trial court were Alh. Mode and Sarkin Fawa Duka-see Ibid P. 7-8.
\item \textsuperscript{35} Ibid P. 8
\end{itemize}
}
When the two accused persons told the court that they didn’t understand the charge, then the court went to tell them the meaning of the said charge as follows:

“What it meant by charge is that the court is suspecting you having sexual intercourse, which if proved, your punishment will be death by stoning you to death, because you are all Muslims and both have been married before.”

Consequently, the two accused persons said that they have understood the charge and the trial court called upon each one of them to show any defence, which could prevent the court from convicting them with stoning to death.

Thereafter the trial court convicted the 2nd accused person for the offence of *zina* punishable by stoning to death as provided under section 129(b) Shari’a Criminal procedure code law of Sokoto State.

Finally, in his judgement, the trial upper Shari’a court judge held thus:

1. The prosecution witnesses didn’t prove the offence of *zina* against the 1st accused and therefore, the prosecution has failed, to prove the allegation against the 1st accused.
2. ‘The 2 first witnesses of the prosecution against Yakubu Abubakar who testified to prove that he committed the offence, their evidence could not satisfy the court to convict him for the offence of sexual intercourse, because the 2 last witnesses did not witness the act, because the offence of prohibited sexual intercourse can be proved by pleading guilt of getting evidence of 4 persons or the evidence of pregnancy physically as said in Risala P. 5. 92.’
3. The 1st accused person has the right under Shari’a to retract his admission and change his plea. If the accused changed his plea of guilty, (as done by the 1st accused), the punishment cannot be enforced. Thus, the 1st accused will be discharged and acquitted.
4. The 2nd accused Safiyyatu Husaini has pleaded guilty of the offence of prohibited sexual intercourse, she got impregnated and delivered. She once got married before divorce. Therefore, she has been convicted and sentenced to death by stoning.
5. Safiyyatu Husaini Tungar Tudu shall be stoned to death till she dies. Her execution is stayed until she finishes breast-feeding her baby.

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36 ibid P. 9
37 ibid P. 9

Assessing the Performance of Lower Courts in the Implementation of Shari’a Penal Law and Justice System in Northern Nigeria
6. The convict shall be stoned to death in the presence of some Muslims as witnesses. She should be stoned on her back and front but not on her face and private part.

7. The bail of the convicted Safiyyatu was revoked but she was released and ordered to report herself to the court for execution after the breast-feeding.

8. Any aggrieved party has right of appeal to Shari’a Court of Appeal, Sokoto State within 30 days from today 9/10/01.

COMMENTS AND OBSERVATIONS

It is to be observed that the above decision of the trial upper Shari’a court brought into light some issues or questions on the implementation of Shari’a penal laws in northern Nigeria. It is shown that police can initiate and even prosecute Muslims before a Shari’a court for offences committed under Shari’a penal code law of a state. Similarly, the Shari’a court was faced with the problem of how to proceed with a case where one of the accused confessed the commission of a joint offence but the other denied liability, as in this case where Safiyyatu confessed committing zina with Yakubu Abubakar who on his part, denied committing the offence. The Shari’a court was also concerned with grant of bail of persons charged with offence punishable with stoning to death (i.e. capital punishment), as well as hearing or taking evidence in a criminal trial. Furthermore, issues of framing charges, its content and explanation, conviction, allocutus, and sentence or judgment were all touched by the above-decided case. What are the means of proof of the offence of zina, and how it’s discharged were equally raised in this case. Finally, it has been shown that execution of a death sentence can be stayed by the court suo moto if it found that the convict is a pregnant woman or a breast-feeding mother. Also there is right of appeal against the judgement of Shari’a court by any aggrieved party to Shari’a Court of Appeal of the state. Therefore, substantial issues of procedure and evidence or adjective law have great role to play in the merits or demerits of this case as we can see in the decision of the Shari’a Court of Appeal in this case later.

b) Commissioner of Police Katsina State) - Complainant

and

1. Amina Lawal
2. Yahaya Muhammed - Accused persons.38

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38 Unreported judgement of the Shari’a court Bakori, Katsina State. Case No. 9/2002 presided by Hon. Judge Alh. Nasiru Lawal Bello Dayi. The case was commenced on 15/1/02 and judgement delivered on 20/03/02.
This case was decided by Shari’a court Bakori, Katsina State. The accused persons were charged with the offence of *zina* contrary to section 124 of the Katsina State Shari’a Penal Code Law No. 2 of 2001.

**Facts of the Case**

The accused persons were arraigned before the trial Shari’a court Bakori on an F.I.R. by the complainant alleging that Amina Lawal and Yahaya Muhammad, both residing at Kurami village were suspected of committing the offence of *zina*, the police arrested the accused persons on 14/1/02 for committing the offence of *zina* for a period of eleven months (11).

The accused persons jointly committed *zina* which is an offence, which resulted in the pregnancy and delivery of a child by Amina Lawal. This is an offence under the Katsina State Shari’a Penal Code Law, 2001.

After reading the F.I.R. and the offence alleged, the 1st accused confessed that she had committed the offence of *zina* since she had delivered a baby girl about nine (9) days ago, that was on 8/1/02. She said that she committed the offence with Yahaya Muhammad, that is, the 2nd accused. The 2nd accused person denied committing the offence of *zina* with the 1st accused, but admitted befriending her for the period of eleven (11) months with the aim of marriage. It was after her delivery that he was arrested and detained at the police station and forced to admit committing the offence with her or else he was threatened with grievous hurt or injury.

The prosecutor told the court that he had witnesses to prove the allegation and the court adjourned the case for hearing, but the accused persons were sent to prison custody. In other words, the accused persons were not released on bail but rather remanded in prison custody till the adjourned date.

The prosecutor tendered in evidence the baby girl of 25 days old delivered of the 1st accused as proof of the offence of *zina* by the accused persons. When the court asked Amina Lawal whether she admitted that the baby girl in her hand was the product of her *zina*. She replied, yes, Yahaya, that is, the 2nd accused person deceived me with a promise of marriage for over eleven (11) months. But Yahaya denied having sexual intercourse with Amina Lawal. The court then said since, the 2nd accused admitted seeking the hands of Amina in marriage for a period of eleven (11) months, he should produce witnesses to show that he had never committed *zina* with the 1st accused. He told the court that he has no proof or witnesses. The Shari’a Court then requested him to take an oath of denial of the allegation.
of the offence of *zina* with the Holy Qur’an. The 2\textsuperscript{nd} accused took the Oath with the Holy Qur’an in the court and because of that the court accepted that he did not commit the alleged offence of *zina* with the 1\textsuperscript{st} accused. The court in its short ruling discharged the 2\textsuperscript{nd} accused person because of the oath made by him refuting the allegation of *zina*.

However, the court proceeded to prefer and read a charge against Amina Lawal for the offence of *zina* based on her confession in open court on 15/1/02 as well as the baby girl delivered by the 1\textsuperscript{st} accused tendered in evidence, before the court on 30/1/02. Thus, under Islamic Law of evidence admission is the best proof, and even better than witnesses. Therefore, the court was convinced and satisfied that Amina Lawal Committed the alleged offence of *zina*, and as she was a married woman before, there was a prima facie case against Amina Lawal. When the charge was read and explained to her, Amina Lawal said that she understood it and admitted the offence of *zina* as charged. Thereafter the first accused was granted bail and the case was adjourned for judgment on 20/3/02.

On 20/03/02, the trial Shari’a court convicted the 2\textsuperscript{nd} accused for the offence of *zina* based on her admission, the charge, and the baby girl delivered of her, tendered and admitted in evidence by the prosecution. This offence is contrary to Islamic Law, and as a Muslim, sane, and mature who once got married as she told the court, she would be punished as prescribed in the book of Risala and the Hadith of the Holy Prophet (SAW), that whoever commits *zina*, and was found to have once gotten married (*muhsin*) shall be stoned to death. Thus, by the combined effect of the provisions of the Holy Qur’an suratul Israel verse 32, the Risala, the Hadith of the Holy Prophet, the court found that it was the same with the punishment provided for the offence of *zina* under section 125(b) of the Shari’a penal code law, Katsina state. As for the 2\textsuperscript{nd} accused person, the court discharged him for lack of proof that he committed *zina* as well as the oath of denial of the offence, which estopped the court from convicting him. In Islamic law the offence of *zina* can be established or proved by three means, namely: confession of the accused, testimony of witnesses, and appearance of pregnancy in a woman who is believed not to be married.

After the conviction, Amina was asked if she had any thing to say before sentence, that is, allocutus. Amina replied that she had nothing to say save a plead for leniency and mercy. She told the court that her baby was only two months old, and would be weaned in 18 months. The trial Shari’a court in its judgment sentenced Amina Lawal Kurami to death by stoning as provided under section 125 (b) of the Shari’a penal code law of
Katsina state. The aggrieved party was given right to appeal to the Upper Shari’a Court, Funtua within 30 days from the date of the judgment. Meanwhile, the court released her on bail to be reporting to the court after every two weeks until she weaned her baby girl, and the court ordered for the stay of execution of the death sentence until Amina Lawal finished breastfeeding her baby girl on 20/9/03.

COMMENTS AND OBSERVATIONS

This case like that of Safiyyatu (supra) raised a number of issues. All the issues raised in Safiyyatu’s case apply also to this case. However, in addition, this case introduced the issue of giving oath to an accused person to enable him exonerate himself from conviction of the offence of zina even though the prosecution had not proved the allegation beyond any reasonable doubt. Similarly, the trial court refused to release the 1st accused, that is, Amina Lawal until few days to her conviction, though after her conviction she was granted bail, the condition was so tight and hard, which was that she must be reporting after every two weeks to the court for a period of 18 months. Another question to ask is whether the court had jurisdiction to pass the death sentence on the 1st accused, in view of the gravity of the punishment. It is also not clear in the Safiyyatu’s case whether the court had jurisdiction to sentence her to death under the Shari’a criminal procedure code law of Sokoto State.

It is our submission that the substantive Shari’a Penal Law, which provides for the punishment of zina, cannot be faulted by any body since it has been codified by the law of the State House of Assembly, but the procedure and evidence used by the trial Shari’a court Bakori is manifestly contestable especially on its jurisdiction.

(c) **AMINA LAWAL KURAMI** - APPELLANT

AND

THE STATE - RESPONDENT

This is the decision of Upper Shari’a Court; Funtua sitting in its appellate jurisdiction presided over by Alkali Alh. A. Abdullahi assisted by three other judges of upper Shari’a courts, namely, Alh. Umar Ibrahim, Alh. Bello Usman, and Alh. Mamuda Suleiman. This appeal was against

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the conviction and sentence of the appellant to death by stoning by the Shari’a
court Bakori, in case No. 9/2000. The appellant was represented by a team of
legal practitioners under the leadership of Aliyu Musa Yawuri. Other Lawyers
appearing with him were, Hauwa Ibrahim and Maryam Imhanobe. The
respondent was represented by Ismaila Ibrahim Danladi, appearing with was
him Babangida Shehu, both Katsina State counsels.

However, before hearing the substantive appeal, the counsels to the
appellant moved a motion-on-notice for the release of the appellant, pending
the completion of breast-feeding her baby, an order setting aside the order of
the trial court directing the appellant to be reporting herself to the trial court
pending the completion of breast-feeding the baby girl in her hand, and for
such further or other orders as the Hon. Court may deem fit to make in the
circumstances.

The Lawyers for the applicant as well as that of the respondent argued
the application citing authorities from the Qur’an and traditions of the Holy
Prophet as the Katsina State then did not enact Shari’a criminal procedure
code law for the Shari’a courts.

However Section 8 of the Shari’a Courts Law No. 5, 2000 of Katsina
State permits Shari’a courts to administer Islamic Law of Procedure and
evidence as provided in the primary and secondary sources of Shari’a whether
in civil or criminal matters, even if there were no Shari’a criminal procedure
code law in the state.

The Upper Shari’a court ruled in favour of all the prayers of the
appellant/applicant. The court also made an order restraining Shari’a court
Bakori from interfering with the case since it was pending on appeal before
it. The court released Amina Lawal to her guardian who undertook to bring
her to court after her breast-feeding or whenever the court so demands.

The appellant filed 12 grounds of appeal, attacking the judgment of
the trial shria court Bakori among other reasons, that Amina Lawal did not
confess the commission of zina as it was not explained to her and that the
Shari’a penal code law No. 2, 2001 Katsina did not become operational at
the time of the commission of the alleged offence. Also the appellant’s counsels
argued that the trial Shari’a court was not properly constituted when it heard
and sentenced the appellant, because by the provision of section 4(1) of the
Shari’a courts law, no. 5, 200 of Katsina State, the court could only be properly
constituted to hear this type of case by at least two-Shari’a court Alkalis. The
appellant’s counsel concluded their argument by citing Section 4 (8) of the
1999 constitution which provides that no criminal
offence shall be punished retrospectively under any law, and so urged the to
court to set aside the judgement of Shari’a court Bakori.

After hearing the reply by the State Counsel, the court in a lengthy
judgment rejected all the grounds of appeal and authorities cited by the
appellant on the ground that Amina Lawal had unambiguously admitted
committing the offence of *zina* and therefore, the court refused the appeal and
affirmed the death sentence by stoning earlier made by Shari’a court Bakori.
Amina Lawal was however released to her guardian to report to the court for
execution after breast-feeding the child. She was granted leave to appeal against
this judgment to Shari’a court of Appeal, Katsina state within 30 days from

**COMMENTS AND OBSERVATIONS**

Issues raised by this appeal are very fundamental. For example, it is
clear that lawyers are now allowed to appear before Shari’a courts to prosecute
and defend criminal cases. Equally, upper Shari’a courts can only be properly
constituted in its appellate jurisdiction by at least three-Shari’a court Alkalis.

Again, interlocutory applications pending appeal can as well be
entertained by upper Shari’a courts for the just determination of an appeal.

It is our humble view that the decision of the Upper Shari’a court to
refuse the appeal while affirming the death sentence passed on the appellant
by the trial Shari’a court Bakori was fundamentally wrong, erroneous and
contestable at the Shari’a Court of Appeal or any other appellate court with
jurisdiction to entertain the appeal from Upper Shari’a Court in criminal
matters in Katsina State. In view of the provision of Section 7 of the enabling
law enacting Katsina State Shari’a Penal Code Law, 2001 and section 4 (8)
of the 1999 constitution which all prohibit punishing an offence retrospectively,
the decisions of Upper Shari’a Court Funtua and that of Shari’a Court, Bakori
can not be regarded as correct and may probably be set aside on appeal later.

Again, this case has brought into light one of the major problems
associated with the implementation of Shari’a penal laws in Shari’a courts of
Shari’a states in northern Nigeria. Many states like Katsina delayed too long
without enacting the appropriate and enabling legislations for the smooth
conduct and application of Shari’a criminal justice system. For example, it is
clear from this appeal that Katsina State up to 19/8/02 has not passed
into law Shari’a criminal procedure code law for
the conduct of Shari’a criminal proceedings in Shari’a courts
This is the judgement of the Sokoto State Shari’a court of appeal against the judgement of the trial upper Shari’a court Gwadabawa in case No. USC/GW/CR/F/1/10/01, which sentenced the appellant to death by stoning for the offence of zina punishable under section 129 (b) of the Sokoto State Shari’a Penal code Law, 2000.

The Hon. Khadis that heard this appeal were: -
1. Hon. Al. Muh’d Bello Silome G/Khadi
2. Hon. Alh. Bello Muh’d Rabah - Khadi
3. Hon. AbdulKhadir S. Tambuwal - Khadi

The appellant was represented by a team of legal practitioners lead by AbdulKhadir Ibrahim Imam.

The appellant filed four original grounds and six additional grounds. The appeal was argued by A. I. Imam Esq. on behalf of the appellant. The highlights of the grounds of appeal by the appellant were:

1. That the upper Shari’a court Gwadabawa lacked jurisdiction to entertain this case and even pass judgement on it.
2. That the Upper Shari’a court Gwadabawa erred in law when it took the admission of the appellant without giving her the opportunity to defend herself or bring her witnesses.
3. That the charge framed by that court against the appellant did not explain what is Adultery (zina).
4. That the appellant was not given opportunity to defend herself by a counsel of her own choice as guaranteed by the 1999 constitution.

In summary, the issues raised and argued by the appellant’s counsel were about seven, but the most important ones were the issue on the court’s jurisdiction to hear and sentence the appellant in view of the fact that the Shari’a penal code law 2000 of Sokoto State was not in existence at the time of the alleged commission of the offence of zina. Secondly, it was argued that the alleged confession was not a confession in law because the appellant did not understand the nature, detail and essentials of the offence of zina as charged.
The Shari’a Court of Appeal in its considered judgment on 25/3/2002 allowed the appeal set aside the conviction and sentence of stoning to death of the appellant, and finally discharged and acquitted the appellant. The Shari’a court of appeal’s judgment held among other things as follows:

1. That the manner in which Saffiyatu was taken to court was wrong. It was not right for a leader to send for the arrest of a person suspected of committing the offence of zina. Therefore, the manner in which the police went to the house of Safiyyatu in order to get information to the effect that she committed zina was wrong and contrary to the principles of Islamic Law.

2. That by virtue of the provision of section 7 of the Shari’a penal code law of Katsina State, an act or omission committed by a person shall not be an offence nor shall it have retrospective effect under the provisions of this law, unless such an act or omission was committed on or after the commencement of this law. Therefore, whoever committed an act contrary to this law before it was signed into law and took effect could be punished for the offence.

3. That the upper Shari’a court Gwadabawa lacked jurisdiction to pass a judgment of stoning to death even if the offence had been committed by the appellant because when the offence was committed it was before the promulgation of the law of stoning to death.

4. That the provision of section 7 of the Shari’a penal code law of Katsina State 2001 was in conformity with the provision of section 36 (9) of the 1999 constitution of Nigeria which prohibits enacting criminal legislation in retrospect.

5. That the Shari’a Penal Code Law was the Law promulgated by the State House of Assembly for offences and their punishments, and also the Shari’a criminal procedure code which are in consonance with section 36(12) of the 1999 constitution.

6. That since Safiyyatu claimed that the child belonged to her former husband and that she was divorced 2 years ago, there was Shubha’ (i.e. doubt) to warrant the judgements of haddi on her. See Al-Mugnihi Abi Abdullahi Bn Ahmed Ibn Muahmmad Qudama Vol. 9 P. 52.
OBSERVATIONS, CONCLUSION AND RECOMMENDATIONS

It must be observed here that several issues were raised against almost all the cited decisions of the lower Shari’a courts in the implementation of Shari’a penal laws in northern Nigeria especially as it affected women. Generally speaking, the problems associated with the implementation of Shari’a penal law by Shari’a courts concerned not be substantive law of crimes and punishment but rather on the law of procedure and evidence as provided in Islamic Law. The substantive Shari’a criminal law as embodied in the Shari’a Penal Code Laws of the Shari’a states of northern Nigeria in view of the provisions of section 36 (8) and (12) of the 1999 constitution could be legally justified. However, when one carefully analyses the conduct of the criminal proceedings by the lower Shari’a courts especially in cases of adultery or fornication (zina) and other huudud related offences, the performances of such courts are not encouraging. This is because the courts tend to disregard rules of procedure and evidence as provided even under Islamic law; hence, on appeal to Shari’a court of appeal, such decisions hardly stand. The errors on procedure and evidence by the lower Shari’a courts can be seen mainly in areas of fair hearing, inadequate explanation of the nature and ingredients of the offence as charged to the understanding of the accused persons. The courts also do engage in rushed and inarticulate investigation of cases of alleged confession of adultery or fornication (zina) and the appearance of unwanted pregnancy on an unmarried woman. The courts ought to have cautioned themselves and investigated fully the circumstances of the pregnancy and the nature of the confession. Thus, the proof and means of proof of the offence of zina as seen in the decided cases pose serious challenges to lower Shari’a courts performance in the implementation of Islamic criminal justice system.

The question that one may require an answer to here is what are the causes of these problems associated with the implementation of Shari’a penal laws in Shari’a states of northern Nigeria since the past three years of its introduction? The causes may be many but some important ones could be identified as follows:

a) Long absence of the practical application of the substantive and adjectival laws of Shari’a criminal justice system in northern States of Nigeria since 40 to 50 years ago. Therefore, it is bound to have hitches on re-introduction now.

b) The persons appointed as judges or Alkalis of the Shari’a courts do not have enough practical experience on the conduct of criminal
proceedings under Shari’a especially as it affects Huudud and Huudud related offences.

c) Again, most, if not all the Shari’a court Alkalis are not trained legal practitioners and therefore seem to have difficulty in appreciating the constitutional provisions or requirements of fair hearing especially in criminal trials.

d) The absence of codified law on Shari’a criminal procedure and evidence in some states, even where they have such codified procedural and evidential laws, were not made well known to the judges. Therefore, the Shari’a courts judges were left with the struggle to read Islamic books of jurisprudence and law to be guided on how to conduct the criminal proceedings. Thus, the Shari’a court judges can be regarded as having inadequate knowledge and training on the procedure and evidence in criminal justice system.

e) Lack of political sincerity and will on the part of the state government to implement Shari’a penal laws as a result of pressure from the federal government as well as international and local human rights activities and organisations. Therefore, you find that many states that do apply Shari’a penal laws only recently signed into law the Shari’a penal code law and the Shari’a criminal procedure code law.

Conclusively, it can no doubt be said that the implementation of Shari’a penal laws by Shari’a courts especially relating to Huudud offences like zina face serious problems and challenges of various dimensions, especially as it concerns lack of proper and adequate training of the Shari’a court judges on Islamic law of procedure and evidence. Therefore, we recommend that the Shari’a implementing states should intensity efforts in training the Shari’a court Alkalis in institutions of higher learning in the country for effective performance and implementation of Shari’a penal laws in the states. Also, we must call on human rights activists and organisations to sponsor conferences and workshops for the Shari’a court judges where trained legal practitioners who are learned in Islamic law would present papers on how best the Shari’a courts could implement Shari’a penal laws with little or no violation of ‘human rights.’
APPLICATION OF THE SHARI‘A PENAL LAW AND JUSTICE SYSTEM IN NORTHERN NIGERIA: CONSTITUTIONAL ISSUES AND IMPLICATIONS

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“Nonetheless, for now the Shari’a as implemented in Nigeria is constitution compliant.”

INTRODUCTION

Like a thunderbolt, the issue of the Shari’a Criminal Justice System came into the limelight in the year 2000 after having gone to slumber since the late 1950’s with the advent of introduction of the Northern Nigerian Penal Code and the constant face-up between the pro-Shari’a and Shari’a antagonists as to whether or not the Shari’a, that is, Islamic personal law should be in the constitution of the Federal Republic of Nigeria. This was the focus of the debate in the 1977 – 78 and the 1988 -89 constitutional debates. The issue at the moment is no longer the existence of the Shari’a Court of Appeal or the Islamic Personal Law in the Constitution, but whether or not the recently introduced Shari’a Criminal Penal law is in conformity with the Constitution of the Federal Republic of Nigeria 1999.

This paper will attempt to explore the Nigerian Constitution (1999) with a view to determine whether or not the recent introduction of the Islamic Criminal Justice System into the Nigerian Legal System conform to, or is in conflict with the constitution, and the extent of such conflict, if any.

Shari’a Defined

The word Shari’a is an Arabic term, which literally means a road, that leads to a watering place. As for the Arabs, the word Shari’a has subsequently acquired the meaning of a straight path to a watering place. Since water brings about life and sound health, Shari’a, used in its technical sense, signifies

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other social aspects of life. The Muslims perceive it as an upright code that keeps man away from evil and deviation.\(^3\)

Shari’a is rooted in the religion of Islam. Islam simply denotes the total, complete and unalloyed submission to the will of Allah. The Muslims see shari’a as a synonym of Islam. In other words the two are the same and inseparable. Evidence of this exposition can be supported from the Qur’an. It says:

“…And we have sent down to you the Book (the Qur’an) as an exposition of every thing, a guidance, a mercy and glad tidings for those who have submitted themselves to Allah as Muslims.”\(^4\)

And elsewhere the Qur’an further states,

“O you who believe! Enter perfectly in Islam (by obeying all the rules and regulation of the Islamic religion) and follow not the footstep of Satan. Verily! He is to you a plain enemy”\(^5\)

All the verses quoted above reinforce the idea that a Muslim must obey all the rules and regulations of the Islamic religion (Shari’a) without any exception. Muslims are further forbidden from accepting some part of the Shari’a like the personal Islamic law and rejecting some parts like the Islamic criminal justice system. If the Muslims accept a part and reject some other parts, they will be condemned by Allah whom they worship. In this respect, the Qur’an states:

“…then, do you believe in a part of the scripture and reject the rest? Then what is the recompense of those who do so among you, except disgrace in the life of this world, and on the day of resurrection they shall be consigned to the most grievous torment. And Allah is not unaware of what you do.”\(^6\) (Emphasis supplied).

Such is the perspective of the Muslims on Shari’a and indeed the Islamic religion, no more, no less.

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\(^4\) Qur’an 16:89
\(^5\) 1bid 2: 285.
\(^6\) 1bid 2:208
A Brief History of Shari’a Criminal Law in Northern Nigeria

Prior to the British conquest and subsequent formation of the present entity called Nigeria, there existed the Shari’a legal system, the criminal justice system inclusive in the northern part of Nigeria. The legal system known to and applied in the erstwhile Sokoto Caliphate of northern Nigeria was deeply rooted in the Shari’a as a whole, “in much of the north” say Okonkwo and Naish there was the highly systematized and sophisticated Moslem law of crime.” But with the coming of the British into most parts of Northern Nigeria, they made several attempts to whittle down the efficacy of the Shari’a penal justice system. A significant and yet unsuccessful attempt was made in 1904 by the Lugard administration to introduce into northern Nigeria the British style criminal code, which was drafted by one of the most eminent English Criminal Lawyers, Sir James Fitztephen in 1878 for the United Kingdom, but it was never enacted by the British Parliament. Further efforts to eliminate the Islamic penal system were evident in the celebrated cases of Gubba vs. Gwandu Native Authority and Maizabo vs. Sokoto Native Authority.

Towards Nigerian independence, to be precise in 1958, the British took the final decision to abolish the Shari’a penal system by setting up a panel of jurists under the Chairmanship of Sayyad Abu Ranat, the Chief Justice of the Sudan who recommended a Penal Code based on the Sudanese Code which was later scrutinized by a committee of Muslim jurists presided over by Mallam Junaid Waziri of Sokoto. Thus, the northern Nigerian Penal Code was passed into law by the legislature on September 26, 1959, thereby expunging the Shari’a Criminal Justice System, a state of affairs that had received no favour at all from the Muslims of northern Nigerian. Even the passage of the bill into law was not without considerable teeth of opposition from the Muslim side. The antagonism against the penal code had continued since then, not until when in 1999 an opportunity lent itself with the return of democracy in Nigeria. Therefore the issue of the Shari’a criminal code as it exists today should be understood as representing the yearnings and aspirations of the Muslims in northern Nigeria, dating back.

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8 (1947) 12 W.A.C.A. 141
9 (1957) NRNL 133
11 (1961) 24 M.L.R. 616 at p. 617
to the invasion and conquest of the region by the British colonial imperialists, as opposed to perhaps the wishes of some overzealous politicians.

**The Shari’a Penal Code**

The Shari’a Penal Code was first re-introduced into northern Nigeria in Zamfara State by His Excellency, Governor Ahmed Sani in the year 2000. Thereafter, other State Governors of Yobe, Kano, Katsina and Kaduna followed suit. In summary the Shari’a penal code may be divided into two parts, that is, *Huudud* Offences on the one hand, and *Ta’azir* offences on the other. *Huudud* literally means a bar that separates. Technically, it stands for the punishments that are specified in the text of Qur’an and Sunnah. Examples of the *Huudud* offences are: Adultery or fornication, rape, sodomy, incest, lesbianism, bestiality, false accusation of adultery, theft, consumption of alcoholic drink, robbery, to mention but a few, *Ta’azir* on the other hand literally means aid or help. It’s technical meaning refer to punishments that are determined by the Qur’an and Sunnah. Examples of such offences are: Forgery, criminal intimidation, and criminal breach of contract of services, offences against the public peace, etc, to mention but a few.

Some punishments provided by the code may be summed up as follows:

(a) death; (b) forfeiture; (c) imprisonment;
(d) detention (e) fine; (f) canning
(g) amputation (h) retaliation (i) bloodwit
(j) restitution (k) reprimand (l) public disclosure
(m) boycott (n) exhortation (o) compensation
(p) closure of premises and (q) warning.

**The Shari’a and the 1999 Constitution**

A constitution has been defined as the organic and fundamental law of a nation or state which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its

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internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, prescribing the extent and manner of the exercising of sovereign power.

Being a supreme law, a constitution is endowed with a higher status, in some degree over and above other legal rules in the system of a government. It is in this light that the 1999 constitution can be described as a supreme law of Nigeria.\(^\text{14}\) The authority of the constitution binds all authority and persons, including the executive and the legislature (National or State). This being so, the Shari’a legislated and practiced in some northern States of Nigeria must comply with the provisions of the 1999 constitution, otherwise the Nigerian courts will not hesitate to declare it null and void.\(^\text{15}\)

In this respect, the most important issue for determination in this paper is whether or not the Shari’a is in conformity with the constitution of the Federal Republic of Nigeria 1999 or to what extent does the Shari’a conform with the constitution.

**Shari’a Courts in the 1999 Constitution**

From the 1979 constitution through the 1989 and 1995 draft constitutions, to the 1999 constitution, Shari’a courts have been given recognition but with jurisdiction on Islamic personal law. The 1999 constitution has made provision for the establishment among others:
(i) The Shari’a Court of Appeal of the Federal Capital Territory, Abuja; and
(ii) a Shari’a Court of Appeal of a State.\(^\text{16}\)

Appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law has been conferred on the Shari’a Court of Appeal.\(^\text{17}\) Islamic Personal Law may be understood from the perspective of these sections to mean issues relating to Muslim marriage, its dissolution or its consequences, like family relationships or the guardianship of an infant. Others include *Wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim. Furthermore, the jurisdictions of these courts are limited to cases, where both parties to the proceedings are Muslims.

The National Assembly and State House of Assembly may, in addition to the jurisdiction conferred on the Shari’a Court of Appeal of the Federal Capital Territory or a State Shari’a Court of Appeal respectively by the constitution, extend its jurisdiction. However, at the time of writing this

\(^{\text{14}}\) Section 1(1) 1999 Constitution.

\(^{\text{15}}\) Section 1 (3)

\(^{\text{16}}\) Sections (d5), (f) & (g), 261(1) and 275, 1bid.

\(^{\text{17}}\) Section 262(1) and 2,777(1) & (2) 1bid.
paper, the National Assembly had not extended the scope of the Shari’a beyond the jurisdiction conferred on it by the constitution, but Zamfara State had taken the lead by extending the jurisdiction of the State Shari’a Court from the Islamic Personal Law to the Islamic Criminal Law.

Still, the question remains where do the northern State get the power to extend the scope of the civil jurisdiction of the Shari’a Courts to include the Shari’a Criminal Law into the Nation’s Judicial and Legal System?

Two legislative bodies, that is, the National Assembly and the State Houses of Assembly were established by the 1999 constitution. Concurrent legislative lists were provided by the constitution to be legislated on by both the National Assembly and the State Houses of Assembly, while the National Assembly is to exclusively legislate for matters that are within the exclusive legislative lists. For other matters, described as the residuary matters, they were left to be legislated on by the State Assemblies. The issue of Criminal Law is neither in the exclusive legislative list nor is it in the concurrent legislative lists. It thus becomes axiomatic for a State House of Assembly to legislate on the matters of Criminal Law, Shari’a Penal Law inclusive, as an issue classified as residuary a matter. In other words any State in the Nigerian federation is legally competent to legislate on any Criminal matter within its respective State, notwithstanding whether or not such legislation has its source from any religion.

Even though the constitution has mentioned the category of courts that it describes as the superior courts of record, it nevertheless empowers the states to establish any court with civil criminal jurisdiction, provided that the status of that court is not at par with the designated courts. Section 6(4) of the constitution states that:

“Nothing in the foregoing provisions of this section shall be construed as precluding:
(a) National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of the High Court;

(b) The National Assembly or any House of Assembly, which does not require it from abolishing any court which it has power to establish or which it has brought into being.”

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From the foregoing section, a state legislature can establish any court if it desires, and may abolish same, provided such court is subordinated to a superior court of record.

In practice so far, the various states that are now applying the Shari’a Criminal or Penal Law have established Shari’a Courts with varying original and appellate jurisdiction. For instance, Kano State has established the Shari’a Court and the Upper Shari’a Court.18

The Shari’a and Fundamental Rights
Section 38(1) of the 1999 constitution guarantees to every person in Nigeria the right to freedom of thought, conscience, and religion. It states:

“Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief, in worship, teaching, practice and observance”. (Emphasis supplied).

Clearly, one can see from the above quoted section that every person that is not necessarily a Nigerian citizen is given the freedom to choose whatever religion or belief whether alone or in a community along with others to observe or practice in public or privately. This being so, it is submitted that Shari’a being part and parcel of the religion of Islam is legally or constitutionally recognized by the constitution of Nigeria. To deny the Muslims in Nigeria the Shari’a legal system would be tantamount to denying them their fundamental rights as guaranteed them by section 38 of the constitution. Thus, any Muslim may wish to enforce his fundamental right to Shari’a guaranteed him under S. 38 by invoking section 46(1) of the 1999 constitution.

It is pertinent at this juncture to still ask whether or not the various categories of punishments recognized by the Shari’a legal system and promulgated by some northern States are in conformity with the fundamental rights provisions in chapter four of the 1999 constitution? For instance, are stoning to death, amputation, and caning contrary to the Nigerian Constitution, and in particular, the fundamental human rights?

18 Section 3(1) (a) and (b) Kano State Shari’a Court Law 2000
This writer is of the view that the Shari’a Legal System and indeed its punishments cannot be constitutionally questioned or impeached because such punishments have not been outlawed by the constitution. Moreover, if one is to take the fundamental right to life, which is the most important of all the rights, it permits of one’s life in execution of the sentence of a court in respect of a criminal offence of which the accused person has been found guilty in Nigeria. The worst punishment that can be inflicted on a convict is the death penalty, which the Nigerian constitution has not outlawed.

Finally, the Shari’a Legal System is intended to curb crime, and eliminate criminals in the society, to protect the life, property, dignity, and moral rectitude of the community, thus, its strict stance against all forms of crimes and criminals.

In discussing this topic, for it to be complete, section 10 of the 1999 constitution dealing with prohibition of State Religion must surely not be left out. The section states that, “The Government of the Federation or a State shall not adopt any religion as State Religion.” The issue here: is the application of the Shari’a by some of the northern States not in violation of section 10? Since it was earlier posited that the Shari’a and Islam are synonymous. So far the application of Shari’a legal system as a whole is not yet complete because the Shari’a in an Islamic state is the supreme law of the land. It is to be the constitution of the Islamic state, this means that the government, the people in the state, Muslims and non-Muslims alike would be subject to the supreme law of the Shari’a. The situation as it exists now is that the Shari’a application in some northern states is still limited to the civil and criminal issues, which is in conformity to and subject to the supremacy of the constitution of the Federal Republic of Nigeria. The Shari’a Criminal Justice System can at best be described or called a statutory law enacted by some State Legislatures of Northern Nigeria in strict compliance with section 36(12) of the constitution, which says that:

“Subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provisions of this law” (Emphasis supplied).
The application of the Shari’a legal system has been limited to the Muslims in northern states, and is not applicable to the non Muslims living in those States, because the penal codes is to apply to the non-Muslims in the magistrate, and high courts. It will therefore be wrong to assume that the application of the Shari’a Penal Law by the northern states is contrary to Section 10 of the Constitution since they have not yet declared or adopted Islam as the religion of their respective States.

CONCLUSION

The application of the Shari’a Penal Law in the northern States in Nigeria is not a new phenomenon since it was rooted well over two hundred years ago. The entire administration of the legendary Sheikh Uthman Dan Fodio was based on the Shari’a, thereby creating a state and civilization, up to the period of imperialist conquest of northern Nigeria to the time of independence in 1960.

However, the new legal order in Nigeria personified by the 1960, 1963, and 1979 constitutions had limited the application of the Shari’a Criminal Justice System to the Islamic Personal Law. Re-birth of the Shari’a penal law has been witnessed in the last three years under the 1999 constitution as the northern States claim to enforce the fundamental rights of the Muslim population in their respective states.

Having examined all the relevant constitutional provisions that are directly or indirectly dealing with the topic for discussion, one is compelled to conclude that the Shari’a Penal Justice is in conformity with the constitution of the Federal Republic of Nigeria, 1999. There is so far nothing to prove otherwise. It is submitted that the constitution seems to have recognized the religious and ethnic diversity of the Nigeria people thereby giving ample room for the protection and preservation of the interest of all without suppressing the interest of any.
REFERENCES

4. Zamfara State Sharia Courts Law NO. 5 of 1999
5. Zamfara State Sharia Courts of Appeal Law No. 5 of 1999
“.... the adoption of the Shari’a penal system was done haphazardly and without setting out the basic pre-conditions necessary for that new order to be set in place. This ‘rush’ was in my view typified by generally, two broad polemics. The first relate to the methodology used in the adoption of the system, which cross sections of Nigerians find as offensive, and a violation of the 1999 constitution. The second relate to what I view as intracontradictory stance.... these later shade of polemics are those that I consider as the condition precedent for the Shari’a”.

INTRODUCTION

In this paper, I set out using the Zamfara State initiative, the background leading to the adoption of some aspects of the Shari’a penal system in some parts of northern Nigeria. This is achieved against the background of the historical development of the penal system in northern part of Nigeria. I also proceeded by setting out what I feel is wrong with the Zamfara initiative and all other States that followed that initiative. I then followed this up with those constitutional provisions that will or have constituted a clog to the full realization of the application of the Shari’a penal system in the northern part of the country. Against this backdrop, I highlighted the problem areas that I considered as the intra slow down mechanisms’ to the attainment of the desire to introduce a viable, meaningful and pragmatic Shari’a legal system in Zamfara State and indeed other States in the northern part of Nigeria adopting some form of the Shari’a penal system. Generally these mechanisms have to do with the failure to establish a justice system intended by Shari’a itself.

I wish to state, perhaps as a personal point of view, that the adoption of the Shari’a penal system was done haphazardly, and without setting out the basic pre-conditions necessary for that new order to be set in place. For instance there was not felt the need to empower and enable the people in both spiritual, and or educating the people about their civic responsibilities, their rights and duties towards their Creator, Allah, the religion, their fellow human beings, and the provisions of social, political, economic, and basic
life amenities. This ‘rush’ was in my view typified by, generally, two broad polemics. The first relate to the methodology used in the adoption of the system in the areas in reference which a cross section of Nigerians find offensive, and a violation of the 1999 Constitution. The second point relates to what I view as an intra contradictory stance. These later shades of polemics are those that I consider as the conditions precedent for the adoption of the Shari’a penal system in any part of the world, and which those states that have so far adopted some form of the Shari’a penal system have taken for granted. The Shari’a legal system is much more encompassing than the penal system. It is inseparable with the justice system. And like I will state later, the justice system in Islam is enormous and multifaceted. In line with this, I beg to quote from the writings of Joseph Schacht who said: “One of the most important bequest which Islam has transmitted to the civilized world is its religious laws, the Shari’a. It is a phenomenon so different from all other forms of law that its study is indispensable in order to appreciate adequately the full range of possible legal phenomenon… Islamic law is the totality of God’s commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and legal rules, detail of toilets, formulas of greeting, table manners, and sick room conversation. Islamic law is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.”

I also draw our attention to the fact that there are doubts as to whether the lot of the people in the Northern Nigeria, particularly in those areas applying some form of the Shari’a legal system are better off with the Shari’a penal system than without it. This is a utilitarian posture that is meant to measure whether there has been any justice in the system since its introduction. In this regard I also state that the system in operation now is one that seeks to punish the poor, unlettered, famished, and disgruntled people of the North beyond the boarders of tolerance. This is because the

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1 By ‘the rush’ I do not mean the application of the Shari’a system as a whole. Indeed the establishment of the Shari’a was done without any precondition by the Prophet Muhammad (SAW) in Medina for the first time in the history of Islam. Indeed the views of Israel Altman are personally subscribed to in this respect. The writer in an article titled ‘Islamic Legislation in Egypt in the 1970s stated that, ‘The harsh Shari’a penalties are a blessing, as they would wipe out crimes altogether, and in any case would very seldom be implemented’. In Asian and African Studies’, XIII (1979) pp. 199, 204.

2 For instance the Zamfara State initiative of being the first to legislate for the introduction of the Shari’a under the 1999 Constitution was castigated by Chief Rotimi Williams, SAN, when he opined that ‘It is now evident that Zamfara State has authorized the direct enforcement of the provisions of the Shari’a… that the provisions intended to be applied… would be illegal and unconstitutional…’ in a paper titled ‘The Shari’a Controversy’ (infra footnote 6) at p. 31.

Shari’a penal system operating in the Northern part of Nigeria seemingly is set out not, only to Islamize the penal system, but punish only the lowly placed, and has not a single provision that deals with the crimes of the lettered and highly placed. For instance crimes of public fund embezzlement, breach of trust, and failure to establish a just, political, social, and economic system, originally and mandatorily required as condition precedent for the establishment and application of the Shari’a are all missing in the Shari’a cum penal system currently operating.

I finally submit that the application of the Shari’a penal system in Northern Nigeria, in the current way that it is, is flawed and may not work any form of justice to the satisfaction of a great many. Unless there is an establishment of a social, economic, political, and other dimensions of the

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5 Even though the Zamfara State Shari’a Penal Law has made exemplary provisions under Section 288-324 dealing with offences by or relating to public servants, I feel that there are a great many things that public officers or highly placed government functionaries do that demand out of justice to be criminalized and adequately punished. For instance the operation of Hajj, Prof. Gwandu stated his disgust at the rate public funds meant for development is being used to pay illegally and criminally more than N350, 000 for 500 and more so-called government sponsored pilgrims. In 99% cases those that are sent are either ‘Bokayes’, influential and wealthy friends, political touts and others that are not educated and prepared to perform the rites. This is nothing but theft and a denial of public social services. The enormous and colossal amount expended each year if utilized for developmental projects will be enough to reduce the harshness of the current economic and social realities of our time. Added to this are the ‘convoy cars syndrome’ where public officers when visiting their families or going to weddings or other social and personal visits not only use official vehicles and drivers but go with the full paraphernalia attached to the lawful discharge of their office at the expense of the public treasury. One may also add the ‘campaign and donations to party and Tazarce funds’ where a public servant will donate millions which are ill-gotten considering his years of service and lawful salary. This last matter is made even worse by some governments requiring that Local Governments must provide a certain number of vehicles out of their statutory allocations to aid the tazarce aspiration of the state governor. To punish some public offences under the Law as mentioned in the sections cited above with 7 – 1 years aggregate and couple of lashes, but cutting the hands of a petty thief driven by poverty and want speaks of the kind of social and criminal justice that is now practiced in states claiming to be applying the Shari’a penal law.

6 The Qur’an and the Hadith of the prophet Muhammad (SAW) are replete with injunctions and directions on how the system is to be established. The payment of compulsory Zakat and optional charity are obligations that have been placed on the state to organize and administer these institutions. This is one of the pre conditions for the establishment of an effective Islamic justice, political and penal systems. Commenting on a Hadith of the Prophet (SAW) where he said, ‘He is not a (true) believer who eats his full while his neighbor remains hungry by his side’ B. Aisha Lemu, in ‘Islamic Studies for secondary school’, Islamic Publication Bureau, (1993, Book 1), at p.64 said that the duty of giving out food as sadaqah, ‘an and Hadith. Eating your fill while your neighbor goes hungry is therefore seen as an act of selfishness so obvious that it casts doubt on the sincerity of faith of the person concerned. It is therefore a point to ponder whether there is any justification for exerting and inflicting punishment on people who do not have the means of getting food to feed themselves, talk less of their family/ies.
Shari’a, the future is going to be more turbulent and those in authority will lose any justification in the quest for the establishment of only the Shari’a penal system.

**BASIC ASSUMPTIONS:**

I begin this paper with the following assumptions

i) That the desire of any state wishing to establish a Shari’a system is to adopt the whole of the Islamic legal system.

ii) That the Islamic legal system consists of many components that are distinct, complex yet interrelated and inseparable.

iii) That despite all the criticisms and condemnations, the fact has remained that the Shari’a or the penal system under it remain applicable only to the Muslims, and the fact of its adoption, even fractionally, over the past three years plus, does and has not posed any danger to the non-Muslims or the continued existence of Nigeria as a sovereign political entity.

iv) That very much unlike it was claimed by many people antagonistic to the introduction of the Shari’a by Zamfara state, or atavistic to the Shari’a as a whole, Nigeria is not a secular state, notwithstanding the provisions of S. 10 of the 1999 Constitution.

v) That there are higher morals, justice, religious and public policy demands on a state adopting the Shari’a penal system to establish and sustain other components of the Shari’a and nourish them before visiting ‘uquba’ or punishments on its citizenry.

vi) That achieving any degree of success in institutionalizing the penal aspect of the Shari’a system alone does not provide one with an objective yardstick to gauge or measure the performance, in the overall of the state under an all encompassing Islamic legal and justice system.

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7 According the Hon. Justice Mohammed Bello, CJN (as he then was), ‘In its generality, Shari’a covers all aspects of human endeavors, be it economical, political, social, theological and is a way of life of Muslim from his birth to the time he will be buried in a grave. In a paper titled ‘In Shari’a and the Constitution’, in ‘The Shari’a Issue: Working Papers For A Dialogue’, Published by, A Committee of Concerned Citizens, Academy Press Plc, Lagos, at p.5
vii) That the Zamfara state Shari’a setting offers the best ground for making inferences as it is the only state that has so far produced enough jurisprudence and legislation that offers any insight into the current discourse on the Shari’a penal and justice system in Northern Nigeria.

TRACING SHARI’A PENAL SYSTEM IN NORTHERN NIGERIA:- THE HISTORY AND POLITICS INVOLVED.

There is agreement across the board that the Islamic Law has been applied in the Northern part of Nigeria for a long time. The rules of Islamic civil law, or in the language of the legal minds, Islamic personal law, have been applied in all the legal and other aspects of the Muslims in Nigeria. The rules on marriage, divorce, custody, entitlements, rights, obligations, transactions, and dispute settlement have been governed and adjudicated applying the rules of the Shari’a. Indeed before the coming of the British colonialists, official records of the penal system in northern Nigeria shows that the rules of the Islamic legal system was in application either by default or under the rubric of customary and native law.

However, the period immediately before the establishment of British control shows a somewhat systematized penal and justice system that was a direct product of the Usmaniyyah jihad. Hitherto, it may be speculated that the penal system was organized according to tradition and customary practices, and punishments were more focused on retribution as way of meting out justice to litigants. With the establishment of the Usmaniiyah control of most parts of the Northern Nigeria, the penal and justice system became centralized, articulated, and focused on the enforcement of Islamic law encompassing both the civil and criminal aspects. The court system were organized and controlled by the Emirs, with Khadis or judges administering the penal and justice systems. Enforcement of the decrees or judgments of the courts were executed by the ‘Dogarais’ and later by the native police.

This system operated somewhat effectively but with reported misuse and abuse of the penal and justice system as well as reported cases of oppression by the court and its officials. It is therefore wrong to assume that there has not been the establishment of or the institutionalization of the Shari’a penal system until the coming of the present political dispensation. Indeed, before this period, the fact that some form of Islamic penal system was part of legislation applying to the whole of northern Nigeria is beyond dispute. Either due to the complexities of the people, or heterogeneity, or
for political and administrative expediency, the penal system in the North has had a complex but a straightforward history.

When the British colonizers came to northern Nigeria during their expansionist journey, it was therefore not surprising that they found a highly organized penal administration of justice system in the Emirates that was effectively managed and controlled by the Emirs. They found no distinction made between the penal and civil aspects of the Shari’a that was applied by the Emir’s and Alkali courts. But in order to make their presence felt and enhance their stranglehold, the British colonialists set about dismantling the system they found. They started by creating room for dichotomy between personal or civil law and criminal law. They left all those aspects of the Shari’a rules affecting the civil law to continue applying to all Muslims and those who chose to be governed by those rules. In the field of the penal system however, the British substituted the penalty of beheading meted on those guilty of the offence of homicide and stoning to death that was meted on the adulterer with death by hanging. And for the penalty of amputation meted on the thief required under the Shari’a they put in its place imprisonment. They also abolished the Shari’a substituted rule of the payment of Diyya in capital offences attracting such payment. They then reduced effectively the Emir’s right and direct control of the enforcement of decisions of the courts when they modified the court system, substituted and replaced the Dogarai with the Native Authority Police.

Another modification came in the form of appeals from the decisions of the Alkali courts to that of the appeal process. This was to later give room for controversy in the way and manner Islamic law was later subjected to the test of repugnancy, compatibility, and other modern human rights standard rules. Yet the fact remains that the Alkali courts were not bound

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8 Elsewhere this ‘reformist’ approach taken by the British colonialists has been stated as an incident of the introduction of reforms as a procedural expedient in legislation and modification. According to Anderson (infra) ‘it was fundamental to the new system that the Shari’a courts, for example, were to be restricted to questions of family law, inheritance, gift, and awqaf, and that the new secular codes were to be administered by courts staffed by personnel trained in a very different way’.

9 Conceivably, the Emir’s were acting under the legal and jurisprudential principle know in Arabic as takhsis al quad or the right of the ruler to define and confine the jurisdiction of his court, when they took charge of not only appointing the Qadis and designating courts, but also determining the geographical jurisdiction of the Qadis within their domain. Seemingly this right has been taken away from them and in the current dispensation is akin to those rights the 1999 Constitution has given to as Chief Judge of a state.

10 According to J.N. Anderson, ‘the controversial element in this new application of the principle was that, in this case, it was not merely a question of deciding whether litigation on some particular subject should go to this court or that, but of giving instructions that no judicial relief whatever should be available, in any court, for certain specified claims. See J. N. Anderson, ‘Law Reform in the Muslim World’, (London: The Athlone Press, 1976). Chapter II, ‘The Philosophy and Methods of Modern Reform’.
to apply rules of the English common law and they did not apply it. Finally, they split the justice system by the creation of the customary courts that was to cater for all non-Muslims in Northern Nigeria who did not want to be governed by the rules of the Islamic law. It is to be noted that these were the only changes that the British colonialists made to the system of administration of justice in Northern Nigeria. There was not a single change on the Shari’a itself.

**THE ZAMFARA STATE SHARI’A PENAL SYSTEM**

With the coming of the present democratic dispensation however, a new dimension was given to the issue of the Shari’a. Using a number of the 1999 Constitutional provisions the Governor of Zamfara state assented to the bill establishing the Shari’a penal system passed by the Zamfara House of Assembly. The assent to the Bill was given on the 27th day of January 2000. This was then followed by the enactment of the Zamfara State Establishment of Shari’a Courts Law in October 1999. Quite apart from

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1 Aharon Layish has drawn attention to this kind of modernist modifications to the Shari’a by making reference to the observation of some other writer on the subject. He said in his article titled ‘The Contribution of the Modernists to the Secularization of Islamic Law’ that ‘Moreover, Coulson claims that substantive and formal reforms, such as the drawing –up of Western-type codes, the introduction of appeal proceedings and the abolition of the Shari’a courts, are tantamount to outward manifestation of changes in Islamic legal philosophy; the Shari’a is said to have lost its character as an eternal, immutable law and, except for matters of worship, to be treated as a function of social conditions, which by their nature are liable to change. ’ See Middle

2 The choice of Zamfara state as a point of reference in this paper was a deliberate one. One reason has been mentioned elsewhere in this paper and incidentally, another equally good reason is the one that I came across in the paper written by Prof. Yadubu. In that paper he stated the distinctive marks between the Zamfara and Niger states approach to the issue of the introduction and legislating the Shari’a penal laws. In his words, ‘...Niger state opted for an entirely different approach. Instead of legislating the entire corpus of the Shari’a as known to fiqh to form part of the sources of law in the state or creating new courts to administer these, the House of Assembly passed five different Bills into law to amend relevant provisions of the penal code law, the law of procedure and sundry, other laws applicable in the state to conform them to the Shari’a ideals. The State also has proscribed certain identified un-Islamic practices. While it can be said that the Zamfara Model is more thorough-going, than that of Niger which is by way of incremental reform’. (Emphasis added). I adopt this line of reasoning and wish to add this to the one earlier mentioned.

3 Such as § 4(7), 6(4) & 5, 38, 277 – 78 and other relevant Schedules

4 Law No. 10, 2000. The Zamfara State Shari’a Penal Code is made up of 409 Sections and 10 Schedules. It was almost the old penal code but with a number of unique style and formulations. An interesting aspect of it that has generated some concern is Chapter VIII titled appropriately ‘Hudud and and Hudud Related offenses’ wherein crimes of Zina, Defamation, Theft, Drinking of Alcohol, Offences, Against Property, Criminal Misappropriation, Criminal breach of Trust, Receiving Stolen Property, and Criminal Trespass were made as the offences falling under that category and all the Shari’a prescribed punishments clearly provided. In Chapter IX the Law prescribes and punishes Qisas and Qisas Related Offenses.

5 The Governor gave his assent to the Bill on the 8th day of October 1999. It is tagged Law No. 5, 1999. This Law made up of 51 Section established for the purpose stated in the preamble three courts. In effect s. 3(1 establishes a) Shari’a Court; b) Higher Shari’a Court and c) Upper Shari’a Court. It is
the fact that there is too much politics involved in the matter of the introduction of the Shari’a penal system in Zamfara state, there are views that seem to suggest that the process or methodology followed in effectuating the desire for the introduction of the Shari’a was faulty. Indeed it is agreed that there are so many other things that are taken for granted at the time when the ‘rush’ was made to lay the carpet for the application of the penal system of the Shari’a. Most of the things that have been taken for granted at the initial stages of the introduction of the Shari’a penal system are now showing up and proving to be checking any form of intended progress in the application of the Shari’a penal system.

Indeed the furore raised by this singular pioneering act was captured lucidly by the opinion of Dr. Abdul-Lateef Adegbite when he stated that the proclamation and adoption of the Shari’a penal system

‘... raised hue and cry among non-Muslims throughout the length and breadth of the country, notably in the media. Some sections of the latter threw objectivity to the winds and heaped all manner of abuse on the governor of Zamfara State, Alhaji Ahmed Sanni, scandalizing Islam in the process and describing Shari’a as barbaric, especially following the amputation of the hand of a cow thief in Zamfara State.

A number of Christian leaders voiced out strong opposition to the Zamfara initiative, some employing unedifying language in the process. Perhaps, the protests would not have been so vociferous if the introduction of the new Shari’a law had not been so dramatized and orchestrated, leading some commentators to interpret the event as a

interesting to note that S. 5(a & b) gave the courts both civil and criminal jurisdictions relating to any course or matter. It is also interesting to note that there has not been any departure or conflict between this law and the 1999 Constitution. This is because going by the provisions of S. 27 of Law No. 5, 1999, the courts established therein are obliged to ‘carry into execution any decrees or order of: a) the Supreme Court; b) the Court of Appeal; the Federal High Court… l) Tribunal established under the Constitution.’ This I feel is meant to give credence to the Constitution but then there is the danger that this is also a way of creating conflict as will be noted under the constitutional problems arising out of the operation of the Shari’a penal system.

Prof. A. H. Yadudu captures this more vividly while anchoring for the basis of the Shari’a under the constitution. As his fourth anchor point, he said, ‘Fourthly, I have no hesitation in anchoring, the basis of the adoption of the Shari’a on the democratic process in vogue. By proposing for the expanded application of the Shari’a the two governors are at once fulfilling a campaign promise and meeting the yearnings and aspiration of the electorate. Similarly the legislators are responding to the demands of their constituencies…’ in a paper titled ‘The Shari’a Debate in Nigeria: Time For reflections,’ presented at a National Seminar On the Place of Women Under the Shari’a, organized by the Constitutional Rights Project, 1st–3rd March 2000, Chelsea Hotel Abuja, and published in ‘The Shari’a Issues: Working Papers For A Dialogue’ (supra, footnote 7).
declaration of Zamfara as an Islamic State, an allegation roundly refused by the State Governor’.\(^{17}\)

Regardless of all these the Zamfara state initiative has contributed in no small measure in restoring back to Shari’a and the overwhelming majority of the Muslims the glory that was lost when the British colonizers turned the Shari’a into a toothless bulldog. It is safe to say that in the least, the Zamfara State initiative has been a reformist contribution to establishing, by legislation and according to the constitution, a long awaited, relatively indigenous penal system that was unceremoniously relegated to the background, and in its place was enforced an alien penal system that was corrupted by the customs, ethnocentric, and other experiences of people living in other countries and regions of this world\(^{18}\)

SLOW DOWN MECHANISMS TO THE APPLICATION OF THE ZAMFARA STATE SHARI’A PENAL SYSTEM

As earlier stated I personally feel that the distance so far covered by the Shari’a penal system in Zamfara state (and also other states adopting some form of the Shari’a penal system in Northern Nigeria) would have been further than it is currently if the following issues had been taken as guides; or at least if the legislators and those in charge had considered them and made adequate provisions to address them. These are:

1. They ought to have taken the golden commandment for the discharge of the vicegerent status of man on earth in relation to the Shari’a in the manner and order that the Qur’an\(^ {19}\) and Hadith had directed, and that is, call people to righteousness first and then proceed with the prohibition of evils. (The principle of *armr bil ma’aruf wal nahy anil munkar*).

2. There ought to have been established a comprehensive justice system and reform or modification of the judiciary and judicial officers and personnel.

\(^{17}\) See footnote 26 infra.

\(^{18}\) S. S. Richardson has shown the history of the penal code that was adopted in place of the Shari’a that was applying in the North at the coming of the British colonialists in his ‘Notes on the Penal Code Law’, (1st ed.)

\(^{19}\) The Qur’an has given the general intendment of this in Surat Saad verse 26 wherein Allah Said, ‘O Dawud We appointed thee as a viceroy (Khalifah) on the land to govern by truth (and justice) between men and follow not desire that can mislead thee from the path of Allah.’
3. There ought to have been put in place a new set of officers and officials that will be sustained by the Shari’a system in conjunction with, or parallel to the personnel and institutions that the 1999 Constitution has put in place and sustained. This would have avoided public funds mix-ups and appropriating and misappropriating public funds. The Shari’a system is supposed to be a self-sustaining one.

4. Establishing a social and economic charter or institution that is responsible for the destitute, the poor and the needy. The system that would have been responsible for catering for the health and wealth of children, the aged, and women as the most vulnerable group in the society. And a system that would have seen that the well-to-do and wealthy are charged dues owing from them to the state and the lowly placed in the society, and arrest the ever widening gap between the haves and the have not. A system that would have reduced the poverty stricken and famished majority of the people.

5. Empowering the masses through education as to how best they should live under the new dispensation especially by learning to, and understanding the religious obligations to completely submit to the will of Allah expressed by the rules contained in the Shari’a penal system and the religion of Islam. This would have given convicts the assurance that the decision reached at their first trial was a just and conclusive one. As such wherever they go in the judicial hierarchy, the decision will remain the same. I am referring to the two Zina cases that have been tried, and appeals made to quash such convictions. There is every room to think that apart from exercising their rights of appeal, there was something that was wrong with either the justice system or the personal conviction of the accused persons to the bond to the Shari’a penal system under Zamfara state and others. Failure to re-orient and provide a sound, pragmatic, effective, and dynamic procedural system may be responsible for the ineffectiveness of the Shari’a penal system.

6. Tackle a problem that is germane to the one above this, and that is how to see to the formulation of rules that will deal with apostasy. Prof. B. O. Nwabueze consider as illegal and unconstitutional even the alleged attempt by Sokoto State’s proposals of making provisions for the application of the Shari’a in criminal proceedings and to empower Shari’a court to try the offence of (inter alia) Apostasy (Riddah). At p. 31 (see footnote 26 infra).
that has touched this issue. It is a very sensitive issue considering the inference that I draw on the constitutional guarantee to the freedom of religion. But the direct effect this will have is on the impact and effectiveness of the application of the Shari’a penal system. In essence, there is nothing that has so far been done to show serious reflection of the Shari’a penal offence of *Ridda*,\(^\text{21}\) the constitutional freedom of religion and the infliction of the punishment of this offense using the Shari’a. On the other hand it is amazing that all known penal offences have been adequately tackled and covered by the Zamfara state Shari’a penal code, but the capital offence of *Ridda* is conspicuously left out.\(^\text{22}\) This is going to sooner or later stultify the application of the Shari’a penal system unless something fast and drastic is done to check this rising tide.

**ANALYZING THE SHARI’A JUSTICE SYSTEM**

In Islam, the realm of law, ethnicity, justice, and morality are determined by the religion itself. They are interwoven and connected.\(^\text{23}\) As a precondition to the establishment of the Shari’a or the application of its laws, especially the penal system, there must exist an effective justice mechanism that is to ensure that things are done according to the strict provision of the Shari’a. The state is to be headed by a just, honest and upright ruler, who must oversee that justice is not only available but is extended to all and is seen manifestly clear first and foremost in the ruler himself, \(^\text{24}\) and then in all, public affairs of the state and its officials. The ruler and all those charged with public duties as well as the judges and judicial officers all must show dedication, commitment, selflessness, and altruism in the performance and discharge of their responsibilities. These qualities must also be shown and

\(^{21}\) This is equated with the offence of high treason in Islam and this is not tolerable in any state or nation. See al Qur’an 5:35

\(^{22}\) Dr. A. Adegbite, (infra footnote 26) maintained that it is not possible, given the provision of the 1999 granting the right to freedom of religion that an there can be any legislation criminalizing apostasy. At p. 69 he stated that apostasy ‘can never be an offence in Nigeria since it would offend then Constitution which guarantees freedom of religion, covering both freedom to practice one’s religion, and the freedom to change from one religion to another’.

\(^{23}\) In Surat al – Nahl in verse 90, the Qur’an put this point beyond dispute when it says, ‘Allah commands justice and doing good; and being generous towards fellow men; He forbids indecency, injustice and insolence.’

\(^{24}\) Al Qur’an in Surat 38, verse 26 establishes the rule wherein it says, ‘O David! Verily, we have made you a chief on earth, so judge you between men in truth and justice and follow not the lust of your heart, for it will mislead you from the path of Allah. Verily! Those who wonder astray from the path of Allah shall have severe torment, because they forgot the Day of Reckoning.'
directed in the way and manner they deal with the ordinary people. Justice as conceived under the Islamic system also requires the existence of an Islamic state, either de facto or de jure and a well entrenched moral, religious, social and economic system. In fact the Shari’a penal system is to be applied to the state in the first instance, by eliminating and destroying all unjust rulers and those meting out injustice to the ordinary people, then in the second instance, to the citizens. This means that the state must not only be an Islamic state, but it must be one that is found, established, and ran on the basis of justice before it can lay claim to the enthronement of the Shari’a system penal or otherwise. It is very difficult to say with any degree of sincerity that Zamfara state or any of these states practicing some form of Shari’a penal system in the Northern part of Nigeria are ‘Islamic states’ founded and ran according to the ordinary and strictly rules of Islamic justice system.

Therefore, both from the macro and micro setting of justice there is very little that can be said about the Shari’a penal system that is now being applied in Nigeria, particularly in those states that are applying the Shari’a penal system. How then do these states proceed to enact the penal system of the Shari’a without satisfying this basic condition of justice? What efforts are there now in addressing this issue? Is there enough justification in penalizing ‘small time (or big time) criminals under the Shari’a penal system when there is no apparent justice system in place or access to justice? Under the Islamic legal and jurisprudential system, justice is at the core of the religion. It is both an article and a command. As an article, justice signifies honesty, sincererity, trust, steadfastness, uprightness, and the ability to dispense justice to all without fear or favor. In the words of Dr. Tawfiq Ladan, ‘justice therefore, is the quality of being morally just and merciful in giving to every man his due..., justice is thus, the duty imposed by God and we have to stand firm for justice though it may be detrimental to our own interests or to the interests of those who are near and dear to us. Justice runs across all facet of the Muslim faith and is the one most

25 Umar (RA) gave the general formula that should guide the judge and the justice system when he gave the opt recited surmons to Abu Musa Al – Ashari on his appointment as the judge in Kufa in the following words, ‘...Consider all people equal before you in your court and in your attention so that the noble will not expect partiality and the humble will not despair for justice from you...Avoid fatigue and weariness and avoid annoyance at litigants...for establishing justice in the court of justice, God will grant you a rich reward and give you a good reputation...’
26 The Qur’ar is saying in Surat al – Nisa in verse 135 that, ‘O Believers, as witness to God, be firm in justice even against yourselves, even against your parents, relatives. And whether it be against the rich or the poor...’
27 See al Qur’an Surat al Nisa 4:105
28 In ‘Women’s Rights And Access to Justice Under the Shari’a in Northern States of Nigeria,’ a paper presented at a two day Strategic Conference on Islamic Legal System and Women’s Rights in Northern
important guide to both private and public action. Justice is required to be the cardinal of state action and a basic pre-requisite that the state and those acting under it must possess and apply in discharging their duties. Giving out and meting out justice to all without distinction is of paramount importance in Islam. It requires and calls for equal rights and equal treatment to all manner of people without distinction. Giving justice to the rich and denying to the poor is against all the tenets of Islamic justice system.\textsuperscript{29} It is more important than \textit{iman} or the act of professing faith in Islam itself. Therefore, it is imperative to any system operating under the shade or shadow of Islam to be shown to be one that is grounded in justice. Any aberration to this may amount to loosing out on any effort claimed to be done under the aegis of Islam or the Shari’a.

Justice in Islam include the article of faith, the provision of access to justice, the establishment of adequate institutions for the dispensation of justice, the grant of rights, duties, abilities, and entitlements on the basis of justice; the treatment of all on the basis of equality and justice.\textsuperscript{30} The collection, dispensation of wealth and the distribution of resources are all within the purview of justice in Islam. And again borrowing the words of Dr. Ladan, 'justice is a virtue in which there is neither transgression, nor tyranny, nor wrong nor sin. In sum, to do justice is to undo injustice.'\textsuperscript{31}

In this wise, the existence of workable, accessible and effective courts, and institutions for the administration of justice is required before proceeding with the application of the Shari’a rules. Highly articulate, sincere, selfless, altruist, learned, qualified, trustworthy, pious, impartial, humble, and specially educated personnel are required to man the judicial and administrative arm of the state government. Availability, accessibility, and effectivity of courts and dispute settlement institutions and machinery must be put in place for justice to be done and be seen to be done. The required

\textsuperscript{29} The Prophet Muhammad (SAW) is reported to have said that ‘many nations before you declined, weakened and were ultimately destroyed because of one fatal error, when some one who was highly placed committed a crime, he was let off, and when someone who was of humble stock committed the same crime he was punished. I swear by the One in whose hands my life rests that even if Fatima, my daughter, had committed theft, I would command that her hand be cut out.’

\textsuperscript{30} Ibn Qayyim summed up this view when he said that, ‘the basis of the Shari’a is wisdom and the welfare of the people in this world as well as the Hereafter. This welfare lies in complete justice, mercy, welfare and wisdom; anything that departs from justice to oppression, from mercy to harshness, from welfare to misery, and from wisdom to folly has nothing to do with the Shari’a.’ In ‘Islam Its Meaning and Message’ Khurshid Ahmad (ed.), The Islamic Foundation, 1980, at p. 176.

\textsuperscript{31} Ibid
rules and procedures for the attainment of this kind of justice must be published and made not only as public documents but should be made easily available to all. Treatment of litigants is required to be on the footing of equality, impartially and with respect and fairness. Presumption of innocence should be the guiding procedure in the dispensation of justice. In fact the Islamic rules of justice require that excessive hadd punishments should not be meted out with dispatch, but should be delayed to enable the culprit reflect on the gravity of the punishment that awaits him and possibly change his mind. In short, the justice system in the Shari’a urges that a thorough procedural process be put in place to ensure that a guilt verdict in penal offences is only passed where there is no other possible conclusion that can be reached. For it is better, according to Prophet Muhammad (SAW) to set a number of guilty persons free than to convict an honest person. To say that these are available under any system operating in Northern Nigeria or the whole of it for that matter is to say the least, a lie.

THE CONSTITUTIONAL POLEMICS TO THE APPLICATION OF THE SHARI’A PENAL AND JUSTICE SYSTEM IN NORTHERN NIGERIA

DEALING WITH THE PROVISION OF SECTION 1 (1) AND (3) OF THE 1999 CONSTITUTION

The above section and sub-sections provides that:

“S 1 (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout The Federal Republic of Nigeria... (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.”

The above is what is called the supremacy of the constitution in legal parlance. It signifies that the constitution is binding and is applicable to all people in the country. Regardless of what your ideology is, or your religious

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32 The courts in Nigeria have made pronouncements on the nature and requirement of Islamic law and Procedure, basically as they relate to the so-called personal law dialectics, see for instance the lines adopted by the Court of Appeal in Mintar v. Kor (1989) 1 NWLR Pt 100, 718 C. A; and I. S. P. L. v. Abuja Bizi (1989) 5 NWLR Pt. 119, 120 C. A

33 The Greek Philosopher Aristotle tried and gave us some reflections about this understanding of the term justice. In his treatise he gave the negative perception of the term when he said that, ‘injustice arises when equals are treated equally and also when un-equals are treated equally.’
convictions, or whether you subscribe, participate, agree or not to the provisions therein, they are binding on you. Your actions and attitudes should only be judged from what the constitution has provided. It then proceeded to enact itself as the supreme law of the land. Any law that does not agree with the constitution shall not be seen as law. And if in conflict with the constitution, then to the extent of the inconsistency, the other law shall be null and void. This is like saying that all other laws or laws, whoever makes them, or authorizes them, must give way to the constitution. For instance, if there are any provisions in the al-Qur’an, the Sunnah, the bedrock upon which the Zamfara state and other states adopting the Shari’a penal system are legislatively and legally construed that conflicts with the 1999 Nigeria Constitution, then the provisions of the Shari’a penal system are null and void since the constitution did not grant them validity.

On the other hand, the Muslims hold as sacred the Qur’an and the Sunnah of the Prophet (SAW) as the only main sources of law. They owe it as an article of faith that anything that is commanded by Allah or His messenger must be followed. Anything that is contrary to the rules contained in the Qur’an and the Sunnah of the Prophet (SAW), as well as those contained in the subsidiary sources of the Shari’a, is void and of no effect or legal force. How then can this conflict be reconciled in the event that a court is faced with the determination of, for instance, whether a thief convicted by the Shari’a court is liable to have his arm amputated? The Shari’a penal system sanctioned this. But the fear is that if this convict appeals to the Supreme Court, will the court declare the sentence as valid or set it aside as a violation of, or inconsistent with the 1999 Constitution? Will such a determination not raise conflicts either way?

In this connection the Muslims will lose the right to claim for the enforcement of the Islamic penal or criminal system when the constitution has seemingly rejected the most basic norm of holding that, it is only the law of Almighty Allah, which they must hold as supreme against any other law. Holding that the 1999 Nigerian constitution is supreme, and at the same time insisting that the hands of those that steal should be cut off is a

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34 However and on the contrary the Qur’an is telling us in Surat Yusuf verse 40 that, ‘Authority belongs to Allah alone. He hath commanded that you worship none except Him. That is the right religion, but most men understand not.’ And the Prophet was made to further proclaim and warn people in Surat Al–Anam where Allah directs Muhammad (SAW) to, ‘Say, for me, I (work) on a clear sign from my lord, but ye reject him. What ye would see hastened, is not in my power. The command (authority, judgment) rests with none but Allah; He declares the truth, and He is the best of judges.’

35 The case of Knight Frank and Rutley (Nig.) v. A. G. Kano State (1998) 7 NWLR Pt. 556, I have recently dealt with the effect of a statute that is inconsistent with the constitution.
bundle of contradictions, or that the person guilty of zina should be stoned is, to my view and belief, hypocritical and amounts to double standards on the part of the states that are clamouring for the Shari’a penal system. This is so unless there is going to be two supreme laws operating in the country.

If there is to be any meaningful justification for the infliction of the *hadd* punishment then the source of justification must be ascertained or the grundnorm responsible determined with specificity. This source must not be the constitution and the Qur’an at the same time. One of the two must be supreme. A conviction for stoning to death or amputation of the arm arrived at by a Shari’a court may be set aside on appeal to the Supreme Court on the grounds that the punishment is against the fundamental rights of the accused as contained in the 1999 constitution or some other international instruments. Here then will lay the problem of which of the two is supreme and to what extent.

**(B) DEALING WITH THE PROVISIONS OF S. 10 OF THE 1999 CONSTITUTION**

S. 10 of the 1999 Constitution provides:


This is what in legal language is viewed as secularism. Secularism itself is a reactionary idea. It is an ideal, according to the Muslims that is

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36 Interestingly, Prof. Ben O. Nwabueze wrote a petty good piece arguing against the entrenchment of the Shari’a and its adoption by Zamfara State by solely relying on this argument that the provisions of S. 10 of the 1999 Constitution in all it spirit and letters does not permit for the adoption of state religion by any constituent part of the federation. He stated that the adoption if not withdrawn would have the effect of compromising the federal states as a whole. He felt that the withdrawal from the introduction of the Shari’a by the Zamfara state is the only solution to the continued existence of Nigeria as a federal state, and if this is not done then there is no point in Nigeria continuing as a federal state. In a lengthy paragraph which I beg to quote, the eminent Prof. State that, ‘The question is whether the power of the federal or state government can, comfortably with the provision in section 10 of the Constitution, be employed to codify Shari’a criminal law in all its plenitude as order by the Qur’an, the Sunnah and other Islamic books, as to enforce it against Moslem and non Moslem offenders alike by arrest, detention and prosecution. To restrict the application of such a code to Moslems alone will lay bare its character as the law, albeit in a codified form, of the religion of Islam. And expose it as a state sponsorship of that religion. The conclusion is thus inescapable that the prohibition in section 10 of the Constitution stamps with an indelible taint of unconstitutionality, the Shari’a criminal law, whether in its original form as contained in a codified form to be enacted by the National Assembly or State House (of) Assembly... If the states in the North are bent on adopting Shari’a criminal law, and refuse to be persuaded to drop the idea, they must be taken to have opted for a confederal arrangement or a complete break-up of the association. It is better to pull apart or break up in peace than fight over the issue.’ In a paper titled
out to impeach morality and religion. It is also a religion in disguise. However, the opinion expressed by Ibrahim K. R. Sulaiman is on this issue subscribed to by this writer. He stated that it is a ‘fact that Islam is directly opposed to secularism, for secularism has no relevance to Islam as it has never been a Muslim problem. Secularism is a purely ‘Western solution to Western problems…the end result of incoherent situations and process’ arising mainly out of the fact that the ‘West has not been fortunate in its political and ideological history in that it lacks unitive policy and philosophy. Islam on the other hand, is a unitive system, which advocates unity between physical and spiritual existence, between temporal and secular authorities, and between faith and disregard of the prevailing social and political norms of a people who need just general awareness to demand and struggle for their own identity and the implementation of their own principles and ideals.37

Anything that challenges the existence of God is a religion, if it is followed and has some people believing and adhering to that tenet or idea. They are termed in Islam as unbelievers. Those that deny the existence of God in totality are the atheists. Regardless of these questions, the point must be made here that the way people keep having the idea that Nigeria is a secular state must be pointedly objected to. Nigeria is not a secular state. Otherwise there is a grand deceit or mockery in the way the Oath of Office is couched and administered. The way that Obasanjo and Atiku as Executive President and Vice Presidents of the Federal Republic respectively and all the state governors, ministers, and all public officers took their oath of office must be called back. They were either lying or playing tricks. Why did they take the Qur’an and the Bible in their hands while swearing the oath? Why did they all end the swearing of the oath by saying the constitutionally mandatory phrase of ‘So help me God’? Why did the drafters of the constitution and those responsible for the Oath of Office capitalize

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Constitutional Problems of Shari’a, (published supra note 7). Happily the Shari’a penal system has been operating for three years plus under the current constitutional system and the federal existence of the country has not been affected notwithstanding the provisions of section 10 thereof.  
38 This contention is supported further by the views of Hon. Justice Niki Tobi of the Court of Appeal when he stated that: ‘There is the general notion that Section II (of the 1989 Constitution) (now Section 10 of the 1999 Constitution) makes Nigeria a secular nation. This is not correct. The word secular etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular, means the belief that the state, moral, education, etc, should be independent of religion. What Section II is out to achieve is that Nigeria cannot, for example adopt either Christianity or Islam as a State religion. But that is quite different from secularism. ‘Law, religion and Justice.' Fundamental Legal Issues in Nigeria, Essays in Honor of Andrew Obaseki, JSC (Rtd.) Wole Owaboye (ed.) (1995) at p. 139.
the ‘G’ in God? Why did not Obasanjo, Atiku, or any governors take a sword, an axe, or held fire, or the tail of an ox or a cow or some other things? It is ridiculous and an abuse of common sense to say that Nigeria is a secular state.

Dr. Abdul-Lateef Adegbite has drawn our attention to the fact that the British system which is so much cherished by adherents to the secularist dogma was and is still founded on religion. In his views, a substantial portion of the corpus of Common Law is Christianity-based as emphatically declared by an esteemed judge and Law Lord in a case before the House of Lords, England’s highest Court.

“Ours is and always has been a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian, there is none. English law may well be called a Christian law.”

Indirectly, what the 1999 constitution has done, and indeed all those that came before it, is to create an atheistic state in the country. And by that singular act, gag all other religions from benefiting from state resources. Yet, state resources are applied to sustain this atheist ideology. This is paradoxical.

Regardless, the conclusion that one can objectively draw in relation to whether the adoption of the Shari’a penal system by Zamfara and other states violates the strict meaning of and the spirit of S. 10 cannot be better than the one Prof. Yadudu has drawn, and that is to boldly assert ‘that neither the Zamfara nor the Niger initiative can be said to have violated section 10 of the constitution which prohibits any state from adopting any religion as a State Religion. I have not as yet seen the plausible case made squarely equating what Zamfara has done with the adoption of an official

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39 In a paper titled ‘Shari’a in the Context of Nigeria’ (supra, footnote 6) opined that it is a lie against the constitution to even infer that it asserts secularism as a constitutional principle. In his view the constitution will be contradicting itself if it say that the country is a secular state on the one hand and on the other to ‘hold otherwise would be to challenge the validity of the Constitution itself for making a provision for a Shari’a Court of Appeal. This would amount to saying that the Constitution has told a lie about itself, namely that it prohibits the State having anything to do with Religion and yet goes to establish Religious Courts as the Shari’a Court of Appeal or a Customary Court of Appeal… Evidence abounds indicating that it is a misnomer to describe Nigeria as a secular state. Even though Nigeria observes work-free Sundays in obedience to the Christian Sabbath injunction; declares religious public holidays; fund religious education; support religious pilgrimages; insists on public functionaries including the President and Governors subscribing to an oath of office; some continue to describe Nigeria as a Secular State.’ At p. 72

40 Per Lord Summer in Bowman v. Secular Society Ltd. (1916 – 17) All ER (Reprint) 1, at pp. 30 – 31
religion. True, each has legislated borrowing from a religious code. However, by no stretch of imagination can either be said to have adopted Islam as its official religion. On the contrary, the two Governors have made it categorically clear that they are not adopting any official religion and remain faithful to the oath of office which they have subscribed to.41

C. DEALING WITH THE PROVISION OF S. 14 (2) (a) CONSTITUTIONAL SOVEREIGNTY.

S. 14 (2) (a) of the 1999 constitution provides that:

a) “Sovereignty belongs to the people of Nigeria from whom government through this constitution derives all its powers and authority.”

Under Islam Allah is the only Sovereign.42 Man is nothing but a created servant and a viceregent of Allah on earth who is created but for the purpose of establishing that sovereignty and the sommands and rules emanating therefrom. The whole essence of man’s creation is to obey, institute, and apply what has been dictated to him. The standard rules that should guide his behavior, action, and inaction are all set and predetermined by the One that created him and on whom resides the power to make laws. Man has no right, according to the Shari’a, to arrogate to himself what he does not have, that is the power to make laws and determine how the law should be applied. Those who develop this idea of sovereignty of the people or of the law as the command of the sovereign are called the legal positivists who see nothing good in nature, or God made laws. They attempted to define the law in form of commands. They see law as a product of intellect and logic. They see reason as the main determinant of the law. And according to them, since there is no way through which rational thinking can be employed in ascertaining the reason behind the law ordained by God, then for this reason any law that comes from God is not positive law. They in fact deny the powers of God Almighty to make laws, or His ability to require that His law should reign supreme, or that they should be followed.

In putting their theory across, the analytical positivists say that the sovereign, as the grundnorm, validates all laws and it is valid in itself unquestionably. The sovereign has the habit of issuing commands, but he cannot be commanded. The sovereign also demands that his/its commands must be obeyed, but he/it is not in the habit of obedience. The sovereign is above all, but nothing is above him. The sovereign determines the validity

* See supra (footnote 16), at pp. 39 – 40.
* Al Qur’an Surat Yusuf and Al – Anam, (supra)

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of not only the contents of the law, but also the procedure of making the law. And in order to move people further away from realizing the magnanimity of the Muslims declaration of the sovereignty of Almighty Allah expressed in Allah Akbar, they say that the powers of the sovereign resides with the people. This is, as far as the Nigerian Muslims are concerned, an unforgivable tardiness.

Muslims believe that Allah TWT is the only Sovereign. To Him it also belongs. He is the One that dictates the rules of law and the Law Giver, (Hakim). He decides the rules (hokum), those that relate to Him and the ones that will be applied to the subject of the law (mahkum alaih). The people who Almighty Allah has created are, among others the subjects of His law on whom the law is directed and applied (mahkum alaih). The people that are created as servants can never be sovereign, as far as the Islamic law is concerned. Such people are also not in a position to make the law since their own essence is to hear and obey, and the people can never be the lawmakers, or in the strict sense of the classical Islamic law they can never be ‘Hakims’. The Nigerian constitution has in its own way denied this. This is the indefinite line of divine between the two approaches.

The interesting aspect of this time of conflict is seen in situations where for instance, there are provisions in the Shari’a penal system, like obviously we have in all the Shari’a penal laws in the North, which criminalize fornication, and according to the Qur’an as the Supreme law for the Muslims is a penal offense. If a person is found guilty and the punishment prescribed is stoning to death. There will be room to argue that the 1999 constitution as the supreme law in Nigeria does not recognize consensual sex between adults as a crime, and will not allow for the method of infliction the punishment as that may amount to inhuman and degrading treatment, in the least. How then can we resolve the supremacy conflict? Additionally, did not these states in applying some form of the so-called Shari’a penal system use and follow the same 1999 constitution in enacting the Shari’a penal codes?

Yet going by the provisions of S. 1 of the 1999 constitution, the injunction of the al-Qur’an, on this and other issues will be pronounced as void the moment the case goes beyond the Shari’a courts. While in the

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43 See for more clarification the explanation given to the intricacies and interconnectivity between judging, governing, law and authority under the Shari’a as explained eloquently by Malam Ibrahim Zakzaky in a paper titled, ‘The Application of the Shari’a in the Contemporary World: Lessons From Some Muslims Countries.’ A paper presented to the National Conference on the Application of the Shari’a Jointly Organized by the Department of Islamic Law, Faculty of Law, Bayero University and Ramman Law Consult, Kano, December 1st to 3rd 1999. At pp. 3 – 6.
Shari’a courts, the provisions of the Qur’an will be pronounced as applicable for they are the Supreme law. My fear here is that even if the idea about the need to have some reflections on this supremacy conflict is objected to, the danger it poses still remains. And that danger is that there will be two parallel judicial precedents with varying degrees and this will not augur well for the legal system and jurisprudence. The constitution explicitly gave sovereignty to the Nigerian people. In Islam however, it is the Almighty Allah that is Sovereign.

D) DEALING WITH THE PROVISION OF S. 38 (1) OF THE 1999 CONSTITUTION.

The section falls under the fundamental rights section. It is therein provided that:

“Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief…”

I feel that it is all right to grant the freedom of religion; it is a fundamental right for people to change their religion. In short, the constitution guarantees that every Nigeria, including the Muslims, have this unfettered right to be an atheist, Jew or Christian, or whatever. However there are problems with the way the penal system are designed to operate given this constitutional guarantee. Would it be right for an accused to say that he is denouncing the religion of Islam at the time that he is to be punished or at anytime at all? The Muslims believe that once a person has accepted Islam, he cannot change that faith and deny the Oneness of Allah.

If a Muslim denounces his religion, he commits a capital offence of \textit{Ridda}, which is punishable after three days without retraction, with the death penalty. Within the first three days the apostate is given a period of time to change his mind. If he persists, then it becomes lawful to take his life. This is the law of Almighty Allah as contained in the al – Qur’an and the Sunnah of the Prophet Muhammad (SAW). This is a clear case of conflict between the constitution and the clear rules of Islamic law. A Muslim that denounces his faith is lined up for the capital offence of ‘Ridda’ or apostasy. The prescribed penal punishment is the death penalty. As noted above, if the constitution is to be given the credence that it wants then the Muslims should be in a position to take this rule that says that there is a fundamental
freedom to change religion, and pronounce it as valid, and as such give the right of people to change religion, subsequently opt out of the penal system currently enforced in some sections of this country.


All provisions dealing with the adjudicative and appellate systems, as well as the ones dealing with the finality of the decisions of the Supreme Court in all causes and matters to the exclusion of any other court will continue to pose problems to the application of the Shari’a penal system and the Islamic justice system. Apart from the fact that most of the Judges and Justices of these higher courts of record are not versed or learned in Islamic law, these Learned Judges and Justices are required to follow and apply laws and rules that are not in agreement with the Shari’a. They will not hesitate to pronounce the invalidity or in applicability of the Shari’a penal system faced with archaic rules of applying the common law, equity, or precedence. They are also bound by the rules requiring that native law and custom, for which unfortunately Islamic law is grouped, which is inconsistent or repugnant as invalid and void.

F) **MORAL AND PERSONAL CONFLICTS WITH THE OATH OF ALLEGIANCE AS PROVIDED IN THE SEVENTH SCHEDULE.**

I must confess that personally I believe very strongly that public corruption, insensitivity, theft of public funds, or its misappropriation; dishonesty or lies by public officers can be attributed to, among others things the callous way the oath of office and allegiance is administered to them at the time they assume office as public servants/officers. This may be true at least from the perspectives of the Muslims. Interestingly, everyone that assumes office takes the oath, I am yet to hear where the same officer voluntarily or otherwise takes the same oath at the end of his tenure to pacify himself as to whether he was guided by the oath during the tenure or not. The oath they take reads:

“I… do solemnly swear/affirm that I will be faithful and bear true allegiance to the Federal Republic of Nigeria, and that I will preserve, protect and defend the constitution of the Federal Republic of Nigeria. So help me God.”

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It is this that is administered to the Muslims, the Christians, and all others, including those that have publicly denounced any form of God. Yet, any public officer must swear to this oath. How then do we honestly think that these people are going to fear God in the way they discharge their public responsibilities?

On the side of the Muslims the problem is confounded. He picks the al-Qur’an to which he is, by all his articles of faith, required to owe allegiance reads the above statement. On the one hand, he holds the al-Qur’an, (and most probably in his heart he keeps his allegiance with the Almighty Allah, His Creator, Nourisher and Sustainer), then proceeds to ‘scream his head hoarse’ by swearing to bear (another) true allegiance to the Federal Republic of Nigeria. In one breath he is swearing to bear true allegiance to two things at the same time, and most assuredly (or probably) in different degrees. I think that there is something that is terribly amiss here. You cannot have it two ways.

Quite apart from our logical assumptions as indicated above, of what use is the oath when you can hardly show its effect on the people that swear to it? This, with respect, is what I can call ‘nonsense upon stilts.’ It is time the Muslims saved themselves and the others from this oath that ridicules the whole idea of oath taking and whatever it sets out to achieve. Despite this oath, the public officers taking it soon on assuming office run riot to the oath. They run amuck gathering ill-gotten wealth by a great many dubious ways. They turn the public treasury into their personal wealth. They steal, cheat, lie, kill and spread all forms of mischief and at the end of it all, they retire to the farms, businesses, homes, and or abroad to enjoy the loot. There is not a single paragraph in the Shari’a penal system, which criminalizes or punishes any of these crimes. How then does one justify the infliction of the hadd of cutting the hands of a famished and wretched person who stole a wandering cow perhaps to feed his family who had not eaten a decent meal in years?

CONCLUSIONS AND RECOMMENDATIONS:

Quite apart from the salient politicization of the process, the Zamfara state initiative has not only opened the door for others to follow in using the constitutional framework provided under the 1999 constitution in establishing a people demanded and oriented legal system. It has unwound the web of mischief that the British have covered the Shari’a legal system in Northern Nigeria, as it existed during and immediately after the Usmaniya era. The codification of the Shari’a penal system is by no means a mean achievement. It has created the needed legal base upon which the Islamic
penal system can satisfy the constitutional requirement of an ‘existing and written law’ without which there would have been decisions, mostly by the Supreme Court, that would have stamped any attempt to enforce the Shari’a penal system as unconstitutional and void on the grounds of failing to prove itself as an ‘existing and written law’. The creation of the Shari’a Courts Law is also another milestone in the process of systematization and reformation to the Shari’a issue in Northern Nigeria. If this is to continue then there is every reason to hope that the other aspects of the Shari’a will be made part of the state deliberate policy that will see to the establishment of a just society as a reflection of the Islamic ideal.

However, it is a point that has been earlier made that there are some fundamental things that ought to have been done before rushing into the implementation of the so-called Shari’a. Indeed the institutionalization of a practicable and viable justice system is at the core of the Islamic Legal System. And a viable justice system is one where there are no lines between the haves and the have – not as far as the application of the penal system is concerned. Equality and equal access, and opportunity to the justice machinery to all, without distinction, is of prime importance to any justice system. The need to provide basic amenities and other social apparatus is a paramount condition for the establishment of a Shari’a penal and justice system. The provision of food, health care, free medical care, the establishment of a welfare state and the need for probity and honesty in the discharge of public duties are the foundation of the Islamic justice system. The need for accountability, the provision of basic education, and a host of other things are important and basic preconditions for the establishment of the Shari’a penal system. In a place where more than half of the people are living below poverty line, where an equal number are illiterate, where food, shelter and clothing are lacking or inadequate, any attempt to avoid addressing these issues is an unforgivable tardiness. And failure to provide for all these and a host of other issues negates any attempt to inflict any form of punishment under the Shari’a penal system in Northern Nigeria, indeed anywhere else on the face of the earth.

I am sure that the reaction will be that the rules of the Shari’a are applicable to Muslims, regardless of the nature of the state where they are, I am saying that Muslims must be accorded certain basic things, as of right, before they are subjected to the rules of the Shari’a. During the times of the rightly guided Caliphs it was reported that for a period of some five years or so, the application of the Shari’a penal system was suspended when people were faced with poverty, famine and a host of other calamities. This is exactly the point that I am making. The state must first see to it that all
people are ensured of their lives and property, are given basic security and are provided with basic needs, and educated before they are visited with the wrath of the law or the authority of the state. And this is a duty falling squarely on a responsible government or state.

In order not to end up reducing all the efforts made, it is imperative that consideration is seriously given by the states applying some form of the Shari’a penal system to urgently find constitutional ways and means of ensuring that the rules contained in their penal system are enforced all the way to the highest court of the land. Otherwise there is no gainsaying the fact that the efforts collectively made will amount to naught. This calls for a constitutional review or amendment to deal with this and other issues outlined here and elsewhere.

Alternatively, a way out may be to push for the adoption of a parallel court system where all the higher courts of record will be duplicated, or those existing be composed of judges and justices learned in Islamic law who will seat and determine any matter that has been decided, having any bearing on the Shari’a or the Shari’a penal system, or where the parties are Muslims. The system of appeals should also follow the process and procedure approved by Islamic law. These courts will operate along with the common law and Islamic ‘personal law’ only, since there is no way to separate the personal aspect of a Muslim from the totality of his life under the Islamic legal system. The states applying the Shari’a penal system must also embark on the fight to ensure that there must be an amendment of all sections of the 1999 Constitution that gives the existing courts in Nigeria the power to apply Islamic ‘personal law’ only. What the 1999 Nigerian Constitution and other constitutions, view as personal (for instance, family law and inheritance) are not truly personal to the Muslim.

The other parallel court system that I suggest should be composed of those learned in other laws and customs to deal with those that are not Muslims. In the event that the case involves a Muslim and a non-Muslim, then there should be a choice given to the non-Muslim, to decide where he wants the case to be heard. In such a situation, people that have enough background on Islamic law and other laws should constitute the court. The Muslim nonetheless is going to be subject to the rules of the Shari’a eventually.

If this is not done, then I foresee in the not too distant future a situation where the decisions of some courts, especially in the states that are applying the Islamic criminal system will be overturned or overruled for one thing or the other. Let us for instance assume that Bubakari is found

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guilty of zina, and being a married man, is sentenced to death by stoning in Zamfara State. Dissatisfied; Bubakari appeals to the Supreme Court. Let us ponder on what the decision as far as the stoning is concerned is going to be. I think that the outcome of this kind of situation can be corrected by submitting a proposal for the amendment of these sections as we suggested. And worse still, what will be the effect if at anytime after the offence, Bubakari decides to change his religion and denounce his faith in Islam. The scenario is not one that I want to witness, but cannot help from imagining how it will affect the application of the Shari’a penal system in Northern Nigeria.
ADMINISTRATION OF ISLAMIC CRIMINAL LAW AND JUSTICE IN A CONSTITUTIONAL DEMOCRACY: PROBLEMS AND PROSPECT

By Abdulmumin B. Ahmed, Faculty of Law, BUK

“Comparing the Islamic criminal justice as they are in the statute books and what is obtainable in some states from the majority of the cases so far decided, one is tempted to state that there are some noticeable discrepancies”

INTRODUCTION:

Share’a is an Arabic word meaning the path to be followed shown by Allah the most high. To a Muslim it is a path not only leading to Allah (the most high) but also a path believed to be shown by Allah, the creator of the universe. It is believed by all Muslims to be the totality of the commandments of Allah regulating all his actions. It is a complete code of conduct whose basic sources are the Qur’an and the Sunnah (tradition of the prophet). Meaning that to a Muslim the Shari’a regulates both his relationship with his creator (Allah) and his fellow beings, which is why it is said to be a complete way of life. Islamic criminal law and justice which is the topic of this presentation is therefore a section of the Shari’a which a Muslim is under an obligation to obey and observe, just like every other aspect of the Shari’a and crime under this legal system is said to be a prohibition imposed by Allah, the violation of which gives rise to punishment. It is broadly divided into:

(a) Huudud, which are offences with fixed punishments in the Qur’an and the Sunnah, and they include Theft (Sariga), armed robbery (Hirabah) adultery/fornication (Zina) defamation (Qazf) drunkenness (Shurbul khamr) apostasy (Ridda) etc.

(b) Qisas which are offences that are defined by the Qur’an and the Sunnah but whose punishments are left to the discretion of the victim or his

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1 By A. B. Ahmed Dept. of Private and Com. Law, Fac. of Law, BUK (1) Qur’an 65: 15
2 Qur’an 45: 18
3 Qur’an 5: 4
4 Qur’an 5: 36
5 Qur’an 24: 2
6 Qur’an 24: 5
7 Qur’an 5: 93 – 94
8 Qur’an 16: 106
close relation to either retaliate or take compensation, and they include murder⁹, involuntary killing, intentional physical injury or maiming, etc.

c) *Ta'azir* which covers any offence whose punishment is not prescribed but left to the discretion of the state and the judge and in this category we have offences like gratification (*Rashwa*), breach of trust (*Khiyarah*) cheating (*Gish*)¹⁰ etc.

**ISLAMIC CRIMINAL JUSTICE IN THE NORTHERN NIGERIA.**
The Islamic criminal justice was operational in what is today called the Northern states of Nigeria before the coming of the British Colonial masters. Entrenched by the Jihad (an Islamic revolution) of Uthman Danfodio in 1805¹¹, it put in place a highly centralized system of criminal administration and a distinct legal system, a fact conceded to by Sir Frederick Lugard himself when he said that he found throughout the region, especially in its principal cities, a complex network of courts where Islamic law was administered by an Alkali, an Islamic law judge who was a man of great respectability and considerable learning¹².

It is therefore not by accident that the British colonial powers introduced the indirect rule system so as not to tamper with the political and legal systems in the North. However during the six decades of the British rule, the colonial factor transformed the content and methodology of the Islamic criminal legal system¹³. The decisive moment in the transformation of the Islamic criminal system was in 1959 after a panel of jurists known as the Abu-Rannat panel, constituted in 1958 by the government of the Northern region, recommended the elimination of Islamic law in criminal matters and the wholesale imposition of the Sudan Penal Code, a proposal which was reluctantly accepted by the regional legislature¹⁴.

This Sudan penal code, which was first used in India, introduced a penal system, which officially allows Muslim judges to continue to try criminal cases such as homicide, adultery, and perjury under Islamic law. But they were required to judge not in accordance with the normative criteria

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⁹ Qur’an 5: 40
¹⁰ Qur’an 4: 34
set out in the Qur’an and Sunnah, but according to statutory law arising from English common law. The penal code ousted Islamic criminal justice system. The constituent Assembly in 1979 recommended that states could establish Shari’a Courts of Appeal to exercise appellate and supervisory jurisdiction involving questions of Islamic personal laws; this recommendation was adopted in the 1979 constitution amidst heated debate. The 1999 Constitution retains this position.

At the dawn of the 4th republic some states in the North took steps to embody the Shari’a in their states laws, especially criminal laws, as laws regulating peoples welfare as a result of a popular demand by people from their states. So through the use of democracy and the provisions of the constitution, these states introduced the application of Islamic Criminal Law. One of such states was Zamfara State where the governor signed two bills into law viz: -

i). Shari’a Court Law No. 5 of 1999, which provides for the establishment, constitution, composition and jurisdiction of Shari’a Courts and makes provisions for the administration of Islamic Criminal Law in the state.

ii). Shari’a Court of Appeal Law No.6 of 1999, which provides for the amendment of the Shari’a Court of Appeal to confer and widen its jurisdiction.

By the provision of these laws Zamfara State seeks to:

(a) Establish new courts in the hierarchy of the court structures known to the Nigerian legal system;

(b) Confer additional jurisdiction to the Shari’a Court of Appeal so that it is competent to determine appeals from the Shari’a Courts on all matters involving Islamic Law (including Islamic Criminal Law).

(c) Introduce the administration and enforcement of Islamic criminal justice system.

These innovations according to Zamfara State government are in line with relevant constitutional provisions, that it is within the competence of a House of Assembly to establish courts in a state so long as it is subordinate to the High Court, and also that the state House of Assembly has similar powers to abolish any court it no longer desires. (Section 6 (4) of the 1999 constitution). The section states: Nothing in the forgoing provisions of this section shall be construed as precluding;
a) The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates with subordinate jurisdiction to that of a High Court.

b) The National Assembly or any House of Assembly, which does not require it, from abolishing any court which it has power to establish or which it has brought into being.

It also argued that legislation on criminal matters was within the competence of both the federal and state legislators since it fell under the concurrent legislative list set out in part 11 of the second schedule to the 1999 constitution, in fact that Section 4 (7) of the constitution explains;

The House of Assembly shall have power to make laws for the peace, order, and good government of the state or any part thereof with respect to the following:

a) Any matter not included in the exclusive legislative list setup in part 1 of the second schedule to this constitution.

b) Any matter included in the concurrent legislative list set out in the first column of part II of the second schedule to this constitution to the extent prescribed in the second column opposite thereto.

Part III of the same schedule explains further that the power of a state to make laws on matters under the concurrent list includes the power to make laws on offences and on the jurisdiction, powers, practice, and procedures of courts of law.\(^{15}\)

Also that section 38 (1) of the 1999 constitution guarantees the right to freedom of religion. In this context, the constitution preserves the right and freedom of the majority of Muslims in this part of Nigeria to manifest and propagate their religion without inhibition, particularly as these states do not prescribe Islam for everybody in the state as the state religion.\(^{16}\)

**ISLAMIC CRIMINAL JUSTICE AND THE PROTECTION OF HUMAN RIGHT.**

The purpose of human right is to affirm to right and needs fundamental to a civilized existence, and thereby ensure the happiness of human beings. Basic

\(^{15}\) See also Sections 277 and 279 of the 1999 constitution \(^{16}\) Which is in line with the provisions of section 10 of the 1999 constitution
human right norms include right to life, right to liberty, right to fair hearing, 
right to freedom of religion, etc. Punishment under Islamic law as characterized 
by flogging, amputation of hand, and death are been vehemently opposed by 
the modern society. In fact it has been the subject matter of opposition not 
only among the members of the states adopting it but all over Nigeria. It is 
submitted that Islamic criminal law is not compatible with the constitutional 
requirements on fundamental human rights.

**Right to life:**
Section 33 of the 1999 constitution provides that every person has a right to 
life, and no one shall be deprived intentionally of his life, save in execution of 
the sentence of a court in respect of a criminal offence of which he has been 
found guilty in Nigeria.

Right to life is also respected under the Islamic Criminal Law, which is why 
murder is seen as a great sin with extreme penalty prescribed for it\(^{17}\). However 
the right to life entrenched under the Islamic Criminal Law just as under 
Section 33 of the constitution is not an unqualified one. It is subject to the 
execution of a death sentence of a court of competent jurisdiction in respect 
of a criminal offence.

**Right to Dignity of Human Person:**
Section 34 of the 1999 constitution provides that every individual is entitled 
to respect for the dignity of his person, and accordingly no person shall be 
subjected to torture or to inhumane or degrading treatment.

Islamic Criminal Law expressly prohibits torture, beating, and other 
cruel and inhumane treatment. The Prophet forbade torture saying, ‘God 
shall torture on the day of judgment those who inflict torture on people in 
life’\(^{18}\).

In another tradition the Prophet is reported to have said that one who is not 
merciful would not receive mercy. ‘Allah will not show mercy to a person 
who is not merciful to people’\(^{19}\).

It is however argued that Section 34 of the constitution does not cover cases 
whereby torture, or what may be taken, as inhumane or degrading treatment 
in the course of execution of a lawful punishment exists. Needless

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\(^{16}\) Qur’an 2: 178; 5; 48, 17: 33.  
\(^{17}\) Abu Ubayd Al-Qasim Ibn Sallam, Al-Amwal 42 – 45. Matba’at Al-Hijazi (1934) Cairo.  
\(^{18}\) Adh-Dhahabi, Muhammad Bin ‘Uthman (1993); The Major Sins (Al-Kaba’ir); Daral-Fikir, Beirut, 
Lebanon; P, 155.  

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to argue that even the agreed present penal system will awfully fail if penalties will be viewed as torture, inhumane or degrading treatment.

**Right to change religion:**
Of all the constitutional provisions on human rights, the right to change religion is the only one that is incompatible with the provisions of Islamic Criminal Justice because Shari’a rules that whoever changes his religion (from Islam to any other) is guilty of *ridda* (apostasy), and on conviction, to be condemned to death. However this may not be a serious issue as hardly a Muslim changes his religion and this is why the offence of *Ridda* is not included in the Shari’a Penal Code of all the states implementing Shari’a.

**Right to fair hearing:**
Judicial powers under the Islamic Criminal Law must always operate in conformity with equity even to the benefit of an enemy and to the detriment of a relation. Shari’a does not allow the slightest modification in the rule of perfect justice or any form of arbitrary procedure to replace it. Certain noble features in this procedure which tally with the provisions of the constitution protecting the interest of the accused person include:

a). **Presumption of Innocence:**
Under Islamic Criminal Law the burden of proving innocence is not imposed on the accused, for the application of the presumption of innocence necessitates that the prosecution be charged with the duty of proving his accusation. Here the Prophet is reported to have said; “Had men been believed only according to their allegations, some persons would have claimed the blood and properties belonging to others, but the accuser is bound to present positive proof.

(b) **Proof Beyond Reasonable Doubt.**
Another important feature is that nobody is liable for a crime, until he is proved guilty. But where there is doubt as to the guilt of the accused the benefit of the doubt should be given to the accused person. The Prophet is reported to have said; “Avert prescribed punishment when there is doubt”.

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19 Qur’an 3: 135
20 Al-Amir, M. I.; (1960) Subul Al-Salam; vol.4; Dar Ihya’al-turath Al-arabi, Beirut; P. 132
In another place he said; “Prevent punishment in case of doubt. Release the accused if possible, for it is better that the ruler be wrong in forgiving them wrong in punishing”\(^{23}\)

c) **Right to counsel**

Islamic Criminal Law guarantees to both parties in litigation the right to appoint another person to represent him before the judge. Islamic jurists point out that this right was first discussed as the principle of the *Wakil* (agent) in litigations by Al-Baihaqi in Al-Sunan Al-Kobra where it is reported.

“All Ibn Abutalib disliked litigation. In any in which he was a party, he appointed Okail Ibn Abit Talib to represent him when he grew very old he appointed me”\(^{24}\).

d) **Hear from the parties to litigation**

Under Islamic Criminal Law, the judge is required to listen to the parties in litigation before passing his judgment. Here it is reported that when the prophet appointed Ali the governor of Yemen, he said to him; “O’ Ali people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know who is right”\(^{25}\).

Also historians relate that the Caliph Umar Ibn Abd-Al-Aziz advised some judges saying, “If an adversary whose eye had been blinded by another comes to you, do not rule until the other party attends. For perhaps the later had been blinded in both eyes”\(^{26}\).

It is also important at this point to show the mode of Criminal evidence under the Islamic Criminal Justice System, which consist essentially of testimony of witnesses and confessions and these must also meet some conditions before they could be accepted in evidence for conviction of an accused person.

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\(^{24}\) Ahmed Ibn Al-Husayn Al-Bayhaqi, Kitab Al-Sunan Al-Kubra 253.


\(^{26}\) 1bid
Testimony:
Jurists generally agree that to ground conviction, at least two witnesses must provide consistent testimony, except in the case of adultery, wherein four witnesses are necessary.

Also testimony must meet certain general criteria in all crimes, in addition to special ones in the case of adultery. To start with, it is argued that under the Islamic Criminal Law, the position of a witness is an exalted one; it can therefore not be left open to every person. This is because the law requires qualitative evidence and this is not to be expected from all. It is for this reason that Islamic Criminal Law requires that a witness must possess the following:

i) Maturity
ii) Reason (must be mentally sound)
iii) Memory
iv) Speech (be able to speak)
v) Visual and audible perception (must be capable of having visually observed the incident to which he testifies)
(vi) Good character.

Moreso any of the following attributes disqualifies the testimony of a witness:

a) Blood relation
b) Enmity
c) A person accused of evil deeds.

This is embodied in a Hadith narrated by Aisha thus:

The prophet said “Neither the testimony of a deceitful male nor a deceitful female, nor a man or woman punished by Hadd, nor a person jealous of his brother, nor an open enemy nor a person nursing some grudges against a particular family nor a person accused of evil deeds nor a near relation is valid”.

In addition to the above criteria, testimonial evidence in cases of adultery must meet additional requirement thus:

The number of witnesses: four competent witnesses are necessary to prove adultery, otherwise the crime is not proven, and the witnesses become guilty of defamation.

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27 Tirmidh; Sunan Al-Tirmidh 2nd Ed. (1975) Vol.4 P. 545.
The forum: Jurists have also agreed that the witnesses to adultery must present their testimony at the same legal session, and that when the hearing is concluded, the absent witness is not allowed thereafter to present his testimony, and the accuser who does not have all four witnesses to support his claim is considered a defamer.

Confession: Confession is the admission by the accused person of having committed the act that incurs punishment. It is the second form of evidence, which Islamic Criminal Law admits as a means of proving criminal guilt. Some rigid requirements are set out here to limit confessions and make their admissibility subject to stringent rules. Some of these conditions include:

a) Free will: The confessor must confess with a free and conscious will. Any pressure, torture, or deception by the judge nullifies the confession.

b) Unequivocal: The confession must be unequivocal, clear, and explicit as to the crime.

c) Forum: The confession must take place in and during a legal hearing, so that if it takes place outside the court, it is invalid except if it is witnessed by two people.

d) Repetition of the confession: The Hanafis maintain that the accused must repeat the confession the same number of times as that of the required number of witnesses. So that if four witnesses are necessary, as in the case of adultery, then four separate confessions are necessary.

e) Corroboration: The judge must find in other circumstances corroboration of the facts confessed for.

Effect of confession:
Under Islamic Criminal Law, a confession only implicates the accused but not his accessories or conspirators. Thus confessing to adultery with a certain woman does not render her guilty, if the legal evidence against her is not present. The confessor is the only person to be punished in such circumstances.

Retracting the confession:
The accused may withdraw his confession at any time before or after sentence, or during execution of sentence, and in so doing nullify the
judgment if it is based solely on the confession. It was said that after confessing to the crime of adultery, Maez recanted and tried to escape while being stoned, but the executioners followed him and put him to death. When the Prophet was informed, he said: “why did you not allow him to repent? God would accept his repentance”

Defences to Islamic criminal liability:
Under the Islamic Criminal Justice offenders in certain circumstances are exempted from criminal liability and some of these circumstances include insanity, unconsciousness, coercion or necessity, infancy, etc. and the reason for this is because one of the elements necessary for establishing criminal responsibility is missing. The basis of this is the tradition of the holy prophet, which says:

“Three categories of people are exempted from punishment; an infant until he attains majority; an insane person until he regains sanity, and a person who is asleep until he wakes up.”

In another tradition the prophet said;

God has lifted away from my people the responsibility for acts done by mistake, in forgetfulness, and under coercion.

It is also important to point out here that even the judiciary under the Islamic Criminal Justice is placed under stringent conditions, for, apart from the fact that to qualify as a judge one must satisfy some stipulated conditions, the judge is said to be answerable to God, so that once appointed he will have to administer justice among the people in an impartial manner.

Problems:
The administration of Islamic Criminal Justice in the states adopting it is bound to face serious challenges in the following situations;

a) Appeals on the decisions of the Shari’a Court of Appeal: Any person who is not satisfied with the decision of the Shari’a Court of Appeal has the right to appeal further. The constitutional arrangement in this respect is that appeals from the Shari’a Court of Appeal lie to the Court of Appeal as provided by section 244 of the constitution.

30 Supra 25
The problem with this section is that the court of appeal receives appeals from the Shari’a Court of Appeal only if such appeals pertain to Islamic Personal Law. That is why Section 237 mandates the Court of Appeal justices to include at least three justices learned in Islamic Personal Law.

b) Evidence: Even where the Court of Appeal accepts an appeal from the Shari’a Court of Appeal, there is bound to be a very serious conflict of law, and evidence falls within the exclusive legislative list.

c) Reaction by non-Muslims: Fearing that the implementation of Shari’a may compulsorily be prescribing Islam for all, the introduction was greeted in some quarters with mixed feelings resulting in protests, and in some states, mayhem.

d) Implementation: Comparing the Islamic Criminal Justice as they are in the statute books and what is obtainable in some states from the majority of the cases so far decided, one is tempted to state that there are some noticeable discrepancies. Take for instance Amina Lawal and Safiya Husana’s cases in Katsina and Sokoto States respectively, who were both convicted for the offence of adultery on the basis of their pregnancy and confession. I need not state the long intellectual debate on the use of pregnancy and confession for conviction. Had the laws being strictly adhered to, there wouldn’t have been any conviction at the lower court, one is therefore not surprised that the higher Shari’a Court quashed Safiya’s conviction and same is going to happen in the case of the conviction of Amina.

The Way Forward:

i) Constitutional Amendment. Since the 1999 constitution is going through the process of amendment a good case should be made for the amendment of all such sections of the constitution, which hinder the smooth application of the Shari’a, since democracy is about the popular demand of the people.

ii) Establishing a Federal Shari’a Court of Appeal. What might seemingly sustain the free application of Shari’a is the establishment of a Federal Court of Appeal. The court should be conferred with exclusive jurisdiction to hear appeals from the Shari’a Court of Appeal and should be a final Court of Appeal of all matters involving Islamic Law.
iii) By now it is becoming clear that the Shari’a controversy may be a thing of the past in Nigeria, particularly as it affects the fear and apprehension of the non-Muslim members of the state that implement it. In the first place, all the Shari’a Penal Codes exempt the non-Muslims as their subjects unless they voluntarily subject themselves to it. Section 3 of the Zamfara Shari’a Penal Code provides that “Every one who professes the Islamic faith and/or every other person who voluntarily consents to the exercise of the jurisdiction of any Shari’a Court established under the Shari’a Court Law shall be liable to punishment under the Shari’a Penal Code for every act or omission contrary to the provision thereof of which he shall be guilty within the state”.

The court of Appeal held greatly in this respect by ruling that Shari’a is only applicable to Muslims in the case of Alhaji Agbebu V Shehu Bawa33.

iv) The application of Islamic Criminal Justice doubtless helps in drastically reducing crime rate in the states that administer it. Even on the side of quick dispensation of justice for accused persons arraigned before Shari’a Courts who get undelayed judgment. This in effect contributes in reducing not only cases in the court but also in decongesting our prisons34.

CONCLUSION

After going through the relevant laws and constitution of Nigeria it seems to be clear that a state under the current democratic dispensation is quite competent to enact laws that may take care of the agitation of its citizens to re-introduce the administration of Islamic Criminal Justice. Furthermore, it is discovered that the Islamic Criminal Justice is not introducing offences which are unknown to modern Criminal Justice System, for it aims at providing security, protecting lives and property, and honours the citizens. In its implementation, stringent conditions and safeguards are provided in order to ensure justice and fair play for any person being subjected to it.

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PROTECTING THE RIGHTS OF ACCUSED PERSONS THROUGH THE PROPER IMPLEMENTATION OF THE SHARI’A PROCEDURAL GUARANTEES IN NORTHERN NIGERIA

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“It is a fundamental principle of the Islamic criminal law that the huudud offences are to set aside in cases of doubt or uncertainty. The prophet [SAW] is reported to have said: “Put off the huudud upon the Muslims as much as you can, if the suspect has a way out, let him off for verily it is safer for the state to err in acquitting the offender than the to err in punishing him”.

BACKGROUND

Northern Nigeria is the cradle of great Islamic legacy in the Borno and Sokoto empires stretching back to the 11th century, and has kept to the application of the Islamic law ever since, despite the interference and presence of the British for at least half a century. At the brink of British retreat and Nigerian Independence, Professor Norman Anderson, who had conducted widespread research in the area of the application of Islamic law in several parts of the world, said: “The Islamic law is more extensively followed and enforced in Northern Nigeria than any where else in the world outside Arabia”.

It was perhaps for this reason and also the fact that the people of northern Nigeria have always nursed “a zeal for maintaining the Shari’a to its full extent” that the British allowed the application of Islamic law side by side with English law.

After independence, the Penal Code law sponsored by the British and other highly placed natives – themselves a part of the empire, suppressed the full application of Islamic criminal law until the year 2000 when Zamfara State of Nigeria reformed its penal laws and created fresh courts with powers to try both civil and criminal matters. This move spread across the states of northern Nigeria and, today, only a few of its 19 states have not turned towards the implementation of the Shari’a criminal justice system.

This paper aims at explaining the general nature of the operation of the Islamic criminal justice system, and also how this philosophy has been
blended into modern legislative initiatives in northern Nigeria. We will set out, therefore, to discuss three main headings; the Shari’a; Maliki legal theory and the safe guards in the general law and the written laws applicable to the region that relate to substantive and procedural rules. In all of this, an attempt will be made to identify the areas that relate to the rights enjoyed by the accused in a criminal trial and also the philosophy underlying the Maliki approach to legal reasoning.

**Shari’a and its Nature.**

Literally, the Shari’a means a path that leads to water. In its technical meaning, it represents “the science of practical conclusions derived from distinct sources.”

The majority of the Muslim jurists have agreed that the main sources of law, are four; the Qur’an, Sunnah, Ijma’ (concensus of opinion of the jurists) and qiyas (analogy). Besides the main sources, the jurists have elected for various methodologies of legal deduction based upon the legal theories of their particular schools of law. It follows logically, that a particular school may reject the methodology of another school.

These methodologies or styles of legal thinking are referred to as secondary or minor sources of law because they do not enjoy unanimity in recognition, but are of the utmost relevance to the schools that respect the methodology in question.

The Shari’a stands for the law of Islam. Allah, the Most High has accomplished the delivery of His complete religion through the vicegerency of Muhammad (SAW). He thereby guides whomsoever He pleases to the straight path.

The Islamic legal system is established upon the finest premises and the clearest principles. It is built upon piety, justice, public policy and the avoidance of mischief. The Islamic law is fortified with clear-cut proofs and well-guided routes for those that seek justice. The administration and realisation of justice is the mainstay of the law. The Qur’an states thus:

“The word of thy Lord doth find its fulfilment in truth and justice; none can change His words…”

According to the famous Maliki judge and jurist, Ibn Farhun, while commenting upon the above verse,

“ ‘His words’ refer to the Glorious Qur’an and they have been perfected in His legal proofs and clear evidences, His commands, prohibitions and other rules…”
He goes on to express the view that judicial procedure ('Ilm al-qada) happens to be the most prominent of all the branches of knowledge because it occupies the most elevated status and it is through its process that the right to life and limb is protected and lost; it is through it that marital rights are secured; and it is by it that ownership of property is determined. The process to be undertaken, according to Ibn Farhun, is “a maze of hidden pitfalls with dreadful consequences” because of the sacredness of people’s rights under the law.

The Ultimate Purpose of Islamic Law
Because of the fact that the Islamic law regards the establishment and realisation of justice as the most important aspect of knowledge and, indeed, objective of the law, Muslim jurists have studied this concept in great detail. They have concluded that all legal rules have been made for the benefit and advantage (masalih) of man. Furthermore, they have broken down the general goal of realization of justice into three objectives. It must be stressed here that the objectives refer to interests of society.

(a) The imperative interests (al-daruriy): They are made up the protection of six interests being the preservation and protection of life, property, lineage, religion, intellect and honour. These interests must be protected by all means otherwise the order of society will disintegrate into chaos and lawlessness. Under the Islamic law, this protection is brought about, mainly, by the criminal law (jinayat), which covers the huudud (fixed penalties), qisas (penalties for torts committed against life and limb) and the ta’zir (penalties that are not fixed and depend upon the good discretion of the state and, to some extent, the judge).

(b) The second type of objective/interest covers relief and concession from stringent and rigid rules of the law that lead to excessive difficulty (ma-shaqqah) or absurdity (mubalagah). These interests amount to nine tenths of knowledge according to Asbag, the disciple of Ibn Wahb, (the disciple of Malik). These interests are referred to as “hajiy” (required). They are not as crucial as the daruriy but they inject concession and mercy (rahmah) into the application of the law. It is under this heading that defences to criminal liability, whether total or partial, apply to mitigate punishment. The jurists refer to this as shubhah (doubt or justification) and, whenever it is established, the maximum penalty, especially under the huudud and qisas crimes, shall be set aside and the ta’zir will be applied instead.
The third type of objective/interest is that of the realization of excellence, the best etiquette and the avoidance of behaviour that is repulsive to people of honour and respect (tahsiniyyah). It is under this heading that the State strives to perfect its role by concentrating on niceties and fine points of social life. People are taken away from immoral and indecent acts even if they appear negligible, and supererogatory acts of worship, charity, and chastity are enhanced and encouraged. It is obligatory for government to find ways of enhancing good and forbidding evil.

The three objectives apply according to the essence and in the degrees arranged. They are interconnected and are supposed to be applied in unison, each complementing and supplementing the other. This interplay is what al-Shatibiy refers to as “takmiliy” but he, just as so many other jurists, refused to reckon it as a fourth degree.

The Islamic law then is not a mere set of blanket and square rules. It is rather a network of highly sophisticated nature. This will be illustrated further under the next heading.

The Nature of the Islamic Criminal/Penal Rules

Crimes are divided into three broad headings in accordance with the penalty to be applied. There are:

(a) al-huudud (specified or fixed penalties);
(b) al-qisas (retaliation as a penalty for injuries to life or limb); and
(c) al-ta’zir (discretionary penalties by the State or judge).

(a) al-Huudud

The term huudud (sing. hadd) literally means a bar that separates one thing from another. Technically, the jurists have defined it to be prescribed penalty given for transgressing the rights of Allah” (public rights).

This category of offences generally consists of zina (adultery/fornication), qadhf (false accusation of zina), Shurb al – khamr (wine drinking), sariqah (theft), and hirabah (banditry). The huudud offences are not compoundable, and the State is under an obligation to enforce the penalty once the case is established beyond doubt (shubhah).

(b) al – Qisas

This literally means to pursue or follow. Technically, however, it means retaliation for intentional injuries to life or limb.
Whereas the *huudud* apply to public rights or rights that are predominantly public, the *qisas* applies to private rights. This signifies that the victim of the offence has the right and option to do any of the following:

(i) Retaliate for personal injuries to life or limb;  
(ii) Elect for compensation; or  
(iii) Forgo both (i) and (ii) above

(c) al – *ta’zir*

This category is the widest of all the categories of punishment. *Ta’zir* literally means to defend, assist, or support.

Technically, it means punishment given for an offence for which the Shari’a has not specified a penalty.

The *ta’zir* applies in two ways: firstly, where the standard of proof in the *huudud* or *qisas* – which is extremely difficult to attain – fails to be achieved, but some ingredients of the offence happen to be established. And it is in this way that the *ta’zir* aids and supplements the *huudud* and *qisas*. An example of this is where witnesses prove that some intruder did break into house 13, but that he was apprehended before removing any article from the house. Here, one vital ingredient for the offence of theft – punishable with amputation of the hand – has not been proved, i.e the removal of the subject matter of theft out of the safe custody.

Another example could be in a case of *Zina*; the witnesses only establish that x and y was locked up in a room, alone, or that they were seen under the same sheets. Here, a vital ingredient of the offence, that is, the res, in res, has not been proved and the *huudud* penalty shall not be enforced in this case.

In both examples above, the court will not apply the maximum penalties (huudud), but will apply a lesser (*ta’zir*) penalty for what has been proved. Therefore in the first example, the intruder will be punished, not for theft as charged, but with housebreaking. In the second example, the offenders, ‘x’ and ‘y’ will be punished for being isolated or secluded with a member of the opposite sex without justification.

Secondly, the *ta’zir* could be applied in offences that basically do not fall under the scope of the *huudud* or *qisas*. This actually forms the majority of the scope of the Islamic Criminal law. According to Ibn Taymiyyah, *ta’zir* offences consist of:

“*Offences that do not have a specified penalty or expiation; for instance, where one kisses a child with passion or kisses or fondles a woman not lawful for*
him, or consumes prohibited substance such as blood or carcase, or defames another with a charge other than that of zina, or the one who steals an article which is not is safe custody or that which is of little value, or breaches a trust as in the case of the public treasury or an endowment or the property of orphans. Or commits dishonest practices in trade …… or gives false evidence, or the judge that accepts bribes… and other things that are prohibited. All these may be punished by ta’zir in proportion to the number of times the offence is repeated” 18.

It is interesting to note the striking similarity of the interplay between the three categories of the huudud, qisas, and ta’zir on the one hand, and the three categories of interests (masalih) on the other.

**Major Principles of Maliki Judicial Procedure**

Maliki jurisprudence stems from the doctrines of legal reasoning postulated by the Imam Malik bin Anas (d. 179 H). This school of law is rooted in the style of thinking of the jurists of Medinah (ahl al-Medinah). People flocked round Imam Malik from several parts of the world. Malikiyyah dominated Hijaz and spread to the Maghreb (north and west of Africa). This is why the Maliki School predominates in Nigeria. But Maliki thought prospered the most in Andalus (Spain and its environs) where all branches of knowledge were studied. It was during that time that Ibn Rushd (Averroes), al-Shatibi, Ibn Hazm, al-Idrisi, Ibn Jubair of Valencia, Ibn Battuta, al – Biruni, and other great jurists and scholars brought the then known world to the brink of relativity and the space age. 19 Mathematics, medicine, poetry, and music were taught in centres of learning but law was given a special status as the determining factor for rights and obligations to the extent that the study of law overshadowed other branches of knowledge. Most of the Maliki texts relied upon in our courts today are works written during the great Andalusian period. The Tuhufat al – Hukkam, which is perhaps the most celebrated of all the judges’ compendiums, written by Ibn Asim, the chief judge of Granada and a student of Ibn Juzay, (the disciple of Ibn Rushd (Averroes). The Tabsiratul Hukkam is another book of judicial procedure written by Ibn Farhun in the style of the Andalusian judges. There is also the Bahjah Fi Sharh al–Tuhufah, an excellent commentary upon the Tuhufah, which is heavily relied upon by our courts today. Al – Shatibi’s treatise on legal
philosophy and reasoning is also widely consulted not only in Maliki jurisdictions but also all over the Muslim world. In the same way, Ibn Rushd’s *Bidayat al – Mujtahid* is a source of solace for jurists world – wide.

Maliki jurisprudence is distinguished for its inclination towards maslahah. This general term covers istihsan, (juristic equity) *masalih al – mursalah urf* (conventions or customs), and sadd al – dhari’ah (blocking the inroads to mischief). The Malikis are also known to incline towards ‘azimah (firmness) as opposed to rukhsah (laxity) in their style of legal thinking. They also respect and recognise the effect of and significance of circumstances upon a legal verdict. 20

Malikiyyah is also distinguished because of its vastness and variety of approaches towards solving legal problems. There is the approach of Ibn al- Qasim recorded in the Mudawwanatul Kubra, and it happens to be the most dominant methodology within the Maliki school. Besides it, there is that of Muhammad bin Ahmad al – Utbiy (d. 255 H) of Cordoba. This version of Maliki thought is covered by the famous Utbiyyah. Another approach to Malikiyyah is that of Ibn al – Mawwaz and this is to be found in the Mawwaziyyah. 21

This divergence can only mean concession and ease in the application of the law. There is room for mitigation and leverage, except that the judge that is not qualified to make *ijtihad* may not depart from the established precedent which is preponderant to an opinion that is not so well established.22 The advantage in this rule is that the law assumes certainty and chances that justice will be done are enhanced.

The Matter of Law and Human Rights.

Under the *Shari’a*, rights go hand in hand with duties. According to Sheikh Uthman bin Fodiyo, it is the duty of government to provide for the rights and interests of its citizens23. These rights are the same interests covered by the *masalih*. Therefore, the State makes it its preoccupation to protect the citizen’s right to life, property, dignity, lineage, faith and intellect; and, furthermore, to cause the enhancement of those rights by blending the *daruriyyah*, *hajiyyah*, and *tahsuniyyah* objectives of the law. The citizen is entitled to this protection irrespective of his social position, age, sex, race or his plight as a suspect.

Besides this general advantage, the State must appoint persons of impeccable character as judges, the law insists that the judge must be possessed of all his senses, that he must be intellectually alert, and must treat both parties equally. The courtroom must be situate at the centre of
town so that the people can gain quick access to justice, and it is the duty of
the government to pay the salaries of court personnel and incidental staff. It is
also the duty of the government to supervise the court properly, and for the
government to appoint special courts or tribunals to hear any complaints
against public officers including judges. Capital punishments, such as the
*huudud*, *qisas*, and other death penalties are not to be enforced without the
approval of the chief executive or his deputy.  

As regards court procedure, we feel obliged to mention that unlike
the modern Western system of law, witnesses must be persons of
unimpeachable character, which means that they must not be found wanting
in honour or reputation. Where the witness is not known by the court, it is a
requirement that two witnesses of unimpeachable character must attest for
him before his evidence is admissible; in *huudud* offences, the general rule is
that females are not competent witnesses. The same rule applies to insane
persons, idiots, and children except that, in exceptional cases, the evidence of
children is admissible in cases of injuries that happen between children, on
condition that their evidence is taken before they disperse or interact with
adults. The witnesses, especially in the cases of *zina* and theft, must be properly
cross-examined by the judge. The judge shall probe them to the minutest
detail and the judge shall call the accused person to give an address as to his
defence even if the prosecution succeeds in proving its case. The court shall
call upon the accused person to produce any defence of his, and it shall allow
him reasonable time to prepare his evidence. It is the preponderant view of
the Malikis that the judge cannot convict the accused if he or she confesses
before him alone. Therefore, the judge’s hands are tied if the accused should
retract his or her confession in open court.

These rules that work as safeguards to the accused are numerous and
are scattered throughout the corpus of the law.

It is only expedient for us to trace them in specific offences.

**Safeguards under Specific Offences**

Before discussing specific offences, it is relevant to introduce the general
principles of liability under our criminal law that ultimately form the
framework for our sub-heading.

Generally stated, punishment will only be executed where the
ingredients of specific offences are proved. But the general conditions
superimpose over the specific conditions. They are:
(a) That there must be a text of the law that prohibits the act;
(b) That there was actual performance of the act by way of a commission
or omission; and
(c) That the offender be of legal capacity.
As far as the first condition is concerned, criminal liability will not be recognized unless there is a specific text that prohibits the offence because of the presumption that all acts are deemed to be permissible until a clear text prohibits such act. Furthermore, in the huudud and qisas offences, there must be a text that specifies the penalty to be given.  

The second condition requires that there should be the fulfilment of all the ingredients of the offence in the huudud and qisas categories. Where even one ingredient fails to be proved, only the ta'zir may be applied. 

The third condition requires that the offender must have been possessed of sound mental capacity (al–aql) at the time of committing the offence. This is necessary for comprehending the nature of the act and forming the wicked intent (al-idrak) that actually justifies punishment. Therefore, insane persons, minors, and persons compelled cannot be said to be subject to criminal responsibility. Persons who are under one form of unconsciousness or the other, such as sleep, mistake, forgetfulness, and involuntary intoxication, cannot be held responsible for crimes in the ordinary way. So also are persons compelled to commit offences if the compulsion is real.

**Specific offences of huudud and qisas nature**

(1) **Zina** (adultery or fornication)

According to the Malikis, zina is “The act of sexual intercourse of a man, fully responsible, through the genitals of a human being over whom he has no sexual rights and in circumstances in which no doubt exits as to the illegality of the act”.

It should be noted that anal coitus with a woman, or sodomy practiced with a man fall under the meaning of “zina”, except that there is a slight consideration in the penalty for sodomy that differentiates the two cases.

**Conditions**

From the definition, we can safely infer the following conditions:

(a) The offenders must be adult, sane, muslim and must have embarked upon the act voluntarily and knowingly;

(b) The act must be committed with a human being. Therefore, sexual intercourse with an animal or jinn is not zina punishable by way of hadd; and

(c) There should be no doubt as to the reason for committing the act and the circumstances surrounding the occurrence.
Proof

There are three general means of proof.

(a) Confession

The confesser must be sane and adult. One confession is sufficient to convict him or her. Retraction of the confession is acceptable where the retraction is accompanied with some defensive plea of what amounts to some doubt, justification or defence (shubhah).

Where the retraction does not carry any defensive plea, the jurists are divided. Some are of the opinion that the retraction will not be admissible, while others say it is admissible. Retraction of confession can be made at anytime even during execution of punishment.

(b) Evidence:

It is a requirement that for the proof of the crime of zina, there must be four unimpeachable male witnesses that saw the res–in–res. They are to give evidence at the same time in a joint session according to the popular view. However, according to Asbag and Ibn Majishun, evidence may be taken jointly or severally on condition that the time spent in between the testimonies is short.

Where the witnesses are less then four, then they will be deemed to have defamed the suspect and will each receive eighty strokes of the cane for falsely accusing another of zina. Where, after testifying, one of the witnesses retracts his testimony, all of the witnesses will be lashed for defamation.

The judge has a duty to properly cross-examine the witnesses as to details and, especially, as to whether they actually were close enough to have seen the res in res.

(c) Manifestation of Pregnancy

Manifestation of pregnancy in a woman resident in the jurisdiction, who is not known to have a husband, is sufficient ground to accuse a woman of zina because it is common knowledge that pregnancy comes about by way of sexual intercourse. Another reason is that the woman’s silence about her state of pregnancy until it is discovered raises a presumption of the establishment of a prima-facie case against such woman.

It is for her, at this stage, to come up with a concrete defence or face the penalty for zina. It is an established principle of Maliki law that if she does not report rape immediately it happens, then it is not for her to
allege rape only when her pregnancy is discovered. In the words of Imam Malik:

“The established practice with us concerning the woman that is found to be pregnant and without husband, who claims that ‘I was raped’ or ‘I got married’ is that these defences will not be admissible and the hadd 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”. 36

The jurists have explained that “bleeding” or “screaming” or “clutching a man” is not to be interpreted literally because, according to al – Tasuliy, the author of the Bahjah, “this is extremely difficult for a victim of rape. Nay, it only means reporting the matter in good time even to her folk”. 37

It is reported in the Tabsiratul – Hukkam that if a woman says the cause of her pregnancy was that she copulated with a man, in between her thighs, not through her genitals and, as a result, the water trickled into her womb, then this defence will be accepted from her and the hadd penalty will be avoided because this is possible. 38

The case of a woman reporting a case of rape

Where a woman alleges that a particular person has raped her, many issues are brought into play especially where the man denies the charge. Firstly, the man cannot be punished by way of hadd because the statement of the woman, by itself, is not proof. It is a general principle of evidence in both the Islamic law and Romano - Germanic law that “Whoever alleges (a fact) must prove”. 39 And since the man has not confessed, then there is no way he may be given the hadd penalty. It cannot also be said that the man should take oath and free himself from criminal liability because the huudud cases are generally not subject to proof by oath taking. Furthermore, the mere fact that the man refuses to take the oath is not conclusive evidence against him. Therefore, in such a case the man escapes the hadd penalty.

Another dimension in this matter is the strength of the claim of the woman since, ordinarily, women do not admit to succumbing to sexual intercourse. Therefore, there is sufficient ground to charge the man with a civil allegation and require him to take an oath and free himself from the liability of paying the dower, befitting the status of the woman for every act
of copulation had with her. If he refuses to take the oath, she takes an oath and claims the dower. 40

This principle is quite complicated and technical since the circumstances of the case are crucial in determining the verdict of the court. The Maliki jurists have, therefore, categorised the cases into three broad headings, each dependent upon whether the woman reported the matter in good time or not.

(a) (i) Where the Man Accused of Rape is of Good Character and Honour:
If the woman’s claim is made after a time (whether long or short) a presumption of defamation is raised, and she will suffer 80 strokes of the cane for her false charge and the *hadd* penalty for *zina* for her pregnancy unless she retracts her statement. The accused will not be made to pay dower or even take an oath to relieve him of the liability to pay dower. 41

What if the woman is of good reputation? There is a difference of opinion. One view states that the man will be compelled to pay the dower and will not even be given the chance to swear and thus escape payment of the dower.

On the other hand the author of the *Bahjah* quotes Ibn Rushd as holding a contrary opinion.

“If she makes a claim (of rape) against a man who is not of that disposition and she also is not of that disposition (meaning both are respectable persons), there is no difference of opinion over the fact that there is nothing established against the accused (rajul) and that she will be given the *hadd* penalty for *qadhf* (defamation). She shall also be given the *hadd* for *zina* if pregnancy ensues and, if pregnancy does not ensue, then the obligation of *hadd* for *zina* is removed.” 42

(ii) Where the woman reports in good time, the *hadd* for *zina* will not be enforced upon her, but she will be given the *hadd* for *qadhf* (defamation). 43

It should not be forgotten that this section is concerned with the man of established honour. One of the ultimate goals of the Islamic law is to
protect honour. What would be the basis of this if an allegation, which is unsubstantiated, is allowed to be made against a man of good reputation? Then bringing down a man of honour will be a simple thing, thereby destroying his life long efforts at building his good reputation and the honour and dignity of his progeny.

It should also be recalled that this relates to unsubstantiated allegations. Where, for instance the man is seen by witnesses making away with the woman until she is found defiled, this is a different case altogether.

(b) Where the Man’s Reputation is not known

(i) Where the woman is not of good reputation or of unknown character and reports the matter after a time.

Here there would be no hadd for zina upon the man because there is no proof against him. The woman will be subjected to the hadd for qadhf (defamation). If pregnancy ensues, she will be punished with the hadd for zina. If pregnancy does not manifest, then there is a difference of opinion as to the application of the hadd for zina upon her. 44

(ii) Where the woman is of good reputation.

There is a difference of opinion among the jurists as to whether the hadd for defamation and zina apply to the woman.

What this means is that some jurists hold that the hadds will apply, while others hold that the hadds will not apply. An extended meaning is that such cases heavily depend upon the merits and circumstances of each particular case, and the task before the judge is enormous. In my humble opinion, putting aside the hadd penalty for zina is the better opinion. Allah knows best.

Whenever the woman avoids the hadd, the man will be obliged to take the oath relieving him of liability to pay the dower and, if he refuses, the woman swears and takes the dower. 45

(iii) Where she reports the matter promptly, she will avoid the hadds of zina and defamation if she is of good character. The jurists are united on this. But where she is not of good reputation, there is a difference of opinion among the jurists. 46

As in the above cases, where the woman escapes the hadd penalty, the man will be compelled to take the oath and if he refuses the woman takes it and claims the dower. 47

(c) Where the Accused is of Bad Character.

The woman shall not be given the hadd whether she reports promptly or not, if she does not become pregnant. 48
Where she becomes pregnant, there is a difference of opinion. There is also a difference of opinion over her entitlement to the dower. According to Ibn al-Qasim, she will not take anything by mere allegation, even if the accused is more evil than one Ibn Azraq, a hoodlum of that time. 49 But according to Ashhab, it is the opinion of Malik that she claims the dower even without having to take the oath. 50

According to Ibn Rushd, the State shall probe and investigate the accused person after imprisoning him. It is only where nothing is proved that he will be given the option of taking the oath and escaping liability. If he refuses, then she will be called upon to take the oath and claim the dower. 51

The whole discussion is indeed complex as in many a legal point. We may sum up by saying that the law strives to protect the accused person and guarantees his rights until the case against him is proved beyond doubt.

It is a fundamental principle of the Islamic criminal law that the huudud offences are to be set-aside in cases of doubt or uncertainty. The Prophet (SAW) is reported to have said:

“Put off the huudud upon the Muslims as much as you can: if the suspect has a way out, let him off for, verily, it is safer for the State to err in acquitting the offender than to err in punishing him”. 52

2) Qadhf (False Accusation of Zina)

Due to the fact that zina is severely punished, and the convict suffers the social stigma that creates serious family repercussions, the law has made proof of the offence of zina extremely cumbersome. Furthermore, it punishes, severely, unjustified accusations of the act of zina.

Definition of Qadhf

Qadhf is an unproved allegation of zina or sodomy against another. It could take the form of the direct accusation, such as saying to another: “O you adulterous one!” It could also be by indirect means such as an innuendo if the word infers the accusation of zina, such as someone saying to another “I am not a fornicator” or something like “O you bitch”. Or “O you donkey”. Qadhf may also take the form of the refutation or denial of another’s paternity such as saying “X is not the son of Y” 53

The conditions for the offence of qadhf are that the offender must be adult and sane. On the other hand, the victim of the slander must be a Muslim sane, adult who must never have been convicted for the offence of
zina. He must also possess the physical organs necessary for the act of zina.\textsuperscript{54}

**Proof of the offence**
The offence of qadhf may be proved by confession or testimony of two male witnesses who are of impeccable character. Unlike proof of the offence of zina, exceptions to the strict rule are allowed. For example, where only one male witness is found, the accused person may be asked to take oath relieving him of liability, and if he refuses, he shall be detained until he swears. Furthermore, according to Ibn Rushd, the testimony of females is acceptable if it is accompanied by the testimony of one male witness and the oath of the victim.\textsuperscript{55}

**Sariqah (theft)**
Theft subject to the hadd penalty has been defined by the Malikis to be “the taking away of property belonging to another stealthily, and without permission”\textsuperscript{56}

The conditions attached to this offence are that the offender must be sane and adult; he must not be the father or mother of the victim; the thief must not have been driven by hunger to steal; the property must be inviolable, capable of legal disposition, the thief must not have ownership over the property, or even constructive ownership, such as pledged property, property belonging to the subject matter of a debt, or property over which the offender has a legal interest: the property must amount to the minimum standard for the theft (nisab) which amounts to 3 dirhams or a quarter of a dinar (about N1,000 = today). Therefore, there is no amputation for theft of paltry sums or trifles; the theft must involve property kept is safe custody (hirz). This implies a place or means customarily reserved for safe custody. There is a difference of opinion over the case of one who steals from the public treasury or clothes hanged on a line to dry. There is no hadd for the one who is authorized to enter a place, or for theft of fruits hanging on trees or crop before harvest. The theft must be done stealthily or secretly. Therefore, there is no amputation for taking away property by extortion, snatching, usurpation or deceit/fraud.\textsuperscript{57}

**Proof**
There are two means of proof: testimony of two male unimpeachable witnesses, and by confession.

In the case of confession, the hadd penalty will apply if the confession was obtained voluntarily. The stolen property will also be returned if it is
intact. Where the confession is obtained by threats or beating, the amputation will not hold and the court shall compel the return of the stolen item.

Where he retracts his confession by pleading some defence, he will be compelled to return the item. 58

**Hirabah (Robbery/Banditry)**

The Maliki jurists have defined it to be “the act of occupying the streets for the purpose of preventing safe passage, or the act of seizing the property of Muslims or other non–Muslims citizens, such act being committed in circumstances that render the victim(s) helpless”. 59

It should be noted that the act of *hirabah* is completed even if the bandits are unarmed. Also, their guides and those who screen them are guilty of *hirabah*. Unlike the case of theft, the concept of *nisab* is of no consequence in the matter of *hirabah* 60

**Proof**

The act of *hirabah* may be proved by confession or by testimony of witnesses who may even be victims of the offence.

Where the bandit repents, before he is apprehended, the hadd penalty for *hirabah* shall be set aside and his liability will only be in respect of the atrocities he committed against *qisas* and *huudud* rights. He shall be subject to retaliation, or compensation for personal injuries and shall also return all goods seized from his victims. 61

**Shurb al – Khamr (Wine Drinking)**

**Definition**

Wine (*khamr*) is any intoxicant even if it is not referred to as “wine” and even if it is drunk in small quantity. 62

The conditions for the offence are that the offender must be sane and adult and must have consumed the intoxicating substance by swallowing it knowingly and willingly. 63

**Proof**

The offence may be proved by confession or by the testimony of two male witnesses as to the consumption or intoxication. Intoxication, here, covers vomit and stench of wine on the breath of the offender. 64

**Qisas offences**

Qisas offences are private interests that the State aids the victim to prosecute. It is for the victim in a case of personal injuries to limb, or his
relations, in a case of homicide, to elect to retaliate if the act was deliberate, or relinquish their right to retaliate and opt for compensation or total pardon.

It is for the offender in such case to plead for mercy or even offer to pay a higher amount as compensation. The State can act as a mediator in this respect, but the final decision rests with the victims(s).

The accused’s life will be spared if even one of the relations opts for compensation even though there is a difference of opinion under the Maliki school as to whether female heirs can counter the decision to retaliate made by her male counterpart of the same degree of strength in terms of closeness to the deceased.65

Where the deceased pardons the offender before dying, the heirs have no right to insist on retaliation except the deceased had made the declaration of pardon before the death became imminent.

Whenever the accused escapes execution by way of retaliation, he shall be put in jail for one year and given one hundred strokes of the cane. This penalty, advocated by Imam Malik as a necessary ta’zir punishment, will deter the offender from repeating the act of murder, and also keeps him away from public view, thereby saving him from some vengeful relation or comrade of the deceased’s. 66

The offender that kills the deceased in a treacherous way (gila), or by way of hirabah, will not be allowed to enjoy the concession of pardon by heirs. He shall be put to death as a matter of public policy. 67

**Proof of Homicide**

There are three means of proof:

(a) **Confession**

Unlike the case of zina, the one who confesses to the killing of another will not be allowed to retract his confession. 68

(b) **Testimony of witnesses**

Two male impeccable witnesses are required to testify to the strike that killed the deceased and, also, to the death of the deceased on the spot.69 If these cannot be established, resort must be had to the qasamah (oath of conjurators)

(c) **Qasamah (Oath of Conjurators)**

The oaths are to be taken 50 times, and distributed between the heirs, in proportion to their shares of inheritance, claiming that “X” is the one who killed the deceased. This procedure is to be undertaken in the central mosque of the city after the Friday congregation. After the oaths, the victims are free to select only one person among the suspects and may put him to death.
It must be noted, however, that this process requires the presence of strong circumstantial evidence (laauth) such as the accused being found over the body of the deceased with a blood-drenched sword or dagger; or there being known enmity and hatred between the deceased and the accused where the former is found in the territory of the accused. Other examples of laauth are the deceased making a dying declaration accusing the suspect of killing him, or the evidence of one unimpeachable witness who witnessed the death of the deceased, or the testimony of two unimpeachable witnesses as to the strike on the deceased.\textsuperscript{70}

**Rights of Accused Persons Under the various Penal Laws of Northern States of Nigeria.**

The Zamfara State of Nigeria, the first State to introduce reforms into the penal law among the northern states, revised the Penal Code law of 1960 and the Criminal Procedure Code Law, also of 1960 by passing mainly three laws into force; the Shari’a Courts Establishment Law of 1999, the Shari’a Penal Code Law of 2000; and the Shari’a Criminal Procedure Code law, 2000.

The aim of this set of reforms was to satisfy the requirement of section 36 (12) of the 1999 Constitution which requires that offences and their penalties must be “Specified in a written law”. Written law has been clearly defined by the constitution to mean an Act of the National Assembly, or a law of a State, or any subsidiary legislation or instrument under the provisions of a law.\textsuperscript{71}

Another purpose served by the laws is the providing of certainty in the law and precision of legal language. Therefore, throughout Zamfara State a uniform penal law applies to all Muslims.

The Zamfara reforms have been adopted by the other “Shari’a States” with very negligible changes. The states that have followed suit have adopted the huudud and qisas chapters of the Zamfara Codes almost verbatim. Interestingly, this gives the Shari’a states in northern Nigeria a uniform public law in the general sense.

The laws establishing Shari’a Courts have clearly and expressly stated that the Shari’a system is binding only on Muslims. Non-Muslims, however, may apply, in writing, submitting themselves to the jurisdiction of the Shari’a court. This applies throughout the states applying the Shari’a legal system. \textsuperscript{72}

The Shari’a Penal Codes are drafted in such a way as to codify the corpus of the Islamic Criminal Law in such a way that all the ingredients of
particular offences are captured under specific sections. The effect of this is that if one or more of the ingredients fails to be proved, then the offence fails to be proved against the accused person. This position clearly summarizes the general law to be found in the books of law.

The Shari’a Penal Code of Zamfara State begins with preliminary sections and chapters that deal with general concepts of the law such as definitions, general criminal responsibility and the circumstances that erode criminal liability, punishments and compensation so that any penalty not stated therein, fails to qualify for execution by any court empowered to try cases under the Shari’a Penal Code Law joint acts and the liability of abettors attempts to commit offences and conspiracy.

The Shari’a Criminal Procedure Code Law, also adopted by several states implementing the Shari’a, contains thirty-two chapters dealing with several issues that effect the accused person ranging from the powers and jurisdiction of courts and grades of court\textsuperscript{73}, process to compel the attendance of accused person such as arrest and summons\textsuperscript{74}, the procedure to be followed in the search of the person or the apartment of an accused person,\textsuperscript{75} how the court receives complaints and the initiation of criminal proceedings, how to conduct trials,\textsuperscript{76} the process to be followed in the drafting of charges\textsuperscript{77}, the method of calling upon the defence to enter its defence or to make a no case submission. Trials are to be held in open court unless there is a special reason to avoid it such as in the interests of a child. The Code guarantees the rights of the accused to several advantages such as a legal practitioner, right to an interpreter, the right to be present throughout the trial\textsuperscript{78}, and if the accused is insane or pregnant or otherwise ill, the code provides for special processes in the carrying out of investigations and executions, especially in the case of the pregnant woman.\textsuperscript{79} Where an accused is sentenced to death, it is the responsibility of the Governor, in consultation with the Council of Ulamas, to pass an Order in Council stating the method of punishment. This procedure is obligatory in the matters of \textit{huudud} and \textit{qisas} \textsuperscript{80}.

The Code provides for the procedure for awarding bail to an accused person and the procedure for compounding cases that are generally not of \textit{huudud} nature.\textsuperscript{82}

The accused person is entitled to appeal against a decision passed against him. He has a maximum of 30 days to do so after judgment.\textsuperscript{83}

Finally, the Chief Judge may make rules of court pursuant to the provisions of the Shari’a Criminal Procedure Code. The aim of this is to enhance the smooth generation and better application of court rules.
CONCLUSION

The procedural safeguards under the Islamic law are not only available to the accused but to all citizens. The aim of the law is to “give each his due”.

The safeguards of procedure are also hinged upon the general law, which has been discussed in harmony and interrelation with the substantive law.

The courts are also guided by several written laws that apply to our courts generally.

It is sad that several state executive officers with the exception of few conform to the Shari’a system only because of sheer pressure and agitation from the people at the grassroots.

But it is not difficult to comprehend that the criminal law goes hand in hand with administrative policies of socio-economic nature that will help to divert the minds of vulnerable and gullible people exposed to crime from the tendency to take to crime. It is my hope that our governments wishing to take to the Shari’a system at all tiers should brace up and set up an administrative body that will supplement the criminal law and support it. This body will oversee public morality and engage deviants in exhortation and admonishment, check the lapses of the court system and personnel, and generally support the police and the public to establish a better life.
NOTES AND REFERENCES


2. Actually being the words of Professor Joseph Shacht and quoted in the reference above at p. 2.


13. Ibid.


15. Where life is lost the victim’s relatives possess the right to retaliate.


25. Ibid, pp. 85, 256. There are a few exceptions to this rule. Well – known brigands and other notorious evil mongers may not be called upon to enter a defence if overwhelming evidence is established against them Ibn Qasim has mentioned 20 witnesses and Ibn Farhun reports a case of 18 witnesses (Ibn Farhun, op.cit, Vol I pp. 169 –170).
27. Ibid, p. 115.
36. Abdul – Baqi M.F. (n.d.) al – Muwatta li Imam Al’immati Malik bin Anas (R.A), Maktabah Anas bin Malik p. 547. Some Maliki jurists such as al – Baij have elected to accept this plea of her’s even without corroboration (see Ibn Farhun, Op cit. Vol. II. p. 91).
Protecting the Rights of Accused Persons through the Proper Implementation of the Shari’a Procedural Guarantees in Northern Nigeria

43. Ibid.
44. Ibid.
46. Ibid p. 357. Ibn Qasim holds that the hadd for qadhf will not fall.
47. Ibid, p. 358.
48. Ibid.
50. Ibid.
51. Ibid.
56. Ibid, p 334.
58. Ibid. P 309
60. Ibid
64. Ibid. See also Audah, op cit, Vol II p 512.
70. Ibid, p 209.
71. See section 36(12) of the 1999 Constitution.
72. See section 5 (ii) of the Shari’a Courts Establishment Law, 1999; section 7 (b) of the Jigawa state Shari’a Courts Law, 2000; and section 20 (i) (b) of the Shari’a Courts Law, No. 11, 2001 of Kaduna State.
73. See sections 9 to 16 of the Shari’a Criminal Procedure Code of Zamfara State.
74. See Ibid, Parts III and IV.
75. Ibid, Sections 73 to 83.
76. Ibid, Chapters XII, XIII XV and XVI.
77. Ibid, Chapter XVII.
78. See Ibid, sections 193, 194, 206 and 207.
79. See ibid, section 239.
80. Ibid, sections 240 and 241.
81. See generally, Chapter XXVII.
82. See Chapter XXVI
83. Section 242.
RESPONSES AND COMMENTS BY PARTICIPANTS

THEME 3: -  
Implementation of Shari’a Penal Law and Justice System in a Constitutional Democracy.


On the presentation, a participant remarked that he expected the paper to deal with constitutionality of Shari’a given the nature of the Nigeria state. That is whether it amounts to adoption of state religion or is a violation of the fundamental rights of individuals. Also that he had expected the presenter to discuss the states responsibilities under chapter 2 of the constitution.

Commenting, a participant remarked that the assessment criteria were not brought out as clearly as it should have been. The paper identified about four areas that should be assessed: the court, the law, and appointment of judges. On the courts, he said that the paper situates these well within the legal system, and that the grades of the courts varies from state to state as the presenter pointed out. However, he remarked that the position in Jigawa State where appeal on criminal matters terminate at the Shari’a court of appeal cannot be said to be constitutional. He disagreed with the views of some colleagues on this issue that to reflect or portray true federalism, offences created by the state should be determined by the state court, that is, ends in the state. This view he said would not stand the constitutionality test. As regards the issue of appointment of judges, he stated that the presenter should have made a thorough study so as to know the true state, that is, what is the capability and quality of these judges and how they can be improved? According to him assessing the performance of the courts is really needed because the fact of Shari’a is inevitable. There is need to focus on how to live with this fact and how to get the best out of it. Now that the courts are in existence they have to be improved upon to make them relevant to the issue of access to justice.

A participant stated that she thought the presenter should have given an insight on the issue of appointment, qualification of judges, tenure, and grounds for removal. Without the analysis of these issues it would be difficult
to assess the performance of the court particularly as regards their different decisions

Another participant wanted to know what machinery the Shari’a states have put in place to educate the women to know their rights under the Shari’a and the constitution. According to him, until this is done there will not be much progress in relation to women’s rights and access to justice.

A participant was of the view that there was nothing wrong in the Shari’a court of appeal being the final court of appeal. He stated that this arrangement satisfied the constitutional requirements of an appellant court in a criminal case.

On the issue of punishment, another participant stated that there was no passage in the Koran to justify cutting anyone’s hand or stoning, people who are anti-Shari’a have taken advantage of this to shower criticism on the Shari’a. He urged the Islamic schools to look at some of these laws that have contradicted the Shari’a.

A participant remarked that there was an absence of procedural law and clear laws of evidence in the Shari’a legal system. He added that economic implementation was also very important for the effective implementation of the Shari’a since the lack of it was the direct cause of friction between couples, leading to severe punishment under the provision of the Shari’a. Also on the qualification of judges, he stated that it was very important for the Shari’a court judges to have legal training for the proper implementation of the Shari’a.

Application of the Shari’a Penal Law and Justice
System in Northern Nigeria: - Constitutional Issues and Implications. By B.Y. Ibrahim


Commenting on the first presentation by Balarabe Haruna, a participant stated that the paper was very illuminating but that he had misgivings about some of the things contained in the paper. He was not in agreement with the view canvassed by the presenter that the government of Zamfara and other Shari’a States should have intensified efforts at empowering people economically before embarking on Shari’a. According to him, though this
is a good idea, however, a look at the past would show that the British colonialists did not take any such steps following the introduction of their own legal system. Therefore the implementation of the Shari’a should continue but that the Zamfara State government and others should work to improve social security so that the people were not forced to commit offences for which they will be punished. Indeed it was also the responsibility of every Muslim to contribute to this and not leave it just for the government.

Again, he stated that the first presenter did not bring out the constitutional issues and implication of the implementation of Shari’a law in Nigeria.

As regards, the second presentation by Dr. Yusuf Ibrahim, he stated that the paper showed that the misgivings of people about the Shari’a did not really with the punishment imposed but with the procedure of imposing the judgment.

On the first presentation, a participant remarked that it ought to have tackled the question “why Shari’a?” This he stated was a very important jurisprudential question. He also noted Nigeria had a tripartite legal system and with this kind of scenario, if some of its people felt that some of the laws were alien to it what would the constitutional position, especially when considered in the light of the definition of what law should be. According to him, a law, which does not reflect the socio-cultural dimensions and aspirations of the people, is not law. He further stted that where Moslems in a constitutional democracy felt that the English justice system did not address their aspirations then the philosophy was that the people could decide for themselves the law that governed them. Furthermore, the said Western standard of human rights does not conform to the provisions of the Shari’a. That the so-called Western democracy was anti people’s rights. Western democracy was not government of the people for the people, and by the people but government of the cartel, for cartel, and by the cartel.

On the belief that there was unanimity in shaira that is, that Moslems were ready to be guided by the Shari’a, but the question was whose understanding of the Shari’a? A participant stated that there was no agreement on a lot of issues. Islam is fair to women but the laws being implemented and trumpeted by the Islamic scholars are against Islam. Moreover, there is a lot of authoritarianism on the part of the Islamic scholars who propose to know the law of God. These scholars she added should be able to understand
other views and accept that their views were not the ultimate. If their understanding of the Shari’a is against the meaning of justice then they should stop and rethink.

A participant pointed out that the constitution did not confer criminal jurisdiction on the Shari’a court, and that for Sokoto State to confer such powers on the Shari’a court of appeal was null, void and unconstitutional. He further stated that the problem with the implementation of the Shari’a was that what was on ground presently was against humanity. The implementators of the Shari’a had taken advantage of the illiteracy level. The imposition of harsh Shari’a punishments like ‘zina’ is only on the common people while the high and mighty gets away with the commission of more serious offences.

Also commenting on the two presentations a participant stated that he did not think Nigeria was a secular state, because every public officer from the president down swears an oath of office on either the bible or Koran. That if Nigeria was a secular state such formality and requirement should be absent from our law. Moreover, the government even sponsors pilgrims and religious institutions with public funds. There are a lot of constitutional problems inherent in the Shari’a particularly the issue of apostasy and zina (adultery/fornication). He added that a Moslem convicted to stoning could based on the constitution, apostate and denounce Islam because the constitution granted every person a right to religion, freedom of thought and conscience.

A participant stated that he was of the view that the Shari’a punishments were not outlawed; hence one cannot start arguing constitutionally on something that had not been put down. On the issue of apostasy, he said that if the matter were brought before the superior courts it would be struck out because the supremacy of the constitution still stands. He urged the NGOs to challenge the Shari’a states to ensure that social and economic justice, which has been provided by Islamic law, was not phased out. In the old Sokoto caliphate, he stated that crime was non-existent because there was economic and social justice, hence there was no need to impose the Shari’a punishment though they were in the law.


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In discussing the presentation, a participant stated that the Islamic criminal law was not incompatible with the constitutional requirements on fundamental human rights. That the Islamic law also recognized such rights like right to life, right to dignity of human person, right to fair hearing, including the requirement of presumption of innocence and proof beyond reasonable doubt and right to counsel.

Several participants stated the need to have proper training of Shari’a court judges and khadis. They noted that the problem was not so much with the laws, but with its inappropriate implementation.

Many other participants also stated that a flexible approach ought to be adopted in matters relating to the Shari’a, and some aspects of the Shari’a should be changed.

Protecting the Rights of Accused Persons through the Proper Implementation of the Shari’a Procedural Guarantees in Northern Nigeria. By M.B. Uthman.

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A participant highlighted the position in Shari’a law where an accused person was required to take an oath to prove his innocence even where no evidence have been brought against the person. He stated that this had serious implications for the issue of access to justice, particularly in the light of the presumption of innocence contained in the constitution.

On the categorization of cases of rape by the Maliki jurists into three broad headings, each dependent upon whether the woman reported the matter in good time or not, a participant stated that this arrangement was clumsy and would not guarantee justice.
THEME 4

Perspectives on the Application of Shari’a in Nigeria
“Life without properties on which its subsistence depends may either become impossible or cause hardships...A soul that observes its religious obligations, enjoys and derives its sexual pleasure within the limit of Shari’a, owns and utilizes the wealth or properties it acquires within the Shari’a legal limits will not be happy where its honor cannot be protected.”

Amendments of a few number of the sections of the Northern Nigerian penal code effected by the Zamfara State Government with a view to creating room for an application of punishments which relate to huudud offenses were received with reactions by some non-Muslims. Some of the reactions were due to fears entertained that the Muslims were changing the affairs of the nation from its secular nature into an Islamic state. That apart some Muslims and non Muslims fears were due to economic problems that they may likely face in the areas of prostitution, the sale of alcohol, operation of brothels and beer parlours in the Shari’a implementing states. Some NGOs supported by the international community were also apprehensive of the newly introduced Shari’a reforms which swept rapidly across some parts of the Northern states like a bush fire.

Yet other reactions recorded from other quarters on the introduction of the Shari’a legal system were that the time to introduce the system was not due, and why now? Or that the system shall only be introduced after Nigerians were dully educated, or that the system shall only be introduced after the quality of life of every individual is adequately improved and taken care of economically and socially, etc.

Whatever be the reasons for these reactions and how to contain them are not and cannot be within the scope of this paper. People are entitled to react to what they feel abnormal, provided they allow reasons to prevail over sentiments and religious bigotry. It is the belief of the writer that no matter how badly offended one may feel on the introduction of the Shari’a legal system in some parts of the northern states of Nigeria, it is one’s personal problem as long as one cannot learn to be tolerant and live with his
fellow citizens, whose lives and religion are governed by the Shari’a legal system. It is therefore a collective and individual responsibility of the Muslims to continue to educate that Shari’a legal system is only meant to apply to the Muslims who agitate for its introduction and no other. With the above background or introduction in mind, the paper intends therefore to highlight the policies and basic principles of Shari’a as they relate to the social welfare and economic security of the Muslims and to make recommendations for their implementation in Shari’a implementing states of Nigeria.

Basic Policies of the Shari’a

In Shari’a system, since all aspects of life are interdependent and the Islamic way of life is a consistent whole, its goals and values in one field determine the goals and values in the other fields as well. With this in mind, it may interest the readers of this piece to know that it is one of the objectives of the system to address and promote the protection of religion, paternity, life, wealth, and honour. The promotion and protection of the above which is the policy of the system is very necessary in view of the following reasons: since one of the differences that exists between the human and animal worlds does not only lie in the exercise of reasons, but morality which the human beings enjoys over the animal, the need and importance to promote and protect religion is therefore of paramount importance to Muslims. This assists in the smooth and good governance of the state. In order to protect and preserve true paternity and lineage of the human race, Shari’a system is ever ready to punish those who engage themselves in extramarital sexual activities. Even though sex is not only natural as well as necessary in procreation and preserving the human race, some rules of the game based on divine inspiration has to be observed. Sexual activities can therefore only be sanitized by regulating the way and mode it is done. Dreadful diseases such as HIV/AIDS and sexually transmitted diseases (STDS) with which the human race is being infested or afflicted today, despite human achievements in modern science and medical facilities may be due to the violations of the rules of sex. Violators, therefore, of the rules of sex as clearly defined by divine law have to be punished in accordance with Shari’a if found guilty. This is because the conducts of violators constitute serious threats and breach to human existence. In the same way, Shari’a system makes it a duty upon itself to guarantee the protection of life. This is done through the application of retaliation and settlement of diyyah and arsh (compensation for life lost and injury caused to human body respectively). Protection of life alone without protecting the wealth or property will be
meaningless. Life without property on which its subsistence depends may either become impossible or cause hardship. The need to protect life therefore becomes equally necessary within the Shari’a system. A soul that observes its religious obligations, enjoys and derives its sexual pleasure within the limits of the Shari’a, owns and utilizes the property it acquires within the limits of the Shari’a legal system will not be happy where its honour cannot be protected.

This is why Shari’a system makes it mandatory to provide for the security and honour of the Muslims within the system.

**Basis Principles of Shari’a**

In an ideal Islamic system of government where Shari’a system operates in its completeness, basic principles and policies of Shari’a must either apply or operate side by side with one another. Until this is achieved, the fruits and dividends of Shari’a system may not be realised with tremendous success and joy for a greater number of the governed. The success and joy derived form the application or implementations of Shari’a are two-fold. While the first fold is made of spiritual happiness which transforms and molds an individual into having a spiritual link and peace between himself and his creator, sustainer and lawgiver on one hand; the second fold is made of the *mu’amalah* [relationship between man and man], whose benefits manifest in the welfare which the system makes efforts to provide through economic and social justice. The two component parts, that is, spiritual and *mu’amalah* are, however, fused into one under the system that is known as the Shari’a system.

**First Principle: Obedience to the command of Allah, the Most High**

In Shari’a system, it is an obligation that the Muslims must be taught, educated and be trained spiritually to believe and support the belief that Allah the most high is not only the creator and sustainer of the universe but he is the one from whom all commands as to dos and don’ts emanate to the worlds of both visible and invisible beings. He is the only one whose commands shall be obeyed. He is the only one who both the human beings and *jinn* shall be conscious of. The position of the prophets and /or messengers of Allah with regards to the commands are more or less than the bearers of the command. In addition to this role, they also play the role of interpreters of the divine message and pass same to their disciples, from one generation to another. The only approved way of interpreting the provisions of the dos and don’ts are therefore based on precedents received from the messengers, from one generation to generation, free from interpolation, to present day.
**Second Principle: Implementation by a Person who Believes in the System and is Committed to it**

Since implementation of the system is not done by Allah the most high himself, it is only done through his vice-regent [khalifah] or Allah’s own representative on earth, an onerous task of this magnitude can only be entrusted to a person who is not only learned in the system, but believes and is committed to it, its implementation and application. That person must, among other things, be one who is conscious of Allah in whatever he says or does. The task to implement the system cannot be entrusted to a tyrant or one who does not believe in it, or to a person who is ignorant of it, nor to one who is not committed to it or is only there to frustrate it on political or other selfish ground. It is the duty of the vice-regent to provide and protect the integrity of religion, religious teachings, and its observance from interpolation. Only those qualified in the field of Islamic law can only be allowed to interpret it. Anybody not so qualified must not be allowed to say anything on what one does not possess knowledge. To allow ignorant persons express opinions in matters of religion is tantamount to distorting its teachings. This will certainly damage it. It will poison the minds of the Muslims to think that what is said about religion by a layman is the correct and true position of Islam and its teachings. In matters of religion, the duty imposed on the implementers of the system to promote and protect it is clearly provided by Ibn Abdul Karimi al-Maghili who said:

“One of the most important duties of the umara al muslimin is the preservation of the religion in that they do not permit anyone to speak of God’s religion, neither by teaching nor judging by legal ruling unless he be one of the learned pious people. And for this reason when Alib. Abi Talib may God be pleased with him came to Basrah, he entered the mosque and found the story tellers telling stories and he turned them out until he came to the circle of al-Hassan al-Basri may God be pleased with him he said:’’ young man, I am going to question you on certain matters and if you answer me [correctly] I shall allow you to remain, otherwise I shall turn you out as I have turned out your companions. Now he had already noticed in him a good manner and procedure and al-Hassan said to him:’’ ask about whatever you wish ‘’. Then Ali said, ‘’What is the fundamental of religion? He replied, ‘piety’. Ali said, what is ruining
religion? He replied, ‘Greed’. Ali said, ‘sit down’. It is the like of you who should talk to the People’’.

Third Principle: Obedience to the Vice-regent
Obedience to implementers of the system, inwardly and outwardly by the governed individually and collectively is a duty, as long as he acts within the system as laid by the Qur’an, Sunnah of the messenger [SAW] and the ijma [consensus of the learned Muslim scholars]. He, therefore, loses the right to obedience of the governed where he acts contrary to the laid down principles of the system.8

Fourth Principle: Must be a Man given to Kindness, More Inclined to Forgiveness than to Anger in his Dealings with people Generally.
The vice-regent must be a person given to kindness, more inclined to forgiveness than to anger in his dealings with the people, especially the governed. The governed can only be treated fairly and be looked after properly in terms of social and economic amenities and welfare where the implementer of the system is a believer in the system, who is conscious of Allah, in terms of obeying his dos and don’ts. It is for this reason that the messenger of Allah [SAW] used to pray and taught his followers also to pray that: ‘Oh Allah, do not entrust our affairs to someone who lacks your consciousness and does not have our interest in his heart,” 9

Fifth Principle: He Must Crave the Company of Religious Scholars and be intent on listening to their Advice.
In view of the fact that the system is the Shari’a oriented one, based on spiritual relationship between man and his creator, it becomes imperative for the implementer of the system to crave the company of religious scholars and be intent to listen to their advice. This is essential if he is to operate within the scope of the system. There is an Arab proverb, which says: “do not ask about a man, but ask about his companion. For certainly, the companion is bound to imitate his comrade”’. 10

Sixth Principle
In view of the fact that in implementing the system, the chief implementor, the leader by whatever name he may be called, will be in need of capable hands to assist and contribute, where it becomes necessary. He shall, however, impose on his official to be just [adl] in the discharge of official duty. In the discharge of their official duty, they shall observe goodness and
avoid doing injustice to each other and the governed. They shall love good
deeds and hate evil deeds. In summary, sultan Muhammad Bello says:

“In short, the moral value and conduct of the ruler is a
reflection on conduct and moral value of his people. Therefore, if they behave well in the sight of their Beneficent
Master, the Glorious, the High, He will inject mercy in the
hearts of their rulers to do good to them. If on the other
hand, they disobey their lord and sought to corrupt the
world, he will make their rulers subdue them, and will
consequently ill-treat them. The most High said: Thus, we
let some of the wrongdoers have power over others because
of what they are wont to earn. And in the Hadith it is
reported: ‘As you are you will be governed’”

The chief implementer must keep watch over his officials and monitor their
activities to see if they transgress the limits or they act within them [limits].

Seventh Principle: Provision of Public Amenities and Making life Easy
for People.
In improving the quality of life, the implementers are duty bound to provide
amenities for people of his state for their temporal and religious benefits. For
this purpose, he shall foster the artisans and be concerned with tradesmen
who are indispensable to the people such as farmers, smiths, tailors, dyers,
physicians, grocers, butchers, carpenters and others, which life cannot do
without, or hardships are experienced without them. Provision of amenities
shall be made for the comfort of the people, so that they may derive maximum
joy for the greater number of people. The commander of the faithful in person
of Umar Ibn Khattab, may Allah be pleased with him, used to constantly
serve the destitute among his subjects and serve them personally. It was
reported that:

“In al Jawhara, al-Hassan al Basri is reported to have said
that Umar was (one day) walking at night in Madinah, when
he came across an Ansari woman carrying a water skin.
Umar questioned her (about) it, and she told him that she
had children and no servants, and that she used to go out
at night in order to fetch water for them, because she does
not like going out (for such work) in broad day light. So
Umar carried the water skin for her to her house. And then
said (to her), ‘go to Umar in the morning he will find a servant for you’. She said, ‘I will’. Al-Hassan al-Basri said, “Then the woman went to him early in the morning, when she saw him she recognized him, as the man who had carried her water skin for her (the previous night). So she turned back but Umar sent for her and ordered a servant and allowance to be provided to her”. 12

But this does not – however – mean that a president of the country or state governor in the modern state has to serve a destitute personally, the way Umar did. It however, demonstrates how caring and kind a leader should behave towards those in whose hand Allah has entrusted their leadership. The modern states can do this through its different agencies and officers if it is serious.

**The Eight Principle: Duty of the Governed to Contribute Positively to the Development the System and the Islamic State within the limits set by Allah (SAW)**

To enable the system and the State move forward in every field of human endeavor, the governed collectively and individually are under the spiritual and legal obligations to contribute to its success within the limits set by Allah (SWT). A pointer to his principle is a famous Hadith reported from the messenger of Allah (SAW) by Anas Ibn Malik, who reported that:

“A man from among the Ansar came to the Prophet (SAW), who said: “is there anything in your house?” The man said, “Yes, a blanket, part of which we use to cover ourselves and part we spread underneath, and a cup from which we drink water”. The Prophet (SAW) said, “Give them to me.” So he gave them to him, and the prophet (SAW) said, “Who will buy these? A man said, I will take them for a dirham.” He said, “Who will offer more than a dirham?” two or three times. Then another man said, I will take them for two dirhams.” So he gave them to him, and he took the two dirhams and gave them to the Ansari, saying, “buy food with one of them and give it to your family, and buy an axe with the other and give it to me...” The Messenger of Allah (SAW) used it to strike a stick in his hand, and then he said to him, “Go and cut wood and sell it. I do not want to see you for fifteen days”. So the man went and chopped wood
and sold it, then he came and he had earned ten dirhams, some of which he used to buy a garment and some for food..."13

The point was also emphasized by a one time Chief implementater of the system, in person of Muhammad Bello, in one of his book.13a

Some Highlights on Devices to Simplify Life under the System

Simplicity of the System
In order to make life of the governed easy under the system, Shari’a makes every social and economic life of the people easily accessible, as highlighted below:

Marriage/Family Life
In order to enable a Muslim have a wife, Islam sets N1, 408 as the minimum amount of money with which the Muslim may afford to pay as *sadaq* for marriage. The amount is equivalent to one quarter of a dinar.14

Acquisition of Land
In addition to a free state grant of a parcel of land by the leader to the Muslim in case of the land that is within the vicinity of the town, the Muslim under Shari’a is entitled to a right to free acquisition of a parcel of land that is far away from the vicinity of the town, without any consent or permission of the leader. A distance of the land that a Muslim is entitled as of right to acquire is defined as “a day journey, which a shepherd can travel with his cattle for grazing from the time of zawwal (sun rise) and be back before the sun sets, in a day”15. He may acquire the land by “breaking the stone on it, or by cultivation, or by sinking of a well, or by cutting trees on it, or even by clearing bushes that may be on it,” etc. This simplicity of Islamic land policy has been designed to facilitate the acquisition of land for residential, agricultural, and other economic activities in Islamic society. The Nigeria Land Use Act shall be made to reflect the Islamic land policy. This will assist a common man to acquire land easily, for his residential, economic, and other economic activities in the country. It will assist and encourage people to empowerment.15
**Transfer of Land**

In any transfer of land, any structure on it and seeds planted in the soil are transferred along with it. This rule can only, however, be excluded either by custom of a particular place, or on agreement of the parties to the contract. However, plants that can be seen visibly on the land, or buried mineral resources, or buried treasures which belong to a transferee where he is aware of their presence and claims knowledge of their existence in the said land. The mineral resources Act shall be amended to conform to Shari’a policy on land. If done, this will encourage and boost the long desired needs for empowerment between Nigerians.

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**Settlement of Diyyah and Arsh**

Settlement of *diyyah* (compensation paid to heirs of a person who loses his life) and *arsh* (compensation paid to a victim for the destruction, or loss of anything short of life) has been allowed purposely to alleviate economic hardship, for which members of the family, or heirs of the victim may likely face in the society. That apart, settlement of *diyyah* is also aimed at appeasing and reconciling with family members of the victim as well. Its rates vary from 100 (one hundred) camels or 100-dinar equivalent to N5, 631,824 (five million, six hundred and thirty one thousand eight hundred and twenty four naira) only. It is – therefore – recommended that the Shari’a implementing States shall facilitate and enhance its smooth execution in favour of the heirs of the victims.

---

**Protection from Frauds Arising**

In as much as Islam allows free economic activities to flourish among the Muslim community, it sets three basic rules for the smooth running of such activities. First and for most, the rule which declares *ribai* (interest) illegal must be observed strictly. Secondly, to check against corrupting the markets, Khalif Umar makes it a duty upon every Muslim wishing to sell wares in the market to acquire Islamic knowledge relating to ethics and etiquette of trade. And thirdly, Shari’a makes a lot of efforts in taking precautionary measures against *al-gibni* (fraud, including selling of wares above its true price). For instance, realizing a profit of not more than one third of the price of a sold ware is permitted but no more. The law relating to *al-gibni* (deception) stipulates that a victim of fraud may lose in his action if he contributes to the frauds of which he becomes the victim. Shari’a implementing states shall, however, monitor our markets to check against
unethical practices. This can be done through enlightenment and monitoring the conduct of our traders, by hisbah officials.\textsuperscript{18}

**Zakat, Waqaf and Wasiyyah Directorate**

From the look of things, zakat, which plays an important economic role, such as removing the social and economic ills among the Muslims, has been ignored, almost completely. The beauty and excellence of the institution of zakat has theoretically remained only on the pages of Islamic book of jurisprudence. It is recommended that the Shari’a implementing states shall pursue this vigorously to enhance its execution.\textsuperscript{19}

**Waqaf (Hubs) Endowment**

In Muslim countries such as Turkey, India, Pakistan, Bangladesh, Iran and Arab countries, Waqaf plays important roles not only in alleviating the socio-economic hardship of its citizens, but in boosting economic activities as well. The Shari’a implementing states shall take advantage of this institution to cushion economic hardship.\textsuperscript{20}

**Wasiyyah**

Wasiyyah or bequest if properly monitored and managed is a potential tool to cushioning economic hardship of the Muslim in Shari’a implementing States generally. In order to take the full advantage of the institutions of Zakat, Waqaf and Wasiyyah, the Shari’a implementing states shall set up a directorate for the collection, management, and distribution of zakat, Waqaf and, Wasiyyah institutions to those entitled. This, I believe will assist in not only alleviating the hardship which is experienced in the country but will promote trade and other economic activities among the people. They will become another source of empowerment, in addition to any other source that may be available. A Directorate to handle these institutions may be established to realize the objectives.\textsuperscript{21} The Directorate has been established in Zamfara State. It functions smoothly in achieving the objectives for which it has been established.

**Legal Remedies to the Usurpation of Land.**

Two legal remedies are, however, available to a victim of usurpation of land. Out of the two remedies available, the victim is entitled as of right to choose one. For instance, the victim is entitled as of right to claim back his land as it was. Any developments so made on it have to be destroyed, so as to get the piece of his bare land. Alternatively, the victim is also entitled to
claim back the piece of land with compensation of the developments made on it by the usurper in its destroyed form. In awarding a quantum (amount) of compensation, social or political, the economic status of the usurper is taken into consideration. If the last option to the remedy happens to be enforced strictly by our learned Shari’a judges who are willing to do the job without interference from any quarter, two advantages will be recorded. First, it will enhance empowerment among the victims of usurpation. Secondly, it will discourage the tendency to usurp land from people.\(^2\) The Shari’a judge is mandated to explain the two options available to both the usurper and the victim of usurpation to enable him exercise his choices.

**The Rule of Hauz or Hiyazah (Estoppel) does not apply to Women in Certain Cases**

In Shari’a Legal System, where a plaintiff keeps silent on seeing a defendant using, or managing his landed property, or chattels, or controlling it, or effecting alterations in the said property, for a period of not less than ten years without raising an alarm, he (plaintiff) is legally estopped from challenging the ownership of property or chattel from the defendant. The ten-year rule, however, applies only to parties who are not related by blood or affinity. Where the parties become related by blood or affinity, the plaintiff can only be estopped if he sleeps on his right for a period of not less than forty years.

The rule of estoppel in this case has largely been relaxed where the plaintiff happens to be of the female sex. In this case, she cannot, therefore, be estopped at all, no matter the length of time, once she can prove by evidence that she is a type of woman, who does not go out according to custom, or that she is a type of woman loved by her husband to the extent of becoming very jealous of her and does not want her to be seen by other men. Shari’a judges from Shari’a implementing states shall be trained in Shari’a legal system with a view to acquiring knowledge and apply same in their day to day judicial work. This is an indirect way of empowerment.

**Islamic Law of Interstate Succession**

Like her male counterpart, a woman may inherit and be inherited also. A Muslim woman may inherit as a daughter, or a son’s daughter, or as a mother, or a mother’s mother, or as a father’s mother. She may also inherit as a sister (whether full or consanguine, or uterine); she may also inherit as
a widow from an estate left by her husband. Dusts on the ration of inheritance by the daughter, or the sister when inheriting along with the son or the brother are being raised as unjust or discriminating against the womenfolk. The difference in the share is not meant to ridicule the status of the womenfolk in any way. It is rather designed to take care of proportionate responsibilities among the heirs belonging to the sex in their daily life.\textsuperscript{24}

The Woman is favoured by Shari’\'a over her male counterpart in many respects. Take for instance, where a person dies and happens to be survived by a son and a daughter and leaves N30, 000 as his estate. Going by the distribution of the estate, which Allah (SWT) undertook upon Himself the responsibility, the son will be entitled to N20, 000 while the daughter will be entitled to N10, 000. Where the son takes a wife for instance, he pays as a \textit{sadaq} (the quid pro quo) of the marriage, to the tune of N20, 000 he has inherited and his sister when taken in marriage she gets N10, 000 as her \textit{sadaq} from her husband. While he is under a duty to shoulder a responsibility of maintaining his wife, by supplying her with the basic necessities of life, such as shelter, medical care, clothing, feeding, protection against aggression, etc., the sister, on the other hand, will be entitled to be provided for by her husband with the aforementioned basic necessities of life. Apart from all these, nothing will - however – stop him from providing her with materials and financial assistance from time to time. In addition, he takes upon himself a responsibility of training her children educationally, without any discrimination along with his own children. Her male counterpart has also been shouldered with a responsibility of funeral expenses for the death of any person on whom the responsibility to maintain becomes obligatory. On her death, or the death of her children, it is her husband that must shoulder such responsibility. In protecting her wealth from being squandered by her male counterpart (brother), Shari’\'a makes it mandatory on her not to transfer, without consideration, to any person, her wealth in excess of one-third without a prior consent of her husband. This is a safety valve or device made by Shari’\'a to protect her wealth. The husband has been put there to serve as a watchdog to protect her interest. Her male counterpart lacks that protection.\textsuperscript{25}

**Improving the Quality of Lives of Muslims in Zamfara State**

Having briefly discussed the policies and principles on which the structure of Shari’\'a stands, it is proper, therefore, to discuss how the quality of lives of the Muslims and non-Muslims alike have improved with the introduction of Shari’\'a in Zamfara State. With his ascension to power as the Executive
Governor of the State in the year 1999, Governor Ahmad Sani Yariman Bakura, the Sardaunan Zamfara, prefers to give attention to human developments, in terms of providing social amenities, social and economic security, and implementing the poverty alleviation programme among the people of the State. His government foresees the danger if people were left to continue to suffer in abject poverty. People neglected in terms of economic and social security cannot be expected to put in their maximum outputs in developing the state where they do not live in peace and have not been supported socially and economically. One cannot expect security of lives and property to reign in a society where people have been denied the basic social needs, such as food, shelter, housing, clothing, healthcare, education, etc. With this in mind, human developments must take preference over any physical developments. This – however – does not mean that the government shall abandon her responsibility to physical development at the expense of the human developments. As a matter of preference, therefore, physical developments have to come at a later stage. Most of the achieved human developments in the state are being done through ZAPA (Zamfara Agency for Poverty Alleviation), as highlighted here below:

**ZAPA’s Scope of Operation:**

It is government’s desire to improve the quality of life of the people of the state that moves her to create ZAPA, to undertake his onerous task. The activities of this agency, involves a wide range of development objectives such as:

1. Providing soft loans to various trades groups including peasant farmers and small-scale industrialists.

2. Alleviating the suffering of *Almajirai* through the provision for monthly allowances to their Malams for provisions of food to the *Almajirai*

3. Registering needy elders, widows, orphans, disabled and other needy people, and providing them with appropriate financial and material support periodically to enhance their quality of life and eliminate destitution.

4. Carrying out public enlightenment campaigns to sensitize and attract support of wealthy individuals, federal government, donor agencies, and associations to assist the state in its efforts at poverty eradication.
As can be seen from objective number four above, the collection, management and disbursement of institutions of *Zakat* (compulsory charity from Muslims), *Wasiyyah* (bequest or gift inter vivos by a Muslim) and *Waqaf* (endowment according to Shari’a) are fully covered by it. A directorate to deal with the issue of collection, management, and distribution of it to beneficiaries in the state has been established. It is under the Ministry of Religious Affairs, Gusau, Zamfara State. Its positive role in minimizing destitution among the people of Zamfara State is very commendable and worthy of emulation by other state governments.

So far, the state government through ZAPA has committed not less than seven hundred million naira (700 million) in its determination to improve the quality of life of the people of the state. In implementing the policies and principles of Shari’a even within the restriction of the constitution, coupled with the activities of saboteurs within and outside the State, Zamfara State Government has been acknowledged as the only government that is closer to the common man. That apart, it is the only government that has been tackling eradication of poverty among its people with all dedication and commitment in the country.

**Loan Disbursement between May and December 1999 Fiscal Year**

In the year 1999, the following items were procured and given as loans to people in the state:

1. 500 wheelbarrows;
2. 5 motorcycles;
3. 91 Tourist Toyota Lite Ace buses
4. 19 million soft loans were advanced to women who repented from prostitution and similar unlawful trade;
5. N25,000 each was advanced as soft loan to help women pursue viable legitimate trade
6. N0 million soft loan was advanced to various small-scale entrepreneurs across the state (NASSI). For details, see table 1.27

**Loan Disbursement in the fiscal year 2000**

Impressed by the success of the soft loan advanced in 1999 when used judiciously by the beneficiaries, government of Ahmed Sani was encouraged to review the amount of loan upwards in the fiscal year 2000. Accordingly the sum of N200, 000,000 (two hundred million) was earmarked by the
government so as to consolidate the gains of 1999 fiscal year. Due to the importance and determination of the government in eradicating poverty in the society which poses a threat to the dignity of the human being, the government of Ahmad Sani Yariman Bakura and Sardaunan Zamfara, reversed upward the amount of N200,000,000 earlier earmarked for loan, to N430 million. For the highlight of the loan, see table 2.28.

Loan Disbursement in the fiscal year 2001

The second phase of the state mass transit programme, which was initiated in the previous years, was carried in the fiscal year 2001. In the year, a lot of new buses and other vehicles were purchased. After the International Trade Fair of Herbalists was concluded in Gusau, the State Capital, some women herbalists in the state were approached for intervention. The success so far recorded in the treatment of patients with ailments by the herbalists pushed the state government to assist them (herbalists) in traditional medicine profession. The success recorded in this field is two fold: first, while members of Herbalists Association in the State are being empowered to enable them enhance their profession, the second advantage goes to the patients who suffer from the ailments, and whose sicknesses were treated by the members of the profession, where orthodox Western medicine failed. The government is fully committed in giving them continued assistance and support in whatever way legally possible to enable their activities cover every nook and cranny of the state. See table 3.29

Non-Muslims are not discriminated Against in Improving the Quality of Life

The responsibility placed upon the Shari’a system of governance to provide social and economic security or welfare, by whatever name it is called, does not discriminate against the non-Muslims residing in the State. Since one of the objectives of providing or improving the quality of life of the people is to achieve peace and tranquility with a view to having a crime-free society, it is, therefore, imperative for the system to cater for the non-Muslims as well if the objective is to be fully realized. This policy has been practiced since the era of the four rightly guided Khalifs until date. The responsibility placed upon the Islamic government to cater for the well being of the non-Muslim community residing in the state has been re-emphasized by Imam Annawawi in his book where he says: “One of the duties of fard kifayah (the Islamic term for collective duty) is that a citizen should be supported if he has no suitable clothes, and that he should be fed
if he has no food and is supported from the *zakat* fund, or the government treasury”. It is to be noted that historical evidences are there in abundance to show or prove that the members of non-Muslim community who reside in Islamic States or the Muslim society benefited from this Islamic magnanimity. It was reported that: “Umar Ibn al-Khattab once saw an old Jewish beggar whom he found to be destitute. Ordering the state authorities to pay for his livelihood, he commented, ‘it is unjust if we collect the capitation tax from him in his youth and abandon him in his old age’. 

Of equal importance and relevance to our paper, the Zamfara State Government follows exactly and faithfully these precedents. The non-Muslim community residing in the State has benefited from this gesture and generosity. In his unpublished book, Dr. N. I. Mayana says: “As part of the administration’s effort to provide a sense of belonging to all communities living in Zamfara State, a soft loan of N4.5 million was granted to the Igbo and Yoruba communities residing in the state. This and other similar considerate gestures helped in strengthening and cementing the cordial relationship between diversified residents of the state. The state has on numerous occasions given thanks to Allah (SWT) for the environment of peace and tranquility that prevails in the State”.

The attention of the government in providing these services to the people of the state is not detracted from providing some other physical developments to the state. These physical developments include a number of projects such as construction of roads project which is worth N1 billion, out of which 40% down payment was done, construction of secondary schools, most of which were 8% completed. Most of the primary schools are renovated. And in the field of education, five science secondary schools were converted into special science secondary schools by providing all the necessary science equipments. Social amenities in terms of electrification projects in the state are being provided in rural areas of the State, so are also water projects. For a successful execution of the elephant projects to the people of the state, however, the government had to give down payments to contractors. The housing projects alone was over N2.5 billion, and 30% of the amount had to be given to contractors. Execution of these projects are going smoothly despite the financial difficulties being faced by the government in its statutory federal allocation, coupled with the fact that Zamfara State has a very low internal revenue income. In its zeal for the maximum happiness to a greater number of the people in the state, the government deems it fit to refuse to impose taxes on the people, as it will
not only be counter productive to the economic activities in the state, but will also defeat the purpose of improving the quality of life of the people.

In addition to the above mentioned project, and inspite of the financial difficulties, the government has been able to manage its meager resources in providing basic services, such as feeding of students, water, chemical, free medical services for women and children and above all, the payment of salaries to workers and/or civil servants in the state. Before this financial problem was encountered, civil servants in the state used to receive 50% of their salaries as ex grata from the state government to enable them celebrate sallah with their families. 36

Establishment of Ja’iz Bank in the State

In its determination to encourage people to invest in banks for the purpose of boosting economic activities, through an interest free bank, a bank that runs and operates on the basis of Shari’ia policy and principles, called the Ja’iz bank will soon be established in the state77. The bank, when established, will aim at wiping out completely all the remains of poverty throughout the state. It is hoped that Zamfara State will soon become a paradise state, the only one of its kind in the country.

Improving Condition of Service for Civil Servants

It is a known fact in our contemporary time that of all the State Governments within the Federation, Zamfara State Government is the first to improve conditions of service for its workers. Shari’a court judges in the state and non-judicial staff in state judiciary are among the beneficiaries of this magnanimous gesture. A minimum take home salary for a junior civil servant in the state is not less than N5, 000, that is, the same with that of the federal government.

Security of Life and Property

With the introduction of Shari’a in the State side by side with improving the quality of life of the Muslim, coupled with the open door policy of the government, a crime wave which used to be high has becomes very minimal. Detailed reports and statistics on crime rates committed before and after the introduction of Shari’a may be obtained by any interested person from the cabinet office in the state. The statistics on the decrease of crime wave, according to my informant was received from the office of the I.G. of police.
Conclusion and Suggestion
Judging from the content of this paper, in terms of spiritual peace which Muslims established with their Creator, Cherisher and Sustainer, coupled with realization of security to life and property in Zamfara State, through the provisions of necessary tools for the survival of individuals in the State, I therefore, appeal passionately to individuals and non-governmental organization to please prevail upon other State governments who have not introduced Shari’a system of government in their domains to please take immediate steps to do so without delay. Also as to those governments, who implement the punitive aspects of Shari’a only, ignoring its socio-economic aspect, to be prevailed upon to improve the quality of life of the Muslims and non-Muslims in the States. Secondly, in Islam the woman occupies a special position in her role as a mother, an educator, and her role in the moral and spiritual training of children generally. A nation is bound to lose where the woman abandons these unique roles and indulges in sexual trade, which becomes incompatible with her esteemed and prestigious position. It is proper, therefore, for women to abstain from doing anything capable of tarnishing their image in the eyes of a society in which she lives. A situation whereby a woman adulterer is made a “heroine” and taken to a foreign country for the purpose of securing few dollars in the name of “human or woman rights” dents her image badly and seriously. Our society will not be happy where the woman is seen as one who spreads or imports into her mother land sexually transmitted disease (STD) or HIV/AIDS through the sexual trade.
Alhamd Lillah!

Table 1: Profile of ZAPA Loan Disbursed in 1999

<table>
<thead>
<tr>
<th>S/N</th>
<th>Types of Loan</th>
<th>Items Disbursed</th>
<th>Amount Disbursed</th>
<th>No. of Beneficiaries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Procurement of working equipment.</td>
<td>500 wheel barrows</td>
<td>5,000,000</td>
<td>500 WB pushers</td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td>154 motorcycles</td>
<td>15,400,000</td>
<td>154 kabu kabu operator</td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td>91 Liteace Buses</td>
<td>45,000,000</td>
<td>91 Mass transit Drivers, NURTW</td>
</tr>
<tr>
<td>4.</td>
<td>Procurement of equipment and distribution of working capital</td>
<td>Machinery, equipment and working capital</td>
<td>10,000,000</td>
<td>740 NASSI members</td>
</tr>
<tr>
<td>5.</td>
<td>Marrassa Galihu (Destitutes)</td>
<td>Amount disbursed as contribution to welfare</td>
<td>1,000,000</td>
<td>About 1,500 destitute &amp; disabled.</td>
</tr>
<tr>
<td>6.</td>
<td>Procurement or working equipment</td>
<td>Buses and working capital</td>
<td>5,000,000</td>
<td>Various groups</td>
</tr>
<tr>
<td>7.</td>
<td>Purchase of taxes</td>
<td>Women taxi program</td>
<td>19,000,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td></td>
<td>1,004,000,000</td>
<td></td>
</tr>
</tbody>
</table>
Table 2: Profile of ZAPA Loans Disbursed in 2000

<table>
<thead>
<tr>
<th>S/N</th>
<th>Types of Loan</th>
<th>Items Disbursed</th>
<th>Amount Disbursed</th>
<th>No. of Beneficiaries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Agricultural loan to farmers across the state.</td>
<td>Working capital to farmers</td>
<td>120,000,000</td>
<td>4,800 farmers in the state.</td>
</tr>
<tr>
<td>2.</td>
<td>Skilled Workers Association</td>
<td>Ditto</td>
<td>3,000,000</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Carpenter Association</td>
<td>Ditto</td>
<td>3,750,000</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Grain Sellers Association</td>
<td>Ditto</td>
<td>3,750,000</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Tailors Association</td>
<td>Machinery, equipment and generator sets</td>
<td>9,000,000</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>Yoruba community in Zamfara</td>
<td>2,500,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Igbo community in Zamfara</td>
<td>2,000,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8.</td>
<td>Motorcycle Technicians Association</td>
<td>500,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9.</td>
<td>Nigerian Automobile Technicians Association (NATA)</td>
<td>2,000,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10.</td>
<td>Zamfara Textile Workers Union</td>
<td>Bicycles and motorcycles</td>
<td>7,000,000</td>
<td></td>
</tr>
<tr>
<td>11.</td>
<td>Yamit and Yan Zuwadakai</td>
<td>Working capital</td>
<td>1,000,000</td>
<td></td>
</tr>
<tr>
<td>12.</td>
<td>Medicine Vendors Association</td>
<td>2,000,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>154,750,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

Table 3: Profile of ZAPA Loan Disbursed January – April 2001

<table>
<thead>
<tr>
<th>S/N</th>
<th>Types of Loan</th>
<th>Items Disbursed</th>
<th>Amount Disbursed</th>
<th>No. of Beneficiaries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Mass Transit Programme</td>
<td>150 Toyota Commuter and Urban buses, 100 Lite Ace Buses</td>
<td>500,000,000</td>
<td>250 transport owners</td>
</tr>
<tr>
<td>2.</td>
<td>Women Herbalists Association</td>
<td>Working capital</td>
<td>500,000</td>
<td>-</td>
</tr>
<tr>
<td>3.</td>
<td>15,000 Bicycles</td>
<td>15,000 bicycles to people at ward levels</td>
<td>45,000,000, 87,300,000</td>
<td>15,000 individuals</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>587,800,000</strong></td>
<td></td>
</tr>
</tbody>
</table>
REFERENCES


2. Readers, in my book of Islamic law may find the basic policy of Shari’a for further reading. A Master degree research on same, conducted by Dr. Umar Bello may however – be of interest. The title of the research is al-Gyayth al-wabil fiSirat al-Iman al-Adil, which is the original work written by Sultan Bello, the son of Sheikh Uthman bn Fodio, translated and edited by Dr. Umar Bello. The work is one of the excellent piece, which I recommend to readers for further research. It is unpublished work.

3. Muslims are forewarned to keep off from illegal sexual conduct by saying: “Do not come near zina (illegal sexual conduct), Qur’an 24: Ayat3 –5.

4. On Qisas (retaliation) see Qur’ran 4: Ayah 4.

5. On Qadhaf see Qur’an

6. See Mu’azu’s dialogue with Ali Ibn Abi Talib, on the test as to his suitability to preach or express opinions on religious matters. See the verse on same.


10. See ibid, at p. 6-7

11. See ibid, at p. 6

12. See ibid, at p. 9


13b. Hadith No. 1398 in the book of hadith collection by Abu Dawud

14. See Nisab in Islamic Calendar for the Hijra year 1423

15. Dasuqi, op. Cit.


17. Islamic Calendar op. cit.

18. For details you ma wish to refer to my works on Economic and Social Roles of Waqaf in Islam and Some Aspects of Islamic Law of Bequest, by the writer.


20. Ibid

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23. 1bid at p. 37 – 38
25. 1bid at p. 45
26. 1bid at p. 45
27. 1bid at p. 46
29. 1bid, at p. 8
30. Mayana, op cit., at p. 62
31. See interviews granted to New Nigeria Newspaper, No. 11, 599, Monday July 8, 2002, granted by His Excellency, the Executive Governor of Zamfara State, Alhaji Ahmad Sani, Yariman Bakura and Sardaunna Zamfara, at p. 6. Col. 1 & 2.
32. 1bid at p. 6, col. 1 & 2
33. 1bid at p. 6, col. 1 & 2
34. 1bid at p. 6, col. 1 & 2
RE – INTRODUCTION OF SHARI’A COURTS IN NIGERIA: SOME PERSPECTIVES

By Professor A. Zubair, Faculty of Law, Unilorin

Allah has promised to those among you who believe and work righteous deeds that He will certainly grant them succession in the land, as He granted it to those before them. And He will grant them the authority to practice their religion, which He has chosen for them. He will, of surety, give them in exchange a safe security after their fear provided they (believers) worship me and do not associate anything with me.

If any disbelieve after this, they are the Fasikun (rebellious, disobedient to Allah). And perform Salat and give Zakat and obey the Messenger (Muhammad (SAW) that you may receive mercy (from Allah).

Consider not that the unbelievers can escape in the land. Their abode shall be the Fire and worst indeed is that destination.

Qur’an 24:55-57

Mr. Chairman, ladies and gentlemen, if I should stop here and say adieu, I would have fulfilled my obligations towards this august audience. This is because the above quoted passage of the Holy Qur’an has said all in details for those who can reflect. But Alas! We are far away from this reflection. We read this passage many times in our recitation and in our prayers; little do we relate it to our present predicament. Instead, we, then with the enemies who lead us to the predicament are seeking solutions. We forget the divine promise to us and neglect our own part of the bargain. Thus, we remain in our downfall. I pray Allah to forgive us and to remove the yoke on us.

The agony of downfall of Muslims dated back to 1492 when the unbroken rule of Spain by the Muslims for seven hundred years was brought to an end. The Chronicle of the World rhetorically put the calamity as follows:
After a ten-year campaign, Granada, the only remaining Muslim State of Spain has fallen to the Christian army.

The surrender of the city is being hailed by Christians as the most signal and blessed day there has ever been in Spain. Muslims are describing it as one of the most terrible catastrophes ever to befall Islam.

If this seems to be a digression, it is for the purpose of linking our present predicament to the body of the grand onslaughts being prepared by the Christians for the Muslims and Shari’a. The event of September 11, 2001 and its aftermath, including the presently proposed America/British War against Iraq are part and parcel of the grandnum. And until we perceive it in this proportion we will continue to chase shadows.

My thanks go to the organizers of this conference for the selection of the main theme. After the hullabaloo that followed the re-introduction of the application of Islamic Criminal Law in most parts of Northern States of the Federation, the implementation brought out other dimensions of debates. The gender crisis is no doubt one of it. But permit me to state categorically from onset that the gender crisis was not unknown to Islam and its Shari’a. In fact, it had raised its ugly head, but was dealt with from the earlier stage of Islam when the revelation was made, and the Prophet (SAW) was alive to his mission. In the tafsir of verse 35 of surat al- Ahzab (Qur’an 23:23) it was narrated from Muqatil b. Hayan who said: “I learnt that when Asma’u bint ‘Umays returned from (the hijrah to) Habashad (i.e Ethiopia) with her husband, Ja’afar b. Abi-Talib, she went to the Prophet’s wives and asked them: ‘Is there any revelation from the Qur’an on our affairs?’ They replied her: ‘No: She then went to the Prophet (SAW) and said: ‘O Messenger of Allah, verily the womenfolk are in despair and loss.’ The Prophet asked: ‘For what reason?’ She replied: Because they are not mentioned in good things (in revelation), as the men folk are mentioned. 1

The Prophet (SAW) could not get an answer to her query. Since he could not speak of his own volition on matters of revelation, he waited for the divine answer. Soonest, the thirty-fifty verse of the Surat al – Ahzab was revealed wherein the womenfolk were mentioned side by side with men folk. And this settled the gender crisis forever under the Shari’a. Under Islamic Law whatever applies to man applies to woman except where specification of either of them is categorically mentioned. This incidence happened in the earlier years of the seventh century. (C. E) We have nothing to borrow from other religions in matters that affect our faith and law for
Allah has accomplished it for us before the demise of His Messenger, Muhammad b. Abdullah (S. A.W).  

II Shari’a Courts in Nigeria Vs Colonialism:

In order to understand the present, the past must be studied. The present predicament is not natural, and it is involuntary. For about five hundred years prior to the British conquest of the northeastern part of present Nigeria in the old Borno Empire, the Saifawa dynasty established Islam as a comprehensive legal system. Consequently, Islamic law administered the life of the people and adjudicated their affairs.

Hausaland, which bounded Al-Kanem Borno in the west, had been in contact with Islam as early as the first half of the 9th century through the trans-Saharan trade links. Islam became State religion and Shari’a it’s legal system. However, by the early, 18th century the Hausa kings feared the need to conform to the strict rules of Shari’a, which denied them the oppression of their subjects. This action precipitated the Jihad led by Shehu Uthman Danfodio which led to the overthrow of the kings thus, the socio-economic and political life of the people were re-organized on the basis of Shari’a Khadis (judges), and al-Kalin al-kalai (Chief Judges) were appointed as well as Wali al – Mazalim (Superior Judge for the general transgression of the people in authority).

The contact of the Southwest with Islam was put around the seventeenth century through some traders and Islamic scholars from Mali. Eventually, Islam was established firmly in Yorubaland, and some attempts were made to introduce its legal system in some towns like Ede and Ikirun but were aborted. Thus, it remained largely a private religion of individuals until the advent of British occupation.

The Southeast, where traditional religion and Christianity are predominant, was not devoid of Islam. In the early twentieth century central mosques had been found in places like Egeraten and Calabar, and by the middle of the century various Islamic centers and Muslim communities were established in Ibo land.

The British occupation met no serious resistance in the southern part of Nigeria, both southwest and South East alike. In the north where the revolutionary system of Shari’a had been established stiff resistance was offered to the infidels occupation. Starting from Ilorin and Bida emirates, the determination to defend dar al-Islam from the advancing British forces was gaining momentum more and more. The resistance persisted until the fall of Sokoto, the capital city of the caliphate in 1903 [C.E]. Before the final battles were fought, the Imperialists had made the whole area a British Protectorate in 1900.
Perhaps, the persistent opposition, which the British experienced in the north, prepared their minds to adopt an indirect rule policy on the occasion of the installation of a new Sultan. Lugard declared:

_There will be no interference with your religion or with the position of the Sarkin Musulumi as head of your religion. The English Government never interferes with religion._

Consequently, the emirs were retained as the Sole Native Authorities in their emirates with proviso to receive the compliance of the British officer Resident in Nigeria on policy matters. Any failure to maintain a kind of master-servant relationship between the Native Authority and the Resident might have made the latter to resort to stricter measures, which in extreme cases could have lead to the removal and exile of the emir concerned.

After the military conquest and the amalgamation of the Northern and Southern Protectorates in 1914, the Colonial Administrative Officers grew in power and interference with the administration of justice in the native courts became rampant. It became an offence to adjudicate without a warrant. The authority of the Native Courts and their freedom were abdicated forever. With the Native Courts Ordinance, 1914 and its replacement of 1918, the hope of a return was sealed off. The Provincial Courts System was now extended to the whole country, and to be directed by the powers-that-be. The exit of sir Frederick Lugard in 1932 marked the end of a gentleman approach. Sir Donald Cameron who replaced Lugard introduced in 1933 four legislations with far-reaching changes: They were as follows:

1. The Protectorate Courts Ordinance;
2. The West Africa Courts of Appeal Ordinance;
3. The Native Court Ordinance; and
4. The Supreme Courts (Amendment) Ordinance.

With this legislation, the system of appeal was extended and there could now be further appeals to magistrates’ Courts or the Supreme Court, and for the first time, appeals on matters of Islamic law lay up to the West African Court of Appeal. The first casualty for Islamic Law was the notorious case of _TSOFO GUBA V. GWANDU NATIVE AUTHORITY_. Because of the reaction from the Muslims in the North; a temporary measure to cool down tempers was introduced in form of the Native Court Ordinance of 1948. The Ordinance empowered the native courts to apply the provision
of the Criminal Code if they so wished. Thus, the Muslim Courts were moved towards the application of the statutory criminal law and away from Islamic law. These temporary measures were removed by the Native Courts (Amendment) Ordinance, No 2, 1951. Section 10A of the Ordinance now provided that where an act of commission or omission constituted an offence under native law and custom and also under the statute, native court could not impose a penalty greater than that provided by the code for the same offence. This provision alone became a strong barrier against the full application of the Shari’a in Nigeria.

Part of the recommendation of Brooke Commission of Enquiry was that a Muslim Court of Appeal be established and that a High Court Judge be impaneled on its bench. It was established in 1956 without a High Court Judge on its bench, thus appeals from Moslem Court of Appeal laid to the High Court. Each of such appeals was allowed on the ground either of repugnancy or incompatibility.

In response to the fears supposedly being raised by the non-Muslims, the Northern Regional Government sent delegations to Pakistan, Libya, and the Sudan. The delegates submitted a report in 1958, and a Penal of Jurists was constituted to make recommendations. The panel recommended the adoption of the Penal Code and Criminal Procedure Code in place of the Criminal Code and the Islamic Criminal Law. Thus, Shari’a provisions regarding punishments were replaced with punishments that were foreign to Shari’a. Consequently, the Native Courts Law, 1956 ought to be amended in order to strip the courts of the power to apply Islamic Criminal Law and native customs relating to crimes. This was done by the enactment of the Native Courts (Amendment) Law, N. R No 10, 1960, which took effect from 1st October 1960.

In comparison with this supposed fear of non-Muslim minorities in the North which led to the replacement of the essential aspects of Islamic Law, Muslim South-West who were in majority complained to the Governor of Nigeria in writing and demanded for their right to be given courts to administer Shari’a, they were not favoured with a reply. They also submitted a memorandum to Brooks Commission calling for the establishment of Muslim Courts in the South. The Commission refused to accede to the request, only for the reason that customary law was already firmly established for the society and that the establishment of Muslim courts would lead to religious uprising. This is a clear oppression to say the least.
The civil cases of Islamic law did not escape the destruction from colonialism and its agents—since the Moslem Court of Appeal’s decision was subjected to the appellate jurisdiction of the High Court. The inclusion of an Islamic jurist in the panel of the High Court when hearing appeal from the Moslem Court of Appeal was unfavorable. From onset a minority judgment was expected. The true intention of the law-maker was to make it a temporary arrangement. The same panel that recommended the replacement of Islamic Criminal Law recommended the scrapping of the Moslem Court of Appeal with a substitute of the Shari’a Court of Appeal already robbed of all the civil jurisdiction enjoyed by the defunct Moslem Court of Appeal and left for the new Shari’a Court of Appeal “Islamic Personal Law”.

At the All Nigeria Judges’ Conference held in Lagos in 1972 it was resolved that a Federal Shari’a Court of Appeal be established as the final court of appeal with regards to Islamic Law cases. The Head of State then, General Murtala Ramat Mohammed, directed in 1975 that a Federal Court of Appeal and a Federal Shari’a Court of Appeal be established at Federal level. Before either of the courts could be established, the Head of State was assassinated. The successor of General Murtala, General Obasanjo, endorsed the establishment of the Federal Court of Appeal while the case of Federal Shari’a Court of Appeal was left to the constituent Assembly for debate. The scenario that was associated with the matter was so sorrowful to be recalled. At the end, the establishment of a Federal Shari’a Court of Appeal was rejected.

Another attempt was made at the constitution making of the nation in 1989. Section 261 restored the jurisdictional powers to the Shari’a Court of Appeal removed by section 238 of the 1979 constitution. It was also capable of stopping the State High Court from entertaining appeal from Upper Area Courts in Civil proceeding where questions of Islamic Law were involved. Unfortunately, Nigerians did not have the opportunity to fully operate the 1989 constitution when a new transition programme was instituted. The 1999 Constitution, which is now in force, is retrogressive with its section 277 (1) and (2). These provisions are in Pari material with those of section 242 (1) and (2) of the 1979 constitution.
III. The Rebirth of Shari’a Courts under Common Law Domination

From the foregoing paragraphs, we have seen how colonialists made English Common Law which is Christian in orientation and content, the basic law of Nigeria as opposed to other laws, and against which other laws will be tested and validated.

The colonial power relegated Islamic Law to the status of a customary law, after its courts known as Native Courts (by then) exercised the largely undefined criminal and civil jurisdiction. This was expressed in the gradual reduction of the jurisdiction of Islamic law culminating in its being limited to “personal law” matters alone; its subjection to common law and English values under the guise of ‘repugnancy and incompatibility tests; the gradual and subtle replacement of Islamic law personnel by common law practitioners who are most ignorant of Islamic law and by the placing of its administration under common law practitioners.

The new resurgence for the application of Shari’a in many of the Northern States is not as if the 1999 constitution unfolded a new initiative into its application. In fact, the constitution diminished it in certain respects. Rather, it is a new wave of awareness and determination, and the gala is to continue unabated, gathering more strength and more momentum.

The Muslims give breath and life to Shari’a. So far there are Muslims in Nigeria, so will Shari’a remain to have applications, recognition, and positive prospects. Its application would definitely engender a crime free society in the long run. For instance, the crime rate in Saudi-Arabia and Libya is below 1%. A sharp drop in crime rate has also been recorded in Zamfara State and other States of Federation that re-introduced application of Shari’a. 19 The deterrent effect behind the penal sanctions has had an impact on the psyche of the people.

In line with Section 6 (4) (b) and (5) (k) the Shari’a courts are established and conferred with civil and criminal jurisdiction in Islamic law matters with all inherent powers of a court of record as well as original and appellate jurisdictions. The Shari’a Court of Appeal’s jurisdiction was extended to hear criminal appeals from the Shari’a Courts. A Shari’a Penal Code was enacted pursuant to section 36 (12) of the 1999 constitution.

These steps which are constitutional may suggest that the application of the Shari’a is possible under the 1999 Constitution. 20 Far from this, all these arrangements stopped at state level, and since we cannot be an island unto ourselves with a state under a federal setup like ours, we should endeavor to aspire for a more convenient and conducive atmosphere at the
federal level. For this reason some issues affecting Shari’a should be highlighted as examples to show the gravity of persecution it and its adherents suffered from the British oriented law and its proponents.

1. **Jurisdiction of Courts in Shari’a Matters:**

a. **Shari’a Court of Appeal and High Court**

   It is the High Court that entertains unlimited jurisdiction on Shari’a matters in states that do not have Shari’a Court of Appeal.\(^{21}\) In States where there are Shari’a Courts of Appeal, its jurisdiction is limited to “Islamic personal law” Matters.\(^{22}\) Other Islamic Law matters go to the High Court.\(^{23}\) This arrangement is in conflict with the widening of Shari’a Court of Appeal’s jurisdiction in the new Shari’a Courts. Certainly, we know the answer when any matter should graduate to High Court. Additionally, the Shari’a Court of Appeal does not have any original jurisdiction. If one may ask: Why should the High Courts that are manned by common law practitioners, have any jurisdiction in Islamic law matters at all? This arrangement is worse than the colonial era where Khadis sat on the High Court when appeal on matters of Islamic law were heard.\(^{24}\) The position under the 1979 and 1999 constitution is that Khadis can no longer sit in the High Court even when the latter hears Islamic appeals.\(^{25}\) In *Maida v. Modu*\(^{26}\) at the Court Appeal, justice Muntaka Comassie took up the point thus: *It seems to me that the new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Shari’a Courts in this country. It does not enhance the jurisdiction of those courts. This, in my view, with all sense of responsibility; is unfair. In most cases, this appeal inclusive, one discovered to be governed by Islamic Law in Islamic Courts and lastly that the subject matters and issues involved called for intensive application of Islamic Law and procedure which are not available in common law system. Moreover, the law to be applied in the High Court are quite alien to the parties and Shari’a Court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter.* \(^{27}\)
b. **The Court of Appeal and the Supreme Court:**

Appeals relating to Islamic law matters are heard by a special panel in the Court of Appeal, consisting of, at least, three justices of that court learned in Islamic law. No such arrangement is made at the Supreme Court. The regular panel of the justices of the court hears Islamic law appeals, and they are not constitutionally required to be learned in Islamic law. The Constitution only requires the president of the Supreme Court to have regard to the need of having justices learned in Islamic law and customary law on the court.\(^{28}\)

2. **Position of Chief Judge and Control of Inferior Courts**

Under the constitution, the Shari’a Court of Appeal and the High Court are superior courts of equal status. The Grand Khadi heads the Shari’a Court of Appeal while the Chief Judge heads the High Court. For a well-known reason, the colonial masters put the Chief Judges as the head of the judiciary of the region. This colonial setup was retained in all our post independence constitutions, 1999 inclusive. Another abnormality is the supervisory role of the Chief Judge on the Area Courts, which are the courts of first instance for Islamic Law.

3. **Appointment of Judges of Shari’a Courts**

   a. Sections 261 (3) (a) and 276 (3) (a) of the 1999 Constitution stipulate the qualification required for the appointment of Khadis of the Shari’a Court of Appeal. Under these provisions, any legal practitioner who has been so qualified for a period of not less than ten years is eligible as a Khadi provided that he has “obtained a recognized qualification from an institution acceptable to the National Judicial Council”. The Constitution failed to specify any years of post qualification experience in relation to his Islamic law qualification. In this circumstance, any legal practitioner with ten years post call experience who newly obtained a diploma in Islamic law or even Islamic Studies taught in English language, and who has no knowledge of Arabic, the language of primary reference for Shari’a, will qualify for appointment as Khadi under the Constitution. The common law practitioners pollute Islamic law with common law ideas.\(^{29}\)
Again, Judges of Islamic Courts must be Muslims. The Shari’a Court of Appeal Law included this qualification. The omission can be an oversight, for the same constitution has introduced a right to freedom from discrimination, \textit{inter alia}, on grounds of religion\footnote{As it stands, any person may be appointed a Khadi, no matter his religion.}.

\subsection*{b. Lack of Uniformity of Qualification}
There is the requirement of 12 years post qualification experience\footnote{for the appointment of Grand Khadi or Khadi of the Federal Capital Territory instead of 10 years post qualification of other Grand Khadis or Khadis as in the case of judges of the Federal High Courts or High Court of the Federal Capital Territory and State High Courts.} for the appointment of Grand Khadi or Khadi of the Federal Capital Territory instead of 10 years post qualification of other Grand Khadis or Khadis as in the case of judges of the Federal High Courts or High Court of the Federal Capital Territory and State High Courts. Is the Grand Khadi or Khadi of the Federal Capital Territory thereby superior to other Grand Khadis or Khadis?

\subsection*{c. Procedure for Appointment of Grand Khadis and Khadis}
Khadis are appointed by the National Judicial Council (NJC). This Council is made up of 22 members. 19 persons among them are with common law background, (1) President of Customary Court of Appeal (both are to be appointed by the Chief Justice, and both may be basically common law practitioners) and (2) laymen. This body is dominated by common law practitioners, and should naturally have a bias for the common law viewpoints and methods.

\section*{4. Legal Practitioners and Islamic Law Matters}
Section 36 of the 1999 constitution includes rights to counsel as a fundamental right. Section 33 of the 1979 Constitution which is in \textit{Pari materia} with this section has been interpreted as giving lawyers right of audience in Shari’a Court of Appeal\footnote{The provision of section 22 (5) of 1963 constitution was different. It clearly stated that lawyers were not allowed in the Shari’a Court of Appeal, Native Courts, and Customary Courts. The aversion of Muslim scholars to lawyers is because they are common law practitioners whose training does not include any iota of Islamic law in most cases. Experience has shown that common law judges and practitioners, due to lack of knowledge, and in some cases, prejudice, distort Islamic law.}.

\addcontentsline{toc}{section}{4. Legal Practitioners and Islamic Law Matters}
while Islamic Law recognizes that the concept of Agency (Wakalah) is extended to legal matters in terms of legal representation. This kind of legal representation is far different from the legal representation introduced by the common law. Common law values are different from Islamic values.\textsuperscript{38} The appearance of lawyers in Islamic Law Courts have not improved the principles, thereby distorting the simple and well-regulated Islamic law procedure.\textsuperscript{39}

If these problems and others that constitute bottlenecks in the full application of Shari’a are removed, we can then claim to have Shari’a law as one segment of the Nigerian legal system. Alternatively, the all-competing parties should agree to discard the alien Common Law and replace it with Shari’a Law, canon Law, and Customary Laws respectively as basic Laws for the country.

**CRITICISM OF ISLAMIC CRIMINAL LAW AND PROCEDURES**

Proof occupies esteem in the administration of justice under the Shari’a. Many ordinances from the Qur’an and the Sunnah emphasize on this. The Prophet (SAW) stated.

“If people’s claims were to be accepted on their face value, some persons would claim other peoples blood and properties…”

In another instance, he averred:

“I am only a human being, and litigants with cases of dispute come to me. Perhaps some of you may happen to be more eloquent and clever in argument than others whereby I may consider that he is truthful and pass a judgment in his favour. If I pass a judgment in favour of somebody where by he takes a Muslim’s right unjustly, whatever he takes is nothing but a piece of fire, and it is up to him to take or to leave.”

These tradition and others speak for themselves in establishing the role that proof plays in the administration of justice. The proof of a case requires presentation of evidence until the matter attains the degree of certainty or highest probability. The establishment of the truth of claims is attainable through four major means under the Shari’a, by the evidences of the Qur’an, the Sunnah and the Ijma’ of Muslim jurists.
They are as below in their categories:

1. **Al – Shahadah**, i.e. Testimony;
2. **Al – Yamin**, i.e. Oath
3. **Al – Nakul**, i.e. Refusal of Taking Oath;
4. **Al – Iqrar**, i.e. Confession or Admission

Many people, including some legal practitioners, have taken interest in criticizing Islamic Criminal law in recent times. The criticism is not new to Shari’a; it is as old as orientalism itself. The surprising thing about this criticism is the display of ignorance of Nigerian laws by these legal practitioners. Some of them lament about corporal punishment as well as procedural steps on confession. Corporal punishment has been enacted in our laws prior to independence. Section 77 of the penal code authorizes any court, whether trying a case summarily or otherwise, to pass on any male offender, in lieu of or in addition to any other punishment to which he might be sentenced for any offence not punishable with death.

In the case of a confession, section 27 (3) of the Evidence Act provides that where more persons than one are charged jointly with a criminal offence, and a confession made by one of such persons so charged is given in evidence, the court or a jury, where the trial is one with a jury, shall *not take such statement into consideration as against any of such other persons in whose presence it was made* unless he adopted the said statement by words or conduct.

Similar effect is upheld in a statement made to the police by an accused person against a co-accused. But if an accused person goes into the witness box to give evidence, he may exculpate or inculpate a co-accused as a witness and may be cross-examined by the co-accused. Additionally, an accused person who is testifying as a witness, could give as evidence in court, any incriminating statement against a co-accused contained in a confessional statement made out of court by him. Under Islamic law, the Statement of an accused person in witness box or as a witness against a co-accused that incriminates his co-accused, *failure to prove his case beyond the reasonable doubt*, especially in case of fornication and adultery (*Zina*), will be tantamount to committing an offence of defamation (*Qadhf*) which is another criminal offence under the Shari’a.

Confession under Shari’a is more subtle than under the common law, especially in criminal offences. It must be completely voluntary without any
interference. No promise of secrecy or deception is allowed to be practiced on the accused person for the purpose of obtaining the confession.

He is also to be warned of the consequence of his confession. Above all, the confessor is allowed to retract his confession at any stage of the proceeding even at the middle of administering the punishment on him after the judgment has been pronounced. Without the hullabaloo in the cases of Safiyah and others it would not have been adjudged at the Appeal otherwise. In fact, in cases of fornication and adultery the two strong means of proving them are:

(a) to produce four male witnesses who shall testify that they saw simultaneously the two accused persons performing the act of fornication or adultery actively without any illusion.
(b) they must all be able to describe the place, the time, the surroundings of the act, and the clothes on the actors if any, without any disparity in their descriptions.

All is to show that Shari’a is not sadistic about its provisions. What it is after is a sane and moderate society where crimes are put at their minimal level at all time.

Habl (Pregnancy) as a Proof of Adultery and Fornication:

This aspect of proof at this stage of our implementation of Islamic Criminal law warrants keen study from all concerned scholars and jurists. The Maliki School of Law’s principles that we adopted in this sub-region needs to be re-examined. If we are to free ourselves from the yoke of the unpleasant past and more on in the right perspective of Islamic law; the adoption of a Mah’hab, a specific school law unflinchingly is unorthodox. The Qur’an and the Sunnah are the bases of Shari’a, which cannot be changed or deviated from. Ijma’, that is, the consensus of Islamic jurists, follows this order. Other sources of Islamic law are part of Ijtihad, utilized for the purpose of administration in accordance to the circumstance of individual cases. A stereotyped judgment is unknown to Shari’a. Each judge is guided by the Qur’an, the Sunnah and Ijima’. The doctrines of stare-decisis and hierarchy of courts is alien to pure and proper Shari’a; what is known is division of jurisdiction of court for administrative conveniences. Even the Imam Malik himself was reported to have said that: “From every scholar you found what you accept and what you reject (in matter of adjudication) except the owner of this grave (pointing to the grave of Prophet Muhammad (SAW) very near to him at Madinah Holy Mosque.”

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The issue of *Habl* (pregnancy) as a proof for adultery or fornication was narrated in the hadith narrated by all six books of Hadith except Sunan al –Nasa ‘ I from Ibn ‘Abbas who said:

‘Umar said: Among what was revealed by Allah was the verse of Rajim (Stoning to death as a punishment for adultery); We read it, understood and perused it. The Messenger of Allah (SAW) Stoned (the convict) to death and we did the same after him (SAW). I am afraid that time will come when someone will say: ‘By Allah, we did not find the verse of rajim in the Book of Allah (SWT)’. For this reason people will go astray for renouncing an obligation, which Allah enjoined. Rajim is allowed in the Book of Allah as a punishment upon whoever commits adultery after he or she has consummated a marriage in a lawful pregnancy, or an admission.48

Another evidence was the narration that asserted that Caliph ‘Uthman ordered for rajm of a pregnant woman.49

What is important to us here is that pregnancy is not a conclusive proof to warrant hadd, i.e. the punishment of rajm. Many excuses can be advanced like duress and unconsciousness. It was reported that Imam Ali (R) told Shurahah, a lady who confessed when she was pregnant: ‘perhaps he committed the offence with you when you were asleep; or he coerced you; or your master married you to him;’50 This evidence and many others testifies that the judge had a duty to educate the pregnant woman how to free herself from the punishment. The practice of the Prophet (S. A. W.) and the companions are abundant in this direction, and which cannot be waved aside in support of a school of law. All the cases that gave raise to controversy would not have occurred if this simple orthodox procedure had been followed. And if it happened that this procedure was followed, the case could not have been treated as a case proved by the appearance of pregnancy alone but by confession, which is strong evidence. As strong as a confession could be, it is also allowed under the Shari’a Criminal law to be retracted in favour of the confessor even during the implementation of the punishment.

Our Khadis could save us a lot of problems by strictly following the tenant and practice of the Prophet rather than the stereotyped dictum of a school.

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There is nothing in the Maliki School that suggests that whenever a pregnant woman is caught without a husband, the conclusion is Zina, and the punishment rajm. May Allah guide us.

CONCLUSION

It is clear from the foregoing that Shari’a legal system is independent and practicable under our present setup. We do not need the supervisory role of the Common Law. And its domination must be shunned. Shari’a is a complete code of faith and practice; the Shari’a covers Iman, Ibadat, and Mu’amalat, and is not negotiable. Allah states in Qur’an 5:44.

“Whoever judgeth not by that which Allah had revealed, such are unbelievers”.
Also Qur’an 5:45 “Who so judgeth not by that which Allah hath revealed: such are evil-doers’

And technically, it is a legal system that covers all civil transactions and relationships, including a comprehensive penal system with defined offences, prescribed punishments rights of fair hearing, the due process of Law; etc. The state is bound to carry it out without affecting other rights and interests of non-Muslims.

The 1999 constitution itself preambles to be under God, together with the nation and it people, in multi-religious federation. To seek to obstruct the Shari’a project in any State is to violate s.38 (1) of the constitution. Shari’a is holistic and can’t be performed in parts.

THE WAY OUT:

Constant dialogue: Muslims and non-Muslims must constantly remain in dialogue as initiated last week by the JNI in Kaduna. This will breed understanding and clear away ignorance and sentiments. Sacrifices will be identified and reciprocated.

Recognition of Pluralist Society: Nigeria must be recognized as a pluralist society that is united in diversity. This pluralism is responsible for accommodating the existing plural legal system, the multi-religious nature of the people and the diverse cultures and traditions. These variables must be respected by the competing parties. Similar examples could be cited of Canada and Indonesia.

The sacrifices which the Muslim in Nigeria, especially in the southern part, have made and endures should be recognized and reciprocated by the other side; The adoption of the English Common law, which is Christian in
orientation and content, as the basic law of Nigeria as opposed to other laws, and against which other laws will be tested and validated. While Islamic law is divine, the Common law is not, moreso that the Nigerian constitution has suffered over eleven changes.

Such sacrifice could best be reciprocated by making Shari’a law national in application, removing all bottlenecks in the application of the system etc. Live and let live.

Alternatively, all competing parties should agree to discard the alien Common Law in place of Shari’a Law, Common Law and Customary Laws as basic laws for the country.

The Muslims in the Southern States have suffered too much and for so long as regards the denial to live and be judged in accordance with Shari’a.

May Allah Protect and Guide us all.
ENDNOTE


2. See Qur’an 5:3

3. Alkali, M. N. ‘The concept of Islamic Government in Borno under the Sayfawa Dynasty’ in Kano Studies. NSI (2) pp. 29-33


5. Gbadamosi, I. G. O. The Growth of Islam, p. 1


15. See a number of cases which have been decided on the basis of the repugnancy and incompatibility test in Bappa Mahmud, A. (Justice), 1988, A Short History of Shari’a in the Defunct Northern Nigeria, Uni. Of Jos Press Ltd., pp. 15 – 20.

16. See M. Bappa, op cit, pp 3 –4

17. Section 18 and 19, Moslem Court of Appeal Law, N. R. No 10, 1956.

18. See Olawoyin V. Commissioner of Police (1961) 1 All N. L. R. 203. Both 1979 and 1999 Constitution were tailored in line with the decision in this case.

19. See Mahmud, A. B. (A. G. and Commissioner for Justice, Zamfara State), (20000, Shari’a and Democracy, a paper presented at

20. Ibid., P. 2.


23. Section 45 (1) and (2) Area Courts/edict, Cap 13, Laws of Kwara State, 1994
27. Ibid. p. 112
28. See Section 288 (1), 1999 Constitution.
32. See Section 42, 1999 Constitution
33. See Section 261 (3) (b), 1999 Constitution
34. Section 276 (3) (b), 1999 Constitution
35. See Paragraph 20, Item 1 part 1, 3rd Schedule to the 1999 Constitution.
37. See for example, the case of Guri v. Hadejia N. A. (1959) 4 F. S. C. 44.
38. See Dr. Gwarzo (Grand Khadi) in Chamberlain v. Abdullahi Dan Fulani in Mahmud (ed), Shari’a Law Reports, Vol. 1 (1961 – 1989) 55 at pp. 59 – 62 compare this the concurring judgment of Kalgo J, at pp. 58 – 59. Although both judges are Muslims, Gwarzo, GK displayed his loyalty to Islamic law while Kalgo J, showed too well the lawyers’ (Muslims notwithstanding) usual preference for common law principle even when such principles contravene those of Islamic law and are patently unjust!


45. Beyond reasonable doubt her means bringing four witnesses who will testify that they have see the accused person performing the act actively.

46. Compare this position with section 31 and 32 of Evidence Act.

47. See Ibn Hazm, (no date) Mulakhas Ibtal al – Qiiyas, Halabi Press, Cairo, p. 81


AN OVERVIEW OF THE APPLICATION OF SHARI’A IN NIGERIA
By Hon. Justice Abdul Qadir Orire

In Nigeria today the alkali profess that their authority is from Shari’a, yet in many of their judgement they proclaim not the Shari’a but the orders of Government. Moreover, they may not in certain matters which are brought before them renounce the judgements prescribed by the Qur’an, for they may not condemn the adulterer to be stoned, neither is the right hand of the thief to be cut off, so men say alkali speaks with two voices and knows not by what authority he judges them; nor is he so expert in the Governor’s law as to be respected”.

An overview of the application of Shari’a in Nigeria needs to be explained, particularly when it comes to what could be defined as Nigeria. This is because Shari’a has been applied in substantial parts of the territory now called Nigerian as well as in other parts now outside the present Nigerian but which were then part of the territory now called Nigeria. It must be remembered that most of the ancient states in West Africa like old Ghana, Mali, and Songai Empires in most cases applied Islamic Law as State Law, talk less of Sokoto Caliphate and Kanem-Borno Empire where in the latter, it was reported that a Queen’s mother had to jail a Mai (King) for improperly applying the Shari’a.

The position of Shari’a was unambiguously known throughout most parts of the West African sub-region including Nigeria, and this was what made an author (1) say, and I quote:

“In the late 18th century, the growth of Islamic acculturation had reached a stage where in the old order had either to ally or come to grips with it. A particularly vocal section of the states the Muslim leaders and their followers were demanding reform in consonance with their conception of a just society. Their demands are understandable since they could not be true Muslims while they were subjected to anti-Muslims law”.

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I went into this historical and detailed perspective so as to show that the operation of Shari’a is not new and is no stranger to this part of the country at all, rather it had been a common phenomenon and that it had never worked to the detriments of anybody.

In fact, under the Sokoto Caliphate, Islamic law flourished and was the sole law of the land. This is more so because among the conditions laid down for fighting the Jihad is the declaration called “Jihad declaration known as wathiqat sudan——” which contained 27 policies which were conditions for:

1. Implication of Shari’a Rule (ahkamu Shari’a)
2. Appointing Judges as obligatory according to consensus of scholars etc.

This was the spirit of the Jihad, and it was carried out to the letter to the extent of appointing qualified Qadis who carried out the spirit of absolute justice enshrined in the Shari’a to its apex. Qadis who used Qua’an and Sunnah to adjudicate among litigants, judges who were truthful, and administered justice honestly and truthfully, and were willing to risk censure by applying the laws of Allah; also men who accepted no gifts what-so-ever for what ever reason they were offered. These people applied Shari’a equally between all citizens. Nobody was considered above the law and no preferential treatment given to anybody. That was the position found by Hugh Clapperton during Sultan Muhammad Bello’s rule which made him report as follows:

“The law of the Qur’an were in his (Shehu) time, and indeed continue to be strict put in force, not only among the Fellates but the Negroes and Arabs, and the whole country was so well regulated that it was a common saying that a woman might travel with a casket of gold upon her head from one end of the Fellata dominions to the other without being molested——”

That situation changed with the coming of the British and the introduction of their English common law so much that later a colonial master in the person of Palmer lamented in one of his reports as follows:

“It is lamentably impossible to deny that in Hausa land the incidents of crimes notably theft, murder, robbery, and burglary had grown worse instead of better since the British Occupation——”
CHALLENGES FACING SHARI’A

From the Past Challenges, Who Faces Shari’a?
Shari’a had been into various challenges and restrictions since the coming of the British Rules in Northern Nigeria. It will interest this audience to know that all aspects of Shari’a such as civil, criminal, personal, and procedural laws were left intact to operate with exception of two aspects; that is, punishment for adultery and theft which is stoning for adultery and amputation for theft respectively.

The denial to enforce the above aspects of punishment was lamented by Muslim Scholars in and around 1930 when their opinion was sought as to whether to expand the jurisdiction of the alkalis. These law teachers at Kano law school lamented as follows:

“In Nigeria today the alkali profess that their authority is from Shari’a, yet in many of their judgement they proclaim not the Shari’a but the orders of Government. Moreover they may not in certain matters which are brought before them renounce the judgements prescribed by the Qur’an, for they may not condemn the adulterer to be stoned, neither is the right hand of the thief to be cut off, so men say alkali speaks with two voices and knows not by what authority he judges them; nor is he so expert in the Governor’s law as to be respected”.

Apart from the above restrictions to enforce certain criminal punishments, there had been several twisting of hands in the application of Shari’a throughout the colonial era. Such hand twisting like classifying Shari’a under High Court law; that native law and custom includes “ Moslem law” and should be treated as such. It was regarded as unwritten and to be proved by evidence in the High Courts.

This was so because all of the judges in the High Court were neither knowledgeable in Arabic nor versed in Islamic law. It was for this that the field way left exclusively to the alkali since the judges of the High Court were not presumed to know customary laws of the area of their jurisdiction.

Furthermore, repugnancy clauses, negative authority ordinances, or restriction through existing laws were introduced to check several aspects of the practice of Shari’a.
An example of the above is the order mandating in criminal causes that a Native Court (alkali court) shall administer the provisions of:

(a) The penal code law and criminal (1) procedure code and any subsidiary legislation made therein.
(b) Any written law, which the court may be authorized to enforce by order made under section 27.
(c) All rules and orders made under the Native Authority law or under any legislation repealed or superseded by that law and all rules, orders and byelaws made by native authority under any other written law in force in the area of the jurisdiction of the court.

In civil causes, it directed a native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it was not repugnant to natural justice, equity, and good conscience, nor incompatible, either directly or by necessary implication, with any written law in force for the time being.

Despite all these challenges there emerged two distinct features for Shari’a namely: that the provisions of Shari’a was distinctly spelt out in 1960, 1963, and 1979 constitutions. Also there emerged from 1956 distinct courts for the application of the law.

Apart from alkali courts, which were later changed to area courts, there emerged Muslim courts of appeal from 1956, which later metamorphosed into Shari’a Court of Appeal with equal status with the High court.

Shari’a Court of appeal in the 1963 constitutions had two roles. It sat as courts of Appeal to hear appeals on Muslim personal law from Area courts and the judge of the court sat as a member of High court of state in its appellate jurisdiction to hear appeals from area courts in all civil causes.

This is contained in the section 62-63 of High court law (cap 49) as follows:

“In the exercise of it’s jurisdiction under section 62 the High court shall be constituted of three members two of whom shall be judges of High court and one of whom shall be a judge of the Shari’a of Appeal”.

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This provision was inadvertently omitted in the 1979 constitution. This created a vacuum because a civil appeal from an Area court, where Islamic law was the applicable law at court of first instance, would go to the High Court where there would be no judge knowledgeable in that law. A correction was made to see that civil appeals went to Sharia’s court of appeal by removing the word “Personal” from the jurisdiction of Sharia’s court of appeal to make it Islamic law simplista. This was initiated during 1989 constitutional conference and was carried into the 1999 constitution. As of now Sharia’s is the applicable law in all civil causes and personal laws affecting Muslims in area where it is the prevailing law.

Area courts as well as Sharia’s Courts of Appeal are constitutionally permitted to apply Islamic in all transactions between parties before them where the prevailing law is Islamic law. Islamic Criminal Law which Muslims had been yearning for was made possible by the constitutional provisions that a state could create new courts and make law for the peace and security of its citizens. Many States in the North saw this as an opportunity to introduce criminal aspects of Islamic law to reduce crime and bring security to its citizens.

This lecture will not be complete if I fail to touch on Sharia’s aspects as far as women are concerned. This is more so when the conference is to determine issues, challenges, and prospects in the protection of women’s rights, and their access to justice under the Sharia in the Northern States.

**Provision laid by Sharia for the Protection of Women:**

A woman cannot be married away by any body (except in the case of a minor by his father) without her consent. A woman has all the rights to enter conditions into her marriage contract; such conditions that the marriage could be terminated at her own will (*Tafuwil Talaq*):

i. A woman can seek for divorce through *Khuleu*.

ii. A woman can seek for the dissolution of her marriage.

iii. When the marriage is between unequal partners

iv. When the husband suffers from certain diseases

v. When the husband is missing

vi. When the husband accuses the wife of unchastity

vii. When the husband in not able to fulfil all marital obligations, and the detail was not known to her before marriage.

viii. When the husband cannot provide maintenance for her

ix. When the husband maltreats her
x. When the husband is guilty of inequality between two or more wives

xi. A woman has right of option puberty {Khiyaru Bulug} if she is married out as a minor that she objected.

In Custody of Children after Divorce:
Whenever divorce occurs, the mother or woman on her side is given the right of custody in the case of a daughter until she is married, and marriage consummated, and in case of a boy, until he reaches puberty.

Nevertheless, the father is to provide for the child’s maintenance and education while he or she is under the mother’s custody.

Other Rights Accorded to Women:

i. The wife has a right to own and dispose of her property.

ii. A wife has a right to be provided with a servants if she is of such status and is not obliged to cook for the family.

iii. She has a right if she wishes not to breast feed her baby

iv. A wife has a right to a self-contained accommodation, feedings, and clothing from her husband.

All these principles of law flow from the last sermon delivered by Prophet Muhammad, May peace and blessings of Allah be with him, when he said at Mount Arafat as follows:

“O people? You have rights over your wives and your wives have rights over you. Treat your wives with love and kindness. Verily you have taken them as the trust of God, and have made their persons lawful unto you by the words of Allah. Keep always faithful to the trust reposed in you, and avoid sins”.

Ladies and Gentlemen which evidence should one require more to show that Shari’a has provisions for the protection of women’s rights and their access to justice other than these and others not mentioned here.
REFERENCES

J. F. Ade Ajayi an M. Crowther in his book “History of West Africa”.

Sokoto Gazettier

Colonial Memoranda K. 7352 Vol. II

Section 25 Native Courts Laws Cap 78, Vol II. The Laws of Northern Nigeria 1963
RESPONSES AND COMMENTS

THEME 4: Perspectives on the Application of Shari’a in Nigeria.

Improving the quality of life of Muslims through the Implementation of Socio-Economic aspects of Shari’a in Nigeria. By S.U.D. Keffi.

A participant called for the economic empowerment of women if any meaningful progress were to be made on women’s access to justice; they had to have the financial means to seek justice. According to the participant, zakhah [that is compulsory charity by Muslims] can help in the realization of this goal.

Also commenting on the need for socio-economic empowerment and social security for the people before the implementation of the Shari’a as canvassed in one of the presentations, she said that this was very relevant. That the government had to put in place effective social security before the full implementation of the Shari’a.

Re-introduction of Shari’a Courts in Nigeria: Some perspectives by Prof. A. Zubair

Commenting on the paper, a participant agreed with the presenter’s view that there should be adequate knowledge on the part of those who are appointed as Khadis of Shari’a courts and proper shape should be given to Shari’a courts by widening its scope and jurisdiction so that matters of Islamic law would not be taken to high court for adjudication. Furthermore, the limitation of the application of the Shari’a to the maliki school of law should be extended to cover all schools or what can be regarded as orthodox Shari’a to make it comprehensive and widen its interpretation and application.
GLOSSARY

Acurz or Hijazah - (estoppels) especially of a person who had slept over his/her right would be prevented from laying claim to it.

Adl - Justice, in principle it means justice and fairness in adjudicating over a matter/concerning two or more people.

Ahadith - Plural form of Hadith, this meaning the sayings (SAW).

Al – aql - Mental alertness/sanity of a person, which is gained upon the attainment of majority.

Al – gibni – Fraud, including selling of wares above its true price, in general terms refers to deception.

Al – halal wa al – haram – Permissions and prohibitions.

Al – idrak – Wicked intent of offender.


Al – nakul – Refusal to take oath.

Al – shahadah – Testimony.

Al – ta’azir – Penalties that are not fixed, but dependant upon the good discretion of the state and to some extent the judge.

Al – Yamin – Oath taken by a person denying an allegation levied against him, or as supportive evidence.

Al –lqrar – Confession or admission.

Al-daruriy – Imperative interest/necessity.

Al-haraba - Robbery.

Aadd al-ridda – Apostasy.

Alkali – Islamic law judge.

Almajirai - Down trodden.

Arsh - Compensation paid to a victim for the destruction or loss of anything short of life.

Ayat - Generally means signs, also referred to the verses of the Qur’an.

Azimah – Firmness.

Baghyy - Rebellion.

Bara’a – Innocence.

Caliph – Leader of Muslim community.

Dinars - Silver coin spent in early Islamic era.

Dinar-Islam - Islamic abode/community/home of peace used to denote Islamic/Muslim community or state.

Dhiminis - A non-Muslim citizen living in Islamic State who has entered a covenant to abide by the law and be protected by the State.

Dinar - Gold coin spent in early Islamic era.

Diyah - Blood money paid by an offender in case of loss of life to the family of the deceased.
Dogarai – Vigilante group
Exparte – Motion made in court by a plaintiff as a matter of urgency while the defendant was not put on notice or has no knowledge of it
Fard – An obligation that is punishable if omitted
Fard Kifayah - A duty, though compulsory, required (limited) of a group, but if carried out by a few is enough for others
Fasikun – Rebellious, disobedient to Allah
Fatwa - Legal/religious Verdict given by Muslim scholars, especially a good scholar
Fiqh – Islamic jurisprudence
Funtus officio – Matter adjudged/decided upon; not having anything to do with a case again after a judgment is given/delivered
Fuqahah - Muslim Jurists
Gila - Treacherous
Gish - Cheating
Grand qady khadi – head of Shari’a court
Hadd - Punishment for committing an offence after being convicted
Hadd al –shurb – Punishment for drinking alcohol.
Hajar - Boycott
Hajiy - Required
Hakim – Lawgiver
Hakm – Rule of law of Islam
Hakm/Hukm - Law/Verdict Laws
Haram – A prohibition, which is punishable if flouted, with fixed punishment
Hejiy – Required
Hirabah – Banditry/aimed robbery
Hirz - Custody
Hisbah – A public ombudsman
HIV/AIDS – Human Immunodeficiency Virus/Acquired Immune Deficiency syndrome
Hhuudud or huduud – Fixed penalties given for transgressing the rights of Allah in the Quram and Sunnah (public rights).
Ibaaha – Freedom
Ibad’at – Devotional duties/act of worship
Ijma - Consensus of Opinion of Muslim Jurists
Ijtihad - Individual’s effort in finding a solution or issue which has no direct provision under the Shari’a
ijtihad – Independent legal reasoning
Ilmalgada – Judicial procedure
Iman - Faith
**Glossary**

**Inter alia** - among others

**Iqrar** - Confession/Admission, especially of an accused person, which is voluntary

**Istichsan** – Juristic equity

**Jadl** - Whipping, especially of those that commit fornication and those guilty of defaming a chaste woman.

**Jihad** – Striving in Allah’s cause

**Jinayat** - Murder

**Khalifah** - May mean mankind as Allah’s vice regent on earth. It could also mean a successor, especially those that succeeded the prophet

**Khiyarah** - Betrayal/breach of trust

**laa dara wa laa dir’ar** – “Do not harm nor reciprocate harm”

**Lauth** - Circumstantial evidence resorted to especially where there is no direct evidence linking the accused to the offence committed.

**Liwat** - Sodomy/lesbianism

**Ma’rufat!** - Good things enjoined and encouraged which may be the speaking of good words, behaving harmoniously etc.

**Mafsada** – Evil

**Mahar al – mithel** – Bride price or equivalent

**Mahdhab** - A particular or specified school of thought in Islam

**Mahkum al-ahhlalaaq** – Those to whom law is directed and applied

**Mahkum alaih** - Subject of law, that is, those who law is made to govern and are judged by.

**Mahr** - Dowry or bridial price paid to the wife by the husband, the payment of which is compulsory to make conjugal relationship legal, though it may be tangible or intangible

**Makkaarim al – ahhlalaaq** -General principles of good character

**Makalaf** - Person Possessing full legal and religious capacity

**Maliki**- The founder of Maliki school of thought

**Maqaasid – al-Shari’a** – Purposes of Islamic law

**Masalih** – Benefit and advantage

**Masalih – mursalah** – Conventions or customs

**Ma-shaggah** – Stringent and rigid rules of the law which lead to excessive difficulty

**Mashaqqah** - Excessive/extreme difficulty

**Masru’iyyah** – Authority supporting legality or illegality of behaviour

**Maslaha** – public interest

**Mazalim** – Institution that tackles complaints against official misdeeds, corruption and official breach of trust.
Min nafsin wahidatin – From a single soul or self, that is, the human race was from a single man

Mu‘amalah – Relationship between man and man

Mu‘amalat - Most material things e.g. Economics, Science and Technology etc or inter personal relation of human beings

Mubah - Act of which the doing is not compulsory but doing is enjoined as permissible behaviour

Mubalagah - Absurdity

Mufti - A grand scholar in Islam who can issue a religious verdict in respect of any matter affecting or concerning the affairs of the Muslim

Mujahid - A person who is making effort, especially Muslim Scholars working in an area of Islamic law that do not have direct legal provision

Munkara – Vices, evil ways, and practices prohibited or outlawed

Mursalah – Conventions or customs

Mushana - (Married) State of being in wedlock, especially of a person accused of zina to make him/her liable to being stoned to death once proved

Nafs - Soul possessed by all human beings

Nisab - Standard that the amount stolen must reach before the person could be convicted for theft

Niya – Intent

Pari material - Of the same matter/subject

Qadf - False accusation of a person most especially married women for committing adultery. Ordinarily accusation of zina i.e. either adultery or fornication; requires four male unimpeachable witnesses, and any variation in evidence or witnesses falling short of four amounts to Qadf, and would be punished with 80 strokes of the cane.

Qadi – Judge

Qasamah - Oath taken to prove the veiling of a person by another where there is no direct evidence about 50 persons.

Qasamah – oath of conductors

Qisas - Law of equality or retribution especially of a victim who suffered injury or damage by inflicting it on the accused

Qisas – Penalties for torts committed against life and limb (private rights) retaliatory punishments on offenders by relations of victims or payment of a fine

Qiyas - Analogical deduction of a Muslim scholar giving judgment based on his understanding of an issue which though is not expressly provided for under the Shari’a

Qur’an or Qu’ran – Holy book of the Muslims

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Glossary

Rahmah – Mercy / not as crucial as drearily but inject concession and mercy
Rajim - The stoning of either a married man or woman guilty of adultery until death is confirmed
Rajul - Man
Rashura – Illegal gratification
Rashwa - Qualification
Res judicata – A case that is finally settled
Riba - Interest/Usury taken on loan or communality
Riddah - Apostasy
Rukhsah – Laxity
Sadaqak (dowry) sadaqa mithli -(Dowry of her equal i.e. paid to a woman who is equal in status with her
Sadd al – dhari’ah – blocking the in roads to mischief
Salat - Islamic act of workshop generally called prayer
Sariqah - Theft
SAW – Form of prayer on the prophet or messenger of Allah. Meaning peace and blessing on the prophet
Shari’a – Literally means a path that leads to water. In its technical meaning it represents the science of practical conclusions derived from distinct sources, which stands for the law of Islam
Shari’a Sharif - Noble/Honourable Shari’a
Shrub al – khamr – Drunkenness
Shubhah - Doubt
Shurbul Khamr - Drunkenness or consumption of alcohol/intoxicant to which the person if found guilty is liable
Stare decisis – To abide/adhere most especially to judgment
STDs – sexually transmitted diseases
Sunnah - The exemplary actions of the Prophet i.e. the way he did things, or actions performed in His presence to which He gave approval, or His sayings.
Sunni – Muslims following the footsteps of the prophet
Suo motu – on his own especially of judge/court to do or correct things even it not asked by the litigant
Ta’azir - Discretionary punishments awarded by a judge/state for those offences having no specific punishments
Tahsiniyyah – realization of excellence, the best etiquette and avoidance of behavior that is repulsive to people of honour and respect
Taklif - Attainment of majority i.e. maturity for legal and religious responsibilities
Glossary

Takmiliy – Interplay of three objectives of Islamic law as completing and supplementing one another
Talaq – Divorce/legal separation of the husband and wife, generally at the instance of the husband
Taqlid – Sticking to a particular opinion, especially of a school of thought whether right or wrong. Conformance to the canons of one of the recognized schools of law
Tasheer – Public Disclosure
Tawbikh – Reprimand
Ulama – Muslim Scholars
Ummah – Muslim community
Wa’za – Exhortation/admonition
Wakalah – Concept of Agency
Wakil – Agent
Waqf – Endowment made by a Muslim mostly for the benefit of the public
Wasiyah – Legacy or Will written by a deceased not exceeding \(\frac{1}{3}\) of his legacy
Wikalah – Lawyers/ agency, concept of
Zakat – Tax paid by wealthy Muslims to the state to distribute to the poor
Zapa – Zamfara Agency for Poverty Alleviation
Zawwal – Sunrise
Zina – Adultery/fornication depending of marital status
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Annexure 1

WORKING GROUPS: Activity: To come up with strategies for improving Women's Access to Justice in Shari’a practicing states in Nigeria

WORKING GROUPS REPORT

Group I
(a) Education and enlightenment of women on their economic rights
(b) Economic empowerment of women to enable them access justice
(c) States should be cooperative and open to women in need
(d) Shari’a compliant states should embark on training of their judges with minimum qualification of LL.B, B. L.
(e) Legal Aid and counseling for women.

Group II
1. Education through:
   (a) Creating enlightenment/awareness campaign through drama presentations, media activities, formal and informal education, production of jingles, handbills, and flyers in Hausa book and Ajani languages, advocacy for traditional rulers and people in authority, training/train the trainers programmes, conferences, seminars and rallies.
   (b) By who? NGOs, CBOs, networking, religious institutions, traditional institutions, the government and Islamic education/board.
   (c) Where? Grass root level [rural areas], places of worship, government offices, market places, schools.

2. Improvement of the judiciary through:
   (a) Strategy: provision for educational standards in the appointment of judges, adequate funding, awareness campaign for women on their right to accessibility to courts without fear.
   (b) By Who? Government judicial service commission, NJI, NBA, CLO, NGOs, CBOs, media, and religious bodies.

3. Involvement of the police through:
b. By who? Training institutions of the police, police affairs service commission

4. Economic empowerment:
a. Strategy: Good governance and enhanced service delivery down to the grass root level

b. By who? Government, CBOs, co-operative societies

**Group III**
- Education of women both formal and civic
- Reform of existing laws
- Provision of legal aids to women
- Economic empowerment for women

**Group IV**
1. The group identified four issues affecting women’s access to justice as follows
2. Right to education
3. Domestic violence
4. Divorce maintenance, custody
5. Right to bail
6. Right to inheritance

Some of the solutions they proffered were:
A capacity building for different groups especially women
B legislation on some discriminatory practices against women
C Enlightenment of the police on the rights of women particularly their right to stand as surety
D Basic education for all women
E implementation of the 30% affirmative action
Annexure II

CONFERENCE COMMUNIQUE

PREAMBLE

Against the background of an earlier strategic conference on Islamic Legal System and Women’s Rights held in October 2002, this conference assessed and evaluated the implementation of Shari’a penal laws and justice system in Northern Nigeria, and its impact on women’s human rights with the aim of determining issues, challenges and prospects in the protection of women’s rights, guaranteeing access to justice under the Shari’a. Furthermore, the Conference’s specific objectives were:

• To make concrete suggestions and outline strategies on how to promote, protect and ensure women’s rights under the Shari’a justice system.
• To strengthen networking for social and legislative advocacy for the promotion of women’s rights in Islamic societies.
• To improve women’s access to justice through exchange of information.

The Conference was attended by Muslim women groups, Islamic jurists and other intellectuals from Nigeria and abroad, as well as judges, NGOs, and private legal practitioners. Keynote addresses were delivered by Professor Muhammed Tabi’u and Honourable Justice Ibrahim M. Tanko of the Court of Appeal, Abuja. Scholarly papers of high academic standards were also presented at the Conference.

THE CONFERENCE OBSERVED AS FOLLOWS:

1. Equal access and opportunity to justice machinery for all without distinction is of paramount importance to any viable justice system.
2. Shari’a legal system recognises and safeguards women’s rights and access to justice as human beings.
3. Islam has a very early history of women activism as embodied in Umm Salma, the wife of the Holy Prophet, on gender equality.
4. Ignorance about Islamic law by women is the biggest threat to their rights and access to justice under the Shari’a.
5. Codification of the Shari’a penal system in the Shari’a implementing states was made within the framework of the 1999 Constitution.

6. Implementation of Shari’a penal law by lower courts is marred by lack of compliance by Alkali judges with provisions of Shari’a Criminal Procedure Codes.

7. Education and enlightenment of the populace and those that implement Shari’a is important for a proper implementation of Islamic legal system.

8. Under Islamic legal system, there is no deliberate policy of bias against women. However, with regard to protecting rights and securing access to justice for women, it is necessary to prevent biases borne out of cultural, personal, or selfish reasons, or even ignorance.

9. Human rights organizations and other civil society groups need full support, participation, and cooperation of Muslim women groups and Islamic jurists for effective protection and improvement of women’s rights under Shari’a in Nigeria.

10. The organizers are commended for securing the attendance of Muslim jurists, judges, and women groups in pursuit of the protection of women’s rights.

THE CONFERENCE RECOMMENDS THE FOLLOWING:

1. For women to get better access to justice under Shari’a, the following steps are to be taken:
   A) Improvement of women education and enlightenment about their rights as enshrined in Shari’a;
   B) Stimulating cross-cultural dialogues,
   C) Establishing effective mechanisms for communiting women’s interests and concerns,
   D) Establishing institutions that will further enable women to access justice, such as legal aid services and access to counsel without any distinctions,

2. Shari’a implementing states should intensify efforts in continuous training of Alkalis or judges on matters of Shari’a, especially on procedure and evidence, in institutions of higher learning, for effective performance of their duties, including adequate funding.

3. Constitutional contradictions with regard to implementation of Shari’a should be reviewed and amended. We also encourage that Shari’a education should not be restricted to Northern institutions, in order to encourage informed dialogue.

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4. Shari’a implementing states should take positive steps toward implementing the socio-economic components of Shari’a. The Conference specifically recommends the establishment of the powerful Islamic “Mazalim” institution to tackle complaints against official misdeeds, including corruption and official breach of trust.

5. Media establishments should take equal interest in the positive aspects of Shari’a implementation as they do in other areas.

6. In view of daily challenges, Nigerian Muslim jurists should embark on improvement of implementation of Shari’a through the process of “ijtihad” (independent reasoning).

7. Shari’a court judges of lower courts should be learned in Islamic law and should possess a minimum qualification of LL.B. degree with specialisation in Islamic law.

WE THEREFORE call on the Governments to desist from using Shari’a implementation to gain political advantage. We further call on Nigerians to imbibe religious tolerance among diverse groups.

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Kasim Musa Waziri Member
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Dated 27th day of February 2003.
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### Annexure III

<table>
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<tr>
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<th>Name</th>
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<tr>
<td>55</td>
<td>Miracle Edozie</td>
<td>FIDA, Abuja</td>
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<td>56</td>
<td>Adbulmalik Shehu Mahdi</td>
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<td>58</td>
<td>George Oji</td>
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<tr>
<td>59</td>
<td>Hauwa Salihu</td>
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<td>60</td>
<td>Augustine Opara</td>
<td>NTA, Abuja</td>
</tr>
<tr>
<td>61</td>
<td>Kelvin Gbarufu</td>
<td>NTA, Abuja</td>
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ABOUT WACOL

Women’s Aid Collective (WACOL) is a non-governmental, non-profit making organization registered as a company limited by guarantee with Corporate Affairs Commission (No. RC. 388132) and has an observer status with the African Commission on Human and People Rights. WACOL is committed to promoting human rights of women and young people. We are gender conscious and work towards gender equality and human rights for all. Our vision is a society free from violence, all forms of abuses, where human rights of all, in particular women and young people are recognized in law and practice.

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ABOUT WARDC

Women’s Advocates Research and Documentation center (WARDC) is a non-profit non-governmental human rights organization established for the protection of women’s human right and the rule of law in Nigeria. WARDC’s vision is a peaceful society free from all forms of discrimination against women and the girl child, with structures to protect fundamental human rights of all, where everybody works vigorously in unity towards a true democracy and development.

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