

CHAPTER 6

TWO FAMOUS CASES

I.

Introduction to Chapter 6

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1. What this chapter comprises.

The primary purpose of this chapter is to make generally available carefully edited English translations of the records of the proceedings and the judgments of the courts in the two *zina* cases of Safiyatu Hussaini and Amina Lawal. Other parts of the chapter give various collateral information which we hope will be of interest to students of the cases.

These cases attracted worldwide attention in 2001-2003 when they were pending. Some scholarly work has been done respecting them;¹ but for information about the cases most authors have had to rely primarily on news reports, and therefore do not deal with the details of the actual proceedings and judgments themselves: the laws under which the cases were brought, heard, and decided; who brought them and why; what happened during the trials; who the lawyers and judges were; how the lawyers argued the appeals; the facts and the reasoning upon which the different courts decided them; the authorities relied on by the courts; and so on. The only exception we are aware of is Ruud Peters's valuable study of Safiyatu's case, which does go into such details.² For his study Peters worked with a translation from the Hausa of the records of proceedings and judgments of the courts in Safiyatu's case. Unfortunately the translation he used leaves a great deal to be desired;³ and, as far as we know, no English translation of the records

¹ For a sampling in English see: S.V. Barrow, "Nigerian Justice: Death by Stoning Sentence Reveals Empty Promises to the State and the International Community", *Emory International Law Review*, 17 (2003), 1203-49; S. Crutcher, "Stoning Single Nigerian Mothers for Adultery: Applying Feminist Theory to an Analysis of Gender Discrimination in International Law", *Hastings Women's Law Journal*, 15 (2004), 239-62; C.E. Nicolai, "Islamic Law and the International Protection of Women's Rights: The Effect of Shari'a in Nigeria", *Syracuse Journal of International Law and Commerce*, 31 (2004), 299-326; Note, "Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism", *Harvard Law Review*, 117 (2003-04), 2365-86; K.N. Roberts, "Constitutionality of Shari'a Law in Nigeria and the Higher Conviction Rate of Muslim Women Under Shari'a Fornication and Adultery Laws", *Southern California Review of Law and Women's Studies*, 14 (2004-05), 315-36; S. Saifee, "Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law With the Inherent Right of Privacy in Islamic Jurisprudence", *Fordham International Law Journal*, 27 (2003-04), 370-454; and V. von Struense, "Stoning, Shari'a, and Human Rights Law in Nigeria", *William & Mary Journal of Women and the Law*, 11 (2004-2005), 405-25.

² R. Peters, "The Re-Islamization of Criminal Law in Northern Nigeria: The Safiyyatu Hussaini Case", in M. K. Masud, R. Peters and D.S. Powers (eds.) *Dispensing Justice in Islamic Courts: Qadis, Procedures and Evidence* (Leiden: Brill, 2006), 219-243.

³ *Safiyyatu's Case* (Enugu: Women's Aid Collective, 2003). Peters: "The English...is defective and sometimes incomprehensible. Moreover, the [translation] omits the Arabic texts of legal sources

and judgments in Amina Lawal's case has yet been published at all. In this chapter we remedy both those defects. We have tried to do much better with the translations presented here; this is discussed further below. And we have added Amina Lawal's case to Safiyatu's. The cases are interestingly different from start to finish. Together they will give readers a great deal of insight into the social and legal contexts and the work of Northern Nigeria's Sharia Courts at all levels.

To the translations themselves we have added five things:

- a bibliography of Islamic authorities cited in the two cases – to which bibliography we have added Islamic authorities cited elsewhere in this work;
- a glossary of Islamic legal terms used;
- brief biographies of all the judges who sat in the two cases; this will also be of interest in the chapter on “Judges of the Sharia Courts”, forthcoming;
- an essay “On Defending Safiyatu Hussaini and Amina Lawal”, by Aliyu Musa Yawuri, who second-chaired Safiyatu's appeal and first-chaired both of Amina Lawal's; and
- the remainder of this introduction, in which the materials translated, the translations, and the two cases themselves are discussed in further detail.

2. The materials translated.

The materials translated are of two kinds: (a) records of proceedings in both trial and appellate courts; the records of the appellate proceedings include records of the oral arguments of counsel (written argument – “briefs” – in the American style not being used); and (b) the written judgments of both trial and appellate courts.

a. The records of proceedings. Records of proceedings in most of Nigeria's courts – including all those that heard the Safiyatu and Amina Lawal cases – are still being taken down in long-hand while the proceedings are under way. This contributes significantly to the slow pace of the proceedings, and the judges, who usually themselves make the records, complain about all the writing they must do. But this is not a culture that is in a great hurry, and the old ways, more or less unchanged since the British colonial masters put them in place, are still serving reasonably well.

There is a large official record-book, in which someone, usually the presiding judge but sometimes the court registrar, writes down what is happening and what is being said while proceedings are in session before the court. The official language of the Sharia Courts in all Sharia States is Hausa. This implies that the records are always made in Hausa (with intersprinklings of Arabic), although the actual proceedings are sometimes conducted in local languages, then being summarised in Hausa for record purposes.⁴ The record made is usually not verbatim; it is usually better called summary of what is being said, although sometimes care is taken to get something word-for-word. But it is

quoted in the Hausa original, and gives only references to these sources, although often in a virtually unrecognisable form (e.g. “Bahjah fi – sharit – tufimam” for *al-Bahja fi sharh al-Tuhfa*.)”

⁴ This was observed by Ostien in a Sharia Court in Konduga, Borno State, east of Maiduguri, where the proceedings were conducted mostly in Kanuri but recorded in Hausa.

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quite detailed and accurate and as has been said its being made slows down the proceedings quite considerably. There is not a different record-book for each case, but rather the same record-book is used, page after page, to keep track of all cases coming before the court one after the other for as long as it takes until the record-book is used up and another is begun. Therefore, since almost every case adjourns and resumes, adjourns and resumes, time and again over the course of months or years before it concludes, the record of any particular case is always distributed through several scattered pages of one or more record-books.

If an appeal is taken, then someone – usually the registrar – must go through the record-books of the court appealed from and copy out the record of the case from the pages where it may be found, into one consolidated document. This copied-out consolidated record, after certification by the judge of the court appealed from as a true copy of the actual record, is transmitted to the appellate court for its consideration. The parties and their lawyers have no role in this process, except to request that the record be made up and to pay for it (usually the responsibility of the appellant). Of the texts we are publishing here, the records of proceedings in both trial courts (Gwadabawa Upper Sharia Court (Safiyatu); Bakori Sharia Court (Amina)) were copied out in the court registrar's hand-writing, certified as true by the judges, and sent along. But the records of proceedings before all the appellate courts (Sokoto State Sharia Court of Appeal (Safiyatu); Upper Sharia Court Funtua and Katsina State Sharia Court of Appeal (Amina)) were typed up, evidently by the court registrars or under their supervision, and certified as true copies by the judges who made the actual records. Of course no appeals were taken from the judgments of the two Sharia Courts of Appeal, so the records of proceedings before them would ordinarily not have been made up; but in these cases the interest was so intense that the records were ordered and paid for, evidently by counsel for the appellants, and translations of the certified copies are included in this chapter.

The summaries in these records of the arguments of counsel before the appellate courts are far from transcripts: they are what the judges who made the records managed to hear, comprehend, and get down while the arguments were being made. One gets a fuller sense of what the oral arguments might have been like from A.M. Yawuri's paper "Issues in Defending Safiyyatu Hussaini and Amina Lawal",⁵ delivered at a conference just weeks before he argued Amina Lawal's case in the Katsina State Sharia Court of Appeal: the paper is fuller, more nuanced, and more passionate than what comes through of his argument in the record of proceedings made by the court and published here.

b. The court judgments. The judgments of the inferior courts which handled these cases appear to have been prepared in advance, read out in open court on the day of judgment, and copied or inserted into the courts' record-books; they were then copied into the consolidated records prepared and sent along when the cases went up on appeal (see Illustration 1, next page). The final judgments of the two Sharia Courts of Appeal were typed up as separate documents, read out on judgment day, and subsequently photocopied and distributed to people who wanted copies. It is perhaps worth noting

⁵ In J. Ibrahim, ed., *Sharia Penal and Family Law in Nigeria and in the Muslim World: A Rights Based Approach* (Nigeria: Global Rights, 2004), 183-204.

Illustration 1

A page from the record of proceedings in Safiyatu's case, giving part of the judgment of the Upper Sharia Court Gwadabawa. The quotation in Arabic at the top is from *As'halul Madarik*; the meaning is then given in Hausa; then there is a longer quotation in Arabic from *Muwatta Malik*, followed again by its meaning in Hausa. Translation at pp. 24-25 infra.

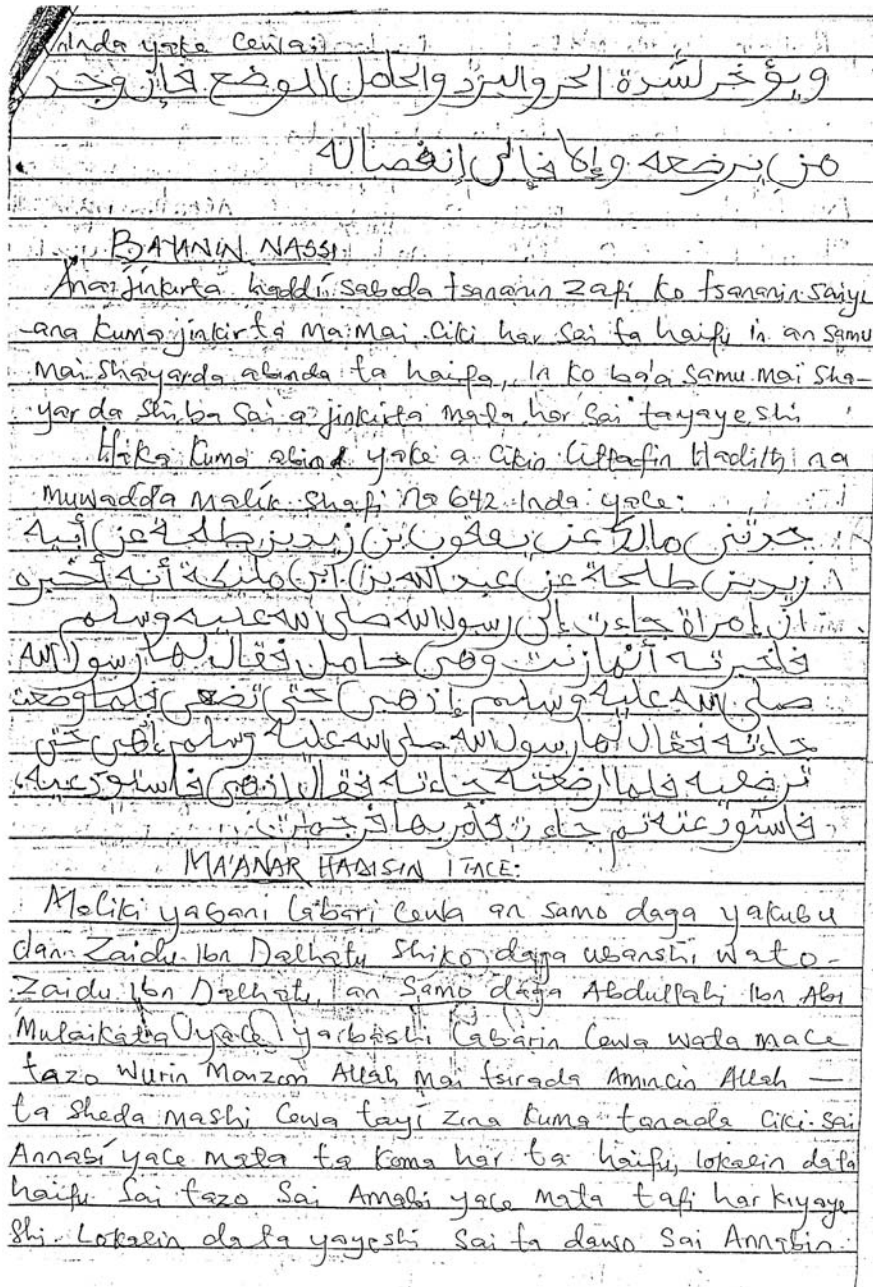


Illustration 2

A page from the judgment of the Sokoto State Sharia Court of Appeal in Safiyatu's case, in which the court is summarising the arguments of appellant's counsel. Translation at p. 35 infra.

.....ko wani wuri lauyan yaci taba yana mai cewa" kuma in an dubi littaffai da dama lokacin Annabi S.A.W da sahabbai duk matsalolin haddin zina da suka faru, wadanda sukayi laifin sune suka gabatar da kansu ga hukuma kuma ita safiyyatu batayi hakaba. mutane sukayi binciken sirinta suka zarge tayi ciki babu miji lauyan yace don haka hanyar da akabi aka kai safiyatu kotu anbi haramtattar hanya ne ya kafa hujja da nassin AlKur'ani.

سورة الحجرات آية ١٢
يا ايها الذين اجنبوا كثير من الناس ان بعض الناس
ولا تجسسوا ولا يعتب بعضكم على بعض

Har wayau dai lauyan mai apil yaci gaba da cewa" Amadadin mai apil safiyyatu muna janye maganar da tayi na cewar Yakubu Abubakar ne yayi mata ciki ya kafa hujjarsu ta jaye wannan maganar da nassin --MUKHTASAR KHALIL VOL II P.285

ويؤيد المقرر بالزنى في كل حال إلا ان يرجع :
المقرر بالزنى باقرار خبير رجوعه ولا حد مطلقا :

Lauyan yaci gaba da cewa :

Acikin SAHIHIL BUKHARI VOL.II P193 Ance:

و فيه التعريف للمقرر بالزنى بان يرجع ويقبل :
رجوعه بلا خلاف .

Don haka maganar da tayi kan Yakubu duk sun jaye ta. kuma suna rokon kotu ta karbi jayewar.

Har wayau dai lauyan yayi daawar cewa ciki kwancine na tsohon mijinta da ta fito gareshi mai suna Alh. yusufu s/birni kware.*

Lauyan yaci gaba da cewa tunda akwai shubha ya kamata ayi watsi da hukuncin rajmu da aka yanke ma mai apil ya kafa hujja da nassin FIQHUS_SUNNAH VOL 2 P 241.

وعن عائشة رضي الله تعالى عنها قالت :

that although in the judgment of the Sokoto State Sharia Court of Appeal (Safiyatu's case) the passages in Arabic are written in by hand in spaces left for them in the typescript (see Illustration 2, previous page), in the judgment of the Katsina State Sharia Court of Appeal (Amina's case) the passages in Arabic are type-written, evidently on a computer.

3. The translations.

As is discussed more fully in A.M. Yawuri's paper in Part VII of this chapter, various groups were involved in the appeals of Safiyatu Hussaini and Amina Lawal. Prominent among these was the Women's Rights Advancement and Protection Alternative (WRAPA), a Nigerian NGO headquartered in Abuja. After the cases were won, WRAPA undertook to make English translations of the proceedings and judgments in both of them – no doubt because of the intense interest in them all over the world. Yawuri himself did the translations. We are most grateful to WRAPA for giving us permission to publish Yawuri's translations here. His work has been gone over carefully by us and clarified and corrected in many particulars with his assistance and approval. We are grateful also to him for his kind cooperation.

Unfortunately, by the time we contacted WRAPA about publishing the translations, some parts of them could no longer be found – either by WRAPA or by Yawuri. This necessitated fresh translations of those parts, which we undertook ourselves: some were done by S.A. Mohammed and some by A.S. Garba, as indicated in the texts which follow.

The translations are fairly free: the effort has been accurately to convey the sense in unstilted English, without attempting to reproduce the Hausa word for word. Sometimes repetitiveness in the Hausa texts has been eliminated or compressed. In the few places where we were not sure we had grasped the sense of the Hausa text we did our best, and then gave the Hausa in a footnote. Very occasionally we have inserted bracketed language which amplifies the Hausa a bit in order to bring out the sense more clearly. We have also inserted some bracketed headings to mark different sections of some of the texts; unbracketed headings are in the originals. A selection of Arabic or Hausa-ised Arabic words – most of them technical terms of the Sharia – have been left untranslated and italicised. Such words are often not isomorphic to single English words – e.g. *zina* is not quite adultery. We felt it would be instructive for readers to see how these words are used in the texts; the glossary in Part V explains their meanings.

Citations in the original materials to Islamic authorities have presented particular problems. Often the same work is referred to by several different names. Sometimes the same name is used for several different works. In one or two cases names of authors are used without saying which of the author's works is referred to. Spellings vary wildly. In the translations we have eliminated most of this confusion. For each Islamic authority cited, we have selected what we considered to be the short title by which it is most commonly known in the northern parts of Nigeria. These short titles have been used consistently in our translations, with uniformity of spelling rigidly imposed. The bibliography in Part IV then gives the correct titles of the works in transliterated Arabic along with other information about them. Other problems with the citations, and how we have approached them, are discussed more fully in the introduction to the bibliography and in scattered footnotes to the texts themselves.

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Quotations in the original materials from Islamic authorities have presented different problems. One is that in their judgments, after giving the quotation in Arabic, the courts often give the meaning, the *ma'ana*, in Hausa (see Illustration 1). So in translating the quoted text one has a choice whether to translate the Arabic, or the *ma'ana* as understood by the court in Hausa, or both: the senses can be somewhat different. We never found the differences to be material and we have consistently translated the Arabic and left the *ma'ana* out. For translations of quotations from basic Islamic sources we have relied on standard authorities as much as possible, in the case of four important ones, as follows:

- *Al-Qur'an*: we have used the English translations of the verses quoted in our texts found in the English edition of *Tafsir Ibn Kathir*, see bibliography. However, in referring to chapters of the Qur'an, we have retained the Hausa usages found in the texts, rather than those found in *Tafsir Ibn Kathir*. E.g. *Suratul Nabli* rather than *Surah Al-Nabl*.
- *Muwatta Malik*: these hadiths are referred to in our texts by page number in the Arabic edition of this work commonly in use in Nigeria, see bibliography. We have left these page references in the texts, but have used Aisha Abdurrahman Bewley's English translations of the hadiths, see bibliography.
- *Sabihul Bukhari*: these hadiths are referred to in our texts by volume and page number in the Arabic/English edition of this work commonly in use in Nigeria, see bibliography. Our quotations in English are from the same work.
- *Arba'una Hadith*: these hadiths are referred to in our texts by hadith number. We have used the English translations of the hadiths that are found in the English edition of *Arba'una Hadith*, see bibliography.

As is indicated in the bibliography there are English editions of other Islamic authorities cited in our texts as well; where possible we have consulted and followed them in the translations from the Arabic used here.

Besides eliminating the redundant *ma'anas*, we have also abbreviated the translations in another way. Appellate judges in Nigeria tend to rehearse in their judgments all the proceedings in the lower court(s) (working from the records sent up to them) and all the issues raised and arguments made before them by counsel (working from the records of the oral arguments which they themselves have made), before proceeding to explain how they are ruling and why. This is true even of judges writing minority opinions, as in the Amina Lawal case in the Katsina State Sharia Court of Appeal. If all one has to study are the judgments of the appellate courts, this extended recapitulation of the proceedings below and of the arguments made in the appellate court can be useful as providing information not otherwise available. Even if one has the actual records of the proceedings below, and of the arguments made before the appellate court, as we do here, the appellate judges' recapitulations can be useful by way of giving insight into their ways of dealing with the information before them, and, in some cases, their different constructions of the facts, the issues, or the arguments. The reader will observe that in the translations presented here we have sometimes left the recapitulations of the appellate courts in, and we have sometimes taken them out, depending on our assessment of their marginal value as additional sources of information.

Possibly someone will wish to check our translations against the Hausa originals or even consider publishing full versions of the latter. The materials we worked with are to be kept in the Documents Section of the library of the University of Jos, where they will be available to interested scholars.

4. Observations on the cases.

The cases of Safiyatu Hussaini and Amina Lawal deserve and no doubt will receive detailed study by scholars from many fields. Ruud Peters, in his study of Safiyatu's case already referred to, has begun this process. We add here four observations of our own; much more of course remains to be said.

a. In which courts capital cases may be brought. From the early days of colonial rule in Northern Nigeria the power to impose the death sentence was limited to the High Court and to Grade "A" Native Courts – the courts of the Emirs and the Chiefs.⁶ The same rule applied under the Criminal Procedure Code of 1960 (CPC) as first enacted.⁷ Less exalted Native Courts – in the Muslim North, the ordinary courts of the alkalis – were never entrusted with the power to sentence anyone to death. Since the abolition of the courts of the Emirs and Chiefs in 1967-68, jurisdiction of capital cases under the CPC has been limited to the High Courts only; the Area Courts, descendants of the ordinary Native Courts of earlier days, are excluded.⁸ In the High Courts, representation by counsel of defendants charged with capital offences is mandatory.⁹ There is authority that in capital cases a plea of guilty cannot be entered: the court must enter a plea of not guilty and put the prosecution to its proof.¹⁰ These and other rules meant to safeguard persons on trial for capital crimes are administered by High Court judges who are qualified legal practitioners and who have had substantial experience as such.¹¹

Things are different under the new Sharia Criminal Procedure Codes (SCPCs). They allow trial of all offences under the Sharia Penal Codes, including capital offences, in the new Sharia Courts – direct descendants of the old alkalis' courts and Area Courts (with a heavy carry-over of judges from the latter), which never had this power.¹² It is true that the power is limited to the Upper Sharia Courts only. But even the judges of the Upper

⁶ See E.A. Keay and S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet & Maxwell; Lagos: African Universities Press, 1966), 26 and 29.

⁷ Criminal Procedure Code, Cap. 30 Laws of Northern Nigeria 1963, Appendix A, "Tabular Statement of Offences", among other things stating the court with least powers by which each offence is triable.

⁸ See e.g. Kano State Criminal Procedure Code, Cap. 37 Laws of Kano State 1991, Appendix A.

⁹ CPC §186: *Defence in capital cases*: "Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence."

¹⁰ *Sanmabow v. State*, (1967) NMLR 314.

¹¹ On the qualifications required of High Court judges see Nigerian Constitution 1999 §271(3).

¹² The descent of the new Sharia Courts from the old Native Courts via the Area Courts will be documented and discussed in the chapter of this work on "Court Reorganisation", forthcoming. As to the power of the Sharia Courts to try capital offences see the Harmonised Sharia Criminal Procedure Code, Chapter 5 (Vol. IV), §§12-16 and notes thereto.

Sharia Courts need not be qualified legal practitioners, and most are not.¹³ There is no requirement under the SCPCs that defendants charged with capital offences be represented by counsel, and neither Safiyatu nor Amina was represented during her trial. When this was raised in Safiyatu's appeal – her lawyer arguing that she should at least have been advised of her right to counsel – the Sharia Court of Appeal said no:

It is not the responsibility of the court to inform the accused to engage the services of a lawyer on a matter before the court. Therefore, we will not say anything further about this ground of appeal.¹⁴

Nor did either of the courts that tried these cases refuse what were in effect Safiyatu's and Amina's guilty pleas to capital charges: their pleas, or "confessions", were accepted and used as one basis for convicting and sentencing them to death.

The position was even worse in Amina's case than in Safiyatu's, because Katsina State, unlike Sokoto, had not at the time of Amina's trial enacted any Sharia Criminal Procedure Code at all – and still has not, for that matter. So in default of a different rule Amina was charged with *zina* and sentenced to *rajm* in the lowest grade of Sharia Court in Katsina State. This meant an intermediate (unsuccessful) appeal to an Upper Sharia Court before she reached the Sharia Court of Appeal which finally discharged and acquitted her.

The general idea, in all the Sharia States, is that Muslims should be charged and tried for all crimes in the Sharia Courts under the Sharia Penal and Criminal Procedure Codes. In fact this is not happening: in all Sharia States most offences carrying heavy penalties – armed robbery and homicide, for example – are being taken to the High Courts for trial under the old Penal and Criminal Procedure Codes, even when the accused persons are Muslims.¹⁵ This means that the specifically Islamic rules of procedure and evidence applicable in such cases in the Sharia Courts, and the specifically Islamic punishments for such crimes – double amputations or even crucifixion for armed robbery; *qisas* for homicide, for example – are being foregone – evidently in the belief that notwithstanding the losses to the programme of Sharia implementation it is better to try such serious crimes, for which the punishments may still be very severe (including death), under the Penal Code, in better-qualified courts, with more safe-guards for the accused, under more modern rules of procedure and evidence.¹⁶ Unfortunately there are a number of offences treated as less serious under the Penal Code – *zina*, for instance – for which the penalties have gone to the limit under the Sharia Penal Codes, and which

¹³ The qualifications required of judges of the Sharia Courts are laid down in the Sharia Courts Laws, to be documented in the chapter on "Court Reorganisation". A sense of the qualifications of the judges of the Sharia Courts at all levels can be gained from the brief biographies of the judges who ruled on Safiyatu's and Amina's cases given in Part VI of this chapter; see also the chapter of this work on "Judges of the Sharia Courts", forthcoming.

¹⁴ Judgment of the Sokoto State Sharia Court of Appeal in Safiyatu's case, *infra*. p. 42.

¹⁵ To be documented and discussed in the chapter on "Court Reorganisation", forthcoming.

¹⁶ One exception to this generalisation: Sani Yakubu Rodi was tried and convicted of homicide in a Sharia Court in Katsina State and sentenced to die in the same way in which he had killed his victims, i.e. by stabbing using the same knife. In the end he was however not stabbed to death, but hanged. See e.g. *BBC World News*, 4th January 2002, Internet edition.

are still viewed as properly brought in the Sharia Courts.¹⁷ Thus these courts, whose qualifications to do so are questionable, are trying people for their lives.

b. Whether the Sharia Courts are bound by the Constitution of the Federation and the laws of the States. This question was raised very clearly, in several different ways, in Amina Lawal's appeals to the Upper Sharia Court Funtua and to the Sharia Court of Appeal of Katsina State.

Section 4(1) of Katsina State's Sharia Courts Law provides that "A Sharia Court shall be properly constituted if presided over by an alkali sitting with two members." The "members" are there to observe the proceedings and to advise the alkali, but they have no formal say in the final decision of the case, which is for the alkali alone. But the Katsina State alkali who tried Amina Lawal sat without any members to assist him. This defect was raised in Amina's appeals, first to the Upper Sharia Court Funtua and then to the Katsina State Sharia Court of Appeal. Amina's lawyer argued that because the trial court had not been properly constituted under the statute, the entire proceeding in which Amina was convicted and sentenced was a nullity. In the Upper Sharia Court Funtua State Counsel responded to this point as follows:

Counsel [for appellant] further argued that only one judge heard and determined the case [in contravention of §4(1)]. We contest this on the following grounds. To begin with, the Hadiths of the Holy Prophet do not provide that a judge must sit with members. So section 4(1) is contrary to the provision of section 3(1) of Katsina State Law number 6 of 2000 [the Islamic Penal System (Adoption) Law] which enjoins that a judge shall base his judgment on the Qur'an and Hadiths.... Where a judge adjudicates according to the rules set down by Allah, it is not befitting for a Muslim to raise objection. We urge this Honourable Court to consider our submissions and affirm the sentence passed by the Bakori trial court.¹⁸

In response to a series of points made by Amina's lawyer based on the constitutional right to fair hearing, State Counsel also said:

This court should not be intimidated by counsel's citation of the provisions of the Constitution. This case is based on the laws of Allah (SWT). The laws of Allah take precedence over any argument that may be proffered in this case.¹⁹

In its ruling on the §4(1) question, the Upper Sharia Court Funtua agreed with State Counsel:

On their ground number 11 [counsel for appellant] contended that the judgment of the Sharia Court Bakori is contrary to section 4(1) of the Katsina State Sharia Courts Law because only one judge heard the matter without the assistance of court members. Counsel for appellant should know that judges in Katsina State base their judgments on the rule of Sharia and Islamic Law as provided by section 8 of the Sharia Courts Law which provides that the courts

¹⁷ See the table on p. 15 of Chapter 4 (Vol. IV), listing five offences in addition to *zina*, punishable only lightly under the Penal Code, but punished under the Sharia Penal Codes with death.

¹⁸ P. 72 *infra*.

¹⁹ P. 71 *infra*.

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are bound by the following laws [The Qur'an, Hadiths, *Ijma*, *Qiyas*, *Ijtihad*, *al-Urf*]. The Sharia Court Bakori based its judgment on the above and the law of Allah takes precedence over any other law.²⁰

The last statement would seem to dispose also of the Nigerian Constitution, along with §4(1) of the Sharia Courts Law of Katsina State.

State Counsel returned to his theme of the supremacy of the Sharia, and expanded it further, in the proceedings before the Katsina State Sharia Court of Appeal, when he opposed the use of an affidavit filed in support of Amina's application for stay of execution pending the outcome of her appeal. He said:

Based on the principles of Islamic law, once a *qadi* has decided a case in accordance with the principles of Sharia laid down in the Qur'an and the Hadiths of Prophet Muhammad (SAW), then it is inappropriate for a Muslim to appeal the judgment as doing so is akin to disputing Allah's judgment and Allah has prohibited that in the Holy Qur'an. This court may only entertain this appeal because doing so will be in accordance with the laws and procedures of Nigeria and of Katsina State which allow appeals as a matter of right. Based on these laws, this court has the right to entertain the appeal. If this court, in its wisdom, decides to hear this appeal, we do not intend to challenge the prayers of appellant's counsel in this application [for stay of execution].

However, I will request this court to dismiss the affidavit evidence filed in support of the application. Evidence in the form of affidavit is an imported European device and is foreign and unknown to Islamic law. If this Honourable Court is going to entertain this appeal, then the records of the proceedings and judgments of the Sharia Court Bakori and the Upper Sharia Court Funtua, and the submissions of appellant's counsel that they have appealed those judgments to this court, are sufficient to support the application currently before the court. But I submit that affidavit evidence has no place under the Sharia.²¹

The Sharia Court of Appeal granted Amina's application for stay of execution without addressing the question of the affidavit.²² But later, in its ruling on the question of whether the trial court was bound by §4(1) of the Sharia Courts Law, or rather was free notwithstanding the statute to hear cases sitting alone just as the *qadis* of old had done, the Sharia Court of Appeal firmly rejected the idea that "Sharia implementation" would mean full-scale reversion to Islamic rules of procedure without regard to the laws of the modern State.

[Appellant's] ground of appeal complaining about [the §4(1) violation] was dismissed by the USC Funtua...when the judge maintained that he had nothing to do with laws enacted by the State House of Assembly. The judge said he was only bound by Hadiths and Qur'an – even though it was the Sharia Courts Law enacted by the House of Assembly which enjoined the court to apply the Hadiths and Qur'an in proceedings before it.... The fact that a single judge sat

²⁰ Pp. 78-79 *infra*.

²¹ P. 88 *infra*.

²² P. 89 *infra*.

over the case and passed judgment shows that this provision of the law that established the courts and the judges was not complied with. It is not possible to apply one section of the law and reject other sections simply because their provisions do not conform with one's wishes. It is clear that when a single judge hears a matter, he is in breach of the law.... The non-compliance with this law renders the judgment null and void.²³

The Sharia Court of Appeal's holding is consistent with the position taken by the Governors and Houses of Assembly of all the Sharia-implementing States, that they aim to implement as much of the classical Sharia as they possibly can, but within the Constitution and laws of the Nigerian Federation.²⁴ It is encouraging to see this position taken and applied also by the Sharia Courts of Appeal; one sees other examples of it in the mixed application of Constitution, statutory law, and *fiqh* in the two Sharia Court of Appeal judgments reproduced in this chapter.

c. Constitutional issues not raised. We find the following provisions of the Nigerian Constitution relied on by counsel for Safiyatu Hussaini and Amina Lawal:

36(1): right to fair hearing, in general

36(5): presumption of innocence

36(6)(a): right to be informed promptly in a language the accused understands and in detail of the nature of the offence

36(6)(b): right to adequate time and facilities to prepare defence

36(6)(c): right to defend oneself in person or by legal practitioners of one's own choice

36(8) and 4(9): no retroactive criminal legislation

36(12): criminal offences to be defined and the penalties therefor prescribed in written law.

So all constitutional defences raised were drawn from essentially one article of the Constitution, on the Right to Fair Hearing; all pointed to procedural problems in these two proceedings only, which might easily be avoided in future cases founded on similar charges; and no constitutional issue was raised that might draw in question the very proceedings themselves or the programme of Sharia implementation from which they arose. Several such issues exist: we mention just two but there are more:²⁵

- the constitutionality of applying parallel Penal Codes in the same jurisdiction under which different punishments are inflicted on different people depending solely on their religion, in apparent violation of Article 42 (right to freedom from discrimination on grounds of religion among others);

²³ P. 103 *infra*.

²⁴ See P. Ostien, "Ten Good Things About the Implementation of Sharia in Some States of Northern Nigeria", *Swedish Missiological Themes*, 90 (2002), 163-174, "good thing" no. 2, "The implementing states have conceded the supremacy of the federal constitution and laws." For further discussion of this point see also the introduction to Chapter 5, 190-191.

²⁵ See the literature cited in n. 1 *supra*.

- the constitutionality of inflicting archaic punishments like *rajm* in possible violation of Article 34 (right to dignity of human persons, including right not to be subjected to torture or to inhuman or degrading treatment).

It is an interesting question why the lawyers for Safiyatu and Amina did not raise such issues, which might have been winners for these cases and the decision of which by the courts might have set valuable precedents for other cases. We asked Aliyu Musa Yawuri to address this question in his essay for this chapter, and he has done so in some detail in his essay in Part VII of this chapter. We hope this will stimulate further discussion of an issue that must frequently confront Muslim lawyers working in the Sharia States.

d. Who may bring charges of *zina*. Although not founded on the Nigerian Constitution, precedents were nevertheless set in these two cases – founded in Islamic law – that should strictly limit the bringing of charges of *zina* in future. One of the most important of these relates to who may bring such charges.

The cases against Safiyatu and Amina were brought by the local police, who in both cases, after receiving information from unspecified sources that the women had become pregnant out of wedlock, went to investigate, and subsequently brought charges of *zina*, not only against the women, but also against the men who, according to the information received by the police, had impregnated the women.

One of the very interesting things about the judgment of the Sharia Court of Appeal in Safiyatu's case is its clear holding that charges of *zina* may not, in Islamic law, be brought in this way.

State Counsel quoted the hadith of Abu Huraira from the English translation of *Sahihul Bukhari*, vol. 8 p. 536, citing it as authority for the proposition that a person can be convicted of *zina* even if he does not submit himself for punishment but is brought before the court by the authorities.²⁶

But:

We agree with appellant's counsel that based on [*Suratul Hujurat* verse 12], it is *haram* to initiate an action against a person for *zina* based on other people's reports. Imam Shafi'i said that a leader does not even have the right to summon a person accused of *zina* for the purpose of investigating the accusation: he supported this position with reference to the same verse of the Qur'an quoted above.... The way the police went to Safiyatu's house just because they heard that she had committed *zina* is contrary to Islamic law....²⁷

It is interesting to compare this holding with the Criminal Procedure Code of 1960, whose provisions were negotiated in detail with the North's leading *ulama* in 1959-60 before it was enacted.²⁸ Section 142 of the CPC provides that:

²⁶ P. 47 *infra*.

²⁷ P. 48 *infra*.

²⁸ See Chapter 1 (Vol. I), 59-61.

142. (1) No court shall take cognizance of an offence under sections 387-388 of the Penal Code [adultery by a man; adultery by a woman] except:

(a) upon a complaint made by the husband of the woman or in his absence by some person who had care of such woman on his behalf at the time when the offence was committed; or

(b) in the case of the woman being unmarried upon a complaint made by her father or guardian or in his absence by some person who had care of such unmarried woman on his behalf at the time when the offence was committed.

(2) Where the husband, father or guardian referred to in subsection (1) is under the age of eighteen years, or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint some other person may, with the leave of the court, make a complaint on his behalf.

In other words, even when the charge could only be adultery (not *zina*), and the punishment could at most be up to two years imprisonment or fine or both (not *rajm*), the class of persons who could bring such charges was strictly limited – in keeping, so it seems, with Islamic law.

Unfortunately, although the Sharia Criminal Procedure Codes adopted by the Sharia States in 2000-2001 copied the provisions of the old CPC almost in full, for some reason they left this provision out. This is what made it possible, under the Sharia Criminal Procedure Code of Sokoto State, for the police themselves to bring the charge of *zina* against Safiyatu, without reference to her ex-husband, her father, or her guardian. But the Sharia Court of Appeal said no. In the latest draft of the Harmonised Sharia Criminal Procedure Code made available to us by the Centre for Islamic Legal Studies, §142 of the CPC has been restored, now appearing, suitably adapted, as §141 of the CILS model code.²⁹ If the Sharia States follow CILS in restoring this provision to their own Sharia Criminal Procedure Codes, and follow the Sokoto State Sharia Court of Appeal in restricting prosecutions for *zina* even further, to persons who voluntarily submit themselves for punishment, we are unlikely to see many further prosecutions for *zina*.

With that we conclude this introduction and commend the reader to the other materials to be found in the chapter.

²⁹ See Chapter 5.