



SHARIA AND STATUTORY CRIMINAL PROCEDURE IN NORTHERN NIGERIA: AN OVERVIEW*

1.1 INTRODUCTION:

Sharia Legal System has gained tremendous attention under the present democratic administration of several states in Northern Nigeria, Bauchi state inclusive. As a result Area Courts were abolished and replaced by Sharia courts. Sharia courts of different grades were established and vested with jurisdiction to try both civil and criminal cases. In Bauchi state for example, Sharia courts were established by virtue of section 3(1) of the Sharia courts (Administration of justice and certain consequential changes) law 2000. Sharia courts of three grades, namely, Sharia courts II, I and upper Sharia court were established and all were vested with both civil and criminal jurisdictions. The courts have jurisdiction over Muslims only except where a non-Muslim has in writing submitted himself to the jurisdiction of the courts¹. These Sharia courts were empowered to apply Islamic law in all civil and criminal cases as well as Sharia penal code. The Sharia penal code law, 2001 of Bauch state was enacted to provide for Islamic law of crimes in line with the strict injunctions of the Holy Qur'an and the traditions of the Holy prophet Muhammad (SAW). Similarly, the applicable laws and rules of procedure for the hearing and determination of both civil and criminal proceedings before Sharia courts shall be as prescribed under Islamic law, which comprises, the Holy Qur'an, the Sunnah, the Ijma Qiyas and Ijtihad. In particular, when the Sharia courts are conducting criminal trials, they should also be guided by the provisions of the Sharia criminal procedure code law of the state².

In the light of the above it can be said that Sharia courts in Bauchi state are to hear and determine criminal cases in accordance with the provisions of Islamic law, Sharia penal code law and Sharia criminal procedure code law. This presentation will now make an attempt to examine what Sharia criminal procedure is all about and bring out some important components or issues of criminal procedure that must be contained in any good Sharia criminal procedure code law for the guidance of Sharia courts conducting criminal trials



2.2 NATURE AND SCOPE OF SHARIA CRIMINAL PROCEDURE

It is relevant at this early part of the presentation to define the scope of this topic-Sharia criminal procedure. In order to accomplish this assignment, it becomes necessary to examine briefly the connotations of the following words: - 'Sharia', 'criminal' and 'procedure'.

The word 'Sharia' may simply means Islamic law. It also connotes 'the divine set of rules revealed by Allah through His Holy Prophet Muhammad (S.A.W) for the regulation and guidance of conduct, affairs and life of mankind, including civil and criminal disputes.³ Again, Sharia has been defined as 'the complete universal code of conduct drawn by our creator (Allah) through His Messenger, Muhammad (S.A.W) to mankind, detailing the religious, political, economic, social, intellectual and legal system. It is meant for universal application, covering the entire spectrum of life, prescribing that which is lawful (Halal) and prohibiting that which is unlawful (Haram)'⁴.

Thus, Sharia is a comprehensive legal system and a universal way of life as divinely revealed by Allah, most merciful. It is all encompassing as agreed by even some of the orient lists like Anderson who once observed that:

Traditionally, the life of a Muslim has been largely dominated by the twine sciences of theology and the sacred law. If the former taught him what he should believe, it was the latter which prescribed the way in which he should behave and all that he should do or abstain from doing. The technical term for this system of duties is sharia: a word that originally signified the way to a watering place, and then came to mean the path of God's commandments. As such it covers every aspect of law as this is classified today (national and international, public and private, criminal and civil) together with a vast amount which would not be regarded as law at all in contemporary western thought (religious and social duties, matters of rituals and devotion and rules for seemingly conduct)⁵.

Therefore, Sharia could be broadly divided into three basic components. They are: Aqidah – (faith or belief); Ibadat-(acts of worship) and Mu'amalat (transactions) which include law of personal status like, marriage, gift, succession e.t.c property law, law of contract e.t.c. It also includes law of procedure and evidence (i.e Qada and Shahada), law relating to the



administration of justice in courts, constitutional law, international law, law of torts and criminal law (i.e Jarimah wal ugubat).

Statutorily, (in this presentation statutorily means Sharia criminal procedure as enacted or codified by some northern states of Nigeria in recent times) Sharia means and shall include knowledge in the theory and practice of Sharia as prescribed by the Holy Qur'an, Hadith and Sunnah of the Holy prophet Muhammad (Allah's peace and blessing the upon him), Ijma and Qiyas – basically in accordance with the maliki school of jurisprudence'.⁶

Sharia as a complete code of life can be seen from what the Holy Qur'an says in chapter 16; 89 thus:

*"And we have sent down to you the Book (the Qur'an) as an exposition for everything, a guidance, a mercy and glad tidings for those who have submitted themselves to Allah as Muslims."*⁷

The word 'Criminal' in English is derived from the word crime. The word crime is synonymous with the word offence and both words are interchangeable.⁸ However the Arabic word for crime or offence is 'Jarima' which is derived from the word 'Jarama'. The word Jarama literally means 'to cut' and 'to earn' what is not good.⁹ Technically, Jarima or crime refers to prohibition imposed by Allah, the violation of which gives rise to punishment (ugubat). These punishments take the forms of Hadd, Qisas and Ta'azir.¹⁰

Again a crime or offence called Ma'asiyat in Arabic means violation of certain primary public rights.¹¹ Once a primary public right is violated, that amounts to wrongful act or omission which gives rise to certain substitutory public rights in the form of ugubat or punishments.¹² Criminal offences under Sharia relate mostly to property, human body/life, reputation, religion, the state, public peace and tranquility, decency or morals. Thus there are twelve offences covered under Hudud and Qisas for which Islamic law or Sharia provides specific, defined or fixed punishments. Thus Hudud offences are defined to be offences which have been mentioned along with their punishments by the Qur'an, Hadith, and Ijma. However all other offences are punished at the discretion of the state or the judge, that is, Ta'azir. It is important to state here that Hadd and Qisas punishments are not within the powers of a ruler, Governor or head of state to pardon.¹³



In line with the requirements of section 36(12) of the Constitution of the Federal Republic of Nigeria 1999, which provides that a person shall not be convicted of a criminal offence unless it is defined and the penalty therefore is prescribed in a written law, the Sharia penal code law 2001 of Bauchi state by virtue of section 28 defines an offence as:

*"Except where otherwise appears from the context the word 'offence' includes an offence under any law for the time being in force."*¹⁴

Similarly, section 2 of the criminal code applicable in southern states of Nigeria, the word 'offence' is defined as follows:

"An act or omission which renders the person doing the act or making the omission liable to punishment under this code or under any order in council, ordinance or law or statute, is called an offence".

It is important to stress that both the juristic and legislative definitions of crime or offence particularly the one provided by the criminal code are in agreement with what Islamic law considers being crime. The only and very fundamental difference is that under Islamic law, crime is not only the violation of man made legislation but also the violation of Allah's commandments. Again unlike the punishments prescribed under the criminal code, certain punishments in sharia are fixed, specified and unchanged. i.e. Hadd and Qisas while the rest attract discretionary punishments i.e. Ta'azir.

With respect to the word 'procedure' in English language it means 'the prescribed methods governing certain process'¹⁵. However, the word 'procedure' in relation to courts or litigation under Islamic law may be called Qada according to some scholars separate and distinct from 'evidence' that is, shahada¹⁶. While some scholars like Ibn Rushd preferred to treat Procedure and Evidence under the main head or chapter of Qada. Thus, shahadah or evidence is made a subtopic of procedure in his book.¹⁷ whatever may be the case it is observed that classical writers of Islamic law have not made any formal and deliberate effort to distinguish between criminal procedure and civil procedure that is including evidence. In fact in some instances, matters relating to procedure and evidence can be found under a relevant substantive law. Therefore going by classical scholars of Islamic law books, the laws of procedure are substantially the same in both civil and criminal proceedings or



matters with only such variations as are clearly called for by the difference in the character of particular claims.¹⁸

In this circumstance, the word 'procedure' under classical Islamic jurisprudence can best be explained together with 'Evidence' and in the process the areas or points of differences, between them are to be stressed. Both procedure and evidence under English law are called 'Adjective law' as distinct from 'substantive law'. Adjective law governs the machinery by which substantive law is applied in practice. It regulates the conduct of litigation and is concerned with establishing facts on which rights, duties and liabilities are founded. However, substantive law defines the legal rights, duties and liabilities of the parties to the transaction in issue. Thus substantive law is a generic term embracing subjects as law of Torts, contract and crimes which are concerned with statements of rights duties and liabilities.¹⁹ Therefore, procedure regulates the conduct of litigation and deals with methods of initiating proceedings for both civil and criminal cases. While evidence deals with proof of facts, means of proof, admissibility of fact and the legal methods of attempting to prove such facts.²⁰ This exposition about procedure and evidence under English law to my understanding applies the same way under Islamic law though there could have areas of differences. .

Under Islamic law, law of procedure and evidence, that is, Qada and Shahadah which has been described as the law which regulates the procedure of courts, relating to the trial and proof of claims,²¹ a Sharia court Alkali shall hear and determine cases, civil or criminal by due observance of the rules of procedure or conduct of litigation on the one hand, and the rules of evidence or proof of facts or claims on the other. Thus, it is said that Islamic law of evidence deals with the elaborate rules laid down for the purpose of guiding the courts in determining the general admissibility and credibility of a witness and the truth of his statements in order to guard against the possibility of the court being misled by his testimony. Evidence also deals with testimony, burden of proof, standard of proof and weight to be attached to testimony adduced by the litigants. Thus, the cardinal principle underlying the Islamic law relating to evidence is that, a good and sound judgment, order, decision or ruling of a Sharia court must be based as far as possible on certainty of proof and not on conjectures. On the other hand, Islamic law of procedure deals with methods of initiating criminal proceedings and how it is conducted by a Sharia court. The principles or rules of procedure under Islamic law



ought to lead to a speedy settlement of claims, an end which the rules of some of the modern or English legal system failed to achieve.²²

It may now be convenient to attempt a working explanation of the meaning, nature and scope of Sharia criminal procedure from the totality of our discussions so far. Hence, Sharia criminal procedure is the method laid down under Sharia or Islamic law including modern legislations such as Sharia criminal procedure code law for bringing a person alleged to have committed a crime or Jarima before a Sharia court for trial. It also deals with the methods to be adopted by the trial court in conducting hearing of the case, the jurisdiction and powers of the court, the right of appeal of both complainant and the accused persons. Finally, Islamic law of criminal procedure provides for the rules governing judgment and the procedure in appellate courts.

As an illustration, let us say that one Garba entered Alhaji Sule's house at night at kofar Gombe Bauchi. He removed cash amounting to =N=50,000.00 from Alhaji Sule's safe and walked out. Unfortunately for Garba, at the gate of the house, he was challenged by Alhaji's security man and after some struggle, Garba was arrested by the security man and discovered that he stole Alhaji Sule's money. Thereafter the security man handed over the suspect i.e. Garba to the police and at the police station both Garba and the security man made statements.

The police after investigation decided to charge the said Garba on First Information Report (FIR) for the offence of theft of =N=50,000.00 and to prosecute him before upper Sharia court I, Bauchi. The officer in charge of the police station granted the bail of Garba to a reliable surety until the following day for Garba to report before the upper Sharia court which has jurisdiction over the area where the offence was committed.

The above hypothetical case raised some fundamental issues of criminal procedure, namely, those of arrest by a private person, enforcement of law, investigation of crime and interrogation of suspect, charge or initiating criminal proceedings at Sharia court by the police and bail. Those are few examples of matters that are exclusively procedural and within the domain of Sharia criminal procedure.

Therefore, a good Sharia criminal procedure code for the guidance of the Sharia courts in conducting sound criminal trial must address issues or points such as the constitution and powers of Sharia criminal courts, arrest and process including means to secure the production or discovery and



liberation of persons unlawfully confined. It should also provide for the prevention of crime, information to the police and the powers of the police to investigate a crime. Also there should have provisions relating to proceedings in prosecution including place of trial, methods of initiating judicial proceedings before a court, trials, charges, some general provisions relating to conduct of trial like need for open court, right of appearance of legal practitioners and judgment. Again, a good criminal procedure code should provide for proceedings subsequent to judgment such as Appeals and Review; special proceedings as it affect administration of justice, persons of unsound mind and corporate personality. Furthermore Sharia criminal procedure should deal with supplementary matters relating to compounding of offences, Bail, Disposal of property, miscellaneous and irregular proceedings.²³

It can be said that in the light of the above, Sharia criminal procedure is not the same with substantive Sharia penal law. This is because, Sharia penal law deals mainly with specific offences known to Sharia like zina, sariqah, Qatl e.t.c; the ingredients of such offences and the defenses to such offences. However, knowledge of Sharia penal law is essential for easier understanding of Sharia criminal procedure, the two topics are separate and distinct. The former dealing with the substantive and the latter only dealing with the procedural law. The subject-matter of this presentation is Sharia criminal procedure and therefore, no much discussion is going to be made on Islamic law of evidence and the substantive Sharia penal law except where necessary for purposes of illustrating some procedural rules.

3.3 SOURCES AND GENERAL RULES OF PROCEDURE IN SHARIA COURTS.

Sharia Legal System is the engine for the administration of Sharia as a complete way of life of a Muslim. On the other hand, the administration of justice is largely dependant on the courts, its personal especially the judges, then its procedure and evidence and rights of appeal. These are very critical for the attainment of one of the most important objects and purposes of Islam or Sharia, which is 'justice'. There are several verses of the Holy Qur'an and the traditions of the Holy Prophet which indicate that one of the major essence of Islam and Sharia on earth is attainment of justice to all mankind. For example, Allah in the Holy Qur'an says:

"Allah commands justice, the doing of good, and giving to kith and kin, and He forbids all indecent



deeds, and evil and rebellion. He instructs you, that ye may receive admonition". (Qur'an 6:90).

Allah most High said:

"If you judge, judge with equity between them for God loveth those who judge in equity (i.e. justly).²⁴

In the same vein, the Holy Prophet (PBUH) also said:

"Do you know those who will be first to enjoy God's mercy on the day of judgement. The Prophet's companions answered that God and His Apostle know better. The Prophet said they are those who accept truth when given to them. They utter it when demanded from them. And when they come to adjudicate between Muslims they do it as if it were between themselves".

In addition, Allah says:

"O you who believe! Stand out firmly for justice, as witness to Allah, even though it be against yourselves, or your parents or your kin, be he rich or poor, Allah is a Better protector to both (than you). So follow not the wish (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allah is Ever well – Acquainted with what you do". (Qur'an 4:135)

In line with the above verses of the Holy Qur'an, the Holy Prophet was reported to have included among the greatest sins in Islam 'act of giving false evidence'. Thus, standing for justice even as witness is compulsory on a Muslim. He must see that justice is attained even against himself, his parents and or in favour of his enemies. To this end, Qur'an 5.8 reads:

"O you who believe, stand out firmly for Allah as witness to fair dealings, and let not the enmity and hatred of others make you swerve from justice. Be just, that is next to piety; and fear Allah. Verily, Allah is well acquainted with all that you do".

These verses of the Holy Qur'an clearly can be described as the basis of Sharia rules of strict observance of impartiality or justice²⁵. Similarly, during the period of the Holy Prophet, many cases between Muslims and non-Muslims were decided in Sharia (Islamic) Courts and many judgements were given in favour of the non-Muslims on the basis of the above verses of the Holy Qur'an. The Holy Prophet indicated to us that there was no single individual above



the law, even himself when he said concerning his wife Hafsat whom he called but did not hear that "had it not for fear of penalty I would have injured you with this stick of teeth brushing I am holding".²⁶ This shows that even if it were himself i.e. the Holy Prophet that deliberately inflicted injury on somebody justice would take its course. In another instance, the Holy Prophet demonstrated or re-stated Qur'anic principle of justice, fairness and equality when he said that even if his daughter Fatima was to steal, he would cut off her hand in accordance with the commands of Allah. This was in the case of one respectful woman who was accused of theft. Then one companion of the Holy Prophet called Usamatu Ibn Zayd pleaded on her behalf. The Prophet asked him: 'Do you want to save her from Hadd punishment? He there upon gave a sermon to the people in the following words:

"O ye people, those before you were lost and destroyed because when influential people amongst them were accused of theft they were pardoned, but when poor persons were so accused they were convicted. I swear by the Almighty Allah should Fatimatu my daughter be accused of theft I would cut off her hand"²⁷

There is therefore, no doubt that Sharia courts and judges are strictly required to do justice without any fear or favour whether on the basis of tribe or religion. Hence Sharia does not discriminate on the basis of Religion and Tribe.²⁸ The Holy Qur'an in support of this proclaims that:

"Lo, we revealed unto thee the scripture with the truth, that thou may judge between mankind by that which God haveth sent and be not those of pleader for the treacherous", (Qur'an 5:105).

According to Abdulkadir Orire the Hon. Grad Qadi (Rtd) of Kwara State,²⁹ the above verse was revealed along with eight other verses acquitting a Jewish citizen of a false charge and condemning a Muslim instead. The verses were revealed on the occasion of a dispute between a Muslim and Jew. The Muslim, Ibn Ubayriq, had stolen a coat of mail and having hidden it in the house of a Jew, accused the latter of the theft. His tribe supported him in his false accusation. The Prophet, notwithstanding the anti-Islamic intrigues of the many Jews that time, cleared the Jews of the charge and convicted the Muslim. This verdict was given at a time when Muslim solidarity was needed.



for the defence of Islam. A verdict against a man supported by his whole tribe meant, in the Arab cultural context, the loss of the tribe. But that consideration did not carry any weight with the Prophet for the guilty is guilty and the innocent is innocent irrespective of religion or tribe. This is the principle which Sharia upholds today.³⁰

Under Islamic criminal justice system, Sharia courts or judges as part of their qualities and requirements is hearing cases fairly and justly, full equality for all (litigants), not to listen to one side of a dispute without the other person, being involved, nor must a judge determine a case without credible evidence or proof, hence the rule that 'he who asserts must prove' and therefore the relevance of the principle of presumption of innocence under Islamic Law. A person must not be convicted until he is found guilty beyond any reasonable doubt. Therefore, Islamic criminal law and procedure is an advocate of fair hearing and natural justice. Infact, it passed 'natural' justice because doing justice is a divine command of Allah in His Holy Qur'an.

Court as machinery of administration of justice under any 'civilized' legal system must have effective honest and competent personnel including judges, clerks/Registrars, messengers, security/law enforcement agents bailiffs and interpreters.³¹ This is also similar with Islamic criminal courts or any courts that is administering justice in accordance with Sharia.³²

The first judge of the first court in Islamic World was the Holy Prophet Muhammad (SAW). During his period he was the overall chief justice of the Islamic world. Any dispute or any decision of his appointed leader or judge in case of appeal goes to him for his final determination,. Generally speaking, it can be said that during the period of the Holy Prophet, courts were not many. However, the Holy Prophet appointed some of his companions to be judges in some provinces, like the case of Mu'az bn Jabal sent to Yemen. Caliph Umar, the second Caliph of Islamic state after the demise of the Holy Prophet, he too served as the chief justice as well as the head of state. He appointed some companions as judges like Abu Musa al-Ash'ari who was sent to be a judge in Basra.

The General principles of Islamic Law regarding courts system, procedure and appeals are primarily derived from the Holy Qur'an and tradition of the Holy Prophet together with the consensus of jurist (Ijma) and analogy Qiyas. Thus, a lot of principles or rules of criminal procedure in Sharia courts are based on the above sources and the famous letter of Umar bn al-khatab,



the second caliph to Abū Musa al-Ash'ari, one of his judges sent to Basra.³³ Similarly, in Nigeria particularly Sharia states, Sharia courts are to be guided by legislation while conducting civil or criminal proceedings.³⁴

4.4 GENERAL RULES OF PROCEDURE IN SHARIA COURTS

The Holy Prophet, Muhammad (PBUH) has laid down rules of procedure (whether civil or criminal) in Sharia courts while determining cases as follow:³⁵

1. When Caliph Ali was appointed as a judge in Yemen by the Holy Prophet and same Caliph Ali requested the Holy Prophet to guide him on how to judge, the Holy Prophet replied that:
 "... When a dispute is brought before you give equal hearing to both sides before making judgement, that is how you will understand the dispute in question."
2. The Holy Prophet requested Sharia courts or judges to adjudicate cases before them by reference to the Qur'an, Sunnah and Ijtihad independent reasoning based on the two primary sources. This is evident when the Holy Prophet appointed Mu'az bn Jabal as a judge and then asked him (Mu'az) what he would do if a case was presented to him. Mu'az relied 'I will adjudicate according to the Qur'an and Sunnah.' The Prophet then said if you don't find solution in either, "Mu'az replied, I will do my best to find out the solution to the problem on analogy of the Qur'an and Hadith", then the Prophet said I thank the Almighty Allah that you know the way which pleases the Almighty Allah and his messenger."
3. The Prophet said:
 "He who asserts must prove, an oath on he who denies."
4. All cases are to be tried in open court as the Holy Prophet had never tried a case in secrecy. At the time of the Holy Prophet Mosque used to be the open court for trials.
5. The Holy Prophet warned judges and Sharia courts against concealment of or favouring an offender. Thus, he said:
 "O ye people, those before you were lost and destroyed because when influential people amongst them were accused of theft they were pardoned, but when poor persons were accused they were convicted. I swear by



the Almighty Allah should Fatimatu my daughter be accused of theft I would cut off her hand.”

The Holy Prophet warned against perverting the cause of justice by bringing false witness and the like. He thus said:

“You came to me for adjudication; perhaps some of you are more intelligent in making their cases than others. If I adjudicate in favour of a person against his brother, depending upon the former's statements while the latter in reality is in the right, then I would only be handing the former a place of hell. Let him take it or not take it.”

The Holy Prophet warned those in authority to desist from extending their influence on a judge or to order him to make a biased/partial judgement. He should be left alone to judge in accordance with the Qur'an and Sunnah or what appears to him as right.

The Holy Prophet was so concerned about criminal trials because of its seriousness, thus he said: “You should avoid punishment of hadd (i.e. prescribed and fixed offences and punishment in the Qur'an and Sunnah of the Holy Prophet), when an offence has not been clearly established, or when there is no clear intention or knowledge such as where a person consummates a marriage before publicizing it.

Again, Holy Prophet added:

“You should avoid Haddi punishment where there is no clear intention or knowledge of committing the offence if there is an alternative for acquittal then he should be acquitted. It is better to acquit a guilty person by mistake than to convict an innocent”.

If a Muslim commits an offence in a non-Muslim country, he shall be punished for that offence when he returns to the Muslim country. Also where a non-Muslim commits an offence in a Muslim state he can be punished in that state.

Trial should commence immediately after commission of an offence and it should continue up to the time of delivering judgement. Judgements should not be delayed and they should be delivered in open court. It is preferable to execute haddi punishment in public and on Friday immediately after the congregational prayer.

A person charged or convicted of Haddi offences (theft, Zina, Qadhf, Drinking alcohol and Rubbery), can not be pardon by any body as regards the punishments.



In addition to the above principles or rules of procedure in Sharia Courts by the Holy Prophet, the second Caliph Umar bn Khattab has also expatiated on the general rules of procedure and how to hear cases in Sharia courts. In the popular letter he wrote on the appoint Abu Musa Al-Ash'ari, Caliph Umar stated far reaching guides on how to judge based on the principles of equality, fair hearing and in accordance with Qur'an and Sunnah. In that letter, Caliph Umar said.³⁶

- a) "Now the office of the judge is a definite religious duty and generally followed practice; Understand the depositions that are made before you, for it is useless to consider a plea that is not valid.
- b) Consider all the people (Litigants) as equal before you in your court and your attention so that the noble will not expect you to be partial and that the humble or weak will not despair of justice from you.
- c) The claimant must produce evidence, while from the dependant an oath maybe extracted.
- d) Compromise or settlement is permissible among Muslims, but not agreement through which something forbidden would be permitted or something permitted forbidden.
- e) If you give judgement yesterday, and today upon reconsideration come to the correct opinion, you should not feel prevented by your first judgement from retracting, for justice is primeval and it is better to retract than to persist in worthlessness.
- f) Use your brain about matters that perplex you if neither Qur'an nor sunnah provided solution. Study similar cases and evaluate the situation through analogy with those similar cases.
- g) If a person brings a claim which he may not be able to prove set a time limit for him. If he brings proof within the time limit, you should allow his claim otherwise you are permitted to give judgement to forestall or clear up any possible doubt.
- h) All Muslims are acceptable, as witnesses against each other except such as have received Haddi punishment and those who proved to give false evidence or illegitimate children.



- i) Avoid delivering judgement in a state of fatigue, weariness and annoyance. For establishing justice in the courts of justice, God will grant you rich reward and give you good reputation.

In the light of the above, it can be said that Sharia as way of life, has also a legal system that is complete and embracing all qualities required for an ideal and up to date legal system. Sharia has recognised the principles of fair hearing, equality before the law and presumption of innocence. It requires cases to be determined base on evidence and not on the personal knowledge of the judge. It has also allowed appeals where a case is not determined justly. All these rules of procedure are derived from the Holy Qur'an, Sunnah, Ijma Qiyas (or Ijtihad) and in the modern context legislations enacted by House of Assembly of a state.

5.5 AN EXAMINATION OF SOME IMPORTANT PROVISIONS OF SHARIA CRIMINAL PROCEDURE CODE LAW³⁷

Sharia courts system, their procedure and appeals are largely governed and guided by statutory provisions enacted by state House of Assembly in line with the strict injunctions of Islamic law. The Sharia courts do try both civil and criminal cases. They conduct their proceedings primarily in accordance with the divine sources of Sharia that is, Qur'an and Sunnah, then other secondary sources like Ijtihad and finally refer to the provisions of the Sharia criminal procedure code law of a state in criminal proceedings. As noted earlier, the scope of Sharia criminal procedure is very wide, however, this presentation will only examine some areas not because the rest are not important but due to time factor and so readers are advised to refer to the code for greater details. Hence, methods of Instituting criminal proceedings, Bail, charges, Trials or hearing, judgement and Right of appeal are going to be examined as contained in the sharia criminal procedure code law.

5.5.1 Methods of Instituting criminal proceedings.

Criminal proceedings can be instituted in Sharia courts vested with criminal jurisdiction by persons or authorities competent to do so: they include, the Attorney- General, the police, private persons and any other authorised authority or person by law.³⁸

The Attorney General of a state is vested with powers by the constitution³⁹



- i) to institute and undertake criminal proceedings against any person before any court of law in Nigeria other than a court-material in respect of any offence created by or under any law of the House of Assembly;
- ii) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person; and
- iii) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

The Attorney General of state can commence criminal proceedings against an accused person before a Sharia court by simply filing a written complaint before a Sharia court Alkali. This complaint should be an allegation that a named person has committed an offence.

The Nigerian police force is further empowered by the police Act 1967 as amended by the police (Amendment) Decree 1987, to institute criminal proceedings before any court against any person alleged to have committed an offence.⁴⁰

In practice and as required by the provisions of the Sharia criminal procedure code law, police institute criminal proceeding, before a Sharia court by laying a First Information Report, (FIR) it is done in a special form after the police has concluded making preliminary investigation and decided to charge the suspect to court.

Private persons may as well institute criminal proceedings against a person alleged to have committed an offence by laying a direct complaint before a Sharia court. This is very important in that, it helps when police refuse to act on their (i.e. private persons) complaint. However, some complicated cases may not be effectively handled by private prosecution especially ones involving murder, Robbery e.t.c . The complaint by private person here may be in writing or orally stated to the registrar of the court who then reduce it into writing.

It is important to observe that the methods of instituting criminal proceedings before a Sharia court as laid down by the Sharia criminal procedure code law is not contrary to what Sharia provides. However, the procedure provided by Sharia is simpler and easier. In fact, under Sharia, no much difference can be found on methods of instituting action before a Sharia court between civil and criminal cases. The two cases however may differ on the trial procedure. They share common things, regarding institution of action.



It is generally required that there must have the complainant (Muddai), the accused (al-mudda'a alaihi) and the offence (Al-madda'a fini). The complainant is to go to court to state his complain, his address, the name of the accused and his address and the details of the offence alleged to have been committed⁴¹. The complaint must be definite, precise realistic and unambiguous⁴². A Sharia court judge must ascertain from the statement of the complainant the above three essentials of claim. The accused must be fully informed of the ingredients and substances of the allegation of the offence against him⁴³. Thus, a criminal complaint ought to state clearly the offence, the date of the offence and time and if necessary the quantum of the property involved.

5.5.2 Trials or Hearing of complaint

The procedure for the trials of a criminal case under the Sharia criminal procedure code is provided in chapter xvi. The Sharia courts are to observe the procedure. It is required that when the court has summoned the complainant and the accused before it, and in an open court, and they all appear or that the accused is brought through arrest, the court shall state to the accused the particulars of the offence and he shall be asked if he has any cause to show why he should not be convicted. If the accused admits that he has committed the offence, his admission shall be recorded as nearly as possible in the words used by him and if he shows no sufficient cause why he should not be convicted the court may convict him accordingly. However, the court is cautioned not to rush into convicting an accused who made an admission unless it is satisfied that he has clearly understood the meaning and nature of the offence and all its ingredients; the effect of his admission, and in addition the court must inform him of his right to retract the admission.⁴⁴

Where the accused denies the allegation, then the Sharia court shall proceed to hear witnesses of the prosecution. If after the close of the prosecution witnesses the courts found the complaint to be without substance or no prima facie case has been established, the court should discharge the accused. But where, the court considers that a prima facie case has been established, it shall then frame a charge against the accused, read it to him, explain all the ingredients of the offence for him to make a plea of guilty or not guilty. If he pleads guilty, the court shall record the plea and may convict him accordingly. In case he pleaded not guilty, then the court should request him to state his defence including right to cross-examine or further cross-examine any of the witness for the prosecution whose evidence has been taken. After the accused entered his defence and produce his witness, the



court shall make its findings and accordingly either convict and sentence the accused or discharge him. Conviction and sentence however shall be done after allocutus has been made by the accused.⁴⁵

The above procedure of trials is in agreement with what is obtainable in Sharia. Under Sharia, when both parties are present in court, the claimant or complainant will be asked to state his claim or case. Then the court will call upon the defendant for his answer, if necessary. When the defendant disputes the claim, the complainant will be called upon to prove his allegation by calling witnesses and thereafter the accused is given opportunity to defend himself by also calling witnesses before judgment is passed.⁴⁶ Criminal trials in Sharia court must be conducted in open court.⁴⁷

5.5.3 Charges

The Sharia courts are expected to prefer a charge against an accused person when offence appears to have been committed after it has heard the prosecution witnesses. The charge shall be framed in a special form or may be modified to suit the circumstance of each case under the code. It is required by the criminal procedure code law regarding the content of a charge that "Every charge under this Sharia criminal procedure code shall have statement of the offence complained of with date and place, and when material, the value of the property in respect of which the offence has been committed".⁴⁸

Also the code requires that:-

"The charge shall also as much as possible define the offence so as to give the accused notice of the matter with which he is charged."⁴⁹

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Then the code provides the effect of errors of the said charge. It says that:

No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall, be regarded, at any stage of the case as material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice.⁵⁰

It is to be observed that the requirement of framing a charge, its contents and legal effects of errors on a charge are all not contrary to injunctions of Sharia especially on the need to do justice and avoid inflicting punishments erroneously.



5.5.4 Custody and Bail of the accused

Generally where an accused person is arraigned before a Sharia court and after the substance of the offence is stated to him and his plea taken, the court is to order for his remand in prison until the next adjourn date. However, where he has a reliable surety or the court is satisfied that he can stand for himself, he can be granted bail pending the determination of the case. Most offences are bailable however, section 301(1) attempt to prohibit the release of a person charged with an offence punishable with death on bail. It reads:

“persons accused on an offence punishable with death shall not be released on bail”

It is however to be noted that subsection (3) of same S.301 has negated the effect of subsection (1).

It states that:

Notwithstanding any thing contained in subsections (1) and (2), if it appears to the upper Sharia court or the Sharia court of appeal that there are not reasonable grounds for believing that a person accused has committed the offence, but that there are sufficient grounds for further inquiry, such person may, pending such inquiry, be released on bail.

In effect, persons charged with an offence punishable with death may be released on bail by the upper Sharia court or Sharia court of appeal. Similarly bail may be granted pending appeal.

5.5.5 Judgement and Execution

Judgment in every trial court shall be in writing and shall be pronounced, the substance of it explained in a language understood by the accused in open court either on the day on which the hearing terminates or at some subsequent time of which due notice shall be given. Thus, no provision is made for delivery of judgment orally by Sharia courts in criminal trials. As regards the contents of a judgment, it is required that, every judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed or sealed by the court in open court at the time of pronouncing it. If the judgment is one of conviction it shall specify the offence of which and the section of the Sharia Penal Code or other law under which the accused is convicted and the punishment to



which he is sentenced. Where the judgment is one of discharge it shall state the offence of which the accused is discharged and direct that he be set at liberty.⁵¹

Execution of judgment varies. However, we shall consider execution of death sentence, Qisas punishment as well as amputation that is haddi. Then we briefly state how haddi lashes are to be carried out.

Whenever a judge sentenced an accused person to death, or that his hands be amputated or that he shall be punished by Qisas or retaliation affecting his limb or body, then it must not be executed except with the consent and approval of the Governor.⁵²

In case of sentence of haddi lashing, it shall be executed at such times as the court may direct. Also the execution of the canning should be stayed for a period of seven days when the convicted person informs the court of his intention to appeal. If it comes to the execution, of canning, the court shall ensure that the canning is carried out in the following manner;

- a) the whip to be used shall be a light, supple leather which is one tailed;
- b) the convict shall be made to sit-up;
- c) the male convict shall be bared except for his underpants;
- d) The female convict shall be relieved only of heavy outer garments that in the opinion of the court may negate the effect of lashes,
- e) The convict shall not be bound unless it becomes clear that the punishment cannot otherwise be carried out;
- f) The executioner shall be of moderate physique;
- g) The lashes shall be of moderate forces so as not to cause lacerations on the skin of the convict;
- h) The executioner shall hold the whip with the last three fingers; the first finger and the thumb are to be held loosely and the whip which emerged between the middle fingers and the first finger,
- i) The executioner shall strike only the back and the shoulders of the convict and where the convict is a female recourse shall be made to strict modesty and decency.⁵³

5.5.6 Appeals and Review

Appeals from the decision of Sharia Courts in criminal matters is allowed and shall be in accordance with the provisions of Sharia courts law, Sharia criminal procedure code law, the Sharia Court of Appeal Law or any rules made under such laws.⁵⁴



Again, whoever is not satisfied with the order, decision or judgment made by a Sharia court may appeal to the upper Sharia court sitting in its appellate jurisdiction. Also appeals from the decision, judgement and orders of the upper Sharia court in criminal matters shall lie to the Sharia Court of Appeal.

Where a party is not satisfied with the judgment of any Sharia courts then he must file notice and grounds of appeal. The grounds of appeal should set out each error, omission, irregularity or other matter on which he relies or of which he complains. Some of the grounds of appeal may include:

- (a) that the lower court had no jurisdiction in the case; or
- (b) that the lower court has exceeded its jurisdiction in the case, or that the decision has been obtained by fraud, or that the decision is erroneous in point of law etc.

Appeal is allowed under Islamic law against judgment of a Sharia court. The late Hon. Grand Qadi of Bauchi State, in his book, the Supremacy of Islamic said that "Judgments of a lower court can be set aside if it is in conflict with Qur'an or Sunnah, or a reknown Qiyas (analogy) consensus of the Muslim jurists, or an important procedural rule such as admitting evidence of the people whose evidence is inadmissible or when a judge is biased, or where he based his judgment on what was personally known to him etc."⁵⁶ It is a condition that the grounds of appeal upon which a judgment could be set aside should be clearly stated. However, Islamic Law does not permit setting aside judgment on grounds of difference of interpretation or independent reasoning (Ijtihad) because the view of the reviewing judge may be wrong.⁵⁷

Similarly, right of appeal and filing of appeal under Sharia could be supported by the provision of the Holy Qur'an 58:1 which reads:

"Indeed Allah has heard the statement of her (Khaulah bint Tha'labah) that disputes with you (O Muhammad (SAW)) concerning her husband (Aus bin As-samit), and complains to Allah. And Allah hears the argument between you both. Verily, Allah is All-Hearer, All-seer."

It is also reported that during the reign of Sayyidina Ali, a young man complained to him that his father travelled with some persons from his locality and did not return. When he asked the travelling companions, they said his father died. He was not convinced and suspected them of murdering his



father, and therefore, filed a suit against them before Qadi Shurayh, whereby they were acquitted upon their denial of the charge.

On appeal, before sayyidina Ali, inquiries were made from every accused in separate trials, whereby all of them gave different versions of the incident. From this the suspicion of conspiracy arose, and upon further inquiry they confessed to the murder of the deceased.⁵⁸

Therefore, it may not be correct for some people to say that once a judge delivered judgment in criminal case, the parties cannot appeal under Islamic Law.

6.6 CONCLUSION

In the final analyses it can be said that Sharia criminal procedure has made adequate provisions for the attainment of justice and so it is wrong to see Islamic criminal justice system as unjust and or barbaric. It has all necessary safeguards for the protection of rights of the accused under the system. It is always insisting on fair hearing, and equality before the law. In fact, Sharia courts in some Northern States don't just try cases whether civil or criminal on the usual Islamic books of jurisprudence but rather they are guided by statutory or codified Sharia law provisions such as Sharia penal code law and Sharia criminal procedure code law. Again, any person not satisfied with the decision of a Sharia court has right to appeal to the appellate court up to the supreme court of Nigeria. However, it is sad to say that despite the application of Sharia penal legislations, yet some states have not enacted Sharia criminal procedure code law thereby leaving the matter of procedure to the judges based on classical Islamic law books. Though there is nothing wrong in consulting Islamic Law books in conducting criminal trials, it is better to have a codified law to guide all Sharia court judges to avoid uncalled for and misconceived blame of lack of fairing under Islamic criminal justice system.



ENDNOTES AND REFERENCES

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See Section 5 of the Bauchi State Sharia Courts (Administration of Justice and other consequential changes) Law 2000.

See section 5 and 7 Ibid; Also, the Sharia Criminal Procedure Code Law of the State to the best of my knowledge is yet to be signed into law.

Mahmud, A.B.: A Brief History of Sharia in the Defunct Northern Nigeria, (1988) P. 49.

Mustapha A. Sharia: A Conceptual Framework. In understanding Sharia in Nigeria, edited A. M. Yakubu & Co. Spectrum Book Ltd, Ibadan Nigeria (2001), P. 17

Ibid.

Section 2, Bauchi State Sharia Courts, (Administration of Justice and certain consequential Changes) law, 2001.

See also Q: 6: 38 Nothing (i.e. Quran) we omitted from the Book.

Doherty, O: Criminal Procedure in Nigeria Black Stone Press Ltd, London, 1990 P. 1.

Bambale, Y. Y.: Crimes and Punishments under Islamic Law, Infoprint publishers, Kaduna (1998).

Ibid. P.1

Abdur-Rahim, M. A.: The Principles of Muhamamada, Jurisprudence, All Pakistan Legal Decision, Lahore (1911) P. 361.

Ibid P. 361

Three of the twelve offences relate to the social set up of people and protection of their families. They are-Adultery (Zina) Qadhf, Drunkenness. Two of the twelve offences protect against property, namely- Theft (sariqah) and Robbery (Hirabah). Another two offences concern the preservation of an authority which is entrusted with the affairs of the people and maintenance of peace. They are:- Treason and Apostasy (Ridda). The rest affect human body and life, namely culpable homicide punishable with death and culpable homicide not punishable with death. Then intentional causing of harm and unintentional causing of harm. P.112.

See also section 27. of the Jigawa State Sharia Penal Code 2000.

Doherty, O. Op. Cit P.2

Daura A. U. M: Jagorar Masu Hukunci; Hausa Translation of Tuhfatil Hukkan, Ibn Asim, Vol. I & II Hudahuda Public Co. Ltd. Zaria (1996) P. 3 and 35.

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Abdur-Rahma M. A: Op cit. P. 365.

Nwadialo F; Modern Nigerian Law of Evidence Ethiope Publition corporation Benin City, Nigeria (1981) P. 1.

20. Ibid P. 1 and 2.



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Ibid P. 364-5.

Some examples of a good Sharia Criminal Procedure Code Law are Sharia Criminal Procedure Code law No. 18, 2000 of Zamfara State and the Sharia Criminal Procedure Code Law No. 7, 2002 of Jigawa State.

Mahmud, A. B: Supremacy of Islamic Law, Huda-Huda Publishing Co. Zaria (N.D.) P. 114.

Orire, A: Sharia: A Legal System and a way life; in understand Sharia in Nigeria, edited A.M. Yakubu & Co. Spectrum books ltd, Ibadan, Nigeria P. 32.

Mahmud, A.B. Op. cit. P. 185.

Ibid. P. 118.

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Orire, A. Op. cit. P. 31

Ibid.

Mahmud, A.B. Op. cit. P. 129-133.

Ibid. P. 130 – 135.

Ibid P. 123, See also Orire – Op. cit. P. 31-32.

See for example Bauchi State Sharia Courts (Administration of Justice and certain consequential changes/law 2000.; Bauchi State Sharia Penal Code Law, 2001, Bauchi State Sharia Criminal Procedure code Law No. 18, 2000 of Zamfara State and Sharia Criminal Procedure Code Law, No. 7, 2001 of Jigawa State.

Mahmud, A.B. Op. cit. Pp. 117-120

Mahmud, A.B. Op. cit. P. 123

This examination is going to be done based on the Sharia criminal procedure code law, No. 7. 2001 of Jigawa State only for purposes of illustration.

See S. 141 of Sharia criminal procedure code law, 2000, Zamfara State. (SCPC).

See also S. 139 SCPC Jigawa State.

See S. 211 of the Constitution of the Federal Republic of Nigeria, 1999.

Doherty, O. Op. cit P. 67. See also sections 4 and 19 of the Police Act 1990 L.F.N.

Abdur-Rahim M. A. Op. cit P. 365-6; See also Daura, Usman.M. Op. cit P. 6-7.

Mahmud, A. B. Op. cit P. 103

Hon. Kadi Tukur Sani Argungu:- Hanyoyin Sakara Da Zartadda Hukunci kan shariun Neman hakki da laiffuka a karkashin dokokin jihar Kebbi na sharia musulnci- a paper presented at a workshop for Sharia court judges of Kebbi State, held on 14/11/2001 at Birnin Kebbi. Pp. 13-13.

See Section 153-155 of the SCPC Zamfara State.

Ibid Sections 156-162.

Abdur-Rahim-M.A. Op. cit 369-370.

Mahmud, A. B. Op. cit P. 120.

Section 1 73 (1) SCPC, Zamfara State

Ibid, Section 173(2).



50. Ibid, S. 174
51. Ibid, Sections 235-337
52. Ibid 256-260 See also Hon Kadi Tukur Sani Argungu Op. cit. P. 11
53. Ibid S. 269 – See also Argungu, Op. cit P. 10.
54. See S. 240 (1) SCPC 2001 of Jigawa State; See also S. 24 (1) of the SCPC 2000 Zamfara State.
55. See S. 242 (2) SCPC 2000 of Zamfara State.
56. Mahmud A. B. Op. cit P. 128.
57. Ibid. p. 128.
58. Haneef, Sayed S. S.: Islamic Law of Evidence Pelandule Publications, Malaysia (1994) P.13.