

Shari'a Implementation in Nigeria

*Issues & Challenges on Women's Rights
And Access to Justice*

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

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

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TABLE OF CONTENTS

Table of Statutes	v
Table of Cases	xiv
Abbreviations	xvi
Bio-data/Contributors	xviii
Acknowledgments	xxii
Introduction	xxiii

THEME 1:

Setting the Scene for the Conference

Welcome Address by <i>Joy Ngozi Ezeilo</i>	2
First Keynote Address by <i>Prof. M. Tabiu</i>	5
Second Keynote Address by <i>Hon. Justice Ibrahim Tanko Muhammad</i>	9

THEME 2:

Women's Human Rights in the Administration of Justice

M. T. Ladan

Women's Rights, Access to and Administration of Justice under the Shari'a in Nigeria.	19
---	----

A. A. Oba

Improving Women's Access to Justice and the Quality of Administration of Islamic Justice in Nigeria.	44
--	----

A.H. Abdelsalam

Islamic Law and Women's Rights: Sudan Experience as a Model	74
---	----

Joy Ngozi Ezeilo

Towards a Cross-cultural Approach to Women's Human Rights.	86
--	----

THEME 3:

Implementation of Shari'a Penal Law and Justice System in a Constitutional Democracy.

Babaji and Y. Dankofa

Assessing the Performance of Lower Courts in the Implementation of Shari'a Penal Law and Justice	
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IMPROVING WOMEN'S ACCESS TO JUSTICE AND THE QUALITY OF ADMINISTRATION OF ISLAMIC CRIMINAL JUSTICE IN NORTHERN NIGERIA

By A. A. OBA, Senior Lecturer, Faculty of Law, University of Ilorin.

“Access to courts in Nigeria is generally poor and access to justice poorer.¹ The reputation of our courts, especially the lower courts, the Area and Customary courts, which are the courts closest to people at the grassroots, are not good. They have been accused of corruption and perversion of justice ...The Islamic criminal system operates within the Nigerian environment and cannot be immune from the problems of the society”.

Introduction

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

Another important preliminary matter is that of worldviews. Worldviews depend on a number of factors such as culture, religion, and ideology. There are many different worldviews in the world. These worldviews sometimes embody conflicting and irreconcilable value systems. Any discussion about women must be placed within specific worldviews

and value systems. The Western worldview is that man is the master of himself. He can do whatever he wants with himself provided he does not hurt another. It is the duty of the State to enact laws, which will facilitate the achievement of his desires, and to avoid laws, which will restrict this objective. Islam does not accept the western view. Neither man nor woman is a totally free agent. Islam subjects man and woman under the command of his Creator – Allah. Again, a woman in the Islamic perspective is under the protection of a man throughout her life, starting from her father, then her husband, and then her eldest son in the event of the husband predeceasing her. Nonetheless, she has full legal capacity as a person to own property and to litigate.

Now the world has become a global village. The means of communications are getting faster with every passing day. A lot of information and cultural practices are available now in the age of cable and satellite television, Internet, video cassette players, videodisk players, and digital videodisk players. However, this information flow has been one-way, consisting of flow from the developed countries. These developed countries are not spread across the world. They are with a few exceptions, concentrated in Europe and America. Collectively they are generally referred to as the Western world. What has occurred in the past few decades is a cultural bombardment of the less developed countries to which Nigeria belongs. There are two distinctive reactions from less developed countries. There is the group that accepts everything from the Western with uncritical acceptance. To them, the West represents what they want their country to become. This group takes western version of human rights as the universal standard to which all societies should conform. Indeed, in the intellectual arena, this attitude is expressed in the theory of universality of human rights. Human rights, they say, are the same for all peoples and in all eras. Of course, there are rival theories.² The relativist school perceives human rights as relative, depending on societies and the era. Another school, the pluralist school says human rights are as pluralistic as there are different cultures. To them, the notion or content of human rights differs from community to community.

The other reaction to this cultural imperialism rejects the domination of the West. They prefer other worldviews. Some of the proponents of this school argue in favour of preservation of the distinctive features of their

own culture. The greatest challenge to western supremacy has come from Islam. Scholars such as Huntington believe that the world moves towards a clash of civilisation.³ This theory championed by Huntington, is premised on the irreconcilable differences between Western civilisation and Islamic civilisation. His theory has suffered a lot of criticism. Nonetheless, there is a lot of truth in some of his assertions. Nobody can deny the fundamental differences between Islamic and Western worldviews.

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

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

This paper is based on a motley collection of statutory materials from three states: the Zamfara State Shari’a Penal Code Law⁴; the Kano State Shari’a Courts Law, 2000⁵; the Kano State Criminal Procedure Code (Amendment) Law, 2000⁶; and the Sokoto State Shari’a Courts Law, 2000.⁷

³ Samuel Huntington, “The Clash of Civilisation?” *Foreign Affairs*, Vol. 72, 1993 and *The Remaking of World Order*, (Simon & Schuster, 1996).

⁴ No. 10 of 2000 (Zamfara State).

⁵ Assented to by the Governor on 25/11/2000.

⁶ Assented to by the Governor on 27/11/2000.

⁷ Assented to by the Governor in February 2000.

With this introduction, one can now proceed to the two broad issues of improving access to justice and quality of administration of Islamic criminal justice in northern Nigeria.

I. Access to Justice

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

Judicial adjudication is not the best means of resolving disputes, especially those concerned with domestic or matrimonial matters. Arbitration is better. Islamic law insists on arbitration before judicial pronouncement of divorce. Nonetheless, the judicial forum is sometimes unavoidable.⁸ Access to courts in Nigeria is generally poor and access to justice poorer.⁹ The reputation of our courts, especially the lower courts, the Area and Customary courts, which are the courts closest to people at the grassroots, are not good. They have been accused of corruption and perversion of justice. Again, the litigation process can be an agonisingly slow, extremely expensive, and unduly technical process. The result is that unless one is wealthy one cannot afford the luxury of litigation.

The Islamic criminal system operates within the Nigerian environment and cannot be immune from the problems of the society. For women, there are additional cultural barriers. A lot has been said about the plight of Muslim women in the north.¹⁰ What is clear is that many are denied the rights guaranteed to them by Islam, and some men use religion to exploit their women. What one will add here is that many of these problems will

⁸ See A. B. Mahmud, *A Brief History of Shari'a in the defunct Northern Nigeria* (Jos University Press, 1988) pp. 29 – 30 and 33 – 34, A. C. Odinkalu, *Justice Denied - The Area Courts System in the Northern States of Nigeria* (Lagos: Kraft Books, 1992) and A. A. Oba, *The Due Process of Law and Key Factors in the Application of the Concept in Area Courts* (Paper presented at a Workshop for Area Court Judges from Five States organised by the Nigerian Bar Association, Ilorin Branch and Sponsored by Women, Law and Development, held at Kwara Hotel, Ilorin, between 8th and 9th June, 2000).

⁹ C. O. Oputa, “Access to Court” *Law and Practice*, Aug. 1988, Vol. 1 No. 1, pp. 1 – 10, 13-15.

¹⁰ See the details given in B. Aisha Lemu, *A Degree Above Them – Observations on the Condition of Northern Nigerian Muslim Woman* (Minna: Islamic Education Trust, undated)

disappear with education and economic empowerment of women. Karimatu successfully challenged her father's alleged power of *ijbar*, that is, power to marry her off without her consent.¹¹ Her move was facilitated by her education and the wherewithal to pursue a court case. A better solution is perhaps an increased Islamisation of the society. The more Islamic a society is, the more recourse there will be to arbitration rather than litigation.

Now when a woman has access to courts, does it mean she will have access to justice? This depends on the law and the quality of the judges. The administrators of law often discriminate against women even under the Penal and Criminal Codes where law does not. For example, women are not accepted as sureties in bail matters.¹² At the same time, the courts often discriminate in *favour* of women, for example by sentencing women offenders to lighter punishment than their male counterparts.¹³ It is easy to see that both attitudes are due to gender stereotyping where women are seen as in need of protection as the weaker sex. There is some discrimination that does not fall within this category. Why is it, for example, that women complaining of domestic violence are not taken seriously unless grievous bodily injury is inflicted? From the police station to the courts, the women complaint will be deluged with pleas, even from person who ought to prosecute her case, that she drops the matter. A woman who can afford the services of a lawyer or who has the backing of a powerful Non Governmental Organisation can obtain judicial redress. It is doubtful if the ordinary woman can.

Some women are not happy that Islamic law does not accept their evidence in *huduud* and *huduud* related cases.¹⁴ It is difficult to understand the basis of this complaint. A woman does not suffer any disadvantage therefrom. In the first place, the rule is for the protection of accused persons. Secondly, no one can say he or she has any human right to give evidence. There is certainly no such right under the constitution. Thus, there is no right infringed upon when one is not acceptable as a witness. Thirdly, as a litigant the woman has no disadvantage. Unlike the common law, Islamic law does not accept parties as witnesses. Whatever a party says is an allegation required to be proved. The scenario where a male litigant gives

¹¹ See *Karimatu Yakubu and Anor v Yakubu Paiko and Anor* (1961 – 1989) 1 Sh. L R. N. 126

¹² M. Odili, "Women and the Law: Discriminatory Practices" *Port Harcourt Law Journal*, Vol. 1, 1999, 208 at pp. 211 - 212.

¹³ *Ibid*, p. 211.

¹⁴ It is no clear whether this rule is statutorily enacted under the new dispensation in northern Nigeria. For example, section 396 of the Criminal Procedure Code (Kano), *op cit*, merely says, "4 unimpeached witnesses" where it ought to have said "4 unimpeached male witnesses".

evidence in his own favour and the female litigant is debarred from giving evidence in her own favour cannot arise in Islamic law.

Women are particularly aggrieved with the law and its administration in respect of rape cases.¹⁵ This complaint is a universal one in common law countries. The complaint is that a woman victim is treated with indifference and rarely gets justice. Starting from the police station when she lodges her complaint, to the court, she is continually embarrassed. In court, she is exposed to cross-examinations designed to further increase her embarrassment. At the end of the day, the accused person is likely to be acquitted on technical grounds, or when convicted, receives a nominal punishment, although the law says that the punishment for rape may extend to life imprisonment.¹⁶

The attitude of Islamic law to rape is that such offence should not exist in an Islamic society. It is the duty of the government to protect the lives and honour of the citizens whether they are Muslims or not. The society is organised on lines within which opportunities to commit rape is virtually non-existent. Persons who are used to life in Western countries where the incidence of rape is alarmingly high will find it extremely difficult to conceptualise a rape-free society. The Shari'a Penal Code¹⁷ punishes rape with *zina* (adultery and fornication) punishments,¹⁸ and in addition, imposes on the culprit, compensation equal to the victim's *sadaqa mithli* (dowry of her equal)¹⁹ in favour of the victim. Under Islamic law, emphasis is on the proof of the offence rather than on impugning the victim's chastity. The standard of proof is the same as in *zina* discussion later in the paper.

¹⁵ See the in depth examination of these matters in T. Akomolafe, "The Rape Case: Man's Trial, Woman's Tribulation?" in J. O. Akande (ed.), *LASU Law Seminar Series, Vol. 1 No. 1*, (Lagos: Lagos State University, undated), p. 86, Joan Kakwenzire, "Women's and Children's Rights in Africa" in Tunji Abayomi (ed.), *Human Rights and Democracy in Africa* (Lagos: Human Rights Africa, 1993) p. 157, Odili, op cit, at pp. 212 – 215 and A. A. Oba, *Rape – The Silent Crisis in Nigeria* (unpublished monograph on file with the author).

¹⁶ Section 357, Criminal Code and section 283 Penal Code. Nonetheless, courts sometimes impose ridiculously inadequate punishment on persons convicted of rape, see the examples in C. O. Okonkwo, "Sentencing for Rape: *The State v Bolivia Osigbemhe*" *Nigeria Law Journal*, 1977-1980, Vol. 11, p. 121 where the convict was given the option of a nominal fine of N600 and N400 upon conviction for six counts of aggravated and repeated rape of two young girls and *Muktar Yerima Mustafa v Bornu N. A.* (1968) SCOPE 14, *Muktar Yerima v Bornu N. A.* (1968) SCOPE 36 where a fine of £20 was increased by the appellate court to an imprisonment for five years upon consideration of a report from an inspector of Area Courts, and more recently, *Oludotun v Ogunbajo* (unreported decision of the Court of Appeal, Ibadan, Appeal No. CA/I/109/95 decided on 22/5/02, see summary in *The Guardian*, December 10, 2002, at p. 8) where the court affirmed a sentence of 7 years imprisonment or a fine of N5, 000.00.

¹⁷ Op cit.

¹⁸ Ibid, section 129 (a) and (b).

¹⁹ Ibid, section 129 (c).

It is important to point out here that a truly Islamic society does not attach any stigma to a rape victim. There is no fault attributable to her and thus, she is not looked upon with ignominy. Under Islamic governments, the emphasis is on eradication and prevention of rape rather than on “access to justice” for rape victims. The countless incidence of unsolved rape cases in Western countries testifies to the wisdom of the Islamic approach. Hugh Clapperton the British explorer (or more accurately, British spy) who visited the Sokoto Caliphate at the time of Muhammed Bello gave this testimony of the peace and security emblematic of truly Islamic communities:

“The law of the Qur’an were in this time so strictly out in force that the whole country when not in state of war was so well-regulated that it is a common saying that a woman might travel with a casket of gold upon her head from one edge of Fellaha dominion to the other without any molestation.”²⁰

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

In many western countries, a new offence of “marital rape” is finding its place in their statute books.²¹ The “offence” is not recognised in all the criminal codes applicable in the country. In Islamic law, a husband may be liable for any injury caused or occasioned by forced sex with his wife, but he can never be liable for “rape”, so long as there is a valid subsisting marriage between them. There is no doubt here that the West has trivialised the serious offence of rape in its quest for “justice” for its women.

II. Administration of Islamic Criminal Justice in Northern Nigeria

Three types of criminal codes are in operation in Nigeria.²² These are the Criminal Code²³, the Penal Code²⁴, and the Shari’a Penal Code²⁵. The

²⁰ Hugh Clapperton, *Journal of the Second Expedition into the Interior of Africa* (London: Frank Cass, 1829) p. 20

²¹ See the discussion of this issue in *TIME*, June 3, 1991, p. 52 and Isabella Okagbue, *The Reform of Sexual Offences in Nigerian Criminal Law* (Lagos: Nigerian Institute of Advanced Legal Studies, 1991) pp. 9 – 10.

²² See the background to the Criminal and Penal Codes in C. O. Okonkwo, *Criminal Law in Nigeria* (London: Sweet and Maxwell, 1980) pp. 3 - 10.

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

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

²⁵ Op cit.

Criminal Code was introduced to Nigeria by the colonial authorities and first used in the northern Nigeria. It was in operation in northern Nigeria between 1904 and extended to the south in 1916. The Code was replaced in the north by the Penal Code in 1960. The reason being that the Penal Code is more “suitable for predominantly Muslim communities”. The North was not particularly impressed by the Penal Code because they were not deceived by its superficial concessions on Islamic ethics. The Penal Code was promulgated into law in the face of considerable Muslim opposition.²⁶ The truth is that apart from the cosmetic improvements, the Penal Code is not any different from the Criminal Code.²⁷ As Karibi-Whyte, aptly pointed out:

*“It is indeed an easily forgotten and ignored fact that the two codes of criminal law in this country have a common origin; namely, the English common Law. The fact that the Criminal [Code] traces its origin directly to Queensland, Australia, and the Penal code to the Sudan and ultimately to India should not obscure the fact that both codes are codifications of English common law of crimes to suit the circumstances of the respective countries”*²⁸

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

What is Islamic Criminal Justice? Islamic criminal justice system derives from Islam. It is the legal expression of Islamic values, concepts, and ideals regarding criminal law. It is important to point out here that there are some differences in the Islamic and western conception of crimes. Criminal law under Islamic law consists of the offences for which the punishments are divinely ordained.²⁹ These are called the *huduud*. The *huduud* and *huduud* related offences consist of theft (*sariqah*); alcohol drinking (*shurbul-khamar*); false accusation of adultery or fornication (*Qahdf*), assault; robbery (*hirabah*), adultery or fornication (*zina*), murder (*jinayat*), apostasy (*riddah*), rebellion (*baghyy*) and sodomy (*liwat*).³⁰ Apart from these, other

²⁶ J. N. D. Anderson, “Criminal Law Reform in Northern Nigeria - A Major Advance”, op cit pp. 451 – 453.

²⁷ See the differences highlighted in Okonkwo, op cit, and p. 9 – 10.

²⁸ A. G. Karibi-Whyte, *History and Sources of Nigerian Criminal Law*, (Ibadan: Spectrum Books Limited, 1993) 232. Owoade agrees. He says: “Both the Criminal and Penal Codes are traceable to the English Common Law”: M. A. Owoade, Some Aspects of Criminal Law Reform in Nigeria, *The Nigerian Bar Journal*, Volume XVI (1980), 25 at 25 n. 2.

²⁹ An introduction to Islamic law of crimes is available in Abdur Rahman I. Doi, *Shari’a: The Islamic Law* (London: Ta Ha Publishers, 1984) pp. 218 – 269. The *huduud* are specifically examined in A. Zubair, *Exigesis of Legislative Verses in the Qur’an and the Relevant Traditions* (Lagos: Al-Madinah Heritage Publications, 1997).

³⁰ See chapter VIII, Shari’a Penal Code.

crimes are *ta'zir* offences, that is, offences for which punishment has not been fixed by divine command but are left to the discretion of the State.³¹

The Shari'a Penal Codes were introduced recently in some states in the north with the intention of giving effect to Islamic law of crimes. Codification of Islamic criminal law is not an easy matter because Islamic law of crimes exist already in a written form. What codification does is to put these crimes in another legal language – the language of the common law. Codification of Islamic law within the current Nigerian legal environment, and in this form and style as done in the Shari'a Penal Code, may mean that the Code will be interpreted in the common law manner, especially if the final appellate court is a common law one like the Supreme Court. The drafters of the Shari'a Penal Code are aware of this problem. Hence, they found other ways of ensuring the enforcement of a more pristine Islamic law of crimes. The Shari'a Courts Law of Sokoto State lists all that is applicable in both civil and criminal cases, including the well known sources of Islamic law³², and specifically mentioned some well-known textbooks of Islamic law of the Maliki School as "reference books" to be used by the courts.³³ Kano State simply provides that "Islamic and Muslim Laws shall be deemed to be statutory laws in all existing laws in the State."³⁴

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

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

³¹ Section 57, Shari'a Penal Code, op cit and Doi, op cit, pp. 226.

³² Section 6, Shari'a Courts Law (Sokoto State), op cit.

³³ Ibid, section 7. This list includes *Al-Risala*, *Muhtasar*, *Tuhfah* and *al-Adawi*.

³⁴ Section 29 (3), Shari'a Courts Law (Kano State), op cit.

³⁵ Mahmud, op cit, pp. 33 - 34 and generally, Odinkalu, op cit.

³⁶ Sokoto State specifically include "serving or retired members" of the Upper Area Court and Area Court (without specifying any further requirement for them) as those qualified to hold office as alkali in the newly created Shari'a Courts: section 4 (1) (a) and (2) (a), Shari'a Courts Law (Sokoto), op cit.

³⁷ A. H. Yadudu, "Colonialism and the Transformation of Islamic Law in the Northern States", (1992) 32 *Journal of Legal Pluralism*, 103 at p. 125.

³⁸ Oba, "Shari'a Court of Appeal in Nigeria: The Continuing Crisis of Jurisdiction" (Paper presented at a Department of Jurisprudence and International Law Seminar held in on 17/11/02 at the Faculty of Law, University of Ilorin, Ilorin.

administration of justice. It brings into contact Islamic and common law concepts of crimes for adjudication in a forum that is supposed to be essentially Islamic. Another feature is that legal practitioners appear to argue cases in the court.³⁹ It has been argued elsewhere that though legal representation is available under Islamic law as specie of agency (*wikalah*), lawyers in the common law mould are not known to Islamic law.⁴⁰ The status and role of legal agents, and rules covering legal representation are markedly different under both systems.

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

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

III. Possibilities for the Defence under the Shari'a Penal Code

Section 126 of the Shari'a Penal Code defines *zina* (adultery and fornication) thus:

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

³⁹ In *Uzodinma v Police* (1982) 3 NCLR 325, it was decided that the statutory prohibitions that prevented legal practitioners from appealing before Area Court are not consistent with the constitutional provisions given accused persons right to defend themselves through lawyers of their own choice. The same case is applicable now in case of the Shari'a Court of Appeal. In any case, the Court of Appeal has held in

Karimatu Yakubu and Anor v. Alhaji Yakubu Paiko and Anor, op cit, that the right to counsel extend to civil cases. See criticisms of this decision as being *per incuriam* in M. Tabiu, "The Right of Audience of Legal Practitioners in Shari'a Courts in Nigeria" *Journal of Islamic and Comparative Law* Vol. 15 – 17, 1985 – 1987 p. 17 - 26 and A. A. Oba, "Do Lawyers have a Right of Audience in the Shari'a Court of Appeal? *Karimatu Yakubu and Anor v. Alhaji Yakubu Paiko and Anor* Revisited, *LASU Law Journal*, Vol. 4 No. 2, 2002, pp. 183 – 197.

⁴⁰ See A. Zubair, "Legal Aid and Legal Representation in Shari'a vis-à-vis the Nigerian Case", *Kwara Law Review*, Vol. 5, 1996, pp. 63 – 64; A. Zubair, "Legal Practice under Islamic Legal System" *Kwara Law Review*, Vol. 8, 1999, pp. 57 – 66, Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, Oxford, 1964), p. 209 and A. A. Oba, *Advocacy under the Shari'a: Its Basis and Legality* (Paper presented at the Annual Conference of the National Association of Muslim Law Students (NAMLASS) held at the Lecture Theatre, Bayero University, Kano between 11 – 12 October, 2001.

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

i. *'Fully responsible'*

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

ii. *'Sexual intercourse through the genitals of a person'*

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

iii. *'Over whom he has no sexual rights'* and

iv. *'In the circumstances in which no doubt exists as to the illegality of the act',*

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

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

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

⁴¹ Section 63 (i), Shari'a Penal Code.

⁴² Ibid, section 48.

⁴³ Ibid, section 63 (ii)

by evidence is virtually impossible. For it requires four unimpeachable male witnesses who must testify to seeing at the same time culprits at the act, and must testify at the same sitting of the court. Should one witness refuse to testify or withdraws his evidence, the other three witnesses who had testified are liable to punishment for slander (*Qadhf*).⁴⁴ For practical purposes, this mode of establishing the offence is virtually non-existent.⁴⁵ When a party confesses to committing *zina*, the confession does not bind the other party. The party who confessed can be punished, but the alleged partner cannot be punished based solely on the confession of the other party.

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

From the Islamic law perspective, there are matters that should be considered in relation to unexplained pregnancy as proof of *zina*. In Islamic law of evidence, there are presumptions. Some are conclusive others are not. Of all the four *Sunni* schools, only Maliki School accepts pregnancy of an unmarried person as conclusive proof of *zina* if she cannot offer reasons to exonerate herself.⁴⁶ In *Al-Muwatta'*⁴⁷ of Imam Maliki, the Imam was quoted thus:

The position with us about a woman who is found to be pregnant and has no husband and she says, "I was forced," or she says, "I was married," is that it is not accepted from

⁴⁴ See Zubair, *Exigesis of Legislative Verses*, op cit, pp. 19 - 23 and section 139, Shari'a Penal Code

⁴⁵ It is nonetheless not superfluous. It is there ready to be invoked in cases of perverts who engage in public sex such as those commercial "live sex shows" prevalent in America and other western countries.

⁴⁶ See El-Umairi, *Islamic Law of Evidence* (unpublished manuscript), pp. 107 – 109. The author was formerly a Lecturer at the Faculty of Law, Ahmadu Bello University, Zaria. He has since retired and left the country. Copies of this valuable manuscript are available among many of his former students. I am obliged to Professor A. Zubair, Head of the Department of Islamic Law, University of Ilorin who made a ⁴⁷ See the translated English version in *Al-Muwatta' – Imam Malik* (translated by A. at Tarjumana and Y. Johnson) (London: Diwan Press, 1982).

her and the hadd is inflicted on her unless she has a clear proof of what she claims about the marriage or that she was forced or she comes bleeding she was a virgin or she calls out for help so that someone comes to her and she is in a state or what resembles it of the situation in which the violation occurred... If she does not produce any of those, the hadd is inflicted on her and what she claims is not accepted from her".⁴⁸

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

Prevent the application of the hadd punishment as much as you can whenever there is doubt⁵⁰

One - neither being a *mujtahid* nor making any pretensions to "expertise" in Islamic law - cannot pronounce any legal verdict (*fatwa*) on these matters. One can only make comments, which can be considered by the experts. The first is that though there are pronouncements of the Supreme Court to the effect that the Maliki school is the applicable school in Nigeria⁵¹, the "Islamic law" incorporated in the criminal law of the States cited goes beyond any particular school. The second is that in contemporary times, pregnancy no longer necessarily connotes sexual intercourse. Artificial insemination and other means are available. The third is that the view of Imam Maliki quoted above refers to a situation where a woman alleges rape. What if she claims ignorance and simply says: I do not know how I got pregnant? Is it not possible for her to be fertilized one way or the other without her knowledge? Again, security is worse now than it was at the Imam's time. Rape is now prevalent. Rape is now very possible even within cities. Rape confronts the Nigerian woman with frightening vividness. Rape in schools, rape in official custody, rape during robberies, rape during riots and rape during "quelling" of riots, sexual harassment at work, school, and everywhere. The stigma attached to and embarrassment attendant to being

⁴⁸ Ibid, p. 392.

⁴⁹ El-Umairi, op cit, p. 108.

⁵⁰ Quoted from Doi, op cit, p. 224.

⁵¹ See *Alhaji Ila Alkamawa v Alhaji Hassan Bello and Anor* (1998) 6 SCNJ 127 at p. 136 (per Wali, JSC).

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

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

Whosoever commits the offence of *zina* shall be punished:

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

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

⁵² Section 34 (1), 1999 Constitution.

⁵³ T. A. Aguda, *The Judiciary in the Government of Nigeria* (Ibadan: New Horn Press, 1983) pp. 46 and 120 – 121, and B. O. Nwabueze, *The Individual and the State under the New Constitution*, NIIA Lecture Series No. 25 (Lagos, Nigerian Institute of International Affairs, 1978) p. 6.

⁵⁴ Zimbabwe: see the joint cases of *State v Ncube*, *State v Tshuma* and *State v Ndhlovu* (1988) (2) S.A. 702, see the case comment on these cases in Gino J. Nasldi, "Judicial Corporal Punishment Declared Unconstitutional by the Supreme Court of Zimbabwe" *African Journal of International and Comparative Law (RADIC)*, (1990, Vol. 2 pp. 131 – 135; Canada: *Smith v Queen* (1988) DLR (4th) 435 and in *Isle of Man* under Art. 3 of the European Convention on Human Rights: *Tyrer v United Kingdom* (1979 – 80) 2 EHHR 1.

⁵⁵ See detailed examination of this argument in Oba, "The Shari'a Court of Appeal..." op cit, pp. 31 - 32.

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

There is also another unresolved issue. Section 406 of the Criminal Procedure Code⁵⁸ provides *inter-alia* that the court shall as soon as possible after passing a death sentence or a sentence for amputation of hand report to the Governor through the Attorney General and the sentence "shall not be carried out unless it is confirmed by the Governor within the period of 90 days". Now, section 408 (1) of the same code provides that "after exhausting all avenues of appeal if utilized by the convict the governor shall make an order for execution of any sentence..." When do the 90 days start to run?

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

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

⁵⁷ See Lev, 20.10, Deu. 22: 13-22) and see further A. A. Oba, "Criminalising Homosexuality: A Re-Examination of the Modern Viewpoints" (unpublished paper on file with the author), p. 1.

⁵⁸ Op cit.

⁵⁹ Zubair, *Exigesis of Legislative Verses* ... op cit, pp. 41 – 42.

⁶⁰ Doi, op cit, p.224.

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

IV What should be done?

There can be two different approaches to improving the quality of administration of Islamic criminal justice in northern Nigeria depending on how one perceives Islamic criminal justice system. The first is to want the administration of Islamic criminal justice to be more compliant with Western systems of criminal justice such as the common law and the civil law. This is the approach likely to be adopted by those who see Islamic criminal system as primitive, barbaric and retrogressive, in other words a law “more suited to the 13th century than 21st”.⁶¹ Another approach is to want it to be closer to the Islamic ideals of criminal justice. This is the approach which proponents of Islamic law, having accepted the Islamic system as the best system for man, are likely to adopt. This is the approach adopted in this paper. There can be a world of difference between Islamic criminal system in its pristine form and the Islamic criminal law as practised in communities. From the Islamic perspective, the best way of improving the administration of this criminal system anywhere and at any age is to bring the practice closer to the pristine form. Islamic criminal system in northern Nigeria is now operated in an environment where supremacy and sovereignty belong outside Islam. In Nigeria, supremacy and sovereignty belongs to the Constitution and the people of Nigeria respectively.⁶² The governments of the states in northern Nigeria like the governments of other states in the country were elected under a system that subject the decision as to who forms the government to the whims and caprices of the people. Thus, improving the administration of Islamic criminal system in northern Nigeria therefore, within the context of this paper, must of necessity be subject to these limitations. If one accepts these limitations, then one cannot be talking of an “Islamic” criminal system in the strict sense.

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

⁶² See sections 1 (1), and (3) and 14 (2) (a), 1999 Constitution respectively.

No one can deny that the reforms carried out by Uthman dan Fodio are closer to pristine than the recent reforms in northern Nigeria.⁶³ There are many testimonies to the quality of justice administered in the courts in the Caliphate from European and Nigerian non-Muslim commentators.⁶⁴ The Sokoto Caliphate was an Islamic State. The political authority not only resided in the leaders of the caliphate, the caliphate was also the dominant power in the sub-region. The state ideology was exclusively Islamic. Islam had the prime place in the education system. The social system and values of the society was dominated by Islamic values. All these had profound effect on the extent of Islamic criminal law enforceable, the quality of judges, and the cooperation of the citizenry. Though the situation in northern Nigeria has not attained the lofty heights, which the Sokoto Caliphate reached. Nonetheless, the recent developments represent a major development in Islamic criminal justice in Nigeria. The contemporary situation can be improved upon and some suggestions are advanced hereunder.

a. The Quality of the Law

The crimes in the Shari'a Penal Code are neatly and appropriately divided into three groups, namely, the *huduud* and non-*huduud* offences⁶⁵, and *Qisas* (bodily harm) and *Qisas* related offences⁶⁶, and lastly *ta'azir* offences⁶⁷. This is no doubt that commendable. The first two groups of offence reflect the drafters' professional expertise and knowledge of Islamic law. The last group however calls for further reflection, for the crimes contained therein were lifted wholly from the Penal Code. Crimes reflect societal values and ethics. It is not likely that the values of the English society as reflected in the Penal Code are co-terminus with those of Islamic societies. Codification of *ta'azir* offences is better done from the scratch, independent of codes

⁶³ See the accounts of the pre-colonial Islamic law courts in Kano in Ibrahim Ado-Kurawa, *Shari'a and the Press in Nigeria: Islam versus Christian Western Civilization* (Kano: Kurawa Holdings, 2000) pp. 285 – 289; the Sokoto Caliphate in A. A. Gwandu, "Aspects of the Administration of Justice in the Sokoto Caliphate and Shaykh Abdullahi Ibn Fodio's Contribution to It" in Syed Khalid Rashid (ed.), *Islamic Law in Nigeria (Teaching and Application)* (Lagos: Islamic Publication Bureau, 1986) pp. 1 – 27; and in O. Bello, "Muhammad Bello's Ideal of Criminal and Political Justice", *Ibid*, pp. 28 – 41 and S. Shagari and J. Boyd, *Uthman Dan Fodio: Theory and Practice of His Leadership* (Lagos: Islamic Publication Bureau, 1978) pp. 28 – 30.

⁶⁴ See the glowing tributes paid to the judges of these courts and Islamic law in F. J. D. Lugard, "Instructions to Political Officers", *Political Memoranda* No. 3, (1906), 168; O. Adewoye, *The Legal Profession in Nigeria 1865 – 1962* (Ikeja: Longman Nigeria, 1977) pp. 2-3; C. O. Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (London: Sweet and Maxwell, 2nd ed., 1980) p. 4 and J. M. Elegido, *Jurisprudence* (Ibadan: Spectrum Books Ltd., 1994) p. 138.

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

⁶⁶ *Ibid*, chapter 9.

⁶⁷ *Ibid*, chapter 10.

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

Another area of concern is the excessive or routine use of imprisonment as a form of punishment. Imprisonment as a penal policy has not achieved much, whether in terms of reformation of offenders, deterrence, or even crime reduction. The use of imprisonment in an Islamic criminal system deserves caution. Although imprisonment as a routine punishment was not used in the prophetic era, there is juristic consensus as to the permissibility of this form of punishment in Islamic law.⁶⁸ Some scholars argue that, imprisonment should not exceed one year because they believe that *tazir* punishment should not exceed a *hadd*.⁶⁹ The prevalent view (to which Maliki school adheres) however places no limit as to the years of imprisonment permissible.⁷⁰ A prisoner is not only deprived of his or her freedom of movement, he is deprived of much more. Take conjugal rights for example. The absence of facilities for this has led to sexual perversions such as homosexuality and lesbianism in our prisons. Imprisonment imposes additional burden on a woman because if she is imprisoned in her reproductive era, she is deprived of her right to procreation – an opportunity if lost, unlike a man, is lost forever. We are not entering here any debate as to validity of, and the maximum period of imprisonment as a punishment under Islamic law - we leave that to others more capable. It suffices here to ask whether our prisons meet the Islamic standard of humanness and human dignity to point out that the Shari'a Penal Code provides for other forms of punishments. Some of those listed under section 93 (1) of the code include reprimand (*tawbikh*), public disclosure (*tash-heer*), boycott (*hajar*), exhortation (*wa'az*), and warning. It appears these punishments have no practical use, as there are no offences punishable by these punishments under the code. Imprisonment, canning and to some extent, fines, are the dominant punishments under the code. Our submission here is that a Shari'a Penal Code, if it makes use of imprisonment as punishment at all, should

⁶⁸ Muhammed Iqbal Siddiqi, *The Penal Law of Islam* (Shari'a) (Lahore: Kazi Publications, 1979) p. 171.

⁶⁹ They used the analogy of imprisonment for *zina* (in addition to lashes) which they fix at one year: *ibid*, p. 171.

⁷⁰ *Ibid*.

keep it to the minimal. It serves no purpose to copy blindly what is done in non-Islamic countries.

Lastly, any attempt to interpret the Shari'a Penal Code from the common law perspective should be resisted. Decisions of English and English style courts are not relevant to Islamic law - so also the methodology and personnel of the common law. Islamic law is Islamic law, common law is common law, and there is no meeting point between the two.

b. Quality of the Administrators of the Law

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

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

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

⁷¹ Private instructions in Islamic law is better than what the famous School of Arabic Studies, Kano offered: A. H. Yadudu, "Colonialism and the Transformation of Islamic Law in the Northern States", *op cit*, pp. 126 - 127, the combined Law degree program have not still attained the level of scholarship available in informal sources: *ibid*, pp. 128 and 130.

⁷² Section 11 (1) (b) and (d), Shari'a Courts Law (Kano), *op cit*.

⁷³ Section 11 (2), Shari'a Courts Law (Kano), *op cit*.

⁷⁴ See section 4 (3) (d) and (e), Shari'a Courts Law (Sokoto State), *op cit*.

law matters is a subjective one determined entirely by the National Judicial Council, a body of about 23 persons with only one “expert” in Islamic Law!⁷⁵

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

c. Reorienting Lawyers about Islamic law

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

⁷⁵ See Item I, paragraph. 20, Third Schedule, 1999 Constitution and more detailed consideration of this issue in A. A. Oba, “Lawyers, Legal Education and Shari'a Courts in Nigeria” in John Hatchard (ed.), *Legal Education and the Administration of Justice in West Africa: Papers From the Commonwealth Legal Education Association 1st West African Regional Conference Abuja* (London: Commonwealth Legal Education Association, 2001) and A. A. Oba, “Judges of the Shari'a Court of Appeal: The Problems of Identity, Relevance, and Marginalisation within the Nigerian Legal System” (unpublished paper on file with the author).

⁷⁶ See Doi's summary of the role and place of judges in Islamic legal system in Doi, op cit, pp. 2 – 15.

⁷⁷ See the summary of the Islamic system in Abdul Muttalib Ahmad Hanbali, “Islamic Law Procedure: A Balance of Justice, Faith and Compassionate Magnanimity” *Kwara Law Review*, Vol. 1 No. 1, 1992, pp. 10 – 21.

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

acclaimed leading constitutional lawyer in Africa, former Chairman of the Constitution (1979) Drafting Committees subcommittee on National Objectives and Public Accountability, and an outspoken opponent of Islamic law, condemns Islamic law in an uncompromising manner⁷⁹, even though, they have no knowledge of Islamic law. Some of us have a smattering knowledge of Islamic law. Others have a working knowledge. All this does not qualify “expertise in Islamic law” in any reasonable sense of the phrase. There cannot be fair comment based on untrue premises. As Lord Denning rightly pointed out in another context, “no comment is fair if it is based in a mistake of fact”⁸⁰ and one will add “nor on distorted facts”.

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

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

d. Islamic Legal Education

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

⁷⁹ See Nwabueze's tirade against Islam in B. O. Nwabueze, *Constitutionalism in the Emergent States*, London and Enugu, 1973, at pp. 83 - 85 in Ibrahim Suleiman's reply thereto in Ibrahim Suleiman, “1979 Constitution and the Shari'a”, in Syed Khalid Rashid (ed), *Islamic Law in Nigeria (Application and Teaching)*, (Lagos: Islamic Publications Bureau, 1986) pp. 62 – 63.

⁸⁰ Lord Denning, *The Closing Chapter* (London: Butterworths, 1983) p. 8

⁸¹ See generally, Oba, “Lawyers, Legal Education and Shari'a Courts in Nigeria”, op cit and I. O. Oloyede, “Islamic Legal Education in Nigerian Universities” in M. O. Abdul-Rahmon (ed.), *Perspectives in Islamic Law and Jurisprudence: Essays in Honour of Justice (Dr.) Muritala Aremu Okunola* (Ibadan: National Association of Muslim Law Students (NAMLASS), 2001), pp. 112 – 124.

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

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

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

e. Public Enlightenment

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

⁸² The program can be summarized thus: After acquisition of basic learning in Arabic language, history and other preliminary courses, Islamic education at university level can be summarised as consisting of advanced study of the preliminary courses and particular in-depth study of foundations of law (*Usul al-Fiqh*), consisting of the nature and sources of Islamic law, its scope and applicability; and the branches of law (*Furu' al-Fiqh*) consisting of substantive, procedural and evidentiary laws; and knowledge of contemporary world so that they have the ability to do *ijtihad* and properly administer Islamic law, see the syllabus of the International Islamic University, Medina in Syed Khalid Rashid (ed), *Islamic Law in Nigeria (Application and Teaching)*, Lagos, 1986, Appendix IX, p. 284.

⁸³ This author has repeatedly called for the creation of professional body of Islamic law practitioners and the establishment of an "Islamic Bar", see: Oba, Lawyers, Legal Education and Shari'a Courts", op cit., and Wahab Gbadamosi, "Varsity teacher seeks Shari'a Bar" The Comet, Friday, December 8, 2000.

going on in the northern states where the Islamic criminal justice is being operated. In fact, the most vehement critic of the newly revived penal sanctions come mostly from the south! Many fear Islamic criminal law for what it is not! Islamic criminal law evokes for many images of amputated hands, indiscriminate flogging and stoning to death. Of course, the press and other enemies of Islam deliberately fanned this macabre image, but ignorance compounded the gullibility of their readers.

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

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

f. Learning Tolerance

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

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

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

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

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

⁸⁵ See the comprehensive study and documentation in Ibrahim Ado-Kurawa, *Shari’a and the Press in Nigeria: Islam versus Christian Western Civilization* (Kano: Kurawa Holdings, 2000).

⁸⁶ A. H. Yadudu, “The Shari’a debate in Nigeria: Dialogue of the Deaf” *The Guardian*, December 7, 1999, p. 8.

a loss of the serious moral basis of society'.⁸⁷ The Nobel literature laureate condemned the arrogance of the West:

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

Solzhenitsyn is very apt. For how can one place the honoring of Safiya by a town in Italy⁸⁹ - an unabridged hatred of Islam or an inordinate love for sexual immorality? This act is another evidence in support of the view that the West is now a post-Christian and a neo-pagan society.

g. Rethinking the Place of Islamic law in Nigerian Legal System

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

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

⁸⁷ See "Russia's Prophet in Exile" in TIME, July 24, 1989, p. 58.

⁸⁸ Ibid.

⁹⁰ Oba, A. A. (2002): "Islamic Law as Customary Law: The Changing Perspective in Nigeria" *International Comparative Law Quarterly*, Vol. 51, October 2002, pp. 817 – 850.

and procedure and help them put their case in the proper legal perspective. The technical victory over opponents which common law practitioners gloat over with so much relish is impossible in Islamic law system

There are other significant and irreconcilable differences between common law and Islamic law.⁹¹ Islamic law frowns at *ex parte* applications.⁹² Evaluation of evidence does not depend on the arbitrary choice of the judges in Islamic law as it does under the common law.⁹³ The principle of *res judicata* does not apply in Islamic law - a judge is never *funtus officio* as regards cases decided by him, he can re-hear and review his own judgement if he discovers for example that it was erroneously made.⁹⁴ The doctrine of *stare decisis*, which is so indispensable to common law, does not exist under Islamic law even where there is a hierarchy system of courts.⁹⁵ An appellant court is not limited to the issues formulated by the parties as in the common law, rather, under Islamic law, an appellate court can *suo motu* reconsider any aspect of the decision of the lower court.⁹⁶

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

⁹¹ See the case of *Chamberlain v Abdullahi Dan Fulani* (1961 – 1989) Sh. L. R. N. 54, and a detailed consideration of some of these differences in Oba, "Lawyers, Legal Education and Shari'a Courts in Nigeria", op cit, pp. 14 - 16.

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

⁹³ See a detailed consideration of this issue in A. A. Oba, *Ascertaining The Veracity of Evidence: A Comparative Study of the Judicial Process in African Law, Islamic Law And Common Law* (Paper presented at a Conference on Politics, Society and Rights in Traditional Societies: Models and prescriptions for the Contemporary Nation Building in Nigeria organized by the Institute for Benin Studies, Benin at University of Benin, Benin between 16th and 18th May 2002).

⁹⁴ F. H. Ruxton, *Maliki Law* (London: Lucar, 1914) pp. 287 - 288.

⁹⁵ A. H. Yadudu, "Colonialism and the Transformation of Islamic Law in the Northern States", op cit, pp. 131 – 134 and Oba, "Lawyers, Legal Education and Shari'a Courts in Nigeria", op cit.

⁹⁶ See Gwarzo's dissenting decision in *Chamberlain v Abdullahi Dan Fulani* op cit, at p. 62.

h. Reforming the Society

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

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

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

⁹⁷ See Suleimanu Kumo, “Shari’a Under Colonialism – Northern Nigheria” in Nura Alkali, Adamu Adamu, Awwal Yadudu, Rashid Motem and Haruna Salihi (eds.), *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books, 1993) pp. 1 – 4. It should be noted that the author is relied on totally on information supplied by colonial agents - S. J. Hogben and A. H. M. Kirk-Greene, *The Emirates of Northern Nigeria*, London, Oxford University Press, 1966, pp. 26, 298, 502, 508 and 462 - for his conclusions

⁹⁸ See sections 15, 1999 Constitution and the detailed examination of this and related issues in A. A. Oba, “Constitutional Responses to Tribalism and Ethnic Pluralism in Nigeria”, *University of Jos Law Journal* 1998, Vol. 6, pp. 27 – 42.

i. Co-operation from the Federal Government

It is quite clear that many of the reforms suggested here are not feasible without the co-operation of the Federal government. The absence of Islamic law and Islamic ethics at federal level invariably affects the quality of Islamic criminal justice in northern Nigeria. For example, the police, prisons, and professional occupations are within the Exclusive Legislative List.⁹⁹ This means that the control of the staff and policy formulation for these bodies rests in the federal government.

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

CONCLUSION

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

⁹⁹ See Items 45, 48 and 49, Part 1, Second Schedule, 1999 Constitution respectively.

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

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

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

We had directed our attention too to the implementation Islamic criminal justice in northern Nigeria. There is no doubt that they have taken very commendable giant steps in the revival of Islamic criminal justice. They had exhibited courage, steadfastness, and patience even in the face of tremendous pressure from national and international opponents of Islamic law. Yet, they should remember that the struggle is a continuous one. They should constantly remember that some opponents of Islamic law argue that the best method to curb what they call Islamic fundamentalism is to allow proponents of Islamic law to operate the law because the group believe that the attraction of Islamic law will fade with mismanagement of it by the operators of the law!¹⁰⁰ Islamic proponents should therefore strive to achieve

¹⁰⁰ See Fareed Zakaria, “How to Save the Arab World” *NEWSWEEK*, December 24, 2001, p. 29. This too is perhaps the attitude of the Federal Government.

the highest standard of Islamic justice. They should be vigilant and must watch the law, the society, and the judges closely. Complaints against administrators of the law should be promptly investigated and effectively tackled. Corrupt and incapable judges should be removed. The laws should be constantly monitored to ensure its proper implementation. Political leaders should ensure that the masses are not driven to crimes by their leaders' indifference to their welfare and harsh economic conditions. We pray for Allah's continual guidance and succour – *wa kafa billahi waliya, wa kafa billahi naseera*.