



THE LAW OF *ZINĀ* IN NORTHERN NIGERIA:
A COMPARATIVE STUDY OF *SHARĪ'AH*,
NORTHERN NIGERIA PENAL CODE AND SOME
MUSLIM COUNTRIES

BY

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ABSTRACT

This research examines the new application of the *Sharī'ah* legal system in some states of Northern Nigeria. It seeks to determine whether or not the new application complies with the *Sharī'ah*. A brief history of the *Sharī'ah* in Northern Nigeria from the pre-colonial era till the year 1999/2000 is included. This includes the anti-*Shariah* movement in Northern Nigeria led by the British colonialists. It also includes the suppression of Arabic Education in Nigeria, and the cessation of Islamic Criminal Law in Northern Nigeria by the British colonizers. This account of history is concluded by explaining the way *Sharī'ah* application was restored in states of Northern Nigeria. The research highlights the situation that opened the avenues of change for those states which led to the success of *Sharī'ah* in achieving its objectives in the society. It compares the Northern Nigeria Penal Code (introduced to Northern Nigeria by British colonizers) with the new codified system of Islamic Criminal law. It also compares the law of *zinā* in three Muslim countries that applied *Sharī'ah* ahead of Northern Nigeria. The Nigerian Constitution was changed several times. An analysis is carried out to determine if the new application by the states complies with the Constitution which was last modified in 1999. The research proves and confirms the constitutionality of *Sharī'ah* which means there is no violation to the 1999 Federal Constitution. This research is confined to the study of the law of *zinā* implemented in Northern Nigeria under what is known as *Sharī'ah* Penal Code. The rest of the *ḥudūd* offences are not examined in this research. Since the inception of *Sharī'ah* application in some states of Northern Nigeria in 1999/2000, the *Sharī'ah* courts have received numerous cases related to the offence of *zinā*. A thorough reading of the two most controversial cases of Amina Lawal and Safiyatu Hussaini decided by the *Sharī'ah* courts in Northern Nigeria is made. The research analyzes whether or not the decisions of the court are in accordance with the *Sharī'ah* law. All these are followed with recommendations by the researcher on how to improve the new application of *Sharī'ah* especially in the area of court procedures. One of the recommendations is that the DNA test should be used by the *Sharī'ah* courts in Northern Nigeria. This helps in reaching the truth with an acceptable degree of certainty especially in the cases of *zinā* presented before the courts. The research is titled “The Law of *Zinā* in Northern Nigeria: A comparative study of *Sharī'ah*, Northern Nigeria Penal Code and some Muslim Countries.”

ملخص البحث

تهدف هذه الرسالة إلى دراسة تطبيق الشريعة الإسلامية في شمال نيجيريا . والهدف في هذا هو معرفة ما إذا كان هذا المطبق في الشمال موافقا تماما للشريعة ومقاصدها. ومن أهداف هذه الدراسة المقارنة بين تطبيق الشريعة والقانون الجنائي الشمالي الذي جاء من قبل المستعمرين البريطانيين. ومن جملة الوظائف لذا القسم أن تتم المقارنة بين كل ما سبق وقانون الزنا في الدول الثلاثة التي هي السعودية والسودان والباكستان، إذ أن لهم قصب السبق في تطبيق الإسلامية في بلادهم لعل الشمال يستفيد من خبراتهم . الدستور النيجيري قد مر بكثير من التغيرات والتطورات عبر التاريخ، فمن مهام هذه الرسالة أن تدرس الدستور النيجيري وبالذات ما يتعلق بتطبيق الشريعة في البلاد لترى مدى سماح وموافقة الدستور لما فعلته بعض الولايات في الشمال من تطبيق الشريعة في مناطقها. والرسالة في النهاية أثبتت قانونية كل ما فعلته تلك الولاية من تطبيق الشريعة. هذا، ومجال البحث في هذه الرسالة هو قانون الزنا في شمال نيجيريا. وكذلك القضايا المتعلقة بالزنا التي رفعت إلى المحاكم الشرعية للبت فيها بما يوافق الشريعة وروحها. والرسالة ختمت بمجموعة من المقترحات التي قدمها الباحث كمساهمة في تقديم ما يرقى تطبيق الشريعة إلى أرقى مستوى يحمي. من تلك المقترحات ، إقتراح الباحث للمحاكم أن توسع دائرة الطرق لإثبات الأحكام حتى تشمل الوسائل الحديثة كالبصمة الوراثية (DNA)، طلبا للحصول على اليقين عند البت في أحكامها. والرسالة قد اشتملت على ملخص تاريخي للشريعة في شمال نيجيريا ، وقد اشتمل هذا القسم دراسة مؤامرات البريطانيين لهدم الشريعة في البلاد. وأخيرا الأوضاع التي سمحت للحكام في الشمال لتطبيق الشريعة . هذا ، وقد أسميت هذه الرسالة "تطبيق قانون الزنا في شمال نيجيريا" دراسة مقارنة بين قانون الزنا الشمالي الشرعي وما هو معروف بقانون الجنائي الشمالي. وقد اشتملت المقارنة بعض الدول الإسلامية. سائلا الله التوفيق والسداد

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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A COMPARATIVE STUDY OF *SHARĪ'AH*, NORTHERN NIGERIA
PENAL CODE AND SOME MUSLIM COUNTRIES**

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This dissertation is dedicated to my father Shaykh Nuhu Tahir Tajuddeen whose moral and financial support I enjoyed toward my education, the one who instilled in me and indeed the whole family the thirst for knowledge.
I ask Allah to reward him and my mother Rahmatu Harun in this life and the hereafter.

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LIST OF ABBREVIATION

AIDS	Acquired Immune Deficiency Syndrome
BBC	British Broadcasting Corporation
DAIJ	Diploma in <i>Shari'ah</i> Law and Legal Practice
DLSP	Diploma in Law and Administration of Islamic Judiciary
DNA	Deoxyribonucleic acid
FCT	Federal Capital Territory
HIV	Human Immunodeficiency Virus
IUM	international Islamic University Malaysia
J.C.P.C	Judicial Committee of the Privy Council
LFN	Laws of the Federation of Nigeria 1990
NPC	Nigerian people's Congress
PW	Prosecutor Witness
US	United State of America
USC	Upper <i>Shari'ah</i> Court
WACA	West African Court of Appeal
WARDC	Lagos: Woman Advocates Research & Document Centre

LIST OF TRANSLITERATION

Consonants

ء	'
ب	B
ت	T
ث	Th
ج	J
ح	h
خ	Kh
د	D
ذ	Dh
ر	R
ز	Z
س	S
ش	Sh
ص	Ṣ
ض	ḍ
ط	ṭ
ظ	ẓ
ع	'
غ	Gh
ف	F
ق	Q
ك	K
ل	L
م	M
ن	N
هـ	H
و	W
ي	Y

Short Vowels

ـَ	a
ـِ	i
ـُ	u

Long vowels

ا + ـَ	ā
ي + ـِ	ī
و + ـُ	ū

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

Islamic law or *Sharī'ah* by nature is a wide and holistic system that encompasses every aspect of a Muslim's life. One of the most important and undoubtedly sensitive parts of *Sharī'ah* is Islamic criminal law. It is a body of law that: defines criminal offences, regulates the apprehension, charging and trial of suspected persons, and determines the type of punishment and the mode of execution applicable to the offenders.¹ The objective of Islamic Criminal Law is to ensure peace and security in the society by controlling the commission of crimes and protecting the rights and interests of the public. Islamic Criminal Law identifies various crimes and has prescribed punishments that are deterrent, reformatory and retaliatory. All these components of Islamic Criminal Law make it effective which is essential because the social structure of a society is very fragile and the absence of an effective criminal justice system threatens the moral fabric of a society. Mere prohibition of an offence by the government or any other authority does not guarantee the compliance of the public. Instead it is the realization of the (existence of Allah and the hereafter) that acts as a deterrent. Nevertheless, in order to ensure the effectiveness of Allah's prohibitions there is a need for the enforcement of punishments that guarantee the effectiveness of such prohibitions. The Qur'ān says, "Whosoever works evil, will have

¹ Anwārullāh, *The Criminal Law of Islam*, (Kuala Lumpur: Percetakan Zafar Sdn Bhd, 2002), vii.

the recompense thereof, and he will not find any protector or helper besides Allah.”² Therefore, the Muslim scholars unanimously agree that the enforcement of Islamic criminal justice is the foremost duty of any Islamic state to ensure it succeeds in protecting the society from the evil effects of crimes and also reforms the offenders and evil doers.³ Hence, Islam promotes universally accepted values which include the protection of religion,⁴ intellect⁵, life,⁶ property⁷ and progeny.⁸

There are three types of offences based on the quantum of punishment in Islamic criminal law, i.e. *ḥudūd*, *qiṣās* and *ta‘zīr*. The *ḥudūd* are the fixed

² Qur’ān, Sūrah al-Nisā: 123. See also Muḥammad Taqī-ud-Dīn Al-Hilālī & Muḥammad Khān, *The noble Qur’ān, English Translation of the meaning and commentary*. Saudi Arabia: King Fahd complex for the printing of the Holy Qur’ān.

³ Ismā‘īl al-Fārūqī, “Humanism and the Law: The case of the *Sharī‘ah*”, *Journal of Islamic and comparative Laws*, no.10 (1981) : 6

⁴ For this reason apostasy is forbidden in Islam. The Prophet ﷺ said: “Whoever changes his religion kill him.” (Al-Asqalānī, *Bulūgh al-Marām*, ed. 1996: 428): For further details on the protection of religion see ‘Abd al-Qādir ‘Auda, *Islamic Criminal Law*, (Egypt: Maktabat al-Turāth, 2003,) the crime of apostasy.

⁵ For effectiveness in protecting the intellect of human beings, anything that has a bad effect on the mind is prohibited i.e. drugs or wine. Allah ﷻ says, “O you who believe! Intoxicants (all kinds of alcoholic drinks), gambling, *al-ansāb* and *al-azlām* (arrows for seeking luck or decision) are an abomination of shaiṭān’s (Satan) handiwork. So avoid (strictly all) that (abomination) in order that you may be successful.” (Qur’ān, al-Mā‘idah: 90): For further details on the protection of intellect see ‘Abd al-Qādir ‘Auda, under the topic of consuming intoxicants.

⁶ Unjustifiable killing is strictly prohibited in Islam to ensure the protection of life. Allah ﷻ says, “And do not kill anyone which Allah ﷻ has forbidden, except for a just cause. And whoever is killed (intentionally with hostility and oppression and not by mistake), We have given his heir the authority [(to demand *Qiṣās*, law of equality in punishment or to forgive, or to take *diyyah* (blood money)]. But let him not exceed limits: In the matter of taking life (i.e. He should not kill except the killer only). Verily, He is helped (by the Islamic law).” (Qur’ān, al-Isrā’: 33). Because of this, suicide is also prohibited in Islam. “Do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.” (Qur’ān, al-Nisā’: 29): For further details on the protection of life see ‘Abd al-Qādir ‘Auda, The crime of killing.

⁷ To ensure the protection of property, all crimes against property are forbidden. Allah ﷻ says, “O You who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you.” (Qur’ān, al-Nisā’: 29): For further details on protection of property see ‘Abd al-Qādir ‘Auda, The crime of theft.

⁸ To establish this goal Allah ﷻ has made *zinā* together with anything leading to it prohibited, and thus, marriage is encouraged. Allah ﷻ says, “And come not near to the unlawful sexual intercourse. Verily, it is a *Fāhishah* [i.e. anything that transgresses its limits (a great sin)], and an evil way (that leads one to Hell unless Allah forgives him).” (Qur’ān, al-Isrā’: 33). Qur’ān talks about marriage in the following verses, “And marry those among you who are single (i.e. a man who has no wife and the woman who has no husband) and (also marry) the *Ṣāliḥūn* (pious, fit and capable ones) of your (male) slaves and maid-servants (female slaves). If they be poor, Allah will enrich them out of His bounty. And Allah is All-Sufficient for His creatures’ needs, All-Knowing (about the state of the people).” (Sūrah al-Nūr: 32). For further details on the protection of progeny see ‘Abd al-Qādir ‘Auda, the crime of *zinā*.

punishments for certain offences which are universal and the variation of time and place has no impact on them.⁹ These offences include theft, robbery, *qadhf* (false accusation of *zinā*), *zinā*, drinking of intoxicants, apostasy and *al-baghy* (rebellion against the leader).¹⁰ The *qiṣāṣ* punishment is described as retaliation. For example, if a man kills someone intentionally he would be killed in return. These offences are different from *ḥudūd*, because their punishments are prescribed as the right of an individual which he or any of his legal heirs can remit.¹¹ The third punishment is *taʿzīr* which literally means to prevent, to honour, to correct, to moderate, to avoid or to assist.¹² According to Islamic criminal law, the term *taʿzīr* signifies any punishment for a crime which has not been fixed by Allah ﷻ in the Qurʾān or by the Prophet ﷺ in his Sunnah. It has been left to the discretion of the ruler or the judge to fix it in accordance with the prevailing circumstances¹³. He has the discretion to determine the punishment in order to reform the culprit and restrain him from recommitting the crime.¹⁴ These are the three types of offences found in *Sharīʿah*. However, this research is confined to the implementation which has given rise to debate among the Nigerian public. The *Sharīʿah* Penal Code of Zamfara has been selected due to the fact that it is the first state to introduce the *Sharīʿah* Legal System in Northern Nigeria. Stemming from this, the remaining eleven states that followed

⁹ Due to this, when one of the companions of the Prophet ﷺ attempted to intercede against the execution of punishment of one of those offences, the Prophet ﷺ informed him that by doing this he is crossing the boundaries set by Allah ﷻ. He said to him, “Usāmah would you dare to intercede in the laws which Allah ﷻ has prescribed...” (Al-Asqalānī, *Bulūgh al-Marām*, ed. 1996: 440)

¹⁰ Al-Tuwaijirī Muḥammad Ibn Ibrahim, *The Book of crimes*, (Buraidah: Cooperative Office for Call & Guidance, 2000), 17.

¹¹ Bakr ʿAbd Allah Abū Zaid, *Al-Ḥudūd wa al-Taʿzīrāt ʿinda ibn al-Qayyim*. (Saudi Arabia: Dār al-ʿĀṣimah), 21-26.

¹² Saʿīd ibn ʿUmar ibn ʿAbd Al-ʿAziz al-Khārashī, “Al-Taʿzīr bi Qaṭʿ al-ṭrāf,” *Journal of Juristic and Legal Issues*, no. 44 (1430) : 169-171

¹³ Nāṣir ibn Ibrāhīm al-Muhaimidī, “Al-Taʿzīr bil Ilzām bil Aʿmāl al-Taṭawwuʿiyyah wa al-Ijtimāʿiyyah,” *Journal of Juristic and Legal Issues*, no. 43 (1430) : 130.

¹⁴ ʿAbd al-Malik Bappa, *A brief history of Sharīʿah in the defunct Northern Nigeria*, (Nigeria - Jos: University Press Ltd, 1988.), 49 – 54. See also At-Tuwaijirī, 4,17,18

the example set by Zamfara state duplicated the laws codified in Zamfara' *Sharī'ah* Penal Code with only a few amendments. These States have been given the authority to implement Islamic Criminal Law by Section 38(1), 4, 6 and 277 of the Federal Constitution of the Nigeria. The legal structure used to implement the *Sharī'ah* Penal Code is composed of the Lower *Sharī'ah* Court, Upper *Sharī'ah* Court, and the *Sharī'ah* Court of Appeal. By virtue of the abovementioned sections from the constitution, these courts have the jurisdiction to decide cases of its Muslim citizens inclusive of those involving capital punishment. More details are given in Chapter Three of this research.

1.1 STATEMENT OF PROBLEMS

On 27th October 1999, the Zamfara State Government announced the enactment of Islamic law in their region.¹⁵ A few months later other states in Northern Nigeria attempted to emulate Zamfara State and implement the same system.¹⁶ These states emphasized the importance of the codification of the aspects of *hudūd* and *qiṣāṣ* penalties above everything else. Nevertheless, this attempt was seen as unconstitutional and non-Muslims in the country reacted negatively towards this change which resulted in some loss of life and property in some states of the Federation.¹⁷ Furthermore, the human rights activists used this to justify their claim that Nigeria is a crude and brutish society. They went further to say that the present

¹⁵ 'Umar 'Abd-al-Qādir, "Legality and Problems of Implementation of *Sharī'ah* Legal System Under 1999 Constitution of Nigeria," (B.A. dissertation, Ahmadu Bello University Zaria, 2002), 65.

¹⁶ These States are; Kano, Kaduna, Borno, Sokoto, Yobe, Bauchi, Katsina, Niger, Kebbi, Jigawa and Gombe.

¹⁷ Kaduna, Jos, and Kano States are leading examples of where these crises that led to loss of lives occurred. See 'Umar 'Abd-al-Qādir, 3.

installed democratic government had not made matters in the country any better because of the *Sharī'ah* phenomenon.¹⁸

Despite the strong opposition that the Zamfara state and 11 other Northern Nigerian states encountered, they continued to pursue their aim to codify *Sharī'ah* law. This set the background for the discussion of the following problem: The problem which inspired the researcher to conduct this research is the claim by Nigerian non-Muslims that the codification of *Sharī'ah* (particularly in relation to penal Law) is unconstitutional and therefore should be rejected. According to them this attempt is contrary to section 10¹⁹ of the constitution.²⁰ In addition they claimed that their right to freedom to practice religion provided in section 38 of the constitution would be encroached if they allowed *Sharī'ah* to operate.²¹ They did not subscribe to the idea of *Sharī'ah* implementation because of this misconception.

Another problem is that the Muslims believe that it is their fundamental right to freedom of thought, conscience and religion provided by section 38 (1)²² to enact Islamic law. Muslims believe that without the implementation of the *Sharī'ah* law their practice of Islam will be imperfect. The system regulates the Muslim society and thus enabling its members to lead complete and satisfactory lives. Therefore based on this reason the enactment of the *Sharī'ah* legal system in those regions is deemed necessary.²³

¹⁸ Ibid.

¹⁹ The section says: "The Government of the Federation or of a State shall not adopt any religion as State Religion." (1999 Constitution of the Federal Republic of Nigeria)

²⁰ See further explanation in chapter four of this research.

²¹ 'Umar 'Abd-al-Qādir, 3.

²² The section says: "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. (1999 Constitution of the Federal Republic of Nigeria)

²³ 'Umar 'Abd-al-Qādir, 3.

A final problem is found in the practice of the *Shari'ah* courts. One example is when the *Shari'ah* Court of Appeal overruled the decision of the Lower *Shari'ah* Court in some cases of *zinā* and this was done without reference to the position under the *Shari'ah*. The research is prompted by these problems and the researcher aims to provide a comprehensive analysis of how these problems are addressed.

1.2 HYPOTHESES

This research seeks to prove the following hypotheses:

1. The enactment of the law of *zinā* in Northern Nigerian is in accordance with *Shari'ah* principles based on the Qur'ān and the Sunnah.
2. The enactment does not violate any part of the 1999 Nigerian Constitution.
3. Nevertheless the enactment of the law of *zinā* faces challenges in terms of application as shown in the two case studies of this research.

1.3 OBJECTIVES OF THE RESEARCH

The research has five objectives:

The first objective of this research is to compare and contrast the application of the *Shari'ah* legal system (in particular the law of *zinā*) and the Nigerian Penal Code in Northern Nigeria. The Northern Nigerian Penal Code was actually introduced by the British colonizers as a law for both the Muslims and Non-Muslims living in Northern Nigeria. The law of *zinā* in some Muslim countries shall be included in the analysis so as to increase its comprehensiveness. *Shari'ah* implementing states in Northern Nigeria can benefit from the similarities, differences or experiences of those foreign countries in order to make the new application more effective.

The second objective of this research is to clarify the misconception people in Nigeria and elsewhere in the world have about the legitimacy and constitutionality of the enactment of the *Sharī'ah* Legal System in Northern Nigeria with regard to the offence of *zinā*. This will be done by analyzing the views on *Sharī'ah* enactment and then selecting the correct opinion which is supported with proofs established by the constitution. Consequently, doing this will enable the researcher to establish the legitimacy of the decisions made by *Sharī'ah* courts in northern Nigeria.

The third objective of this research is to critically analyze the two controversial cases of *zinā* (Amina Lawal and Safiyatu Hussain) decided by *Sharī'ah* courts in Northern Nigeria after the enactment of *Sharī'ah* in Northern Nigeria. The reason for doing this is to clarify a misconception about the judgments being gender biased against women²⁴.

The most important aspect of *Sharī'ah* application is the positive impact it has on the society which is the case in Northern Nigeria as it will be seen later in this research. It is essential for this research to highlight the benefits which the northern society has gained from the application of *Sharī'ah* law. This will help in proving that those who accuse *Sharī'ah* of bringing insecurity and violence to the society are misinformed in their judgment. The facts established from analyzing the cases will be a tool in achieving this aim²⁵.

The fifth objective of this research is to serve as a guide for the society to know and understand the role they are supposed to play in spreading the divine revelation of Allah. They have to fulfill this role to ensure that Allah's message to humankind

²⁴ The reason behind selecting these two cases is mentioned in Chapter Six of this research: 6.0 Introduction.

²⁵ For more details on this issue refer to Chapter Four of this research: 4.3 Steps taken by the Government to cleanse the society.

becomes superior and uppermost on the face of the earth since this is the only way to achieve world peace.

1.4 LITERATURE REVIEW

Since the inception of the implementation of the *Sharī'ah* legal system in Zamfara State, numerous articles, theses, and papers have been written about it. A number of conferences have also been held across the country on the same topic. Some of those materials are highly relevant to this research while others do not deal directly with the research topic. However, they are needed to elaborate on some issues discussed in the research. The literature in this regard is classified into three groups: literature dealing with the historical background of *Sharī'ah* in Nigeria, the legality and constitutionality of *Sharī'ah* application in Northern Nigeria, and those that deal with the positive impact made by *Sharī'ah* on any society that applies it. Among writers that have written on the historical background of *Sharī'ah* application in Northern Nigeria is 'Abd al-Malik Bappa Maḥmūd,²⁶ In his book he discusses several issues regarding the conspiracy by the British against *Sharī'ah* in Northern Nigeria. His discussion includes; the suppression of Arabic Education by the British colonizers,²⁷ how they abrogated the *Sharī'ah* Legal System and the cessation of Islamic criminal laws in Northern Nigeria. Among the important topics he discusses are the importance of *Sharī'ah* in building the society, the obligation of applying *Sharī'ah* and a call to an Islamic authority.²⁸ This book is one of the main references of this research, especially on the history of *Sharī'ah* in Northern Nigeria.

²⁶ 'Abd al-Malik Bappa, *A brief history of Sharī'ah in the defunct Northern Nigeria*, (Nigeria: Jos University Press Ltd, 1988).

²⁷ Ibid.

²⁸ Ibid., 49-54. For further details on the difference between the two systems refer to Chapter Five of this research: 5.1 *Zinā* under Northern Nigeria Penal Code 1963.