

Part One

The Development And Application of Sharia In Northern Nigeria: Issues And Challenges

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1. INTRODUCTION

This part of the book aims at a brief examination of the development and application of Sharia in Northern Nigeria from the 19th century to the colonial period, the impediments to its application, and the issues in Sharia debate from 1977/78 to 2001. It finally aims at looking at the need for a contemporary reformulation of the Sharia.

2. THE SHARIA UNDER THE SOKOTO CALIPHATE

The Sharia, is essentially a “believer’s law” in the sense that it is primarily binding on those who believe in it. It coherently combine ethical norms of virtue and vice, good and evil, and represents the standard of judgement for all human actions.

The emergence of Sokoto Caliphate in the 19th Century A.D. gave the Sharia a new outlook altogether in Nigeria; it became supreme in every sphere of life:- Government, Economy, Foreign Policy, Administration of Justice and the organization of society.¹ The Sokoto Caliphate represents probably the most ambitious attempt in Islamic history, after the first two centuries of Islam, to organize state and society in accordance with the Prophetic model and in compliance with the precepts and provisions of the Sharia.

The merit of the Sokoto Caliphate experience lies not just in the conclusive proof it provided that the Sharia is for all times and for all people, but more fundamentally in its contribution to the conception of law² and its utilization of the political and social institutions of Islam to achieve maximum benefit for the Muslim community. The thoughts of the Caliphate's greatest ruler Muhammad Bello, on the Sharia³ are as relevant today as they were about one and a half centuries ago when they were first contemplated.

Every people, every generation and even every country, Muhammad Bello said, does have a responsibility to examine the Sharia and out of it formulate their *fiqh* (Jurisprudence) to meet their peculiar circumstances. No generation should rely on another as far as the understanding and application of the Sharia is

concerned. Super-imposing *fiqh* of one generation on another would ultimately lead to corruption.

The State, as the Custodian of the Sharia, Muhammad Bello pointed out, has the primary responsibility to examine critically the social and moral conditions of its people on the basis of what it understands to be the purposes and spirit of the Sharia policies and legislations relevant to the issues. The State must therefore review the Sharia continuously, emphasizing aspects of it, which have become important, shelve, for the time being, the aspects that have due to changing circumstances, become less important. The State, as the authority with the ability to evaluate the conditions of society from all perspectives from a vantage viewpoint, is permitted to ignore the letter of the law in favour of the spirit if the occasion so demands. It is only in this way that the fundamental objectives of the Sharia can be realized, and the interests of humanity in general and the Muslims in particular safeguarded.

Human society is inherently susceptible to change; the change ideally should be in the positive direction but that is not always the case. Change in the direction of corruption and moral decline is a strong possibility. The State, when applying the Sharia, must keep the fact of life in mind, and strive not only to accommodate such changes but to reorient them through a balanced and

empirical approach in the application of the law, towards fulfilling the ends of the Sharia. Muhammad Bello explains that it is God's continuing practice to ordain laws suitable to the people concerned: - if their faith and morality are strong this is reflected in the law, if otherwise, God then relaxes the law for them. Unless this is done by the State, the likely consequences will be that the people will abandon the Sharia altogether.

Finally, Bello did not see any need for the Islamic State to subscribe to particular schools of law when initiating policies or in the administration of law. If the State is indeed Islamic, then it should have leaders who are profoundly learned in the Shariah, and can arrive at the right decisions regarding the problems and welfare of the people. The State, as conceived by Muhammad Bello, is a *mujtahid*, capable of drawing right inferences and designing right programmes for the people and does not need to rely on a particular school of law to solve its problems. It should face its peculiar situations with boldness and initiative, and deal with them on an empirical basis. The implication of Bello's thought is that the schools of law were created for specific purposes and for a specific age, and that age has passed. What is happening now is different. For that reason a new legal framework, in terms of conception, policies, institutions and methodology is essential if the Muslim Ummah is to move forward.

The Sokoto Caliphate did make considerable contribution to the development of the concept of justice under Islamic law; in particular, it shows clearly that many of the principles of the Shariah, when applied by a state, tend to have revolutionary implications. The Sokoto land policy is one example. Land is conceived as the common property of citizens – not just of one age but of future generations – and therefore it cannot be privately owned, not monopolized by a few individuals or families. Land is seen as the most solid basis for securing the economic and social well being of citizens, and the law in Sokoto stated that non-Muslim powers or economic interests cannot be granted any part of Muslim land. Moreover, land is directly related to the defence of Islam⁴, making it illegal for the Islamic urban centres to be allocated to those who have no interest of Islam at heart.

Another example is the economic policy⁵. The Caliphate believed that the Shariah imposed on it a duty to pursue the improvement of the quality of human life until what it terms “human perfection” is achieved. This had two desirable results: the Caliphate had to make itself self sufficient especially in food, and in general, self-reliant economically, so that there was no state on which it depended, or to which it was accountable. Secondly, the Caliphate felt obliged to take almost complete control over the economy of West Africa, making the

region into what a writer calls Sokoto Common Market. Added to this was the security the application of the Shariah gave to the Caliphate. A woman, says the European visitor to the Caliphate, Clapperton⁶, could travel alone with a casket of gold from one end of the State to the other without any fear of being robbed or molested.

In short, the Shariah gave to the Sokoto Caliphate what no human law could ever confer—security, prosperity, integration of society, economic self-sufficiency and above all political sovereignty. European scholars have to concede that what the British Empire overthrew was not a despotic and primitive state, but a very great civilization whose achievements in terms of human development could stand anywhere. It is the Shariah, in company with Islamic ideology that made that possible.

At the turn of the century that society was engulfed by world forces that were too strong for it. Now, fitting enough, it has been reborn as the nucleus of a new and powerful nation.

This potentially powerful nucleus is still to play its rightful role in Nigeria, for two obvious reasons. The country has been denied for so long the guidance of Islam in matters of organization of state and society,

and public life in general. Secondly, the civilization, which has given it its strength and vitality, has been over many decades. The scheming and plotting of the colonial power ensured that it would take a very long time for Muslims to regain their composure and initiative. The first aspect of Islamic law to be destroyed by the colonial power was the land tenure law, which was immediately replaced by a law, which justified the usurpation of Islamic lands, and gave repression legitimacy.

The colonial power also abolished the economic system built around the institution of *zakat*. The only part of the sharia it was ready to concede was the so-called law of personal status; all others were dismantled. And this is the situation today. In fact Islamic criminal justice was eliminated in pre-independence Nigeria: Nigeria was not to be granted independence, nor admitted to the United Nations unless Northern Nigeria abandoned the sharia – this threat was backed with a vow to impose sanctions on the North and strangle its economy.

3. IMPEDIMENTS TO THE APPLICATION OF SHARIA

Islamic Law in Nigeria came to be adversely affected by colonial legislation in two ways:- Firstly, by being totally replaced with the comparable provisions of English Law,

as was the case of the enactment of Penal Code, which totally annulled the rules of Islamic and customary criminal law, with minor and cosmetic exceptions. Secondly, by statutorily recognizing provisions of Islamic and Customary Laws. The Marriage Act of 1914 for instance provides for a monogamous form of marriage, but does not abolish other forms of marriage under Islamic and Customary Laws. Such legislation nonetheless derogates from the status of Islamic and Customary Laws and enhances that of the received English Law when it provides that in case of conflict between the two, the provisions of the enacted received English Law shall prevail. And so even though Islamic Law on the subject might not be abolished, yet certain aspects of it might become inconsistent with the provisions of the enactment and so become void.

While modification in the Islamic Law is sometimes achieved by express legislative enactments, as for example the adverse impact of the enactment of the Penal Code, it is also often achieved by implication. In a recent⁷ decision the Court of Appeal, Kaduna division, ruled against the long-standing practice whereby two Judges of the High Court in the Northern States sat with a *Qadi* of the Sharia Court of Appeal when hearing appeals on Islamic Law matters from Upper Area Courts. The Court of Appeal held that Section 63 of the High Court Law, 1963 which allows this practise is in

conflict with Section 235 of the 1979 constitution which states the qualifications of a High Court Judge and the manner of his appointment.

It decided that only a Judge with these qualifications could sit on the bench of the High Court. The consequence of this decision is that when hearing appeals from Upper Area Courts even on matters of Islamic Law, the High Court Judges now have to rely on Assessors. The Constitution does not provide for the appointment of High Court Judges who are learned in Islamic Law, even in the Northern States where the High Courts have a wide Jurisdiction in the application of Islamic Law.

Next impediment to the application of Islamic Law in Nigeria is the criteria of repugnancy and incompatibility⁸. The repugnancy test requires that no rule of Islamic Law or Customary Law shall be applicable if it is 'repugnant to natural justice, equity and good conscience'⁹. This requirement is untenable to a primarily divined system of justice of Islamic law to be subjected to the test of human values that are always conflicting and liable to err. It is not permissible for the Justice of Islamic Law which plays a significant role in providing virtue by crushing vice; which strikes at the very root of the evil and obviates the causes which give rise to it, to be subjected to contradictory human values

solely based on reason. Moreover, natural justice has meant different things¹⁰ to different people at different times. What is considered as natural justice by an Englishman might not be considered so by a Nigerian. In fact even the colonial Judges and Lawyers were not certain as to what make a rule of Islamic Law repugnant to natural justice, equity and good conscience. Let alone to talk of the neo-colonial Judges and Lawyers. That's why in *TSAMIYA V. BAUCHI* N. A.11 Jibowu, Ag. F.C.J., of the ten Supreme Court of Nigeria observed that:- "The fact that the Maliki Law of Willful or intentional homicide differs from the English Law or the provisions of the Criminal Code because it does not recognize provocation as a defence will not justify the conclusion that the Maliki Law of homicide is contrary to natural Justice, equity and good conscience. It is the recognized law of the area to which it applies and it has been recognized by the people to whom it is applicable as their native law is good enough for them or not and whether they desire a change¹².

Also in *Rufai V. Igbira* N.A.¹³ while dismissing the appeal of the appellant, Brown C.J., observed that: "Upon the second question it was said that in refusing to grant the injunction the magistrate's decision was contrary to natural Justice, because it purported to deprive the appellant of a legal right which he has had under the common law of England. The magistrate was concerned

to give effect to section 32 (i) of the Magistrates' courts (Northern Region) Law, 1955. By that section he was required custom which is not repugnant to natural Justice——“. He had found from the evidence that the Chief's order was a lawful one (according to Islamic Law) by native law and custom. He was bound to observe it and enforce the observance of it unless it was repugnant to natural justice”.

Moreover, the courts have not hesitated to use the test to widen the Jurisdiction of the received English Law. In the words of Lord Atkin in *Eleko V. The Government of Nigeria*¹⁴ a rule which fails to pass this must be totally rejected, without the court having any power to modify it or remove the repugnant element. For such rejected rules, comparable provisions of the received English Law have proved to be convenient replacements.

There is also the rule that so long as a provision of Islamic Law or Customary Law remains 'incompatible either directly or by necessary implication with any law for the time being in force', it cannot be enforced. The only reasonable interpretation of this provision is that rules of Islamic or Customary Law must not conflict with enactments of the Nigerian Legislature. This is enough to have reversed the normal situation under the sharia where decrees of a political authority are necessarily subordinate to the dictates of the Absolute Sovereign-

Allah. Yet our courts of law have gone even further by subordinating the rules of Islamic Law not only to the enactments of the Nigeria Legislature, but also to the received English Law. For instance, in *Adesubokan V. Yinusa*¹⁵ the Supreme Court of Nigeria made statements¹⁶ implying that the phrase 'Law for the time being in force' includes the provisions of the received English Law. It has been rightly remarked¹⁷ that such an interpretation if strictly followed would result in the virtual abolition of Islamic and Customary Laws in this country.

One of the disadvantages of reference to Islamic Law as part of 'native law and custom' is that it prevents the formulation of a proper policy for the determination of Islamic Law and its application to Muslims. Reference to Islamic Law as part of 'native law and Custom' could be grudgingly allowed so long as this phrase is used merely as a convenient term for describing the system of laws, which the British found in operation among the inhabitants of this country. Islamic Law therefore, with its insistence on stable rules of social life and its universality, cannot accommodate the so-called characteristics of customary law which portray it as a collection of adhoc rules, differing from community to community, and subject to the caprices of 'accepted usage'. In support of his contention is the most recent decision of the Supreme Court of Nigeria. In the case of

Alhaji Ila Alkamawa V. Alhaji Hassan Bello and Anor,¹⁸
Hon. Justice Bashir Wali, who read the lead judgement
commented on the status of Islamic Law vis-à-vis
customary law in Nigeria in the following words:-

“Islamic Law is not the same as
customary law as it does not belong to
any particular tribe. It is a complete
system of universal law, more certain
and permanent and more universal than
the English Common Law”¹⁹.

Strengthening His Lordship’s statement is the fact that
by making separate and distinct provisions for the
administration of both Islamic and customary laws, the
Nigerian Constitution has recognized them as distinct
and separate Laws²⁰. It follows therefore that any
statutory law that purports to abrogate the distinction
made between the two laws, becomes null and void to
the extent of its inconsistency with the constitution²¹.

4. BASIC ISSUES IN SHARIA DEBATE: 1977/78 - 2001

This part of the publication limits itself to placing a
historical perspective on three of the topical issues of
sharia in Nigeria namely:

- 1) Its constitutional status,
- 2) Its scope of application, and
- 3) Sharia Courts.

The objective is to clarify the matters in issue, and to proffer suggestions on what should be the priorities for the future.

First, the constitutional status of sharia: - It is well known that the sharia was one of the most topical subjects in public debates, which preceded the enactment of the 1979 and 1989 Constitutions. But it is doubtful if it is equally well known what exactly was the basic constitutional issue in question that generated debates on the sharia.

One amazing fact about those debates is the astonishingly wide difference between what the public debated on the sharia, and what in fact was formally being considered for inclusion in the constitution.

Among members of the public there was a variety of perception of what the sharia debate was about. Committed Muslims, Christian missionary critics, leftist, progressive, secularists, opportunistic politicians etc., each of these had their own peculiar perception of what the sharia debate was all about.

But the questions in issues before the Constitution Drafting Committee, the Constituent Assemblies and the Constitution Review Committee were very well and concretely defined. In the 1978 “Sharia Debates”, the basic issue was the Constitution Drafting Committee’s recommendation for a Federal Sharia Court of Appeal with Jurisdiction over Muslim Personal Law. But in 1988, the issue before the Constituent Assembly was simply whether or not to allow the re-channeling of appeals in cases of Islamic Law (other than cases of personal status) to Sharia Courts of Appeal rather than, as the case had been, to the High Courts.

Since the introduction of the Sharia Penal and Criminal Procedure codes in 2000 by the Zamfara State Government and followed by Kano, Sokoto, Jigawa, Kebbi and Kaduna States, among others, the Sharia debate took a new dimension. The debate in public has centered around the constitutionality or otherwise of such codes; whether or not its application, the Sharia is gender insensitive, gender discriminatory or anti-poor and the disadvantaged people in the society; or the sharia is anti-national integration and unity of Nigeria or non-Muslims from the south.

It can be observed from this that in those debates, the most fundamental issue for Muslims, which is the possible enshrining of the Sharia in the Constitution as

a legal and ideological system of its own, and as alternative to or co-equal with the imposed Western legal and ideological system, did not even so much as make it to the formal agenda of constitution-making in the country. All the sweat that went into the Sharia controversy would therefore seem to have been wasted. To many Muslims the basic concern of critics were relatively perpetual.

Now the question is: - Why has this most fundamental issue of the Sharia been so consistently ignored or at best marginalized in the country's search for a just and workable constitutional order?

The answer is not far to seek. First there is the lack of concrete and articulated formulation and presentation of what the Muslims want the Sharia to be for Nigeria. Muslim articulation of their aspiration regarding sharia never goes beyond the fuzzy and ill-defined demand for its full application. But since the struggle for sharia is generally held by Nigerian Muslims to be a periodic and part-time affair, their lack of coherent conception or formulation of what the sharia should be for Nigeria is hardly surprising.

The second reason on why the sharia has been ignored or marginalized in the country's formal agenda of constitution-making is the nature and psychology of the

Nigerian elite who exercise pre-eminent or perhaps even exclusive authority in constitution making. Due to their education, training and life-style, the Nigerian elite who alone deal with the business of constitution drafting, rectifying and promulgating, have proved impervious to any idea or perception of social, political or constitutional order different from the secular European models. This constricted perception of the Nigerian elite has severely constrained the range of alternatives that they on their own can envision, or that any other interest or pressure group can canvass before them. The debate over political and economic ideology illustrates this point. Whatever else anyone said during that debate, the actual alternatives formally presented never went beyond capitalism, socialism, and mixed economy. This narrow perception, conditioned by Western secular and materialistic thought, was so decisive, that even public debates and controversies, were in so far as the fundamentals of the constitution, were concerned, little more than side shows. Nothing substantial could change just because of anything said during those debates.

To Nigeria constitution-makers, looking from that narrow vantage-point, the sharia belonged wholly and exclusively to the domain of "religion" beyond which it might only as a concession be allowed some say on questions of culture, tradition and religious freedom. The aspects of the Sharia courts manned by *Qadis*

(Judges) who would adjudicate in cases between Muslim parties on principally matters of Muslim personal law, were conceded only on these narrow grounds. The possibility of the sharia being considered as an alternative ideology and the basis of a legal and political order was therefore out of the question. One might however observe that even within these narrow limits in which the sharia has been allowed to operate, Muslims themselves have shown no enthusiasm to consolidate the little they have got. They could for instance demand that the scope within which the sharia is presently allowed to operate should be protected by constitutional entrenchment so that scope becomes at least the irreducible minimum.

Second, is the scope of application of sharia: - Muslim perception of the sharia issue is so much entwined with constitution making that once a particular round of constitutional debate comes to an end by the enactment of a Constitution, Muslims act as though the sharia issue too is over, whether lost or won, until the next round of constitution-making or review.

The struggle for sharia has consequently taken the shape of a seasonal phenomenon, rather than a perpetual effort, which is to be sustained until victory is won.

The following two assumptions, both false and inimical to the Sharia struggle, are implicit in this attitude: -

(i) That it is impossible to get changes made in the constitution to redress injustices against Muslims except when Government on its own wishes to revise or re-draft the constitution.

Needless to say this assumption is flagrant underestimation by Muslims of their political power and capacity to bring about change. It is also an indication of their belittling the importance of the Sharia issue. It is well-known that Muslims do exert pressure on government until they secure some other mundane objectives, such as the creation for them of States and Local Governments, which sometimes necessitates the alteration of the constitution.

(ii) That the Sharia issue is an exclusively constitutional one

This assumption came only from inadequate acquaintance with the Nigerian legal system. Under our legal system, contrary to popular belief, it is not the constitution that defines which laws are or are not to be applied by the courts whether generally or in particular cases. Take the English law for instance. Although it dominates the legal system, there is not even a mention of it in the constitution. It is the ordinary statutes of the Nigerian Federal and State Legislatures on such matters

as jurisdiction and power of courts, and laws of evidence and procedure, that guides the courts as to which systems of the law they are to administer and in which cases. When the legislators, both State and Federal come to perform their duty of enacting laws, the constitution leaves them free to choose the principle and details of whatever law they have power to enact, and to import those principles or details from Australia, China or Antarctica. All that the consideration does is to set a framework and impose limitations, but its provisions not so much constrain the legislature as to confine the scope of Islamic Law to the limits within which it presently operates.

It follows therefore that there is a lot that can be done within the existing powers of the State and Federal Legislatures to enhance the application of Islamic Law. In particular the following can be accomplished, given the political will, through the State and Federal Governments and legislatures:

- (i) Removal of legislative constraints such as 'repugnancy' and 'incompatibility' clauses which for no meaningful purpose other than the convenience of colonial policy have circumscribed and debased the application of Islamic Law²².
- (ii) Alteration of the conflict of law rules so as to

provide implicitly for the application of Islamic Law by all the relevant courts in cases involving Muslims. At the moment, adverse interpretation by the English courts had often frustrated even the obvious intention of the existing conflict rules²³.

- (iii) Creation of Shari'ah Court of first instance and of appeal in places where they are required by lacking. As will be shown later, shari'ah courts are in Nigeria pre-requisite for ensuring proper and just application of Islamic Law.
- (iv) Upholding Sharia values and principles in laws enacted by the legislature, and making provision for the creation and nurturing of basic Muslim social and commercial institutions, such as Islamic banks, Islamic Commercial Companies, the hisbah, etc.
- (v) Incorporating Islamic Legal education as an integral part of the mainstream legal educational system of the country on all levels. At the moment Islamic law is ignored in the Law School and by most Nigerian Universities while the National Universities Commission (NUC) is preparing to dislodge it from even the Universities that have incorporated it in their degree programme.

Third, The Sharia Courts: - The so-called Sharia controversy in Nigeria has invariably centred around Sharia courts. In effect Sharia courts have stolen the show from the sharia itself. But proponents and opponents of the sharia have been content to abandon the Sharia as an issue and transfer their power of logic and their sentiment to a struggle for or against Sharia courts.

That the human mind is more at home with the concrete than the abstract may be plausible explanation of this phenomenon. But the historical perspective will show that there is in fact more to the issue than the mere proclivity of the human mind.

The real explanation lies in history, it lies in the British colonial policy, which deliberately targeted the Shari'ah courts (Emirs and Alkali courts) as the object of British design in controlling and subjugating their Muslim subjects in Nigeria. Perhaps because Nigerian Muslims expressed their abhorrence of British rule largely in terms of rallying around Islam and the Sharia, British colonial policy worked simply on the logic that to control, subjugate and secularize these obstinate Muslim subjects was the way out.

But the situation in Northern Nigerian at the advent of British rule made a frontal attack on Sharia court's

foolhardy: Not only was Muslim attachment to these courts too strong to break, but the British themselves needed the existing court system to operate their system of indirect rule. The Sharia courts were therefore retained.

British retention of Shari'ah courts was, however, no evidence of British commitment to maintain these courts in their Islamic character. The future of Sharia court was carefully defined by the British colonial rulers in terms of the benefits and objectives of colonial rule.

There is ample evidence of this in the terms on which Sharia courts were left to operate: that is, in the limitation imposed on them such as their subjection to the repugnancy test, to other colonial laws, and to the close control and supervision of colonial administrators. In reality, the Shari'ah courts became an incongruous appendage of a secular and secularizing colonial structure.

Two strategies were employed by the British to bring about the subjugation and secularization of Sharia courts. The first strategy acted directly on the Sharia courts, by surreptitiously and cautiously seeking to wean them over from Islamic Law, secularize their personnel, law and procedures, and thereby undermine their Islamic identity and attachment. Through this policy

Sharia courts were expected to gradually imbibe, assimilate and adopt the colonial laws and legal procedures to which they were being introduced. Through supervision and tutoring by colonial administrators, English law and legal methods were expected to substitute Islamic Law in the Sharia courts²⁴.

The second strategy involved subordinating Shari'ah courts to the appellate and supervisory power of British courts. This was initiated from 1933. Its objective was to control the administration of Islamic law, and even possibly to debase their Islamic character as Sharia courts. All the required power and authority was granted, first cautiously, but later more openly, to the judges of British courts to carry out this task.

Two vital consequences resulted from this British policy and approach. First the policy did succeed in undermining and debasing the Sharia courts. With the effective subjugation of Sharia courts to the British courts, and the occasional interference of British courts in the Sharia courts' application of Islamic law, the status of the Sharia court and the laws applied in them gradually became ambiguous.

The prestige and authority of Sharia courts dwindled, at the same time as the resentment of their opponents, and pressure to further secularize them mounted.

Corruption became the symbol of Emir's and Alkali courts, and learned scholars preferred to avoid appointment as judges to these courts.

The extent of the debasement and demoralization can be gauged by the fact that although in the earlier years Emirs and Alkali stood resolutely against the incursion of English laws into their courts, that resistance had been so successfully broken by the early sixties that when the Penal Code and Criminal Procedure Code replaced the Islamic criminal law, Emirs and Alkalai were readily recruited and trained as principal manpower for enforcing those codes. It was not long afterwards that the Emir's courts were abolished, and Alkalai courts were transformed into Area Courts.

The second consequence of the British policy was that administration of Islamic Law came to be fully dominated and controlled by the British courts. Judges exclusively trained in the English law became the final arbiters not only in determining the scope of application of Islamic Law, but also in actually interpreting the rules of Islamic Law. Instances abound to show how avidly these powers have been misused to constrain the Islamic Law, to whittle down the jurisdiction of Shari'ah courts, and even sometimes to distort the provisions of Islamic Law.

With this background, it should not be difficult to see why Sharia courts should hold the position of preeminence in the “Sharia debates”.

The opponents of the Shariah courts as the ultimate symbol of what the Sharia has meant to them while Muslims know from experience that no meaningful application of any part of the Sharia can be guaranteed in Nigeria other than through Sharia courts.

The historical experience shows how pertinent to the protection of Sharia and securing its proper administration it is that Sharia courts must be created and maintained all over the country, including the Southern States and on both the State and Federal Levels.

The focus of the Sharia issue must however be shifted from the raucous debate on Sharia courts to a discourse on the nation’s need for the substance and fundamentals of the Sharia. In the search for a just and viable social, economic and political order the fact must be made clear that the Sharia offers to the nation not only models alternative to what it has so far adopted but also comprehensive programme of social transformation.

Towards A Contemporary Re-Appraisal of the Sharia

The first problem Muslims must tackle is the very conception of the sharia itself – how to derive legislations from it and the machinery to be invented for its smooth generation. Two things are needed to be done at the initial stage. First, scholars of Islamic Law must come to terms with the fact that Muslims are now living in an era never contemplated by the authors of the schools of law; and this era certainly calls for a thorough appraisal of the entire *fiqh* – its philosophy, methodology, structure, content and above all, its end product. A new system must be evolved. The contemporary society has much right and obligation to explore the sharia and derive its own laws from it to meet its demands and aspirations as any other generation. As Imam Shafii said of his other colleagues who developed school of law; ‘they are men, and we are men’.

The role of the sharia as a problem-solving tool has now been suffocated by the literature of *fiqh*. It is to *fiqh* – (i.e. the system of studying and communicating the sharia) that most Muslim jurists turn when they are forced to examine a question, pass a judgement or work out a problem. The idea is to look for rulings and opinions of classical jurists and scholars on problems perceived to be similar. Thus, punishment prescribed by the classical jurists, and judgements passed by them

have become the norms of the Sharia.

The transformation of classical *fiqh* to the norms of the sharia has had two major impacts on the sharia. Firstly, it has transformed the Sharia into an ossified body of laws. Excessive reliance on *fiqh* thwarts the development of a contemporary understanding of the sharia. It transforms the sharia from a dynamic to a static institution.

Secondly, it focuses the attention of the well-defined and trodded traditional path to the exclusion of new and emerging areas where the sharia has a major role to play. Thus, for example, despite the serious problems in the area of environment, rural and urban development, the impact of the media on society and so on that Muslim societies face, the Sharia is not invoked in these areas. Moreover, most Muslim jurists, scholars and intellectuals do not have the inkling of the role the sharia has to play, and must play, in science and technology policies, energy issues, public policy, urban renewal, rural development, conservation and on the impact of new biological techniques that will find their way in Muslim societies.

As simply a legal framework, the sharia cannot shape policy and thus cannot play a positive and dynamic role in directing Muslim society towards a desired future.

However, as ethics it can become a corner stone of all policy making, in all areas, and thus steer Muslim societies towards an ethically sound and viable future. The ethical principles of the sharia have to be derived from the Quran and turned into universal and prime indicators of what is ultimately good and Islamic and what is ultimately bad and therefore un-Islamic. This means that from the specific and the concrete legislation of the Quran, including a consideration of the historical context in which this legislation was revealed, we must derive general principles, which are evident in this legislation and in fact are the spirit behind the legislation. It is these principles, which would become our main tool for the contemporary elaboration of the sharia. Thus, for example, when we examine the verses of the Quran banning alcohol, we note that they are revealed in a particular sequence of time: first verse warns of the detrimental effects of alcohol⁴²; the second asks the believers not to pray whilst under the influence of alcohol⁴³, the third bans alcohol outright⁴⁴. The fact of these verses is pretty evident: the overall effects of alcohol are bad and therefore not permitted. But the principles, which these verses reveal, have wider implication than simply that alcohol is not permitted in Muslim societies. In fact, we can draw two principles from these verses. The first is the principle of gradual change. The Quran prepares the Muslim community gradually, over a period of time, before completely

prohibiting alcohol. Thus the Quranic methodology is to introduce radical changes slowly and gradually. The second is the principle that Muslim societies should shun those things in which the harm they may cause is greater than their potential for good. This principle has serious implication for policy making. For example, in shaping an energy policy, it can be argued that nuclear energy, with its potential for much greater harm than the benefits it could bring to a society, should not form the basis of the energy policy of a Muslim State. Similarly, this principle can be used in formulating a medical policy. Here, one cannot only argue against such social abuses as smoking and drug addiction, but one can also examine the impact of certain drugs and medicines on the overall health of society. One can argue that those drugs which induce dependency on multinational corporations and contribute little. Indeed negatively, in improving the dominant health problems of a country, and so on. Thus from the verses which apparently talk of alcohol, we can draw two general principles which can actually be used for pragmatic ends.

Here we move from deduction to induction; that is, we draw general principles and conclusions from specific rules and categories. We need to study the Quran from this perspective: to understand and bring forth the underlying principles in all their multi-dimensional richness and variety – which form the edifice of Islam.

When applied to concrete problems of modern society, these general principles will yield viable contemporary solutions. Moreover, because of their general and ethical nature, the application of these principles would not be limited to selected areas of law; they could be applied to all areas of contemporary thought and action, however complex and sophisticated, thus making the sharia a total system of ethical guidance.

Re-appraising the sharia also requires a new approach to the *Sunnah*. While traditional Muslim scholars paid little attention to drawing general ethical principles from the Quran, they did exactly the opposite to the *Sunnah*. Every aspect of the *Sunnah* was generalized beyond its logical and historical limits. While on the one hand, the traditional scholars insisted that the individual verses of the Quran can only be fully understood and appreciated in the historical context in which they were revealed, on the other, they paid little attention to the historical milieu in which the Prophet lived. All aspects of the *Sunnah*, every single authentic hadith, without due consideration of the context in which the Prophet acted or passed a judgement, was given the weight of general ruling. Moreover, the method of actually studying the life of the Prophet itself is very confirmed and reductive: ahadith (sayings of the Prophet) are separated from the seera (Life of the Prophet). The *Seera* itself follows a chronologically linear pattern. And the

emphasis of the Seera-predominantly on battles, the social and ethical state of Arabia before Islam, the marriages of the beloved Prophet and so on – was first introduced by classical writers like Ibn Ishaq and has remained the same ever since. Both the linear nature of studying the *seera* and its particular emphasis make its value limited for the modern mind and reduce its relevance for contemporary reality. As a basic source of the Sharia, every generation must rewrite the *seera* and thus make it meaningful to their time. This rewriting would only make sense if it used new tools and approaches to understand the seera.

To make the *seera* more meaningful to our times, we must study it analytically and examine it for models of thought and behaviour which can be operationalised in contemporary society. Only by looking at the Prophet as an action-oriented paradigm, and by turning his every act and judgement into universals, can we bring out the contemporary relevance of the *seera*; and thus capture the original spirit of the Sharia.

Transforming the *seera* into a living action-oriented paradigm analyzing the problems of Muslim societies with the concepts of the Sharia, drawing out ethical principles from the Quran – all this is tantamount to turning the Sharia into a problem solving tool. The true and meaningful contemporary relevance of the sharia for

Muslim societies is on all – embracing ethical system that solves diverse and complex problems of modern societies and provides pragmatic alternatives of thought policy and action.

The demand for the Sharia is not and cannot be a demand for random introduction of laws and regulations, ossified and out-dated legal procedures. Ultimately, the demand for the Sharia is a demand for an ethical restructuring of society. But this demand cannot be met given the present body of knowledge – with its notions and opinions based on historical situations, Aristotelian logic and confining methodology – that we recognize as the Sharia and the static traditionalism that guards it. It is a demand that can only be met with a serious intellectual effort, in which traditional and modern scholars combine their energies and direct their minds towards a contemporary re-appraisal of the Sharia. Without this effort, attempts to implement the sharia will continue to lead to the recreation of historical societies, with little bass in the present and the future.

Hence the problems of implementing the sharia in modern society are largely methodological. The methods of finding solutions to new problems by seeking textual proof from the Quran and Hadith or using deductive analogy seem to have led Muslim societies to

an impasse.

CONCLUSION

Therefore, any serious attempt to shape contemporary society in the true spirit of the Sharia must conclude with elevating it to its original position as the fulcrum of Muslim civilization, the chief arbitrator of all actions and policies, the sole delineator of what is good and what is bad. Such an attempt must synthesise the spirit of the sharia with its contents, the eternal with the dynamic, and integrate it with contemporary conditions, concerns

and issues.

NOTES AND REFERENCES

1. See generally, Ibrahim, S., 'The Conception of Law' in *The Islamic State and the Challenge of History*, Mansell Publishing Co., London 1987, pp. 61-74.
2. *Ibid.*, Chap. 5.
3. *Ibid.*, pp. 64-67
4. *Ibid.*, pp. 55-59
5. Ibrahim, S., Chapter 8, pp. 111-114.
6. *Ibid.*, p. 83.
7. See *Mallam Ado and Hajiya Rabi v. Hajia Dije*, FAC/K69/82 (unreported), See also Appendix VIII, p. 25 of *Islamic Law in Nigeria*, ed. K. Rashid, for the text of this important Judgement.
8. See section 34 (i) High Court Law (N.N. Laws 1963) Cap.49.
9. Generally see, Park, A.E.W., *The Sources of Nigerian Law*, London, (1963), pp. 69-75; Obilade, A.C., *The Nigerian Legal System*, (1979) pp. 100-103.
10. See Speed, Ag. C.J., in *Lewis v. Bankole* (1908)

IN.L.R.82 at 84.

11. (1957) N.R.N.L.R. 73 at 81.
12. See also Fagoji v. Kano N.A. 1957 NRNLR 84
13. 1957 NRNLR 178.
14. 1931 A.C.662 at 673.
15. 1971 IALL NLR 226.
16. Ibid, at p. 232.
17. See Obilade, op. cit., p. 106.
18. (1998) 6 SCNJ127.
19. Ibid, at p. 136.
20. See sections 250-264 and 279 of the 1999 Nigerian Constitution.
21. See section 1 (i) and (3) of the 1999 Nigerian Constitution.
22. A reasonable construction of the constitutional provisions on the Sharia courts (i.e. section 261 and section 329 of the 1989 Constitution) will show that in fact the aspects of Islamic law enshrined in the Constitution have been placed beyond these 'tests'.
23. E.g. the decision of the Supreme Court in Adesubokan v. Yinusa (1971) NNLR 113.
24. See the Native Courts Ordinance, the Protectorate Courts Ordinance, and the West African Court of Appeal Ordinance, all of 1933.

Part Two

Women's Rights Under Sharia In Northern Nigeria: A Case Study Of Safiya¹

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1. Introduction

When women's rights under Sharia or Islamic Law² are discussed, these by implication also cover all the Muslim women in Nigeria with the exception of those states of the Federation where Sharia is not applied to the Muslim.

When we also speak of human rights under Sharia we really mean that these rights have been granted by ALLAH, the Almighty God, and no one has the right or power to abrogate, suspend³ or withdraw them. They are part and parcel of the Islamic Faith. Therefore every Muslim or State authorities who claim themselves to be

Muslims will have to accept, recognize and enforce them, or must not violate them else the verdict of the Holy Quran for such individuals and governments is clear and unequivocal:- “Those who do not Judge by what God has

Sent down are the disbelievers (ka’firun)”,⁴
“They are the wrong-doers (za’limun)”,
“They are the evil-livers (fa’siqun)”.⁵

Women’s rights sanctioned by the Almighty God are rooted in the Sharia or Islamic Law, which is essentially a “Believer’s Law”, in the sense that it is primarily binding on those who believe in it. It rests therefore on faith or conviction. The Sharia basically operates to concretize the ideals of Islamic faith in practical life: - it therefore insists that it must proceed from conviction and its operation must at no time be the result of coercion. With its own ethical norms of virtue and vice, good and evil, it represents the standard of Judgement for all human actions.

The Sharia has two components: - the Divine and the Human. The Divine component constitutes all that is contained in the Holy Quran and the Prophet’s Sunnah. The Quran contains principles, exhortations and laws, which the Absolute Sovereign, Allah, has revealed to guide mankind. The Sunnah is the elaboration and

exemplification of those principles, exhortations and Laws impractical life – situations by the Prophet of Islam. It is those two that constitute the Divine and the immutable component of Sharia or Islamic Law.⁶

The human component constitutes all the efforts of Muslim scholars and Muslim generations in finding the best means of applying the Sharia according to their understanding and to their particular circumstances with due regards to the changes in human conditions and experiences. This is what is called *iJihad*. It is a continuous process involving scholars and people in general and aimed at ensuring that all generations of Muslims and all conditions are brought in line with the Sharia. Since *iJihad* is a purely human endeavour and therefore subject to error, it is not immutable and its binding nature is limited to its relevance to a particular situation or a particular generation. Thus every age and every major change in human condition requires and *iJihad* made by the people of that age or condition. The law can therefore be described as both strict and flexible and dynamic in the sense that on the one hand it is based on absolute principles and on the other, it responds to changing conditions and human experiences in a continuous process.⁷

It cannot be denied that every system of Law is oriented towards certain purposes which it seeks to implement.

Though the Sharia as a matter of principle provides only general principles of law and policy, it nevertheless touches on all aspects of life. Allah says concerning the Quran in chapter 16 verse 89 that, “We reveal the Book unto you as an exposition of all things and a guidance and a mercy and good tidings for those who have surrendered to Allah”. The idea for this comprehensiveness is to ensure that the law is self-sustaining and that Muslims remain at all times governed by a total system of law so that they are forever self-reliant in matters of law and policy.

This comprehensiveness does not mean the killing of human initiatives or research. The law itself defines its own limit. The purpose of the Sharia is to guide human conduct and to provide general principles of life. It leaves all issues, which are dependent primarily on observation, experimentation or inventions to human initiatives.

It follows that the main objective of the Sharia is to construct human life on the basis of virtues (*ma'rufat*) and to cleanse it of the vices (*munkarat*). The term *ma'rufat* denotes all the virtues and good qualities that have always been accepted as “good” by the human conscience. Conversely, *munkarat* denotes all the sins and evils that have always been condemned by human nature as “evil”.

The Law does not, however, limit its function to providing us with an inventory of virtues and vices, it lays down the entire scheme of life in such a manner that virtues may flourish and vices may not contaminate human life.

The late Sayyid A. A. Maududi beautifully remarked that “the Sharia is a complete scheme of life and an all embracing social order where nothing is superfluous, and nothing is lacking”.⁸ It follows that the Sharia being an organic whole can function smoothly and demonstrate its efficacy only if the entire system of life is practiced in accordance with it and not otherwise.

Consistent with Maududi’s remark is the most recent pronouncement of the Supreme Court of Nigeria on the status of Islamic law in Nigeria. In the lead judgement of the Supreme Court read by his Lordship, Justice Bashir Wali, in the case of Alhaji Alkamawa v. Alhaji Bello and Anor, his Lordship said: - “Islamic Law is not the same as customary Law as it does not belong to any particular tribe. It is a complete system of universal Law, more certain and permanent and more universal than the English Common Law”.⁹

By making separate and distinct provisions for the administration of both laws, the Nigerian Constitution has recognized them as distinct and separate Laws¹⁰. It

follows therefore that any statutory law that purports to abrogate the distinction made between the two laws, becomes null and void to the extent of its inconsistency with the Constitution.¹¹

For the purpose of human rights protection therefore the Sharia views women first, as human beings, second as citizens of an Islamic State or Muslim Community, and third, as Constituents of the most vulnerable segment of humanity or society needing special protection.

Hence this paper primarily aims at a critical examination of Safiya's sentence to death by stoning for a crime of adultery under Sharia in the context of human rights. Second, the paper aims at providing a brief description or an over-view of women's rights under Sharia in Northern Nigeria. Finally, the paper highlights some issues and challenges ahead of Nigeria as well as provides suggestions for a way forward.

2. Basic Rights of All Human Beings Under Sharia

Under the Sharia every person irrespective of his country of origin, religion, race, sex, age or colour has some basic human rights simply because he is a human being, which should be respected by every Muslim.

These basic human rights are: -

A. The Right to Life

The first and the foremost basic right is the right to live and respect human life. The Holy Quran lays down: -

“Whoever kills a human being without (any reason like) manslaughter, or corruption on earth, it is as though he had killed all mankind...”¹².

As far as the question of taking life in retaliation for murder or the question of punishment for spreading corruption on this earth is concerned, it can be decided only by a proper and competent court of law. In any case, no human being has any right by himself to take human life in retaliation or for causing mischief on earth. Therefore it is incumbent on every human being that under no circumstances should he or she be guilty of taking a human life. If anyone has murdered a human being, it is as if he has slain the entire human race. These instructions have been repeated in the Holy Quran in another place saying:-

“Do not kill a soul which Allah has made sacred except through the due process of Law...”¹³

Here also homicide has been distinguished from destruction of life carried out in pursuit of justice. Only a proper and competent Court will be able to decide whether or not an individual has forfeited his right to life by disregarding the right to life and peace of other human beings. The Prophet, may God's blessings be on him, has declared homicide as the greatest sin only next to polytheism. The Tradition of the Prophet reads: - "The greatest sins are to associate something with God and to kill human beings."¹⁴ In all these verses of the Quran and the Sunnah of the Prophet the word 'soul' (*nafs*) has been used in general terms without any distinction or particularization which might have lent itself to the elucidation that the persons belonging to one's nation, the citizens of one's country, the people of a particular race or religion should not be killed. The injunction applies to all human beings and the destruction of human life in itself has been prohibited.

Immediately after the verse of the Holy Quran which has been mentioned in connection with the right to life, God has said: - "And whoever saves a life it is as though he had save the lives of all mankind".¹⁵

B. The Right to Justice

This is a very important and valuable right, which the Sharia has given to every person as a human being. The

Holy Quran has laid down: - “Do not let your hatred of a people incite you to aggression”.¹⁶ “And do not let ill-will towards any person incite you so that you swerve from dealing justly. Be Just; that is nearest to heedfulness”.¹⁷ Stressing this point the Quran again says:- “You who believe stand steadfast before God as witness for (truth and) fairplay”.¹⁸ This makes the point clear that Muslims have to be Just not only with fellow Muslims or tribes men but even with their enemies. Their permanent habit and character should be such that no man should ever fear injustice at their hands, and they should treat every human being everywhere with justice and fairness.

C. Right to Equality of Human Beings and Freedom from Discrimination

The Sharia not only recognizes absolute equality between persons irrespective of any distinction of colour, race or nationality, but makes it an important and significant principle. The Almighty God has laid down in the Holy Quran:- “O mankind, we have created you from a male and female. And we set you up as nations and tribes so that you may be able to recognize each other”.¹⁹ This means that all human beings are brothers to one another. That the division of human beings into nations, races, groups and tribes is for the sake of distinction, so that people of one race or tribe

may meet and be acquainted with the people belonging to another race or tribe and cooperate with one another. This division of the human race is neither meant for one nation to take pride in its superiority over others nor is it meant for one nation to treat another with contempt or disgrace, or regard them as a mean and degraded race and usurp their rights. “Indeed, the noblest among you before God are the most heedful of you”.²⁰ In other words the superiority of one man over another is only on the basis of God-consciousness, purity of character and high morals, and not on the basis of colour, race, language or nationality and even this superiority based on piety and pure conduct does not justify that such people should play lord or assume airs of superiority over other human beings.

This has been exemplified by the Prophet in one of his sayings thus: - “No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a Blackman, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay”.²¹ In this manner the Sharia established equality for the entire human race and struck at the very root of all distinctions based on colour, race, language or nationality. According to Sharia, God has given man this right of equality as a birthright. Therefore no person should be discriminated against

on the ground of the colour of his skin, his place of birth, the race or the nation in which he was born.

D. Right to Respect for the Chastity of Women

Under the Sharia every woman has the right to protect her chastity from being violated. A woman's chastity has to be respected and protected under all circumstances and without distinction as to race, colour, religion, age or nationality. All promiscuous relationship has been forbidden to a Muslim man, irrespective of the status of the woman, or whether the woman is a willing or an unwilling partner to the act. The words of the Quran in this respect are:- "Do not approach (the bounds of) adultery".²² Infact, violation of chastity of a woman is a crime punishable under the Sharia.

E. Right to Freedom from Slavery and Inhuman Treatment

The Sharia has clearly and categorically forbidden the primitive practice of capturing a free man, to make him a slave or to sell him into slavery. On this point the clear and unequivocal words of the Prophet are as follows: - "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is who enslaves a free

man, then sells him and eats this money”.²³ The words of this Prophetic Tradition are also general, they have not been qualified or made applicable to a particular nation, race or religion.

As a matter of policy in Islam, freeing a slave by one's own free will was declared to be an act of great merit, so much so that by the period of the four (4) Rightly-Guided Caliphs, all the old slaves of Arabia were liberated. After this the only form of slavery, which was left in Islamic society, was the prisoners of war, who were captured on the battle field. These prisoners of war were retained by the Muslim Government until their government agreed to receive them back in exchange for Muslim soldiers captured by them, or arranged the payment of ransom on their behalf. If the soldiers they captured were not exchanged with Muslim prisoners of war, or their people did not pay their ransom money to purchase their liberty, then the Muslim Government used to distribute them among the soldiers of the army, which had captured them. This was a more humane and proper way of disposing of them than retaining them like cattle in concentration camps and taking forced labour from them. Thus the Sharia preferred to spread them in the population and thus brought them in contact with individual human beings. Over and above, their guardians were ordered by Islam to treat them humanely. The result of this humane policy was that

most of the men who were captured on foreign battlefields and brought to the Muslim Countries as slaves embraced Islam and their descendants produced great scholars, imams, Jurists, commentators, statesmen and generals of the army. So much so that later on they became the rulers of the Muslim world.

F. The Right to Co-operate and Not to Co-operate

The Sharia has prescribed a general principle of paramount importance and universal application saying:- “Cooperate with one another for virtue and heedfulness and do not cooperate with one another for the purpose of vice and aggression”.²⁴ This means that the person who undertakes a noble and righteous work, irrespective of his or her nationality, race, religion, colour or age, has the right to expect support and active co-operation from the Muslims. On the contrary, he, who perpetrates vice and aggression does not have the right to win our support and help in the name of religion, race, nationality or affinity.

G. The Right to Freedom from Want and Deprivation

Under the Sharia, the needy and the destitute have the right to freedom from want and deprivation. The Holy

Quran enjoins all Muslims in the following words:-

“And in their wealth there is acknowledged right for the needy and destitute”.²⁵

The words of this injunction show that it is a categorical and unqualified order. Furthermore this injunction was given in Mecca where there was no Muslim society in existence and where generally the Muslim had to come in contact with the population of the disbelievers. Therefore the clear meaning of this verse is that anyone who asks for help and anyone who is suffering from deprivation has a right in the property and wealth of the Muslim, irrespective of his/her religious, racial or linguistic background or nationality.

3. Rights of Citizens in an Islamic State

The Sharia guarantees to all citizens, including children and women, certain fundamental rights in an Islamic State. These are: -

i. Right to Security of Life and Property

In his Farewell Hajj address the Prophet of Islam is reported to have said:- “Your lives and properties are forbidden to one another till you meet your Lord on the

Day of Ressurrection”.²⁶ God Almighty has laid down in the Holy Quran:- “Anyone who kills a believer deliberately will receive as his reward (a sentence) to live in Hell for ever. God: will be angry with him and curse him, and prepared dreadful torment for him”.²⁷ The Prophet has also said about the *dhimmis* (the non-Muslim citizens of the Islamic State):- “One who kills a man under covenant (i.e. a dhimmi) will not even smell the fragrance of paradise”.²⁸ The Sharia prohibits homicide but allows only one exception, that the killing is done in the due process of law which the Quran refers to as *bi l-haqq* (with the truth). Therefore a man can be killed only when the law demands it, and it is obvious that only a court of law can decide whether the execution is being carried out with justice or without justification.

Along with security of life, the Sharia has with equal clarity and definiteness conferred the right to security of ownership of property as mentioned earlier with reference to the address of the Prophet’s Farewell Hajj. On the other hand, the Quran goes so far as to declare that the taking of people’s possessions or property is completely prohibited unless they are acquired by lawful means as permitted in the Laws of God. The Sharia categorically declared:- “Do not devour one another’s wealth by false and illegal means”.²⁹

ii. Right to Protection of Honour

The Sharia guarantees to every citizen the right to protect his/her honour. In the Prophet's Farewell Hajj address, he also prohibited any encroachment upon the honour, respect and chastity of all citizens regardless of age, sex or colour. The Quran clearly lays down: -

- a. "You who believe, do not let one (set of) people make fun of another set;
- b. Do not defame one another;
- c. Do not insult by using nicknames;
- d. And do not backbite or speak ill of one another".³⁰

According to the Sharia the mere proof of the fact that the accused said things which according to common sense could have damaged the reputation and honour of the plaintiff, is enough for the accused to be declared guilty of defamation.

iii. The Right to Privacy of Life

The Sharia guarantees the right of every citizen in a state to protection against undue interference or

encroachment on the privacy of his life. The Quran has laid down the injunction: - “Do not spy on one another”.³¹ And “Do not enter any house except your own homes unless you are sure of their occupant’s consent”.³² The Prophet has gone to the extent of instructing all Muslims that a person should not enter even his own house suddenly or surreptitiously. He must indicate that he is entering the house, so that he may not see his mother, sister or daughter in condition in which they would not like to be seen, nor would he himself like to see them. The Prophet even prohibited Muslims from reading the letters of others, so much so that such conduct becomes reprehensible in Islam.

Espionage on the life of individual citizens is violative of the right to privacy under Sharia. For all intents and purposes, the basis of espionage policy is the fear and suspicion with which modern governments look at their citizens who are intelligent and dissatisfied with certain official policies. This is exactly what Islam has called as the root cause of mischief in politics. The Prophet is reported to have said: - “When the ruler begins to search for the causes of dissatisfaction amongst his people, he spoils them”.³³ In this manner it becomes difficult for a common citizen to speak freely, even in his own house and society begins to suffer from a state of general distrust and suspicion.

iv. Right to Personal Liberty

Under the Sharia every citizen has the right to personal freedom and it is prohibited for a citizen to be arrested or detained or imprisoned without any due process of law or explaining the reason for the curtailment of one's personal liberty. A person must be given an opportunity to defend himself against any charge and proof of his guilt is required to be given by the state in an open court for any act of arrest, detention or imprisonment. This is in the interest of Justice. The Quran injunction is very clear on this point. "Whenever you judge between people, you should judge with (a sense of) justice".³⁴ It is related in the *hadith* that once the Prophet was delivering a Lecture in the mosque, when a man rose during the lecture and said:- "O Prophet of God, for what crime have my neighbours been arrested?".³⁵ The Prophet heard the question and continued his speech. When the man rose and repeated the question twice, the Prophet ordered that the man's neighbours be released. The reason being that the Police Officer who was present in the mosque at that time did not get up to give any reason for their arrest in the open court nor in camera.

v. Right to Freedom of Expression

The Sharia has given the right to freedom of expression

to all citizens of an Islamic State on the condition that it should be used for the propagation of virtue and truth and not for spreading evil or wickedness and not for malicious criticisms or abusive languages. Denial of this right to citizens amounts to an open confrontation with God, the All Powerful. The Holy Quran has described this quality and right of the Muslims in the following words:- “They enjoin what is proper and forbid what is improper”.³⁶ The main purpose of an Islamic Government has been defined by God in the Quran as follows:- “If we give authority to these men on earth they will keep up prayers, and offer poor-due, bid what is proper and forbid what is improper”.³⁷ The Prophet is reported to have said:- “If any one of you come across an evil, he should try to stop it with his hand (using reasonable force), if he is not in a position to stop it with his hand then he should try to stop it by means of his tongue (meaning he should speak against it). If he is not even able to use his tongue then he should at least condemn it in his heart. This is the weakest degree of faith”.³⁸ As far as the government which itself propagates evil, wickedness and obscenity and interferes with those who are inviting people to virtue and righteousness is concerned, according to the Quran it is the government of the hypocrites and of tyrants.

vi. Freedom of Association

The Sharia has also guaranteed the right to freedom of association and formation of parties or organizations. This right should however be exercised for propagating virtue and righteousness and should never be used for spreading evil and mischief. Addressing the Muslims, the Holy Quran declares: -

“You are the best community which has been bought forth for mankind. You command what is proper and forbid what is improper and you believe in God”.³⁹

This means that it is the obligation of the entire Muslim Community that it should invite and enjoin people to righteousness and virtue and forbid them from doing evil. If the entire Muslim community is not able to perform this duty then “let there be a community among you who will invite people to do good, command what is proper and forbid what is improper, those will be prosperous”.⁴⁰

vii. Freedom of Religion

The Sharia guarantees the right to freedom of religion and conscience to its citizens in an Islamic State. The

Holy Quran has laid down the injunction: - “There should be no coercion in the matter of faith”.⁴¹ Though there is no truth and virtue greater than the religion of Islam, and Muslims are enjoined to invite people to embrace Islam and advance arguments in favour of it, they are not asked to enforce this religion on the non-Muslims.

The exemplary tolerance displayed by the Prophet when he issued the famous charter of Medina deserves a mention here. He conceded in that Charter the right of the Jews and Christians to practice their faith without hindrance.

Further, the Sharia has guaranteed to the individual the right to protection of his or her religious sentiments and sensitivities. It has been ordained by God in the Holy Quran: - “Do not abuse those they appeal to instead of God”.⁴² These instructions are not only limited to idols and deities, but they extend to the leaders and national heroes of a people or nation other than yours. The Sharia does not prohibit people from holding debate and discussion on religious matters, but it wants that these debates should be conducted in decency. “Do not argue with the people of the Book unless it is in the politest manner”.⁴³ This order is not limited to the Christians and Jews, but extends to followers of other faiths with equal force.

viii. Right to Equality Before the Law

The Sharia guarantees to its citizens the right to absolute and complete equality before the law. According to the Quran: - “The believers are brothers (to each other)”.⁴⁴ Further “If they (the disbelievers) repent and keep up prayer and pay the poor-due, they are your brothers in faith”.⁴⁵ The Prophet has said that:- “The life and blood of Muslims are equally precious”. In another hadith he has said: - “The protection given by all Muslims is equal. Even on ordinary man of them can grant protection to any man”. In another more detailed hadith of the Prophet: “those who accept the oneness of God, believe in the Prophethood of His Messenger, give up primitive prejudices and join the Muslim community and brotherhood, then they have the same rights and obligations as other Muslims have”.⁴⁶

This religious brotherhood and the uniformity of their rights and obligations is the foundation of equality in Islamic society in which the rights and obligations of any person are neither greater nor lesser in any way than the rights and obligations of other people. As far as the non-Muslims (or dhimmis) of an Islamic State are concerned, the rule of the Sharia has been very well expressed by the Caliph Ali in these words: - “They have accepted our protection only because their lives may be like our lives and their properties like our properties”.

According to the Quran, discrimination of people into different classes was one of the greatest crimes that Pharaoh used to indulge in: - “He had divided his people into different classes,” “And he suppressed one group of them (at the cost of others)”⁴⁷

4. Specific Rights of Women Under Sharia

Under the Sharia women are guaranteed the following specific rights because of their special responsibilities and status in the eyes of Islam. These rights are: -

A. Right of Equality in Status, Worth and Value

The Quran 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 Quran, male and female are created *min nafsini wahidatin* (“from a single soul or self”) to complement each other.⁴⁸

Women and men are clearly equal in terms of religious and ethical obligations and rewards. The Quran provides: - “And who does good works, whether male of female, and he or she is a believer, such will enter paradise and they will not be wronged the dint in a date-stone”.⁴⁹

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 Quran 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, to think, to contemplate, as well as to learn from the signs (ayat) of Allah in nature.⁵⁰ In fact, the very first revelation to Prophet Muhammed (peace be upon him) was concerned with knowledge. In a Quranic society, there can never be a restriction of this knowledge to one sex.

It is the duty of every Muslim and every woman to pursue knowledge throughout life, even if it should lead the seeker to China, we are told.⁵¹ The Prophet of Islam even commanded that the slave girls be educated, and he asked Shifa' bint Abdullah to instruct his wife Hafsa bint Umar. Lectures of the Prophet were attended by audiences of both men and women and by the time of the Prophet's death, there were many women scholars.⁵²

C. Right to Own and Dispose of Property

The Holy Quran, 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 Quran provides:- “Unto men a fortune from that which they have earned, and unto women a fortune from that which they have earned...”⁵³

D. Right to Inheritance and Dower

The Holy Quran grants 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 Quran reads:- “O you who believe, it is not lawful for you to inherit forcibly the women (of your deceased kinsmen) nor (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 lowdness. 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.”⁵⁴

It is clear that the Quran not only recommends, but is even insistence upon, the equality of women and men as an essential characteristic of a Quranic society. The claim of the non-Muslim critics that Islam denigrates women is denied emphatically by the Quran. 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 Quran, 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.⁵⁵

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 Sharia 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 she remarries or during 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 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 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 is 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.⁵⁶

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 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. Physical cruelty includes of course, such crude measures as beating; (b) husband's withdrawal of his social relations from her by either physically deserting her or by 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.⁵⁷

5. A Case Study of SAFIYA: Death Sentence For Adultery Under Sharia and Human Rights

i) Facts of the Case⁵⁸

On the 10th of October 2001, a 31 year old mother of four, Safiya Hussaini of Tungar Tudu was sentenced to death by stoning by an Upper Sharia Court in Gwadabawa, Sokoto State, for committing adultery with the second accused Yakubu Abubakar, a 53 year old man. While passing judgement on Safiya, the trial court judge, Mohammed Bello Sayinnal said, the convict confessed to committing adultery, an offence punishable by stoning to death. The judge further said that his judgement was based purely on Islamic Jurisprudence. The trial judge ruled that because Safiya was an expectant mother, the sentence should take effect after she has weaned the child while the 53-year-old man accused of having sex with her was discharged for lack of evidence, as provided for by the Sharia Legal System. Safiya was, however, given 30 days within which to appeal while the ruling still awaits the approval of the Governor of Sokoto State, Alhaji Attahiru Dahiru Bafarawa.

An appeal has been filed on Safiya's behalf, by a team of Legal practitioners from a Sokoto-based law chambers (Mutumchi Chambers) headed by Abdulkadir Imam, to

the Sharia Court of Appeal to Sokoto, challenging the trial court's proceedings and Judgement. On Monday, 22 October, the appellate Court wrote to the trial court in Gwadabawa, to arrange and send forthwith eight copies of the court proceedings of the case.

ii) Safiya's Sentence to Death by Stoning:- A Misapplication of Sharia

There are three grounds of misapplication of the Sharia in Safiya's case:- (a) misapplication as to the proof of adultery; (b) misapplication as to the type of punishment; and (c) misapplication as to or in ignorance of conditions for imposing death sentence by stoning.

(a) Misapplication as to Proof of Adultery

In the above case, misapplication of the Sharia occurred as a result of reliance by the judge on a weaker authority than a more authoritative guidance and the primary source of the Sharia itself namely, the Quran.

Here, proof of adultery under Sharia requires no less than four witnesses. The Quranic verses cited below are authorities for this proposition of the Islamic law of evidence. A person who accuses a woman of adultery and cannot prove the fact by evidence of four witnesses shall be deemed to be a liar in the eye of law (even if the

accusation be true in fact). The Quran says: - “Why did they not bring four witnesses of it? So, as they have not brought witnesses they are liars in the sight of Allah” (Quran 24:13).

As a matter of fact, the Quran very strongly deprecates the publication of sexual scandal and calumny among the Muslims. It says: - “Those who love that sexual scandal should circulate respecting Muslims, for them is a grievous chastisement in this world and the world hereafter” (Quran 24:19).

A charge of adultery against a chaste woman, even if true, shall be deemed false unless it is supported by four witnesses. The Quran says: - “And those who accuse chaste women but bring not four witnesses, scourge them with eighty stripes and never afterwards accept their testimony. They indeed are evildoers: - save those who afterward repent and reform themselves. Surely Allah is Forgiving, Merciful” (Quran 24:4-5).

The above Quranic verses relate to a false charge of adultery against a woman, but the majority of Muslim Jurists say that by way of analogy (Qiyas) the verses apply to a false charge of that nature against a man as well. The punishment for a false charge is two fold:-

1. The offender shall be flogged with eighty stripes and

2. This evidence shall not be accepted in any case, in future.

The difference of juristic opinion here is that Imam Shafi'i says that after the offender has repented and reformed himself, his evidence may be accepted in future cases. Imam Razi says that the majority of the companions of the Prophet and their successors held the same opinion. But according to Hanafi Jurists, his evidence cannot be accepted even after his repentance.

It is therefore clear from the above Quranic provisions that basic rules of evidence regarding proof of adultery by testimony have been laid down.

Adultery can also be established by the pregnancy of the woman. This happens where the woman is not married but has conceived, which no evidence of rape was alleged. According to the majority of the Muslim Jurists, pregnancy alone will not justify hundred stripes or stoning to death, hence, there must be either admission or testimony of four reliable witnesses.

The Maliki School contended that if a woman is found pregnant and yet unmarried, and she has not claimed any compulsion, by presumption, she has committed adultery and there, she is liable to hundred stripes or stoning to death.

However, the other schools of Islamic Jurisprudence do not impose the punishment of hundred lashes or stoning by means of presumption, instead they apply the discretionary (or Ta'zir) punishment. According to the *Hidaya*: - "The maximum number of stripes in ta'zir punishment is thirty-nine and the minimum is three. But the judge may add a sentence of imprisonment as well. Some Jurists say the maximum is seventy-nine stripes".⁵⁹

It should be noted that confession or the admission of adultery by the accused can also prove the offence. According to the Hanafi School of Islamic Jurisprudence, such admission must be made at four different times and in four different sittings. The judge has to run the accused out and away from his presence after the first, second and third admission. The Hanafis base their opinion on the case of one Ma'iz heard and decided by the Prophet himself, and also on the analogy of four witnesses. But Imam Shafi'i says that admission made by the accused once is sufficient to prove the case against him.⁶⁰

The case of Ma'iz relied upon by the Hanafis had been considered by a writer on Islamic Jurisprudence, a weakest kind of authority or hadith attributed to the Prophet which cannot be taken to have abrogated a Quranic provision on the matter of proof and on the

issue of punishment for adultery to be discussed in detail below.^{60A}

(b) Misapplication as to the Type of Punishment

Here too, misapplication of the Sharia arose due to non-reliance by the Judge on a more authoritative guidance and the primary source of the Sharia than on a weaker authority. The punishment for adultery, upon proof, according to the first Quranic verse revealed in this regard is: “And for those of your women who are guilty of adultery, call to witness against them four witnesses from among you, so if they bear witness, confine them to the houses until death takes them away of Allah makes a way for them”. (Quran 4:15)

Thus we see that house confinement for life (or life imprisonment) was the prescribed punishment for adultery given to a woman under this verse. But the verse itself says that some other provisions may be made in this respect in future. This other provision was in fact made in the following Quranic verse:- “The adulteress and the adulterer, flog each of them with a hundred stripes, and let not pity for them detain you from obedience to Allah, if you believe in Allah and the Last Day, and let a party of Muslims witness their chastisement”. (Quran 24:2)

Now it is abundantly clear from what has been said, that according to the Quran, the punishment for adultery for both man and woman is a hundred stripes inflicted in public in the presence of a party of Muslims.

What then is the authority for sentencing Safiya to death by stoning under the Sharia in Sokoto State? The notorious case of Ma'iz seems to be the authority for stoning to death as a sentence or punishment for committing adultery. This case is mentioned, in detail, in the following hadith of the Prophet: - "Buraidah says: Ma'iz son of Malik came to the Prophet and said: - 'Make me clean'. The Prophet said to him: 'Woe to thee, go back ask for God's pardon and repent before Him'. The man went away a short distance and returned and again said: - 'Make me clean'. The Prophet gave him the same reply as he had given him in the first instance. The man went away, came back again, said the same thing, got the same reply and went away. He returned for the fourth time and said: 'Make me clean'. The Prophet said: - 'Of what should I make you clean?' The man replied: 'Of adultery'. The Prophet then asked: 'Is the man mad?' People said he was not. The Prophet then asked: 'Has the man taken some intoxicant?' Thereupon a man stood up, smelled the mouth of Ma'iz and said: 'No! He is not drunk'. The Prophet asked the man; 'Have you committed adultery?' He replied: 'Yes' The Prophet then ordered that the man should be stoned to death. That

when the people began to throw stones at him, he ran away. He was overtaken and stoned to death. When the Prophet was informed of all this scenario, he said: “Why did you not let him go?”.⁶¹

There is nothing on record to show that the case of Ma’iz occurred after the above cited Quranic verses concerning the punishment of adultery were revealed. It is stated that a companion of the Prophet was asked whether the case of Ma’iz was before or after the verse prescribing a hundred stripes as punishment for adultery was revealed. He replied: “I do not know”.^{61A}

It has been submitted that if this tradition is genuine, the case of Ma’iz must have been decided before the Quranic verse was revealed.^{61B}

Moreover, it has been stated in the *Usul al-Shashi*, a well-known book on Islamic Jurisprudence, that the Ma’iz case was, in the early period of Islamic history, of the nature of the weakest kind of a hadith. It was in the later period that the hadith became known.⁶²

It is noteworthy that a minority of early Muslim Jurists have always held the opinion that the only punishment for adultery of all kinds is a hundred stripes and that stoning to death is based on no credible authority as cannot be found in the Quran. Most of the modern

Muslim Jurists and scholars have expressed the same opinion.⁶³

It is also worthy to note that the majority of Muslim Jurists, who are in favour of stoning to death, have on the other hand so enunciated the law of evidence on the point that it has become almost impossible to sentence a person to death by stoning unless he or she, like Ma'iz, insists on being stoned to death.^{63A}

It should be noted that the trial Judge in Safiya's case relied actually on a different hadith of the Prophet as the authority for stoning to death and in accordance with sections 128 and 129 of the Sokoto State Sharia Criminal Procedure Code Law 2000. The hadith goes as follows:-
“.....That a woman came to the Prophet of Islam pregnant and said to him that it was as a result of Zina (adultery). The Prophet asked her to go back until she delivered the baby. After delivery, she came back to the Prophet and she was asked to go back and wean the child. After weaning she returned to the Prophet and was asked to go and hand over the child to someone who would take care of it and he directed that she be stoned. She was accordingly stoned to death.

While it is evident that stoning to death is nowhere found in the Holy Quran, it is nevertheless, according to the Biblical law, the punishment for adultery.⁶⁴

(c) Misapplication as to the Conditions for Imposing Stoning

Misapplication of the Sharia in relation to the conditions for imposing death sentence by stoning has been clearly stated by a contemporary Muslim Jurists, constitutional expert and thinker, Sayyid A. A. Maududi thus: - “Islam prescribes a hundred stripes for the unmarried and stoning to death for the married partners in the crime. But of course, it applies to a society wherein every trace of suggestiveness has been destroyed, where mixed gatherings of men and women have been prohibited, where public appearance of painted and pampered women is completely non-existent, where marriage has been made easy, where virtue, piety and charity are current coins and where the remembrance of God and the hereafter is kept ever fresh in men’s minds and hearts. These punishments are not meant for that filthy society wherein sexual excitement is rampant, wherein nude pictures, obscene books and vulgar songs have become common recreations, wherein sexual perversions have taken hold of the cinema and all other places of amusement, wherein mixed, semi-nude parties are considered the acme of social progress and wherein economic conditions and social customs have made marriage extremely difficult” .⁶⁵

**iii. Safiya's Death Sentence by Stoning –
Violative of Her Rights to Life Human
Dignity and Fair Hearing/Fair Trial**

From the record of proceedings, the trial Judge clearly lacked Jurisdiction or competence to entertain the case of Safiya for two basic reasons: - (a) that Safiya was seven months pregnant without a husband before the Sokoto State Sharia Penal and criminal procedure codes came into force on 31/1/2001; (b) the trial Judge assumed Jurisdiction to try Safiya's case 6 months after delivery of the baby and one year after the alleged offence was committed. Hence the trial was contrary to the principle of Non-Retroactivity of Penal laws.

He offends not only section 36 (8) of the 1999 Nigerian Constitution but also the Sharia itself where the combined effect of the Holy Quran Chapter 17 verses 15-16 prohibit retroactive penal law and punishment. (See Yusuf Ali's commentary-items 2192-3)

In addition, Safiya was neither given the opportunity to cross-examine prosecution witnesses, nor was she cautioned or told of her right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person. Hence violative of her right to fair hearing under section 36 of the constitution.

In view of the three grounds of argument advanced for the misapplication of the Sharia in the above case, the inescapable conclusion is that the sentence is violative of Safiya's right to life and security of person. Under the Sharia every person irrespective of his or her age, sex, race, religion, colour or nationality, has the right to live and respect for human life. The Holy Quran provides: "Do not kill a soul which Allah has made sacred except through the due process of law..."⁶⁶ Here due process of law requires a competent court of law to decide on the forfeiture of the right to life acting in accordance with the procedure laid down by the most authoritative guidance or source of law, as in the case of Safiya, the Holy Quran.

Following the trend in international human rights law, one can argue that a plethora of international conventions have entrenched the abolition of death penalty or sentence by whatever mode of execution (i.e. by stoning, hanging, shooting, electrocution or lethal injection, etc.), by affirming the non-derogability of the right to life and the right to human dignity. For instance Article 7 of the International Convention on Civil and Political Rights prohibits inhuman treatment by upholding the rights of human dignity available to every individual. The 2nd Optional Protocol on Abolition of death penalty further advances the right of dignity of the human person under Articles 1 and 2.

Article 5 of the African Charter on Human and peoples' Rights also advances further the right to dignity of a person. Nigeria has ratified the ICCPR in 1993 and has domesticated the African Charter as such these provisions are binding on her and the courts have a duty to ensure that the state do not breach these international obligations.⁶⁷ These principles have been long accepted and applied by Nigerian courts in the following cases:- Agbakoba v. SSS;⁶⁸ Fawehinmi v. Abacha;⁶⁹ and Abacha v. Fawehinmi.⁷⁰

Apart from the international law, section 33 of the 1999 Constitution of Nigeria guarantees every citizen the right to human dignity. The right to human dignity is further reinforced under section 45 of the 1999 Nigerian Constitution by making it non-derogable under any circumstance whatsoever. The Court of Appeal in the case of Uzoukwu v. Ezeonu II⁷¹ held that the obligations imposed by section 31 of the 1979 Constitution (equivalent to section 33 of the 1999 Constitution) rests squarely on the state.

vi. Contending Issues in Nigerian Federalism and Constitutionalism

1. Assuming there was no misapplication of the Sharia by the trial judge as per the above case, is the death sentence by stoning in Nigeria Constitutional?

2. If the status of Islamic law and of the application of Islamic Personal law is constitutionally and judicially settled, what of the introduction and application of the Sharia Penal law and Justice system by a State?

In other words, is it within the Constitutional and legislative competence of a State government within the Nigerian Federation to fashion out a penal law and justice system, the provisions of some of which are inconsistent with the Supremacy clause and fundamental human rights guaranteed by the constitution?

3. How do we respect, promote and protect norms, sensitivities and values cherished most by different communities in our 'holding together' type of Federation as opposed to 'the coming together' type of federation being practiced in the USA and elsewhere?
4. Must a legal system of any country or state divorce law from morality especially in relation to sexual offences like adultery, fornication and homosexuality? Why? Where do we place the sexual or reproductive health rights of women that are internationally guaranteed?

5. What is the appropriate legislative response to such laws, policies and practices that affect the rights of women and girl-children in Nigeria?

Response

As to the first question, it should be noted that death penalty or sentence may be carried out either by hanging, or shooting or electrocution or by lethal injection or by stoning to death. By whatever mode of execution and irrespective of the Code prescribing for it in Nigeria, the Supreme Court of Nigeria in the case of *Onuoha Kalu v. the State*⁷² seems to have reached the conclusion that there is nothing in the Constitution of Nigeria that renders the death penalty under section 319(1) of the Criminal Code of Lagos State unconstitutional. That although the arguments against capital punishment may be proper basis for legislative abolition of the death penalty, the authority for any action abolishing the death penalty is clearly not a matter for the law courts.

Is this conclusion and reasoning extensible to death sentence by stoning? Well, Safiya's case is currently appeal and there may be further appeal in the future up to the Supreme Court. Time will tell for the final answer.

As to the second question, the supremacy clause of the

Constitution is very clear under section 1: - “This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”. “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”.⁷³

Further, “If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void”.⁷⁴

Furthermore, the Constitution empowers the House of Assembly of a State to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say: - (a) any matter not included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution; (b) —————; (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution”.⁷⁵

It is clear from the above that a State House of Assembly is empowered to make laws by the Constitution only in accordance with the provisions of the Constitution and not otherwise. But there is no express Constitutional

prohibition of the introduction of the Sharia Criminal Law and Justice System in any part of Nigeria. However, any such law must be consistent with the provisions of the Constitution.

As to the third question, there is real need for inter-religious/ethnic groups dialogue rather than mutual hatred and suspicion. This will surely bring about understanding of each others' positions, interests and views in order to establish peaceful co-existence.

Further, the sharp edges of religious extremism, intolerance, ethnicity, statism and regionalism, should be gradually curtailed or be eliminated with a view to foster growth and development of Nigerian Citizenship and nationality as well as understanding the rich diversity of the Nigerian Federation.⁷⁶

As to the fourth question, one cannot doubt the distinction between law and morals but one may find it difficult to concede to the positivists' argument that there must be a water-tight separation between law and morality. Every law has an undertone of morality and to incorporate both in any legal system will promote the realization of Justice. Consequently, one would concede that there is a distinction between law and morals, but not a separation or divorce.⁷⁷

With due respect to late Dr. Aguda, Karibi-Whyte J.S.C., and morality should be immuned from the intervention of the law may be sound on its face value but if recognized morality is as necessary to society as say, a recognised government, then society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.⁷⁸

Further, the fact that the object of the criminal law is to prevent conduct harmful to society, such conduct is not the less criminal because it was done in private. If it is not likely to be injurious or in fact reprehensible it will not earn the condemnation of the people, and this gives it the stamp of criminality. These are the moral considerations for prohibiting incest, homosexuality, bestiality, adultery and fornication in Nigeria. In each of these cases, the practices are in private yet the morality of the society rejects them.

Furthermore, there must be something questionable in any custom that entitles a husband to be unfaithful to his wife but frowns at the wife “meeting other men sexually”. This surely is discriminatory and unjust. One wonders how many husbands will agree to put up with their wives who even occasionally have sexual relations with others outside the matrimonial home.

On a more serious note, in this age of sexually transmitted diseases including HIV-AIDS, allowing a promiscuous society to continue to exist without any admonition will be risking serious health problems. On the other hand, restricting sexual relations to only one's partner will curb the spread of diseases and thus save a lot of money that might otherwise be pumped into the health sector for treating sexually transmitted diseases.

Moreover, if paternity is not acknowledged, a pregnant girl or woman may be forced to commit abortion with all its attendant risks, not to mention its being a criminal offence under our law.⁷⁹

As to the last question, an appropriate legislative response in the context of protection against harmful social and cultural practices or laws and policies affecting the rights of women and girl-children (such as Female Genital Mutilation, Early Child Marriage or Forced marriages, widowhood Rites, etc) is that which:-

- (a) takes cognizance of the harmful effect and consequences of social and cultural practices that affect the rights to life, human dignity, health, education and to freedom from discrimination and all other forms of violence against women and girl-children;

- (b) outlaws such practices with penal and civil sanctions;
- (c) reforms all existing domestic statutory and customary – laws, practices and policies to conform with the relevant and binding international human rights standards;
- (d) sets up an institutional mechanism to monitor effective compliance with items (b) and (c) above; and
- (e) (c) seeks to rehabilitate victims of such practices, especially the needy ones.

CONCLUSION

It is evident from the above analysis that women's rights are protected under the Sharia because they are first human beings second, citizens of an Islamic State or Muslim Ummah and also because they belong to the vulnerable segment of society.

Safiya's sentence to death by stoning, is by virtue of the lack of Jurisdiction of the trial Judge who entertained the case contrary to the principle of non-retroactivity of penal laws, and of the right to fair trial, violative of her right to fair hearing under section 36 of the 1999 Nigerian Constitution.

Happily, on Monday 25th March 2002 Safiya's conviction was quashed, discharged and acquitted by the Sokoto State Sharia Court of Appeal, Sokoto, thereby upholding the appeal, the principle of non-retroactivity of penal laws and the right to fair hearing of Safiya.

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75. *Ibid*, Section 4 (7)
76. See Ladan, M. T. 'Role of Youth in inter-ethnic/ religions conflicts in Nigeria, Kaduna-Kano case study – 1980-96', in: - Uwazie, et al; *Inter-ethnic and religions conflict resolution in Nigeria, 1999*, CSUS, USA and Lexington Books, USA, Chapter 9 pp.97-112
77. See Ladan, M. T., 'The Relationship between Law and Morality:- The Nigerian Experience', in A.B.U., *Law in Society Journal*, December 1993, Vol. 2, pp.1-12

78. **Ibid at pp. 1-12**

See sections 228-230 Criminal Code and 232-233 Penal Code

Part Three

A General Overview of the Implementation of Sharia In Nigeria Before 2000 And Beyond

Mohammed Bello Uthman

Northern Nigeria

Islam reached the Bornu Empire as early as the 7th Century, C.E. and it was from there that Islam spread to other parts of the western Sudan. By the 11th century the nucleus of the great Islamic polity was formed, and by the 16th century, the Bornu Empire had reached its apex of Islamic civilization. The State was composed of the Majlis (state council) and the Kogunawa (the executive body), which had under it various departments such as trade, police and protocol. The Goni's (jurists) were appointed judges, scribes and ambassadors of the state. It said that one could rise from a house servant or foot soldier to the topmost ranks of the Koguna system¹.

The Sokoto Caliphate, on the other hand, like Bornu, was a full-fledged Islamic polity that implemented the Shari'ah. This was as a result of the revivalist movement of Sheikh Usman bin Fodio. According to Sheikh Usman the office of the *muhtasib* that has the responsibility of “enjoining good and forbidding evil” – a fundamental principle of the Islamic law occupied the widest scope, which included providing for poorly fed animals and aiding the weak peasants. The domination enjoyed by the ruling class before the revolution was checked. This was done, especially, through the office of the *caliy al-mazalim* who presided over special courts that tried cases involving highly placed officials of the State. Governors of provinces were compelled to allocate one day in a week to listen to complaints by peasants against officials of the government. The suppression of injustice was considered to be as sacred as worship. Only the best men were appointed judges and their pay was made sufficient. Public offices were not to be contested for and the prison houses were to be inspected regularly. Anyone who was detained wrongly was set free the judicial system was broken down into specialized courts of marriage, orphans property and so forth. Muhammad Bello, the son and successor of Sheikh Usman, instructed his police to execute the law and to treat the strong and the weak in the same way. He treated the enforcement of the *hudud* (specified penalties) as of strict importance. Interference with the application was

considered a betrayal of Allah and His Messenger. He also stressed on the preservation of the five fundamental objectives of the Shariah (i.e. the preservation of life, property, religion, lineage and intellect).

Obedience to lawful authority, cooperation, kindness and prudence². When Clapperton visited the empire during Bello's time he commented thus:

“The laws of the Qur'an were in his (Bello's) time so strictly put in force... that the whole country when not in a 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 end of the Fellata dominions to the other”³.

The legacy was so well preserved that in 1955, Professor Norman Anderson was compelled to say:

“The Islamic law is more extensively followed and enforced in Northern Nigeria than anywhere else in the world outside Arabia”⁴.

Women greatly benefited from the revolution of the Shehu. According to one writer:

“The Shehu insisted on their education and moral progress... He reserved the harshest words for those scholars who encouraged the abandonment of women to ignorance and ignoble life... he had mobilized women through education, brought them into the mainstream of life, and above all, produced women of sufficient caliber to take a pride of place in Islamic history”⁵.

The intervention of the British brought about the collapse of the polity and the systematic removal of not only the legal system of Islam but also economic life and social justice in terms of:

- a) the eclipsing of the Arabic language and education;**
- b) the imposition of the roman script, the English law and western ideals of education and civilization;**
- c) the actual attempts at abolishing the Native (Islamic) courts system by the British and also by their native successors;**
- d) the imposition of the Penal Code Law of Northern Nigeria of 1960⁶.**

It is interesting to state that the recent clamour for the revival of the application of Shariah and its precepts of social and economic justice is no accident. Nor also has

it any thing to do with President Obasanjo being in power. To Professor Joseph Schacht, one of the most prominent students of Islamic law in the Western world, on his visit to Northern Nigeria in 1957, he claimed to have found in the Muslims of Northern Nigeria “a zeal for maintaining the Shari’ah to its full extent⁷ .

It is no surprise, therefore, that most of the Northern States have elected to return to the application of the Shariah – the legacy of their people that has existed a thousand years before British colonization.

Southern Nigeria

The British were able to curtail the application of the Sharia to the North – which they called a Muslim area – and recognized the South as a Christian area thereby limiting its law to customary/traditional rules which applied side by side with the “received” English law⁸ .

From 1960

At the brink of independence the Penal Code Law was imposed on Northern Nigeria, thereby ousting the jurisdiction of the courts to make resort to the full scope of the Islamic Criminal Law. The most significant and charismatic penalties of *hudud* and *qisas* were abolished and what remained of the Islamic Criminal Law was a shadow of its substance. On the other hand, the courts

in the North were allowed to use Islamic law in personal matters and some aspects of the civil matters as well.

In 1975 the then Head of State, General Murtala Mohammed, inaugurated a committee headed by Chief F. R. A. Williams to draft a new constitution for the country. Its report was submitted to Murtala's successor, General Olusegun Obasanjo. It made recommendations for the appointment of a Grand Mufti and three other Muftis to sit as a Federal Shari'a Court of Appeal. On the submission of the report the whole array of opponents of the Sharia screamed about it and the issue was put to rest by the Constituent Assembly created by Gen. Obasanjo in 1977. There was a heated debate and the Muslims lost out because they were in the minority. They thus staged a walkout from the Assembly. The remaining members passed a resolution against the establishment of a Federal Shariah Court of Appeal and, further, clipped the wings of the state Sharia court of Appeal. The customary court of Appeal was created and given unqualified jurisdiction – a power the Sharia Court of Appeal does not have up till now⁹. It should be remembered, though, that the whole controversy of 1977 was whether or not to establish a Federal Sharia Court of Appeal.

1999

The next significant development came in 1999 when the Fourth Republic came into being and the Governor of Zamfara State, Alhaji Ahmad Sani, indicated his intention of re-introducing the application of the Sharia legal system including its criminal justice system. The call was received with tremendous enthusiasm by Muslims all over the country and with bitter criticism by many non-Muslims within and without the country.

The Muslims argued that the 1999 constitution gives powers to states, under section 6(5)(k), to establish “such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal matters with respect to which a House of Assembly may make laws”. The Governor of Zamfara State argued that matters relating to crime fall under the residual powers of both the National and State Houses of Assembly. Therefore, he went ahead to submit to his House of Assembly two-draft Laws, the Shariah Penal Code bill and Sharia Criminal Procedure Code bill in the year 2000 which they passed into law. He also established Shariah Courts by a law, which gave them powers to try cases involving both civil and criminal jurisdiction.

The proponents of Shariah legal system also argued that Nigeria is a federation, which necessarily must allow for unity in diversity thereby providing an atmosphere for

peace and harmony within our divergent backgrounds of culture and heritage.

Since the successful take off of the Sharia legal system in Zamfara State, the overwhelming majority of States in the North have gone ahead to pass similar laws. The non-Muslims have argued that the Sharia legal system is unconstitutional and that Nigeria is a secular state that does not accommodate religion in matters of state, they have also expressed fear that the application of the Shariah will affect them.

Conclusion

The Muslims of Northern Nigeria have enjoyed the legacy of the Sharia for 1,300 years and they should have their heritage preserved. They have also made it very clear that the application of the Sharia shall cover only persons who profess Islam. In the hullabaloo that has beclouded the real issue, many seem to forget that the Muslims, themselves, are entitled to their rights of observance and practice of their religious law, which is fundamental, their faith. They also express fears of being submerged into culture and civilization that is alien to their faith. They have suffered, also, the imposition and domination of the received English law since the days of colonization.

The way out of the impasse is for an honest and truthful approach to the matter. Issues must be dealt with squarely and fears of both the proponents of Shariah and the opponents should be resolved by dialogue and sincere objectivity.

- ¹ Alkali, M. N. 1977, *The Concept of Islamic Government in Bornu under the Seifawa Dynasty, Constitutionalism in Islamic Law*, CILS, ABU Zaria, pp. 73-5.
- ² Suleiman, I. (1986). *A Revolution in History*, Mansell, (London and New York), pp. 169-171.
- ³ Uthman, Babaji et al (1999), *Towards a New Socio-Economic Dispensation: Reform Imperatives and Priorities*, being a position paper presented the National Conference on the Shari'a and Constitutional Process, p. 2.
- ⁴ Ibid p. 1.
- ⁵ Suleiman, I. Op. cit., p. 177.
- ⁶ Uthman, Babaji et al. op. cit. p. 1.
- ⁷ Ibid. p. 2.
- ⁸ Adegbite, A. (1999) *Sharia and the Nigerian Situation*, being a paper presented at the National Conference on the Shari'ah and Constitutional Process (17-18 Nov.)
- ⁹ For an excellent discussion, see Mahmud, A. B. (1988) *A Brief History of the Shari'ah in the defunct Northern Nigeria*, Jos University Press, pp. 40-43.

Safiya's Burden - Nigeria's Constitutional Dilemma - An Assessment of Women Right Under Sharia Law — Discussion

*Alhaji Olalekan Yusuf, Chaiman of the
Ikeja Branch of Nigerian Bar
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INTRODUCTION

The case of Safiya Hussaini of Tungar Tudu brought into fore the issue of adultery under the Sharia and its consequence. Thus, since the 10th of October 2001 when she was sentenced to death by stoning by an Upper Sharia Court in Gwadabawa, Sokoto State for committing adultery with a 53 years old man, the public and Nigerians at large have reacted. In fact, the issue has generated furore among women activists and associations.

To start with, all laws owe their origin or root to divine law or the laws divinely ordained by God through various religions. For instance, in Christianity we have the Ten

(10) Commandments. Also, in Islam we have the Sharia, which basically operates to concretize the ideas of Islamic Faith. Universally, all legal systems owe their emergence to these divine laws. Thus, one cannot separate the English Legal System from the Christian faith, while the Sharia cannot be separated from Islam. Ditto our customary laws cannot be divorced from our traditional beliefs in Africa.

Coming down to Safiya's issue and its constitutional implications, it should be stated that for us to have a good discussion, we must place emphasis on the concept "rights". A right is something to which we are entitled; Rights that are laid down in Law are called Legal Rights. These rights can vary from one country to another. They may also change as the Law changes. Thus, legal rights are the most solid of all rights in that they can be defended and upheld in a national court of Law. Rights are universal in nature.

They apply to all people at all times in all situations. As mortals or citizens of a nation, we are equally entitled to them regardless of our gender, race, ethnic group, colour, language, national origin, class or religions or political creed. Thus, the right enshrined in Chapter four of the Constitution of Nigeria is fundamental and cannot be undermined by any other law or legislation.

Let's make a detour back to Islam or Sharia Law to undertake a mental excursion of the rights of women. Human rights under the Sharia are granted by Allah and these rights forms an integral part or constituent of the Islamic Religion. On the issue of Women, the Islamic Faith has the greatest respect for the dignity of women. Thus, Dr. Muhammed Tawfiq Ladan at page three of his paper titled Women's Right under Sharia in Northern Nigeria: A case study of Safiya has stated as follows.

“For the purpose of human rights protection therefore the Sharia views women first, as human being, second as citizens of an Islamic State or Muslim Community and third, as constituents of the most vulnerable segment of humanity or society needing special protection”.

As stated earlier on, no legal system can lay claim to existence outside divine or natural laws. The Islamic Legal System has varieties or plethora of rights. And these rights are for the benefit of all persons irrespective of his country of origin, religion, race, age, sex or colour. These basic rights includes Right to life, Right of justice, Right to equality of human beings and freedom from discrimination, Right to respect for the chastity of women, Right to freedom from slavery and inhuman treatment, Right to cooperate and not to cooperate,

Right to freedom from want and deprivation.

Also is an Islamic State, Sharia makes provision for a certain fundamental rights to wit: Right to security of life and property, Right to protection of honour, Right to privacy of life, Right to personal liberty, Right to freedom of expression, freedom of Association, freedom of Religion, Right to equality before the law.

Coming to women specifically the following are the rights guaranteed by the Sharia:

- (a) Right of equality in status, worth and value**
- (b) Right to education**
- (c) Right to own and dispose of property**
- (d) Right to inheritance and dower**
- (e) Right to maintenance**
- (f) Right to custody of children**
- (g) Right to obtain divorce**

A cursory look at Islamic Faith reveals that Islam has made adequate provisions for its adherents. The religion itself is a way of life. Sharia Law owes its origin to Allah.

At this juncture, it's imperative to examine the relationship between the Sharia Law and the Nigeria Constitution. The Sharia Law is one of the sources of our Laws. Our constitution has basic provisions for fundamental rights. The 1999 constitution of chapter

iv and specifically sections 33 to 44 contains a number of rights guaranteed under the said constitution. It should be noted that these rights bears resemblance with those rights guaranteed under the Sharia.

The grouse of the Nigerian public with the judgement was based on the nature of the trial and the type of the punishment imposed. The Upper Sharia Court, Gwadabawa based his judgement on Islamic jurisprudence and imposed a punishment of death by stoning. It should be emphasized that death sentence by stoning is novel or unknown to Nigerian Criminal System. For instance, death sentence may be by hanging or firing squad. Also its unjust to convict a woman for adultery while the man involved was set free for want of evidence.

Moreover, section 33 (1) and section 34 of CFRN 1999 provides for right to life and human dignity. And the Sharia also makes provision for this right. Also we are not disputing the right of Nigerians to practice the religion of their choice but states wishing to practice the Sharia Legal System must take cognizance of the fact that the Penal Code had existed from 1960 and that the said Penal Code is not superior to the constitution of the country. Thus, Section 1 of our constitution places emphasis on the supremacy of the constitution. Thus, the trial of Safiya, her conviction and punishment

imposed must be consistent with the provisions of our constitution.

**Critique/Comment on the Public
Lecture Titled “Women’s Rights Under
Sharia In Northern Nigeria”
A Case Study of Safiya**

Dr. Muhammed Tawfiq Ladan

Fausat Lanre-Bakare (Mrs.)
*Participant at WARDC Programme of
6th – 7th March, 2002.*

After a careful perusal of the public lecture test
delivered by Dr. Muhammed Tawfiq Ladan, I have no
doubt in my mind that he extensively dealt with the
subject with clarity and indepth research.

The discriminatory practices against women which dated back from time immemorial have come under criticisms and corrective measures are being put in place by the peace-loving and constitutionally advanced society/organizations irrespective of ethnic, religious and social divide in ensuring total freedom for the women and their development.

It is in the light of this that it becomes imperative that different legal systems under which such discriminatory practices are being justified need to be examined for clarity and enlightenment and for necessary reforms. One of such legal systems is Sharia, which has of recent been introduced in some Northern parts of Nigeria extending its application to criminal justice. It was pursuant to this new legal system that the Upper Sharia Court in Gwadabawa, Sokoto State sentenced a 31 years old Safiya Hussaini of Tungar Tudu to death by stoning, for committing adultery with one 53 years old Yakubu Abubakar to which she confessed. The judgement was said to have been based on Islamic jurisprudence according to the trial Judge Muhammed Bello.

The lecturer examined the constitutionality of the introduction of the Sharia legal system by the states concerned. While believing in the supremacy of the constitution “and its binding force on all authorities”¹. S. 4 (7) (a) of the 1999 constitution empowers the State House of Assembly to make laws for the peace, order and good government of the State or any part thereof in respect of any other matters with respect to which it is empowered to make laws in accordance with the provisions of this constitution.

It was in the exercise of the powers conferred under this section that justified the introduction of the Sharia

Criminal Law and Justice System more so, is no express prohibition of its introduction in the constitution. The provisions of Section 6(4); 6(5)(k) and S. 277(1) should also be looked into. Meanwhile, he urged us not to lose sight of S. 4(7) of the 1999 constitution. However, he calls for a need for inter-religious/ethnic groups dialogue for better understanding and appreciation of position.

The lecturer goes further to examine extensively the justiciability of the punishment imposed by the trial judge on the accused person by sentencing her to death by stoning based on the Islamic Jurisprudence. He threw more light on the sources of sharia, which are the Holy Quran, Hadith, Ijma and Qiyas, which he also described as Divine Law and Human Laws.

The first primary source is the Holy Quran which is regarded, as the Book in which there is guidance, sure without doubt to those who fear God². Hadith which consists of the deeds, practices and sayings of the Prophet Mohammed (SAW) as the second source is being revered following the commandment of Almighty Allah that Obey God and the Messenger³ and that he who obeys the Messenger obeys God⁴ and furthermore that whatever the Prophet gives you accept and whatever he forbids abstain from it⁵.

As a product of research the lecturer citing various verses of the Holy Quran to buttress his point has been able to drive home the point of stereotype bias against women, display of tradition and political prejudice under the guise of religion or how else do you explain relying on hadith which contradicted the provisions of the Holy Quran if truly the government is sincere about the application of the Sharia Legal System in its truth and undiluted form?

Adultery is a condemnable act, morally reprehensible and widely condemned. While this may be a good ground for seeking divorce under the Matrimonial Causes, it is ordinarily not a criminal act. However, under the Sharia it constitutes a criminal offence for which there is a punishment clearly spelt out unequivocal in its terms. Human beings are warned against such an immoral act when Allah says “Nor come near to adultery for it is a shameful deed. And an evil opening the road (to other evil)”⁶.

Where adultery is alleged 14 witnesses are required to prove it otherwise those who alleged in the sight of God are deemed liars⁷ and where they are able to prove it by calling the witnesses as required the punishment prescribed on the offenders is 100 stripes as commanded by Allah. The woman and the man guilty of adultery or fornication, flog each of them with a hundred stripes.

Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day. And let a party of the Believers witness their punishment”⁸.

In another chapter of the Holy Quran Almighty Allah says “if any of your women are guilty of lewdness take the evidence of four reliable witnesses from amongst you against them, and if they testify confine them to houses until death do claim them”⁹.

The above verses are the extent to which the punishment could be applied; one wonders why the provision of the Holy Quran was sidelined for a not too convincing hadith. More so, in the said hadith reported, it was the said Maiz who offered himself to be punished after confession and when he could not withstand the punishment he fled and was pursued and the Prophet was reported to have said “why did you not let him go” this confirmed the fact that it was not compulsory that the punishment be carried out on him.

The questions to be asked are:

- i. Is mere confession by Safiya sufficient?
- ii. Is pregnancy conclusive?

Though the argument for the introduction of the Sharia Legal System was based on the states' desire to meet with the yearnings of their people's demand and for the purpose of curbing the high level of moral decadence in the society by instilling discipline and ensuring due compliance with the Sharia way of life. Laudable as their action may seem, they ought to be reminded that human lives are so precious that our creator acknowledges this and warn sternly that "... take not life which God has made sacred, except by way of justice and law"¹⁰ and also enjoins us "Nor to take life which God has made sacred except for just cause"¹¹ i.e. after due process of law and in accordance with the tune and letter of the Quranic provision.

There should be end to these discriminatory practices, as Allah does not discriminate against us. What makes a person honourable before Him is one's righteousness¹².

In conclusion while appreciating the great work of the Scholar, I wish to observe that in the notes and references the following verses were wrongly cited and hereby corrected as follows:

- 12. 5:35 not 32
- 15. 5:35 not 32
- 16. 5:3 not 2
- 17. 5:9 not 8

In conclusion, it would be an achievement and great contribution to the development of women and their protection if the human rights activist and the allied NGO's join hands in ensuring that the states which had taken cover under the constitution to introduce the Islamic Criminal Justice must at the same time ensure that they operate within the Islamic Law and the Quranic injunction in the administration of justice by the Courts.

REFERENCES

1. - S. (1) & 3 of 1999 constitution
2. - Q 2 v 2
3. - Q 4 v 59
4. - Q 4 v 80
5. - Q 59 v 7
6. - Q 17 v 32
7. - Q 24 v 13
8. - Q 24 v 2
9. - Q 4 v 59
10. - Q 6 v 51
11. - Q 7 v 33
12. - Q 49 v 13

**Re: Safiya Hussaini Tungar Tudu's
Case A Critique of Dr. M.T. Ladan's
Paper**

*Jummai Audi Head,
Private Law Dept., Faculty of Law,
A. B. U., Zaria*

Sharia is all encompassing system. Its basic principle is contained in the Quran. While the interpretations and explanations are found in the hadith, i.e. sayings and doings of the Prophet Mohammed.

Dr. Ladan has no doubt made a very good attempt at examining the Safiya's case within the context of Sharia in Nigeria.

First, Ladan's paper however did not bring into focus all the cases of adultery contained in the hadith which could throw more light on the case and to open our eyes to the different aspects of adultery found in the hadiths which the Prophet had judged himself.

Secondly, I am not sure which hadith the state in question used as precedent to decide Safiya's case. For

I am not very sure as to whether they actually used the quoted Ma'iz's case.

That notwithstanding we should concern ourselves with

1. Which provision of the Quranic text was applied?
2. Which of the hadiths was taken into accounts as precedents.
3. Whether Nigeria subscribes to any Islamic Jurisprudential School of thoughts on the issue. If yes, has it been followed in Safiya's case?

We know that Nigeria adopts the Maliki School of thoughts for all Islamic personal matters of Muslims. Apart from the Maliki School in Islamic matters, there are the Hambali the Shafi'i and the Hanafi though not officially recognized in Nigeria. All have views on Islamic issues on which they sometimes agree on while they also on certain issues. So if Nigeria officially recognizes the Maliki's views as part of the law, it also forms part of Nigeria's Islamic Law.

Therefore on the issue of "adultery" in question there are three sources of laws on the subject; the Quran, a couple of hadiths as precedents and the Maliki Law in Nigeria.

The Ma'iz's case certainly is not in conformity with the provision of the Quranic text and that of Maliki Law.

We need to know for certain what precedent informed the judgements in Safiya's case.

Islamically women would want to see that the Quranic injunction is upheld and applied which is the basic law which has already made provision on the subjects.

Hence Safiya's death by stoning to death would be a violation of her right to life Islamically, constitutionally and internationally wise.

Procedure on Safiya's Case of Adultery

Due process of Sharia enjoined by the Quran should be seen to be followed. Procedure is a vehicle to justice, where proper procedure is violated in the matter, the justice given should be in questioned in an Islamic State where social, economic and legal justice is the objective.

Ideal Sharia State

- An ideal sharia state is one in which the citizens know the sharia that governs their lives. They know their rights and obligations to themselves, to the society and to Allah. What this means is that the populace have good grasp of Islam, without ignorance and illiteracy in order for them to abide by it.

- An ideal sharia state endeavours to put in place facilities in place that would lead to social and economic advancement of the people and deter men and women from engaging in premarital sex. Such empowerment would prevent women in engaging on commercial sex work. Can we afford to fail to undertake to provide these and yet turn round in the court and pronounce stoning by death?

Way Forward

1. To test the Sharia applied in Safiya's case against the Quran and Maliki Laws on one hand and to test the sharia against the constitution in the court of law and whether the Prophet's tradition can supercede the Quranic provision. This has been done in Islamic countries such as Pakistan, where cases go up to the Supreme Court. Shikat Gah in Lahore has followed women's cases to the Supreme Court and have documented such cases, according to those positive and negative to women.
2. To argue that the procedure for confession to be valid has not been followed, which now leads to miscarriage of justice to her.

On the ground that there are:

- Misapplication of Sharia as to the condition of stoning to death under Islamic Law.
- Misapplication of Sharia as to the proof of adultery.
- The Sharia Criminal Code was introduced before Safiya's case? Is the Sharia of this state discriminatory to women in its haste to implement Sharia improperly because it concerns women, who belong to the disadvantaged class in the society in terms of wealth and political position? Applying the Sharia in retrospect is not acceptable in Sharia itself.

A Brief On Safiya Hussaini Turgar Tudu

Abdulkadir Imam Ibrahim (Esq.)

INTRODUCTION

Safiya Hussaini Turgar Tudu was convicted by the Upper Sharia Court Gwadabawa for an alleged offence of adultery (zina) and sentenced to stoning-to-death by virtue of section 129 (b) of the Sokoto State Sharia Penal Code Law; The Judgement was delivered on 9th October 2001.

First Contact With Safiya Hussaini Turgar Tudu

Safiya Hussaini T/Tudu came to our Law firm on 23/10/2001 in company of her Uncle one Labbo Sabon Birnin Kware, and other two persons namely; Muhammadu Sani Hussaini and Abdullahi Hassan Dan Kara (barely two weeks after the judgement of the trial Upper Sharia Court Gwadabawa) and we received the brief and the same day prepared Notice/Grounds of

Appeal and Motion for stay of Executive of the judgement of the trial Upper Sharia Court Gwadabawa, there and then we filed same before the Sharia court of Appeal Sokoto State, in line with section 233 (2) (b) of the Sokoto State of Nigeria, Sharia Criminal Procedure Code.

Barely five days after Safiya Hussaini's brief to our chambers one Malam Mustapha Ismael from Kano came and introduced the interest of Baobab Human rights organization from Lagos to take up the matter on behalf of Safiya Hussaini and same was acknowledged by the law firm and subsequently various meetings were held at Abuja in respect of the matter.

Court Proceedings (Stay of Execution)

The Sharia Court of Appeal, Sokoto State granted stay of Execution on 22/11/2001 in respect of the Application filed on behalf of Safiya Hussaini and the Appeal was slated for 14/1/2002 for hearing.

Appeal:

On the 14/1/2002, A. I. Ibrahim (Esq.) argued the Appeal on behalf of Safiya Hussaini T/Tudu and same was adjourned to 18/3/2002 to enable the State Counsel representing the State Government from the Sokoto

State Ministry of Justice, reply to the issues raised.
Issues raised/argued during the hearing of the Appeal
14/1/2002

In original Grounds of Appeal filed by our Law firm, A. I. Ibrahim argued Ground one of the original grounds, which is on the Competence of the trial Upper Sharia Court Gwadabawa misled itself by entertaining the matter in that, by virtue of the record of proceedings of the said Court, Safiya Hussaini T/Tudu was charged to have committed the offence of adultery (zina) on 23/12/2000, the period in which Safiya Hussaini was with six months pregnancy, while the Sharia Criminal Code of Sokoto State commenced on 31/1/2001 and its trite that criminal law can not be retrospective. References were made to section 4(9), 36(8) and 277(1) of the constitution of Federal Republic of Nigeria 1994.

Quran chapter verse.....

Issue No. II

Retraction of Safiya Hussaini's earlier statements or purported admission of committing the alleged offence of adultery (zina) with one Yakubu Abubakar Tungar Tudu, and coupled with doubts involved in the whole matter. References were made to various traditions of the Holy prophet Muhammad (P.B.O.H.) in various

Books such as:

1. Mukhtasar Vol. II page 285
2. Fiqhu Sunnah – Vol. II page 241
3. Biday at – Al – Mujthid wani hayyat Al – Muqtasid Vol. II page 468
4. Ihkamu – Al Ahkami – page 118, to mention but a few
5. Sahih Al – Muslim Vol. II page 193.

Similarly, we concluded issue No. II on the various authorities on retraction and replaced same with authorities on dormant pregnancy. See authorities (supra).

Issue No. III

This issue was argued on the basis of whether Safiya Hussaini T/Tudu as at the time of trial by the Upper Sharia Court Gwadabawa is a (Muhsinees) Married women under legally consummated marriage to warrant her be stoned to death for the alleged offence of adultery (zina) which is among the conditions that can warrant stoning to death. Reference were made to various authorities includes:

Bidayat Al – Mujtahid wa nihayat Al – Mugtasidi; page 470.

Issue No. IV

This issue was based on lack of opportunity to the parties concerned to make their final address before judgement i.e. *izari*.

References were made to various authorities regarding the importance of *izari* and failure to observe it by any court of Sharia amounts to nullity – Books such as: -

- 1) *Ihkamu Al – Ahkami*
- 2) *Bahjah*
- 3) *Mukhtasar*.

Issue No. V

The honourable Judge of the trial Upper Sharia Court Gwadabawa based his conviction against Safiya Hussaini on the ground that she was pregnant.

We argued that by virtue of the authority based on majority view and Shafi's opinion that pregnancy alone can not lead to Hadd of stoning to death see: -

Sahih – Al Muslim – Vol. II page 192 – 193

Issue No. VI

This issue was argued based on the way Safiya Hussaini T/Tudu was arrested and arraigned before the trial Upper Sharia Court Gwadabawa which is contrary to the principles of Sharia. In that no precedence on the way she was arrested and it amounts to poke nosing into her affairs because it was one of her Brothers (same parents) who reported her to the committee on Sharia and the committee informed the police and she was arrested, against the provision of the Holy Quran which stated that one should not intrude into someone's secrecy and privacy.

Also some reported authorities that served, as precedence on this type of offence indicated how the Holy Prophet Muhammad (P.B.O.H) was not happy with people reported cases of that nature to him.

Issue No. VII

This issue was also argued based on lack of proper procedure followed by the trial Upper Sharia Court Gwadabawa in that the trial was not in line with proper procedure of the criminal Sharia trial as provided by the Sharia criminal procedure law of Sokoto State.

A thorough perusal of the record of the proceedings of

the trial court shows that no opportunity was given to the accused persons concerned (most especially Safiya Hussaini T/Tudu) to cross-examine the witnesses called in order to test the veracity of the evidence given, hence no fair hearing see: section 35 (2) and 36 (1) of the constitution of the Federal Republic of Nigeria 1999.

Conclusion

The above-mentioned issues were among issues formulated and argued from the original and additional grounds of Appeal during the hearing of the Appeal.

Opinion

There is a strong believe that Safiya Hussaini T/Tudu will be discharged and acquitted by the Appellate Court (i.e. Sharia Court of Appeal Sokoto State) at the end of the case.

Abdulkadir Imam Ibrahim (Esq.)

Qur'anic Views On Woman

The following Qur'anic verse indicates that man and woman are equally Muslims and faithful. It says:

“Surely the men who submit and the women who submit, and the believing men and the believing women and the truthful men and the truthful women and the patient men and the patient women, and the humble men and the humble women, and the almsgiving men and the almsgiving women and the fasting men and the fasting women and the men who guard their private parts and the women who guard their private parts, and the men who remember Allah, much, and women who remember Allah much Allah has prepared for them forgiveness and a mighty reward. (33:35)

3. Ijma: Consensus of Juristic Opinion

4:5a: O ye who believe, obey Allah and obey the message and those charged with authority among you. If ye differ in anything among yourselves refer it to Allah and the last Day: that is the best and most suitable for final determination”.

115: If anyone contends with the messenger even

after guidance had been plainly conveyed to him, and follows a path other than that becoming to men to faith, we shall leave him in the path he has chosen, and land him in Hell, - what an evil refuge!

Q. 2:227: -“But if their intention is firm for divorce, Allah hearth and knoweth all things”.

Q. 29:69: -“And those who strive in our (cause), - We will certainly guide them to our paths. For verily Allah is with those who do right”.

b. Q. 4:15 “If any of your women are guilty of lewdness take evidence of four (reliable) witnesses from amongst you against them; and if they testify confine them to houses until death do claim them or Allah ordain for them so me (other) way”.

❖ *He ordains for them another way in Q. 24:2*

Q. 24:2 “The woman and the man guilty of fornication, flog each of them with hundred stripes let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the last say, and let a party of the believers witness their punishment”.

4:135 “O ye who believe stand out firmly for justice, as witnesses to Allah, even as **a g a i n s t** yourselves, or your parents or your kin and whether it be (against) rich or poor, for Allah can best protect both. Follow not the lusts (of your hearts), lest you swerve, and if ye distort (justice) or decline to do justice, verily Allah is well- acquainted with all that ye do”.

Communique of a Two-Day Experts Group Meeting On Women's Rights Under Sharia Law In Nigeria Held at the Women Development Centre, Agege, Lagos (March 6 - 7, 2002), Under the Auspices of Women Advocates Research & Documentation Centre (WARDC)

Preamble

Against the background of the sentence to death by stoning of Ms. Safiya Hussaini by a Sokoto State Upper Sharia Court last year, the Women Advocates Research & Documentation Center (WARDC) in conjunction with Friedrich Ebert Stiftung organized this meeting as part of its contribution to the protection of women's rights under the Islamic Legal System. The following summarizes the way forward in this regard:

1. Ignorance about Islamic law by those implementing it, and those it is meant for, is responsible for certain instances of miscarriage of justice and poor implementation of Shariah

in Northern Nigeria. Education and enlightenment of the populace and those that will implement Shariah Law is important for a proper implementation of this Islamic legal system.

2. Given indications that deep-rooted practices, which have their roots in local customs and practices specifically work negatively against women, it is important to put in place structures that will ensure that societal prejudices do not deny women rights guaranteed under the Islamic legal system.
3. Due to the reality that past and current trends confirm the absence of socio-economic justice, there is need for a just socio-economic system to be put in place to assure a level playing field for a proper implementation of the Shariah. This is more so with women as mentioned in 2 above.
4. The component units of the Nigerian federation should be allowed to practice what best suit their customs and traditions. To this end, the Nigerian constitution, through a

National Negotiation, should embody a true reflection of federalism to address the peculiarities of component units of the federation.

**Mrs. Abiola Afolabi
National Coordinator, WARDC.**

Annexure

CASE NO USC/GW/CR/FI/10/2001

DATE: - 3/7/2001

COURT	UPPER SHARIA COURT GWADABAWA
JUDGE	MOHAMMADU BELLO SANYINNAWAL
COMPLAINANT	COMMISSIONER OF POLICE
ACCUSED/PERSONS'S	1. YAKUBU ABUBAKAR T/TUDU 2. SAFIYYATU HUSAINI T/TUDU
REASON FOR COMPLAINT	SUSPECTING ACT OF ZINA.

STATEMENT OF COMPLAINANT

I Police officer No. 125816 Sgt. Idirisu Abubakar hereby complained against you Yakubu Abubakar Tungar Tudu and you Safiyyatu Husaini Tungar Tudu of Gwadabawa Local Government, on behalf of

Commissioner of Police, suspecting you to have committed the offence of Zina. Contrary to sections 128 and 129 of Sokoto State Shariah penal code of 2000.

That on 23/12/2000 at about 2.00p.m. in the afternoon. A team of police at Gwadabawa attached to Area Commander office have got information that you Safiyyatu Husaini had illegal sexual intercourse with Yakubu Abubakar in which you are pregnant and both of you have married before. Police have got you arrested and investigation was concluded and the allegation against you was satisfactory in light of the above, I therefore complain against you before this Hon. Court, in order to convict you.

Kom- Case accepted under chapter 111 Section 12 sub sec 9(1) of sharia penal code law of 2000. The content of allegation read over to the accused persons.

Court- To the first accused Yakubu Abubakar. Do you understand the allegation level against you by police?

Ans- 1st Accused: I hear and understood the allegation against me.

Court- 1st Accused: Was the allegation true?

Ans- 1st Accused: I didn't commit the said offence; I did not have any sexual intercourse with her.

Court- 2nd Accused: Safiyyatu Husaini do you understand the allegation against you by police.

Ans- 2nd Accused: I understand the allegation against me.

Court- 2nd Accused: Is that true you have committed the said offence, alleged against you?

Ans- 2nd Accused: Safiyyatu Husaini, yes it is true that Yakubu Abubakar had sexual intercourse with me and impregnated me. I later delivered a girl six months ago.

Court- To the prosecutor, you heard the first accused Yakubu Abubakar denied the allegation against him, do you have evidence to prove the allegation?

Ans- Prosecutor, I have proof two civilians and two police officers. I therefore asked for date to enable me call my witnesses.

Court- Case Adj. To 17/7/2001 to enable the prosecutor present his witnesses. The two Accused persons are granted bail. first Accused person, Yakubu Abubakar was granted to Sarkin Fawa Duka of Chimmola village. While the second Accused Safiya Husaini was granted bail to one Moh'd Sani Tungar Tudu. Sign by Judge: Moh'd Bello Sanyinnawal.

Today being 17/7/2001 court sit for hearing 1st and 2nd Accused are before the court.

Court- Prosecutor are your witnesses in court?

Ans- Prosecutor, yes Abdullahi Tungar Tudu and Attahiru and they are all out of court.

Court- First prosecution witness Abdullahi Tungar Tudu Muslim, Hausa by tribe, age 64, and farmer of Gwadabawa Local Government Area. He took promise that he will stay true in his evidence.

Court- First prosecution witness: Abdullahi what do you know about the first Accused Yakubu Abubakar?

Ans- First Prosecution witnessed; said I Abdullahi Tungar Tudu. What I know in respect of this matter was that, some days ago two police men met us at Tungar Tudu one of them by name Ali but I don't know the name of the other one, they called Safiyyatu in front of me they said to her that they were informed that you have pregnancy while you don't have husband. Who give you that pregnancy? Then she said it was Yakubu Abubakar who impregnated her. They called Yakubu in front of me, and asked him that it was Safiyyatu that said you are the one who impregnated her, is

that true? Then he said “Safiyyatu tell the truth because of God”. Do you mean you did not know anybody beside me, then Safiyyatu swore by God that she didn’t meet with anybody beside you then police asked Yakubu that how many time did he have sexual intercourse with Safiyyatu he said only three times he did. Then Safiyyatu said it was four times. They started argument in front of us, we just fixed three, and that is all I know that they reached an agreement of three times not four times.

Court- First accused: Do you have any objection or question to this witness?

Ans- I have heard all what he said, but I didn’t agree because he was not there when the policemen called me. Because I did not see him.

Court- To the first prosecution witness, you heard what Yakubu said that you were not there when police called him, so how would you satisfy this court that you were there.

Ans- Yes the police men who called him knew that I was there.

Court- First prosecution witness discharged and call second prosecution witness Attahiru Tungar Tudu, Muslim, age 45, Hausa and a farmer,

he live at Gwadabawa Local Government. He affirmed that he would state what he knows.

Court- Second prosecution witness; what do you know about those accused persons.

Ans- Attahiru, what I know was that some days ago a police man name Ali came to Tungar Tudu together with one police man, he asked me where is the village head, I told him he was not in the town, then he asked me where is the village head representative. I said I am. He then asked me to carry him to Safiyyatu house. When we reached the house she was called out, and he asked her that we received information that she was pregnant even as an Ex-house wife, so who impregnated you? The said Yakubu Abubakar was the one who impregnated me, later Yakubu was invited in front of me, then Ali the police man said to him, that Safiyyatu said that you are the one who impregnated her is it true? Then he kept quiet. Ali repeated the question to him Yakubu asked Safiyyatu to tell the truth that she didn't know any man beside me, Safiyyatu swore by God that she never have sexual intercourse with any man except him, then the police men asked Yakubu how many times did he had sex with Safiyyatu, the Safiyyatu

quickly answered that it was four times, Yakubu said it was three times, and that is what I know.

Court- To Yakubu do you hear the evidence given by Attahiru, do you agreed with his evidence or do you have any objection against him or question you need to ask him.

Ans- I heard what he said but I did not agree because Attahiru was a friend to Abdullahi a relative of Safiyyatu and he is their neighbour that is my objection.

Court- To witness was it true that you are friend to Abdullahi.

Ans- I am not his friend but he is my in-law.

Court- First prosecution witness Abdullahi was it true that you are related to Safiyyatu and you are her neighbour.

Ans- I have no relationship with Safiyyatu, but I am her neighbour but if Yakubu knows our relationship with me, he should say it.

Court- Yakubu what is the relationship between Abdullahi and Safiyyatu as you said?

Ans- Their fathers are from the same father, they have the same grand father.

Court- Abdullahi was it true?

Ans- It is not true there is no relationship between us.

Court- Yakubu do you have evidence to prove the relationship of your parents?

Ans- First accused I have no evidence to proof that.

Court- The two witnesses were discharged and the case Adjourn To 14/8/2001.

The prosecution was asked to bring his remaining witnesses.

Bail of the two accused continues till then.
Signed by Moh'd Bello Sanyinnawal.

Today being 14/8/2001 Court sits and the two accused persons are before the court.

Court- To the prosecutor, do you come with your remaining witnesses?

Ans- Prosecution, I have to inform this Hon. Court that the two witnesses are all policemen, the policemen were sent to Sokoto by the Area Commander, so I seek Adjournment I will come with them when they return.

Court- Case Adjourned to 11/9/2001 waiting for more prosecution witnesses' bail of the two

accused continues. Sign by Judge
Mohammadu Bello Sanyinnawal.

Today being 11/9/2001 Court sits the two accused before
the Court.

Court- Prosecution do you come with the witnesses?

Ans- The two witnesses are all policemen they are
before the Court (CPL. Aliyu Yusuf) Joseph
U.T. Constable.

Court- Third prosecution witnesses before the court
name CPL Aliyu Yusuf No. 112724 Muslim,
attached to Area Commander office
Gwadabawa, Hausa by tribe promised to tell
the truth.

Court- CPL Aliyu Yusuf what do you know about the
two accused.

Ans- What I know between Safiyyatu and Abubakar
is that on 23/12/2000, we received
information that Yakubu Abubakar
impregnated one Safiyyatu Husaini while they
were not married at Tungar Tudu Chimola
District of Gwadabawa Local Government
Area. We informed our superior (Area
Commander) then he permitted us to go and
investigate the matter. We went there and
asked about the Village head while he was

absent but his representative was around he called the two suspects for us, after we questioned them Safiyyatu said she had sexual intercourse with Yakubu Abubakar four times. But Yakubu denied, saying she is his relative. He said he used to stop and play with her, and that is what I know.

Court- First accused Yakubu Abubakar, do you agree with what he said, and do you have any question to ask him or objection?

Ans- I heard all that he said and I have no objection.

Court- Second accused Safiyyatu Husaini, do you heard the evidence of CPL Aliyu Yusuf, do you agree or you have any question you want to ask him?

Ans- Safiyyatu evidence or CPL Aliyu Yusuf was true that I told them Yakubu Abubakar had sex me four times but Yakubu said it is three times he sex me, so CPL did not tell the truth against Yakubu.

Court- Fourth prosecution witness in court that was second witness in this sitting and he is Joseph U. T., Christian police No. 113600, Age 38, attached to Area Command Office Gwadabawa Local Government, he affirmed to tell the truth.

Court- Second prosecution witness for today Joseph what do you know about the two accused persons?

Ans- I Joseph what I know was that on the 23/12/2000 at about 2.00p.m. We received information that somebody name Yakubu Tungar Tudu had impregnated one Safiyyatu Husaini of Tungar Tudu for investigation, and we meet them when investigated, Safiyyatu said it is true that Yakubu impregnated her. We asked Yakubu he denied being the one who impregnated her. That is what I know.

Court- First accused, do you hear what witness Joseph said, any objection against him? Or question you need to ask him.

Ans- First accused, I heard and I am satisfied with this evidence.

Court- Second accused Safiyyatu do you hear the evidence of Joseph? Are you satisfied? Or do you have any objection against him or question you need to ask him.

Ans- I hear and agreed with his evidence.

Court- Prosecution any other witness.

Ans- Prosecution I have no any witness to call.

ALLOCUTUS

Court- First accused do you have any things to say before passing Judgement.

Ans- First accused yes I have, that I am satisfied with evidence of police which they informed the court that told them I didn't sex her ever at once. But I am not satisfied with the two witnesses said that was 1st & 2nd witnesses because it is just a plan I didn't agree with that evidence.

Court- Second accused person Safiyyatu Husaini do you have any things to say before passing judgement.

Ans- Second accused, the policemen who testified didn't tell the truth but Yakubu gave me the said pregnancy.

Court- Question to the second accused before passing judgement.

Court- Second accused, Safiyyatu when were you divorced last? How many years to the time you go sexual intercourse with Yakubu Abubakar, which lead you to pregnancy?

Ans- Second accused two years of my divorce.

Court- When divorced were you with hidden

pregnancy from your former husband, before having this sexual intercourse?

EVIDENCE OF ADMISSION

Safiyyatu- 1) For my knowledge it is Yakubu's water that entered and became pregnancy. Because after I left my husband's house, I had three menstrual periods and I cleaned up before Yakubu started reaching me.

Court- Alh. Mode, Messenger, a Muslim 70 year old. Do you witness what Safiyyatu said that she had sexual intercourse with Yakubu Abubakar she was pregnant and she delivered.

Ans- Alh. I witness what Safiyyatu said before the court.

Court- Sarkin Fawa Duka Muslim age 75 years do you witness what Safiyyatu said that she had sexual intercourse with Yakubu Abubakar, which is contrary to the Sharia.

Ans- Sarkin Fawa I witness what Safiyyatu said.

Court- Case Adjourn to 9/10/2001 to enable the court to go through and pass judgement, bail of the accused person continues till 9/10/2001 case adjourns for judgement. Sign by Judge Mohammadu Bello Sanyinnawal.

Today being 9/10/2001 court sits, 2 accused person before the court.

CHARGE

I Mohammodu Bello Sanyinnawal Upper Sharia Court Judge Gwadabawa. I hereby charged you Yakubu Abubakar and you Safiyyatu Husaini with offence of sexual intercourse, in this case that presented by police that you committed an offence of sexual intercourse, while you Safiyyatu got pregnancy and delivered a baby, without being married, which is contrary to Shariah law section 128 in Sharia Criminal procedure code law of 2000, Sokoto State, which is punishable under section 129 (b), the punishment is death to any person committed the same offence, he should be stone to death.

Court- First and Second accused persons Yakubu Abubakar and Safiyyatu Husaini do you understand the charge.

Ans- We didn't understand.

MEANING OF CHARGE

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

Court- Accused person do you understand the

charged.

Ans- Yakubu Abubakar I understand well.

Ans- Second accused I understand what the charge mean.

Court- Two accused persons since you understand the punishment of the offence, you are suspected to have committed, for that do you have any defence, to prevent you not been convicted as the offence is punishable by stoning to death?

Ans- Yakubu Abubakar my reason was that I did not ever have sexual intercourse with her, and the first two witnesses are her relatives but the two policemen have said the truth that I didn't said I have sexual intercourse with her.

Ans- Safiyyatu Husaini, I said I got pregnant and I delivered, which I can't say I impregnated myself it was Yakubu Abubakar who give me the said pregnancy there he said he is the one, but I know he denied being the one, therefore I didn't agreed.

CONVICTION

I Mohamradu Bello Sanyinnawal I am satisfied that you Safiyyatu Husaini have committed an offence of sexual intercourse while you are Muslim and you once married I therefore convicted you with said offence base on your proof and the pregnant you have up till your deliberation which if committed, the offence is punishable to be stoned to death under section 129(b)

of Shariah criminal procedure code law of Sokoto State.

JUDGEMENT

Base on this case No. USC/GW/CR/FI/10/2001. Which the police officer Sgt. No. 122816 Idirisu Abubakar being presented on the 3/7/2001 where he is prosecuting Yakubu Abubakar and Safiyyatu Husaini all of Tungar Tudu that they should be punished under section 129(b) with offence of sexual intercourse after the allegations read over to them, the First accused Yakubu Abubakar denied, but the Second accused Safiyyatu Husaini has proved being that the court ask the prosecution to prove his case by presenting witnesses because the first accused denied. The prosecution called four witnesses.

The 2 first witnesses have testified that the 1st accused has proved having sexual intercourse with Safiyyatu up to three times, but other two witnesses they didn't testify that he proved it while they are the one asking them questions so they are the most people to know what he stated because it is what went for and they took their statements earlier in Islamic Sharia. The two first witnesses of the prosecution against Yakubu Abubakar, who testified to prove that he committed the offence, their evidence can not satisfied the court to convict him for the offence of sexual intercourse,

because the two last witnesses do not witness that because the offence of prohibited sexual intercourse can be prove by pleading guilty or getting evidence of four persons or to see the pregnancy physically as said Risala p. 592, where he said: -

The meaning of this citation: - Punishment of death to who commit an offence of prohibited sexual intercourse can not be imposed until pleaded guilty or seeing the pregnancy or hearing the evidence of 4 male witnesses and matured sensible and they saw them at the same time doing so. If we considered, this citation we could see that the first accused person Yakubu Abubakar does not commit the offence and if prove that he pleaded guilty he still have right to change his plea. If he denied, then it fails to him, see Muhtasar Vol. 2 page 285 where he said:

Meaning of the citation:- The accused can be convicted and sentenced to the punishment at any way unless if he changed his earlier plea so if the charged card be admitted and punishment can not be enforce. But the second accused person Safiyyatu Husaini have pleaded guilty before the offence of prohibited sexual intercourse. In which her pregnant was seen and the delivered it see Muhtasar Book Vol. 2 page 285 where he said:

MEANING OF NASSI

Any woman can be convicted for the offence of prohibited sexual intercourse if the pregnancy was seen and if she was not married. Whether she is a woman or a slave woman. Reference to the above citation Safiyyatu has been convicted with punishment of death and she would be sentenced to death by stoning still she dies. As it come in the Book of Ashalul-Madarik Vol. III page 163 which says:

Meaning of citation: - Any body committed the said offence should be stoned to death and part of Muslim to witness it and at the same time the book explain the part of the convict to be stone to death Vo. III p. 163.

Meaning of citation: - The convict should be stoned at his back and front but not at face and private part. He should be stoned to death. Later to be bathed and prayed and taken to her last home of Muslim. Also Safiyyatu Husaini's execution is stayed until she finished breast-feeding or her baby as said in the book of Ashalul-Madarik Vol. II page 169 where he said:

Meaning of citation: Execution can be stayed if it is during cold or hot season like wise a pregnant woman until she delivered, if same body can feed the baby, and if no one can feed the baby, she can't be executed until she finished breast feeding. Also in the Hadith

Book of Muwata Maliki page 642 says:

The meaning of Hadith: - Maliki inform that he collected from Yakubu son of Taidu Ibn Dalhatu, who collected from Abdullahi Ibn Abi. Mulailkats says he was informed by him that one woman came to prophet of Allah peace be upon him. Informed him that she committed prohibited sexual intercourse and she is pregnant, the prophet said to her go back until you delivered, when she delivered then she should come back, when she delivered she came back the prophet said to her you go, back unto you finished breast feeding after she finished and came back to prophet he ask her to go and hand over the child to someone who would take care of him she went and do so, later she came back then he directed that she should be stoned then she was stoned therefore based on the above grounds, I, Muhammadu Bello Sanyinnawal Upper Sharia Court Judge Gwadabawa I sentence Safiyyatu Husaini Tungar Tudu of Gwadabawa Local Government to be stoned to death, till she die. She should be stoned to death as stated above but not now until she finished feeding her baby, i.e. breast-feeding.

The she should bring herself to court for execution I therefore revoke her bail and she is not under the care of any body and she would not to be remanded at

prison.

But if she does not come back after breast-feeding of her baby, the Muslim people have right to bring her back. And I therefore discharged Abubakar Yakubu Tungar Tudu because he was not convicted by the court.

RIGHT OF APPEAL

Right of appeal to Sharia court of Appeal Sokoto State within 30 days. From today 9/10/2001.

Judgement delivered today.

Sign by and stamp by Judge.

TRANSLATED BY
ABDULRAUF A. SHEHU
HIGH COURT OF JUSTICE
SOKOTO
22/1/2002.

*Protection of
Women's Right
Under Sharia Law
Safiya
TugartuduHuseini
- A Case Study*

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