

Jurisprudential Appraisal of Concept of Adultery in Islamic Penal Administration of Secular State: Critique of Challenges to Enforcement in Nigeria

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Abstract: The eradication of the powers of the traditional rulers in the criminal circles led to the demise of Islamic criminal justice administration. The new introduction at the end of the millennium led to an overwhelming reception which however brought both resistance and approval from the Christians and Muslims: The doctrinal method is adopted and found that the enforcement of the punishment of adultery in Nigeria is challenging both at home and abroad due to the religion sentiment and uncared attitudes of some Muslims towards the enforcement of the crime and the unfavorable environment, such as economic hardship, corruption, insecurity and absence of sincerity in the enforcement of the crime. It has been recommended that to make the enforcement of the crime meaningful, both government and the Muslims must provide conducive economic, security and corrupt –free environment. It was further recommended that the society should be better enlightened as to the religious obligations while the Christians should be made to have confidence in the enforcement of the offence particularly as the Islamic law only bind Muslims and consented non- Muslims.

Keywords: Adultery, appraisal, criminal, justice, enforcement, Islamic, jurisprudential, Secular State,

1. Introduction

The reintroduction of Islamic criminal law of Adultery (otherwise called Zina) into Islamic Criminal Justice System in Nigeria between 1999 and 2003 threw the country into a major darkness across the Northern States of Nigeria and created fears and reactions throughout the Nigerian State. The re-introduction led into dividing the country opinion into approved and resentment. While the Muslims approved the reintroduction of the Legal system, the Christians, both at home and abroad resented for of uncertainties on the application of the justice system particularly as it affected them. The Christian resenting and holding the view that the re-enforcement of Islamic Criminal law of crimes was not only against the trend of democracy both nationally and internationally but a step back to the pre-civilization period otherwise referred to as the “dark days” of civilization. From the forgoing, there seems to exist two opposing groups on the re-introduction of Islamic Criminal Justice system into Nigeria of Adultery which has led to the major challenge on the enforcement of the crime of adultery (Zina).

This paper seeks to examine the challenges to the enforcement of the Islamic Crime of Adultery in a secular state, focusing on Nigeria, from the perspective of definition, proof assigned by the different Islamic schools of thoughts, incomprehensive application of the injunction of Qurqan and Hadith, constitutional impediment as well the review of some judicial discussions.

2. Conceptual clarification of terms

2.1 Adultery (Zina)

Zina is the Arabic word for adultery. Generally, adultery or zina is defined as an unlawful sexual intercourse between men and women. Conceptually, adultery or zina means:

An intercourse between a man and a woman who is neither legally married nor is it a relationship of master and his slave girl or any relationship that establishes some semblance of validity. It is an act of sexual intercourse between man and woman who are not legally married to each other.¹

The different prominent Islamic school of thoughts have attempted to assign meanings to the word “Adultery (Zina)”.

The Maliki School restricts the meaning to “any sexual intercourse that is not legally sanctioned by valid marriage nor by any other reason to support the existence of marriage of master and slave girl.”² On the other hand, the

¹ Rusa, M.A. Bidayaul Mujtahid Wanuhayat al- Muqtasid Daral ihya itturah al- arabi (1992 Vol. 2 p.559)

Henef School of thought concluded that adultery is a voluntary illegal sexual intercourse between a man and a woman who are married either before or presently.³ The Hambali School of thought confined adultery to unlawful sexual intercourse through the female organ or through the rectum. The Shafii Schools accept the insertion of the male penis glands into the female organ in circumstances where there exists no misapprehension of fear.⁴

It is the view of this author that the above views of the different Islamic Schools of thoughts point to no other area than that adultery is “unlawful sexual intercourse”.

2.2 Statutory Definition of Adultery

The Penal Code defines adultery as follows:

Whoever being a man subject to any native law or custom in which extra marital sexual intercourse is recognized as a criminal offence, has sexual intercourse with any woman whom he has reason to believe is not his wife, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both⁵.

The Sharia Criminal Code defines adultery (zina) as follows:

Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital of a person over which he has no sexual rights and in the circumstances in which no doubt exist as to the illegality of the act, is guilty of the offence of Zina⁶

3. Critique of Islamic penal administration on Adultery

3.1 Punishment for Adultery (Zina)

Punishment for adultery or zina is death or 100 lashes of cane which is viewed in Islam as very severe. Islam also believes that punishment is an integral part of retributive justice that is anchored on the principle of justice, the main purpose for which Allah (SAW) sent messengers (PBUH) to mankind.

Allah said in the Holy Quran: “We have sent aforetime our messages with clear signs and sent down with them the book and the balance of rights and wrongs that men may stand forth in justice and we sent down iron, in which is great might ”⁷

Punishment is simply the penal law prescribed by the Shariah for violating the law of God. Punishment could be said to mean recompense or compensation for the evil act of the doer which comes after the act was committed⁸. In view of the gravity of the punishment of adultery, Islam has placed very high standard of proof to prevent an abuse in the Islamic Criminal justice administration.

3.2. Nature and procedure for proving Adultery

The nature of proof of offences in Islamic law is that where the punishment is severe, the procedure to establish the offence is rigid and cumbersome such that it may turn round to be formidable or even impossible to prove.⁹ The Islamic Criminal Justice System provides that the offence of adultery must be proved with sufficient number of witnesses or by confession or pregnancy without valid husband.¹⁰

In *Commissioner of Police V Amina Lawal and one Other*¹¹ the court held, “In Islamic Law the offence of adultery can be established or proved by three means, namely confession of the accused, testimony of witnesses and appearance of pregnancy by a woman who is believed not to be married”

² Sa'id, M.I. and Muhmud, M.D. “Wither the law of Adultery in Islam : A need for Redefinition” Journal of Islamic and Comparative Law, Usmanu Danfodiyo University, Sokoto Nogeria. (2000) vol.2 p. 41

³ *ibid*

⁴ *ibid*

⁵ Sections 387 and 387 Penal Code Law of Nothern Nigeria 1963 (as adopted and amended by the Northern States of Nigeria)

⁶ Section 126 Sharia Penal Code Laws of Yobe State,

⁷ Surat 57 Ayat 25

⁸ Surat 42 ayat 40

⁹ *AlAhmadu Rungumawa v Hantsi Muh'd Rungumawa* (2006) 3 SLr (pt. 11) 204 @ 211

¹⁰ See Section 124 Sharia Penal Code, Laws of Kano and Katsina Stetes

¹¹ (Unreported) Referred to by Ladan, M.T in *Sharia Implementation in Northern Nigeria: Wqmqn and Children Rights Focus* League of Democratic Women (Leeds Nigeria) Kaduna (2005) pp. 111- 113.

The Sharia Penal Code provides that the offence of adultery can be proved as follows:¹²

- i. That the accused had sexual intercourse through genital with a man or a woman.
- ii. That he or she knows or had reason to know that he or she has no sexual rights over the person is neither the husband nor the wife.
- iii. That the sexual intercourse was not done in circumstances that doubt can be relied on the illegality of the act.

Ladan¹³ observed that:

The provision of the Sharia Criminal Code has links with the traditional penal code, though with some difference regarding to definition and punishment for the offence. It is the further observation that the offence of adultery is not limited to intercourse with person known to be the wife or husband of another person but extends to cover any extra marital sexual intercourse through the genital of a person (which differentiate it with sodomy) the punishment for fornication and adultery.

3.3 Standard of Prove of Adultery

The standard of proving the offence of adultery in Islamic law is very high and rigid that it is hardly proved. This standard is depended on the nature of witnesses and quality evidence.

3.3.1 Requirement for Witnesses

The Holy Quran provides for four male witnesses in proof of adultery. The Quran states “Why did they not bring four witnesses to prove it when they have not brought, such men in the sight of Allah (stand forth) themselves as liars”¹⁴

In addition the four witnesses must satisfy the test of trustworthiness and must also see the actual act being committed with their testimonies clear and unambiguous.

Where any of the four witnesses gives a different version contrary to what is required by Islamic law, the accused will not only be acquitted but the other three witnesses will be punished severely for false evidence against the accused.¹⁵

The offence of adultery is divided into two types based on the nature of punishment. There is adultery by an unmarried and married person and the nature of punishment as prescribed by Allah in the Quran¹⁶ and the Hadith or Sunnah of the Holy prophet (SAW).

All the jurists of the schools of thought are agreed on the proof of adultery by four witnesses provided the four witnesses are reliable, male, adult, Muslims and sane and must have seen the commission of the act at the same time and such testimony must be clear and unambiguous.¹⁷ Notwithstanding the above concurrence of the schools of thoughts, they however differ as to the procedure or manner of the testimony of the witnesses.

The Maliki and Hanafi schools approved that the witnesses must testify at the same venue and attend the venue at the same time and testify. The Shafu school did not insist on the testimony of the witnesses at the same venue and time.

The position of the husband of a wife who are blessed with children for the purposes of witness of adultery is contested by the different schools of thought. While Maliki school admits the testimony of a husband with other qualified witnesses, the Hanafi, Hambali and Shafii schools of thought hold the view that the evidence of a husband is not admissible against the wife.¹⁸

It should be noted that generally, the evidence of a Muslim is deemed reliable unless otherwise disqualified and strict religious animosity will not be regarded as a ground of impeachment of witness.

3.3.2 Requirement for Confession or Admission

A confession or the admission of adultery which must be clear and devoid of ambiguity in its wordings and contents is a better evidence when made by able and matured person thereby bringing the maker liable for the enforcement of the punishment of the crime against him.

¹² Ladan, M.T. *A Hand book on Sharia Implementation in Northern Nigeria: Wqmqn and Children Rights Focus League of Democratic Women* (Leeds Nigeria) Kaduna (2005) p. 144

¹³ Ladan, M.T. *A ibid* p. 144

¹⁴ Surat 24 ayat 13

¹⁵ *AlAhmadu Rungumawa v Hantsi Muh'd Rungumawa* (2006) 3 SLr (pt. 11) 204 @ 216 par.148 - 154

¹⁶ Surat 52 ayat 2

¹⁷ Anas, M.Y. “Adultery(Zina) and punishment in Islamic Law: A case of misunderstood Approach in present times”

¹⁸ *Ibid*.

This Islamic principle received judicial approval by the apex court in Nigeria. In *Hada v. Malumfashi*¹⁹ where the Supreme Court held that “An admission or *iqrar* under Sharia Islamic Law is a binding declaration by its maker and for it to be binding on its maker, it must be clear and devoid of ambiguity in its wordings or context.”

The four schools of thought are in concurrence on confession of an accused whether male or female as sufficient as bases for convictions provided such confession proceeded from an adult and same person wherein the confession must be a voluntary act as well²⁰.

However, there are divergence views as to the number of confessions that would be sufficient as proof of an adultery.

The Hanafi and Hambali schools accept four confessional statements as enough proof of the crime contending that the confession are admitted in place of witnesses and in the case of adultery, four witnesses are required as sufficient for proof. The Malaki and Shafii on the other hand consider a confessional statement as sufficient for proof of adultery, relying on the Hadith which reported that the prophet (SAW) instructed the stoning to death of a woman who confessed to an offence of adultery.²¹ on confession.

The above, be it as it may, the position of the Hanafu and Hambali schools is more preferable in view of the fact that the Holy Quran has stated that four unimpeachable male who are equally qualified are the requirement for proof of adultery. It is worthy of note that one beautiful thing about Islamic position on confession in the case of adultery is that confession, may be withdrawn even at the verge of execution of sentence. However, there are divergence views among the Islamic schools of thought.

According to Hanafi, Shafi and Hambali, a confessional statement can always be withdrawn and the maker must be spared unless there is credible evidence by means of witnesses. The Malaki School is of the view that a retracted confessional statement is not admissible against the maker unless there are evidences of doubt. Generally, the above enumerated ways are provided for proof of adultery in Islam.

3.3.3 Presumptions of Adultery

However, there is also presumption of adultery where a woman is pregnant not by the husband or by an unmarried woman.

The Islamic schools of thought are however hold different views as to the rebuttal of presumptions of adultery. While Hanafi accepts defence of compulsion without more as sufficient to refute the presumption, Malaki School accepts compulsion, rape and the like with corroboration as sufficient defence. On the other hand the presumption of adultery through pregnancy is not enough to hold a person liable for adultery²²

3.3.4 Procedure for Proving Adultery

The mere admission of adultery without more is not enough. If there was an oath taking it must be proved that special oaths five times each has taken place in court or at a conspicuous place where a huge gathering of people witnessed the oaths taken. It must be proved that a husband swears all in all five times that he saw his wife making love with another man directly and that he saw with his naked eyes having sexual intercourse with another man.²³

Quran chapter 24 provides:

And as for those who accuse their wives and have no witnesses except themselves the evidence of one of these (should be taken) four times, bearing Allah in witness that that he is most surely of the truthful ones. And the fifth (time) that the curse of Allah be on him if he is one of the liars²⁴

Where the man declined to take the multiple oaths, punishment of defamation must be meted on him with eighty lashes. However, the wife must be made to take the multiple oaths that the husband lied against her.²⁵

In *Nigerian Law and Practice in A Globalized World* ed. Muhammed I.M. and Mansur, I. Said (2010) usmanu Danfodiyo University, Sokoto- Nigeria(2010) p. 201

¹⁹ (1993) 7 NWLR (part 303) 1 @ 52-53 par.144-171

²⁰ Sa'd, M.I and Muhmud, M.D. “wither the Law of Adultery in Islam: A need for Redefinition” Journal of Islamic and a comparative Law (2000) vol. 2 p.41

²¹ *ibid*

²² See Commissioner of Police V Amina Lawal and 1 Other, 2002 (unreported)

²³ Quran 24 v. 6-7

²⁴ *ibid*

²⁵ See Quran 24 v. 6

The above injunction has received judicial appreciation by the Nigeria Court of Appeals in *AlAhmadu Rungumawa v Hantsi Muh'd Rungumawa*²⁶

4. Challenges to Enforcement in Nigeria

The history of Islamic Criminal legal system in Nigeria is as old as the country and Sharia being part of Islam is not separable and wherever Islam spreads, it goes with its legal system. Islamic law in its total ramification applied in what became the Northern Region of Nigeria before the advent of the British in Nigeria that totally expunged and replaced Islamic criminal legal system with the penal code. This began the decline of the operation of Islamic Criminal Legal System and the accompanying challenges to its enforcement in Nigeria.

This situation was captioned by Khan as follows:

Nigeria Muslims were totally governed by Islamic law until Nigeria became a British Colony. The advent of colonial rule saw the gradual phasing out of Islamic law. The present truncated form of Islamic law applicable in Nigeria is the product of the colonial training..... the approach of the legal education adopted by colonialist is still continuing in Nigeria²⁷

In pursuant of the colonial orchestrated ambitions to eliminate Islamic Criminal legal System in Nigeria, Constitution of Nigeria provided for non-adoption of state religion (secular State). Section 10 of the Constitution provides that "The Government of the Federation or of a State shall not adopt any religion as State Religion."

It will seem that the above provision of the Constitution is the imagination of the colonialist which purport to further distinct the Muslims from the gradual enlargement of the scope and extent of the application of Islamic law.

Notwithstanding the Constitutional provisions, most states in the Northern part of Nigeria enacted laws to establish Sharia courts and extending their jurisdiction to cover all aspects of civil and criminal causes including adultery or zina. The challenge on the enforcement of the provisions on the Islamic Crime of Adultery may be said to be self imposed by the law creating the offence taking into consideration the incomprehensive nature of its application, strictness of proof and jurisdictional limitations as well as other constitutional impediments.

4.1 Partial incorporation of Quranic and Hadith Provisions

All the provisions of the Sharia Criminal Legal System do not incorporate the injunction in the Quran and Hadiths into either the Sharia Penal Code and Sharia Criminal Procedure Code as to entitle them the protection under Section 36(12) Constitution²⁸ which provides:

Subject as otherwise provided by the Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written laws, and in this subsection, a written law refers to an Act of the National Assembly or a law of a State, any subsection legislative or instrument under the provisions of a law.

A cursory look at the provisions of all the Sharia Penal Code and the Sharia Criminal Procedure Code shows the absence of comprehensive incorporation of the injunctions of the Holy Quran and the Hadith thereby rendering the Holy Quran and the Hadith to an unwritten law. Thus, the Quran and the Hadith cannot benefit from the provisions of Section 36(12) of the Constitution and can be deemed to be inconsistent with the provision of the Constitution.²⁹

4.2 Inherent Problem of Proof

In Islamic law where the punishment is severe as in the case of adultery, the procedure of establishing same is rigid and cumbersome such that it may turn round to be formidable or even impossible to prove. For an

²⁶ (supra) p. 217 par. 157 - 169

²⁷ Khan, M.M.A *A Case for Teaching Mirath as independent courses in Islamic Law in Nigeria, application and Teaching* (Islamic Publication Bureau, Lagos, 1988) p. 181.

²⁸ Constitution of the Federal Republic of Nigeria, 1999(as amended)

²⁹ Bello, M. Key notes address at the National Seminar on Sharia held in Kaduna. 1-12 February, 2000. Bello, M. was the Chief Justice of Nigeria

example, the testimonies of four un-impeachable witnesses as well as special multiple oaths respectively for adultery and Lian.

In *Al-Ahmadu Rungumawa v. Hantsi Mah'd Rungumawa*, the Court of Appeal held on the standard of proof of adultery as follows:

The allegations against the petitioner by her husband must be proved by the testimonies of four un-impeachable Muslims who must have seen the petitioner and the said paramount in the act. If one of the four give a different version contrary to what is required by Islamic law then the accused will be acquitted and the other three will be punished severely for giving false evidence against the petitioner. The standard in proving adultery in Islamic Criminal law is very high and rigid.³⁰

There are some decided cases that could not escape setting aside for the non-compliance with the requirement of proofs.

In *Safiyatu Hussain T/Tudu v. Attorney General, Sokoto State*.³¹ the appeal was against the decision of the Upper Sharia Court, Gwadabawa in Case No. USC/GW/CR/F1/10/01 which sentenced the appellant to death by stoning for the offence of adultery (zina) punishable under Section 129(b) of the Sokoto State Sharia Penal Code Law 2000.

The police arraigned the appellant and produced four witnesses, two civilians and two policemen. The appellant admitted the allegation but stated that the pregnancy that gave the child was that of her former husband. It is pertinent to note that the two policemen and even the witnesses did not witness the commission of the offence, notwithstanding the trial court sentenced the appellant.

On appeal to the Sharia Court of Appeals, it was argued that the alleged confession was not in law because the appellant did not understand the nature, details and essentials of the offence as charged. In setting aside the judgment of the Upper Sharia Court Sokoto, the Sharia Court of Appeals, Sokoto held that "Since Safiyatu is claiming that the child belongs to her former husband and she was divorced 2 years ago, there is *Shubha* (i.e doubt) to warrant the judgment of *haddi* on her"

In *Amina Lawal Kurami v The State*³² the Sharia Court of Appeals held:

Though Amina had earlier admitted to the charge, it was clear that she was misled into confessing her guilt. The decisions of the lower courts were wrong because Amina was not told about the gravity of the punishment for the offence. The early sentence was wrong because it was based on the fact that Amina was pregnant and later gave birth to a baby girl, a scenario, they said was not enough evidence to convict her for adultery

4.3 Improper Application of Islamic Procedure

A careful study of the performances of the Sharia Courts in Criminal proceedings indicate that the performances of the Sharia and Upper Sharia Courts are not encouraging in relation to cases of adultery and other allied crimes.. The reasons for this is not far fetched'

Ladan, M.T³³. observed that

The problem associated with the implementation of Sharia Penal Law by Sharia Courts concerned not only the substantive law of crimes and punishment but rather on the law of procedure and evidence as provided in Islamic Law. The court tend to disregard rules of procedure and evidence as provided even under the Islamic Law. The errors on procedure and evidence by the lower courts can be seen mainly in the arrear of fair hearing, inadequate explanation of the nature and ingredients of the offence as charged to the understanding of the accused persons. The court also engage in rushed and inarticulate investigation of cases of alleged confession of adultery and appearance of unwarranted pregnancy on an unmarried woman. The proof and means of proof offences as seen in decided cases posed serious challenges in the implementation of Islamic criminal justice system

³⁰ (2006) 3 SLR (part 11) 204 " 216-217 par.148-156

³¹ Unreported decision of Sharia Court of Appeals Sokoto State in Appeal over case no USC/GW/CR/10/01 decided on 25/3/2002. Cited in Ladan, M.T *A Hand book on Sharia Implementation in Northern Nigeria: Women and Children Rights Focus* League of Democratic Women (Leeds Nigeria) Kaduna (2005) pp.116-117

³² Unreported case of Sharia Court of Appeals, Katsina State decided on 25th September, 2003

³³ Ladan, M.T. *op.cit*

4.4. Constitutional Impediment

The Nigerian Constitution guaranteed right to religion³⁴ but prohibits state religion and thereby, making Nigeria a secular nation. Section 10 of the Constitution states, "The Government of the federation or of a state shall not adopt any religion or state religion".

Mubeeh in his book, *The Islamic Crisis in Nigeria: Path to solution*³⁵ expressed the view that though, the Constitution seems to have guaranteed the adoption and application of Shariah criminal Law from the perspective of freedom of religion and constitutional compliance, there are some constitutional impediments to full implementation of the Islamic Criminal justice system in relation to capital punishment like death by stoning and for apostasy, evidential proof as well as jurisdictional problems and courts.

The Shariah Court of Appeal in all the States that adopted Shariah Criminal justice systems had the Constitutional jurisdiction over appeal on Islamic personal status only and the Court of Appeal to which appeal lies from the sharia Court of Appeals has the constitutional jurisdiction to entertain appeal on Islamic Personal Status from sharia court of Appeal and not on Criminal matters³⁶. It seems that with the application of Sharia Criminal Law appeal over conviction will end at the Sharia Court of Appeals which will be tantamount to a breach of the provision of the Constitution of the Federation of Nigeria.

Section 240 provides;

Subject to the provision of this Constitution, the Court of Appeals shall have jurisdiction to the exclusive of any other court of law in Nigeria, to hear and determine appeals from --Sharia Court of Appeals of the Federal Capital Territory, Abuja----- Sharia Court of Appeals of State

Notwithstanding the expansion of the jurisdiction of the Sharia Court in the States, the appeal that may be entertained and determined by the Court of Appeals from the Sharia Court of Appeal of the Federal Capital Territory, Abuja and the States are on those items stated under section 277(2) Constitution of the Federal Republic of Nigeria which covers the civil aspect of Islamic matters of Islamic personal status .

5. Conclusion

The paper traced the jurisdiction over the criminal jurisdiction of Criminal justice administration under the Secular state of Nigeria and discussed the challenges on the enforcement of Sharia criminal justice administration in Nigeria which are majorly on constitutional provisions relating to the enforcement of Sharia criminal Code such as death by stoning as well as the problems self imposed by the different Sharia criminal Codes of the States which include the in-comprehensive application of the injunction of the Holy Quran as well as Hadith

The Paper recommend that for the application of the Sharia Criminal Code, the sections 277(2) of the Constitution of the Federation should be amended to delete 'Islamic Personal Status' and replaced with 'Islamic Laws' as well as incorporating the phrase 'Islamic Civil and Criminal Laws' In the alternative, the different State Houses of Assembly operating Sharia Criminal Code should enact laws to expand the jurisdiction of Sharia Court of Appeals to entertain Criminal Appeals. It is recommended that the States Houses of Assembly could enact laws to make the criminal appeals lie to the High Courts from the Upper Sharia Courts.

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³⁴ I section 42 Constitution of the Federal Republic of Nigria,1999(as amended)

³⁵ Mubeeh, AS.O *The Sharia Crisis in Nigeria: Path to Solution* (Ramat Publishing company, kano)

³⁶ See section 240 Constitution of the Federal Republic of Nigeria, 1999(as amended)

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