

Zina: The 'Forgotten Problem' of the Shari'a in Nigeria

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Timothy Little's paper takes up the vexed and knotted issue of zina laws in Nigeria. Through a careful tracing of the intertwined histories of Shari'a law and colonial legal structures that persist to this day, Timothy explores themes of religious identity, tradition, national identity and their relation to the idea of legality. He characterizes zina as a 'forgotten problem', and argues that the fact that the zina laws, while facially neutral, impact women to a far greater extent, allows the legal persecution of women to be narrated away as a form of maintenance of cultural norms. He draws upon themes of Islamic feminism and international solidarity to sketch a way forward in protecting the rights of women in Nigeria.

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INTRODUCTION

Muslim men, like men everywhere, are the last to accept that gender inequality is a social contraption rather than a religious imperative. This is natural not only because men are the ultimate beneficiaries of this inequality, but also only those who are victims of injustice tend to see it and appreciate the absurdity of attributing it to God.¹

These words by Sanusi Lamido Sanusi, the crowned Emir of Kano, encompass numerous aspects of the following Article. Prima facie, they optimistically suggest some of Nigeria's elite are willing to speak on gender-inequality; however, this statement is equally symbolic of the fact that in most communities around the world, societal concerns remain predominantly represented by men. Moreover, it highlights Islam is not responsible for patriarchal control

¹ Sanusi Lamido Sanusi , 'Shariah and the Woman Question' (2000) <<http://www.hartford-hwp.com/archives/34a/081.html>> accessed 15 March 2016.

over women. In truth, it is the long-established universal trend of men, colonising the divine through male-centric misinterpretations of religious texts that is responsible for the existing patriarchal power-structures in the 21st century. Lastly, these words suggest that legal change cannot occur without widespread change to the beliefs and attitudes of all gender-identities; to not support or accept unjust patriarchal dominance. Therefore, it is submitted that when beliefs are grounded in habitually patriarchal interpretations of religion, it must be appreciated the pursuit for legal reform requires a long-term solidarity strategy.

Despite *zina* being a gender-neutral concept, females from poorer communities remain at most risk of conviction. Attempting to provide *zina* with a definition may appear to be a contradiction in itself. Broadly, classic *fiqh* (Islamic jurisprudence) uses *zina* as a term to describe unlawful sexual activity or adultery. *Zina* is not defined in the Quran, however the guilty are subject to pre-determined *hadd* punishment (God specified) – a married offender is punished with *rajm* (death by stoning), and an unmarried offender is punished with 100 lashes. *Fiqh* provided *zina* rulings to ensure sexual order and legitimate paternity.² Therefore, the classical rhetoric on *zina* is a ‘God-given moral stipulation’ that Muslims should attempt to abide by.³ Nevertheless, since the advent of the 1999 Constitution of Nigeria, *zina* has been legislated in 12 northern Nigerian states, under the ‘Hudud and Hudud-Related Offences’ section of the respective Muslim penal codes.⁴ Following promising decisions in *shari’a* appellate courts, *zina* has become the *forgotten problem* of the Islamic criminal justice system of Nigeria.⁵ Fortunately, there have been no *zina* convictions for well over a decade. However, the few promising judgments only established precedents in the respective jurisdictions, and the relevant legislative provisions remain unchanged. Thus, the law lacks certainty as to whether *zina* convictions will appear once again.

The federation of Nigeria and all of its states are theoretically secular, as per the Constitution.⁶ Some post-colonial scholars argue the principle of secularism is poorly adhered to in a

² Ziba Mir-Hosseini, ‘Criminalising sexuality: *Zina* laws as violence against women in Muslim contexts’ [2011] SUR 7, 18.

³ Ziba Mir-Hosseini and Vanja Hamzic, *Control and Sexuality: Revival of Zina Laws in Muslim Contexts* (1st edn, Women Living Under Muslim Laws 2010) 7.

⁴ All share structural similarities, save for Niger state. Niger state enacted the 2000 Niger State Penal Code (Amendment) Law. The Act also provides for *zina* and *zina*-related offences, however it is defined and grouped in a different structure to the other states. Nonetheless, the *zina* provisions of Niger state are equally as barbaric as its counterparts.

⁵ Widespread international attention on *zina* in Nigeria has also ceased, partly because of other concerns in the region, e.g. the increasing prominence of the Islamic fundamentalist organisation, Boko Haram.

⁶ Constitution of the Federal Republic of Nigeria 1999, Article 10: ‘[t]he Government of the Federation or of a State shall not adopt any religion as State Religion’.

significant part of the country because it is an imposed Western ideology.⁷ Thus, it appears reasonable to firstly consider the status of Islamic law and gender roles in pre-colonial, colonial and post-colonial Nigeria. This Section will argue that colonial interference resulted in an oppression of the Muslim identity which continues in the present-day. This has created space for the ruling elite to use Islam as a method of over-glorifying the region's pre-colonial history,⁸ whilst holding the concept of 'culture' as a weapon that affirms patriarchal practices and ideologies.⁹ Whilst it is accepted that legal pluralism underpins all of Nigerian history in some way, greater emphasis will be placed on a model of pluralist legal theory in the second Section. This will allow for an in-depth analysis of the Muslim populace's longstanding struggle for autonomy over *shari'a*, and how its eventual implementation occurred with legitimacy.

During discussion of Islamic criminal law in contemporary Nigeria, and its explicit human rights breaches, it will be questioned whether the '*shari'a* implementation' movement was actually intended to reflect the social climate of the Muslim community. Or alternatively, whether it was intended to protect the ruling class' political interests and power. The specific *zina* laws under the new Muslim penal codes will be examined in the third Section. Consideration will be given to how the gender-neutrality principle behind *zina* has been largely overlooked by the courts. Attention will then turn to, *inter alia*, patriarchal Sections of 9th century Maliki *fiqh* that have been interpreted in a way that does not safeguard female rape victims from facing *zina* convictions. The fourth Section submits that it is possible to change *zina* laws through a *solidarity strategy* that includes *formal* law reform, *informal* changes to communal power-structures, and reorienting international pressures. This article will conclude by amalgamating these arguments to support the overall argument; Nigerian *zina* laws must be incrementally dismantled in a way that ensures females are not subjugated to live under patriarchal interpretations of *shari'a*, and forces Nigeria to fulfil its domestic and international human rights obligations.

⁷ Leela Fernandes , *Transforming Feminist Practice: Non-Violence, Social Justice and the Possibilities of a Spiritualized Feminism* (1st edn, Aunt Lute Books, San Francisco 2003) 102.

⁸ Andy Greenwald , 'Postcolonial Feminism in Anthills of the Savannah' (2012)
<<http://www.postcolonialweb.org/achebe/greenwald3.html> > accessed 9 December 2015.

⁹ Ethel Crowley , 'Third World Women and the Inadequacies of Western Feminism' (2014)
<<http://www.globalresearch.ca/third-world-women-and-the-inadequacies-of-western-feminism/5372515>> accessed 9 December 2015.

I. BACKGROUND: HISTORY OF ISLAMIC LAW AND GENDER ROLES

An assessment of Islamic law and gender roles throughout Nigeria's history is imperative when understanding the context behind the present *zina* laws. Throughout this Section, emphasis will be placed on the form of Islamic law that existed in pre-colonial Nigeria, and how the colonial regime and its continuing legacy ultimately oppressed the Muslim identity. The focus will then shift to how the region's colonial past allowed for an 'over-glorification' of the pre-colonial era, and why such a movement inherently overlooks gender rights.¹⁰

Islamic Law in Pre-Colonial Nigeria

The practice of Islam in Nigeria was introduced during either the 9th,¹¹ or 10th century,¹² and remains the predominant religion in the northern region. In 1804, the political landscape of northern Nigeria was heavily influenced by a religious movement sometimes referred to as the Jihad of Shehu Usman Dan Fodio. The movement resulted in the first application of Islamic law in formal judicial structures during the 19th century, following the creation of the Sokoto Caliphate.¹³ By the time northern Nigeria was under colonial control, a court system already existed with Islamic law matters tried before an *alkali* (Islamic law judge).¹⁴ The Quran, the Sunnah and sources of *shari'a* formed the body of Islamic law, and its application was without restrictions.¹⁵ No formal building was used as a courthouse, and the *alkali* would hear cases in his home or travel to other locations.¹⁶ Hiskett asserted that despite the administration of Islamic law developing considerably from the period of the 1804 Jihad, the Islamic identity and upholding of justice in accordance with *shari'a* 'was not seriously threatened' prior to

¹⁰ Please note: the spelling of many Islamic concepts and even names of certain individuals vary between sources.

¹¹ Auwalu H Yadudu, 'Colonialism and the Transformation of Islamic Law: in the Northern States of Nigeria' [1992] J Legal Plur Unoff Law 103, 110.

¹² Rose C Uzoma, 'Religious Pluralism, Cultural Differences, and Social Stability in Nigeria' [2004] BYU L Rev 651, 655.

¹³ (n 11) 110.

¹⁴ A B Yusuf, *Nigerian Legal System: Pluralism and Conflict of Laws in the Northern States* (1st edn, National Publishing House, New Delhi 1982) 33.

¹⁵ (n 11) 110.

¹⁶ C N Ubah, 'Islamic Legal System and the Westernization Process in the Nigerian Emirates' [1982] J Legal Plur Unoff Law 69, 70.

colonial rule.¹⁷ There is still much debate centred around the jurisprudential standing of *shari'a* in pre-colonial Nigeria. Yadadu claimed that 'Islamic law applied in a fairly unqualified manner throughout the region during the pre-colonial period'.¹⁸ Nigeria consists of numerous heterogeneous Muslim communities which have resulted from a strong history of cultural exchange and legal pluralism in the northern region.¹⁹ Within each separate group's interpretation and application of Islamic law, there has been a historic influence of individual customs and cultural practices.²⁰ Indeed, 'what is assumed to be Muslim in one community may be unknown or even considered un-Islamic in other Muslim communities'.²¹ Hamzic highlighted that although *shari'a* formed the basis of jurisprudence in the Sokoto Caliphate,²² it did not produce a homogenous *fiqh* or preclude the Hausa majority from also continuing the application of customary laws.²³ Furthermore,

[F]or Hausa Muslims[,] Shari'a did not exercise complete monolithic control over litigation, but was one of several possibilities for finding legal relief. The choice was... most likely weighed on the balance of personal experience and social identity as often as that of faith.²⁴

In support, Salamone submitted Islamic law in the territory was 'strongly tempered by custom' and that "'pure" Islamic law is not and was not in the past practised in Northern Nigeria'.²⁵ However, Salamone seemingly formed this view by observing Islamic law's customary influences, and then recognising the lack of judicial evidence to suggest otherwise.²⁶ In contrast, it is argued that determining the 'purity' of Islamic law from court records alone is a misguided approach. Although Islamic law contains rules that are judicially enforceable, adherence to its norms are largely dictated by the conscience of the believer.

¹⁷ M Hiskett, *The Sword of Truth: The Life and Times of Shehu Usman dan Fodio* (1st edn, Oxford University Press, New York 1973) 144.

¹⁸ (n 11) 108.

¹⁹ (n 3) 121.

²⁰ *ibid.*

²¹ Muhammad Umar, 'Gender Issues in Application of Islamic Law in Nigeria' [2007] AJ 29, 43.

²² T Falola et al, *A History of Nigeria* (1st edn, Cambridge University Press, Cambridge 2008) 73.

²³ (n 3) 121.

²⁴ M Wren-Bivins, *Telling Stories, Making Histories: Women, Words, and Islam in Nineteenth-century Hausaland and the Sokoto Caliphate* (1st edn, NH: Heinemann, Portsmouth 2007) 126.

²⁵ Frank Salamone, 'The Clash Between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria' [1983] J Legal Plur Unoff Law 15, 29.

²⁶ (n 11) 113.

Despite opposing views regarding the jurisprudential standing and 'purity' of Islamic law in pre-colonial northern Nigeria, it is clear that *shari'a* and a Muslim way of life was central to the majority's identity.

Colonial Influence on Islamic Law

The 'Indirect Rule'

The majority of northern Nigerian Muslims feared Islam would be prohibited under British control.²⁷ However, the High Commissioner, Lord Lugard, enacted a policy which brought the pre-existing court system under the British style of administration, and became known as the 'Indirect Rule'. Some have argued that because the introduction of the Indirect Rule allowed for native administration, any transformations to the substance and form of customary laws could not be connected to colonial policies.²⁸ However, Lugard's intentions were clear. He had previously stated that some matters would become illegal 'even though sanctioned by native law or religion',²⁹ and the native courts were permitted to enforce customary laws provided they did not encroach on (the British perception of) 'natural justice and humanity'.³⁰ This clearly applied an 'irresistible pressure to modify [native laws] closer to the canons of Western societies'.³¹ In support, Allot provided how colonialism ultimately transformed the pre-colonial judicial institutions:

These institutions were left in place, and originally were given considerable freedom to function in a traditional way. Reforms were however gradually introduced, which led to the native courts being progressively anglicised in their jurisdiction, their personnel and their procedure... the use of written process to summon parties and witnesses; the training of court members; the eventual selection of court members on the basis of their qualifications rather than their customary position – all these changes were gradually introduced in most of the

²⁷ (n 16) 71.

²⁸ (n 11) 109.

²⁹ Frederick Dealtry Lugard, 'Papers of Frederick Dealtry Lugard, Baron Lugard of Abinger' [1858-1919] MSS Brit Emp (Rhodes House Library), s 65.

³⁰ (n 16) 71.

³¹ (n 16) 69.

British territories. The end result was that by the closing of the period of the British colonial rule, the so-called native courts... bore little resemblance to the traditional institutions which they gradually replaced.³²

Ubah described this transformation as the 'westernization process', and argued it impacted most substantially on *hudud* punishments,³³ as they did not operate in line with Lugard's concept of 'natural justice and humanity'. *Rajm* for *zina* was replaced with a fine or imprisonment.³⁴ This example is not submitted to support *hudud* punishments, but instead highlight how colonialism restricted Muslim autonomy over religious practices. Whilst some Muslim countries embraced Western values, they were clearly imposed on the Nigerian Muslims by external power.³⁵ Another argument is that the re-shaping of Islamic law was initiated by embracing the capitalist mode of production.³⁶ This argument may have merit regarding matters such as property rights under the land tenure system. However, it is difficult to find an isolated link between Marxist principles and the transformation of offences such as *zina*. In support, Yadadu questioned, '[W]here does economic determinism come in to give a plausible rationale for a principle of Islamic law decreed in the holy Qur'an or extracted from it and other sources of the Shari'ah?'³⁷

As will be seen, weakened autonomy of Islamic law under the 'Indirect Rule' has enabled ruling elites in contemporary Nigeria to manipulate perceptions of what re-gaining the Muslim identity requires.

Over-Glorification of Pre-Colonial History

Following the colonial regime, 'the North entrenched itself in a policy of self-protective withdrawal from Western culture, whereas people in the South were deeply influenced by

³² A N Allott, 'What is to be done with African customary law?' [1984] *Journal of African Law* 57, 58.

³³ (n 16) 71.

³⁴ *ibid* 72.

³⁵ (n 16) 69.

³⁶ (n 11) 108.

³⁷ *ibid* 109.

it'.³⁸ This introduces another issue stemming from colonialism which results in inadequate recognition of women's rights.

Adultery laws appeared under the British-style of criminal and penal codes in the latter half of the colonial period, and capital punishment for the offence was prohibited.³⁹ Prima facie, this might add weight to the argument that colonialism could not have influenced existing *zina* laws in contemporary Nigeria. However, attention must turn to one of the cornerstones of post-colonial theory, described by Fanon as the 'cultural nationalist phase'.⁴⁰ It asserts the first step taken at the time of colonial independence is the 'reclamation of the previously disparaged and disrespected culture'.⁴¹ Peterson stated this phase offers a 'service of dignifying the past and restoring...[Muslim] self-confidence'.⁴² In contrast, it is submitted this phase also leads to an over-glorification of the pre-colonial society that once existed. Such over-glorifications can be problematic for gender-equality. Restoration of incompatible patriarchal practices establishes rigidity in the law to adapt to the gender-neutral principles that should be expected in the present-day. Indeed, Greenwald claimed the 'result of the glorification of pre-colonial culture is the acceptance of, or refusal to deal with, inherent issues of gender inequality or abuse within the society'.⁴³ In support, it is submitted that gender-inequality has been perpetuated partly by the ruling elite in contemporary northern Nigeria, who have implemented or supported, poorly drafted and gender-bias provisions of Islamic law. For example, the supposed 're-introduction' of *zina*, despite it being legally obsolete in the overwhelming majority of all Muslim countries prior to the 20th century.⁴⁴ In 1959, Anderson wrote of an unreported northern Nigerian case that concerned *zina* and homicide.⁴⁵ The married woman in question confessed to *zina*, however the Native Court rejected her testimony 'on the ground that a woman is not a competent witness in a criminal litigation'.⁴⁶ As will be seen in Section III, this example is in stark contrast to the evidential rules seen in

³⁸ Lissi Rasmussen, *Christian-Muslim Relations in Africa: The Cases of Northern Nigeria and Tanzania Compared* (1st edn, British Academic Press, London 1993) 43.

³⁹ O Kane, *Muslim Modernity in Postcolonial Nigeria: A Study of the Society for the Removal of Innovation and Reinstatement of Tradition* (1st edn, Brill, Leiden 2003) 93.

⁴⁰ F Fanon, 'National Culture' in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003).

⁴¹ (n 8).

⁴² Kirsten Holst Petersen, 'First Things First: Problems of a Feminist Approach to African Literature' in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003).

⁴³ (n 8).

⁴⁴ (n 3) 21.

⁴⁵ J N D Anderson, 'Conflict of Laws in Northern Nigeria. A New Start. ' [1959] ICLQ 443, 444.

⁴⁶ The woman's husband had murdered his friend, and so there were no other witnesses. see (n 14) 145.

contemporary *zina* trials. In addition, no documentation or evidence of capital punishment exists for *zina* offences in Nigeria before the introduction of the 1999 *hudud* legislation.⁴⁷ There appears to be a lack of evidence suggesting *zina* was an integral part of pre-colonial Nigerian society. Thus, it seems to have re-appeared as a result of over-glorification.

It has also been suggested the rights afforded to women in pre-colonial Nigeria were mostly determined by their social-class, not gender. For example, the majority of females were not allowed formal education under the rule of Shehu Usman dan Fodio. However, his daughter, Nana Asma'u, was a respected teacher, poet, writer and counsellor to the Caliph.⁴⁸ When the social status of the women convicted of *zina* in contemporary Nigeria is considered in Section III, it would appear class continues to influence which rights women are afforded. In addition, most women in the Sokoto Caliphate during the 19th century freely chose not to wear *hijab* (head covering).⁴⁹ During colonial times, *hijab* became symbolic of the Muslim resistance.⁵⁰ However, *hijab* did not remain symbolic of the Muslim female population's strength and unity against colonial oppression. It is now a compulsory part of the female dress code,⁵¹ enforced by an over-glorified patriarchal interpretation of customs that supposedly existed in the Muslim communities of pre-colonial northern Nigeria.

Use of 'Culture' as a Patriarchal Weapon

The concept of 'culture' is used universally to facilitate patriarchal dominance in politics and the attached legal systems. Nigeria is of no exception. Crowley asserted the concepts of 'culture' and 'tradition' can be purposefully confused within politics, arguing the result of this confusion is often the subordination of women.⁵² By appearing to take a religiously conservative approach, politicians are enabled to claim, for example, that they wish to preserve traditional family structures, for the 'cause' of restoring a lost 'culture'. It is therefore of little surprise that this most often subjugates women to the roles of mother and housewife.⁵³

⁴⁷ (n 3) 122.

⁴⁸ Oluwakemi Adesina, 'Women, Shari'ah, and Zina in Northern Nigeria' [2010] African Nebula Issue 2 43, 44.

⁴⁹ (n 3) 121.

⁵⁰ *ibid.*

⁵¹ (n 3) 121.

⁵² (n 9).

⁵³ *ibid.*

El Sadaawi suggested that when politicians are wanting to appeal to a Muslim majority, particular sections from the Islamic texts are taken to justify their political interests. Therefore, by supposedly 'restoring' *zina* into Muslim life,⁵⁴ politicians gather support from the Muslim populace. In practice, however, such religious politics reproduces gendered perceptions of religious 'purity', which is 'projected onto the material bodies of women', and encourages repressive beliefs regarding women's sexuality.⁵⁵

A common trend in Nigerian politics is the claim to prioritise achieving social and political stability. As a result of colonialism, military rule, and tensions with the more secular South, a common view is that northern 'stability' will be achieved by restoring the Muslim identity through '*shari'a* implementation'. However, there is irony in hegemonic institutions using religious identity and tradition in the struggle against secularism, particularly because their own interests are gaining greater state power and control.⁵⁶ Nonetheless, the supposed restoration of 'culture' results in affirming patriarchal ownership of women in all aspects of life. As will be seen when attention turns to the turbulent journey towards *shari'a* implementation, supporter confidence was clearly placed in the image often portrayed by conservative leadership. However as highlighted by Crowley, '[this] conservatism is called "culture" but it really is "tradition": [here,] culture... is seen as something to which we return[,] rather than a complex and dynamic contemporary process'.⁵⁷

Various regimes in Nigeria's history have resulted in a sense of oppression amongst the Muslim population. Crowley and Greenwald's submissions illustrate the grounds that have led to the ruling elite now using *zina* as a weapon that exacerbates the oppression of women with legitimacy in Nigeria's pluralist legal system. This argument is strengthened by considering the '*shari'a* implementation' movement, in the following Section.

II. LEGAL PLURALISM AND SHARI'A IMPLEMENTATION

⁵⁴ Which *fiqh* delivered rulings on for the purpose of ensuring legitimate paternity in the family unit, as discussed.

⁵⁵ (n 7) 102.

⁵⁶ *ibid* 104.

⁵⁷ (n 9).

The concept of legal pluralism is not confined to the colonial and post-colonial nations, however it is most commonly applied to such contexts.⁵⁸ This Section argues that the substance and form of Islamic law in post-colonial Nigeria has been re-shaped significantly by legal pluralism, and this is particularly clear under what is now a federal legal system. Legal pluralistic theory allows one to investigate the rationales behind legal change, and thus, how *zina* has 're-appeared' under *shari'a* implementation. Attention will also be given to the social impact of using religion in politics, and how this has transitioned into formalised law that oppresses the rights of women.

Pluralist Legal Theory

The concept of 'legal pluralism' is without a set definition. Menski claims that Ehrlich made the earliest contribution to the body of pluralist legal theory,⁵⁹ through his assertion that law 'exists side by side with other factors in society which may heavily influence or even in practice override it'.⁶⁰ Northern Nigerian pluralist, Ahmed Beita Yusuf, defined legal pluralism as, 'the differential retention of some relatively distinctive legal institutions by individual groups and organisations within a single society'.⁶¹ He added, '[t]hat is to say a legal system is pluralistic if there exist two or more interacting juridical sovereignties within a given community, region, state or political entity'.⁶² Yusuf claimed this definition allowed for the assertion that legal pluralism applies to societies of all complexities, and would appear in all social environments that encompass a 'hierarchical politico-social structure'.⁶³ In support, Weber added, every sub-group that exists under any form of political organisation is undoubtedly subject to distinct rules and structures that aim to control the behaviour of its members.⁶⁴ In a submission that widens the boundaries of legal pluralism even further, Pospisil claimed that no 'human society' could even exist with only one legal institution.⁶⁵ He was of the opinion that each 'social segment' of a human society would possess a distinguishable legal-type structure that would regulate its members, and each structure

⁵⁸ J Griffiths, 'What is Legal Pluralism?' [1986] *J Legal Plur Unoff Law* 1, 5.

⁵⁹ Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd, Cambridge University Press, New York 2006) 92.

⁶⁰ J M Kelly, *A Short History of Western Legal Theory* (1st edn, Clarendon Press, Oxford, 1992) 362.

⁶¹ (n 14) 13.

⁶² *ibid.*

⁶³ (n 14) 13.

⁶⁴ Weber M et al, *Law in Economy and Society* (1st edn, Simon and Schuster, 1967) 17.

⁶⁵ L Pospisil, *Anthropology and Law: A Comparative Theory of Law* (1st edn, Harper and Row, New York 1971) 107.

would be distinguishable from all others.⁶⁶ Pospisil's argument appears to support Hamzic and Salamone's previous assertions regarding pre-colonial Nigeria, that the substance and form of Islamic law in each sub-group was heavily influenced by unique customs. Moreover, the theorem of Japanese pluralist, Masaji Chiba, illustrates the all-encompassing nature of legal pluralism.

Masaji Chiba's 'Tripartite Model of Law'⁶⁷

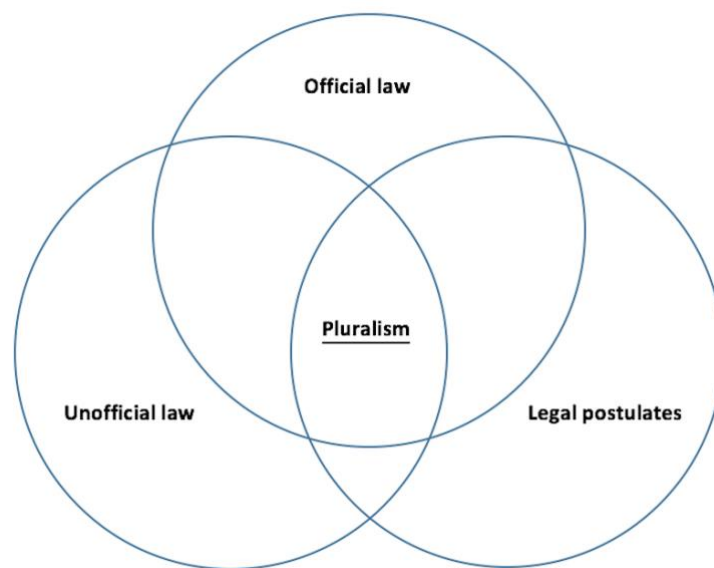


Figure 1

Chiba's theorem of legal pluralism consists of *official law*, *unofficial law* and *legal postulates*. Whilst using Japanese law to illustrate the functionality of the tripartite model, he claimed that it would be entirely applicable in all societies.⁶⁸ It is acknowledged that when applied to a modern context, much of Chiba's work tends to inaccurately undervalue Western jurists' ability to detach from their own social conditioning. However, the tripartite model remains a useful tool when analysing the development of legal structures heavily influenced by natural, customary and positivist law.

⁶⁶ *ibid.*

⁶⁷ This diagram was influenced by Werner Menski's *Law as Overlapping Circles*. see (n 60) 189.

⁶⁸ Gordon R Woodman, 'Book Review: Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Culture*' [1992] JLP 141, 143.

Chiba believed, '[t]he conception of legal pluralism emerged when other systems of law were found working in reality together with the "law", [whether] in harmony or in conflict'.⁶⁹ According to Chiba, *official law* includes positivist state law, as well as customary, religious, local and family law – provided it has been authorised by the State.⁷⁰ *Unofficial law* is the system made up of practices that are only authorised by 'a general consensus of a certain circle of people', and specifically not by the State.⁷¹ Finally, Chiba held that any norms and values that are not rules created by the state or by a sub-group, are considered part of the *legal postulates* system.⁷² Interestingly, despite clear attempts to weaken legal centralism, it is submitted that Chiba's three-level structure is clearly based on the assumption that *official law* i.e. positivist law, will always remain superior of other legal systems in the model. Chiba's model will be analysed in greater detail to illustrate how, *inter alia*, *zina* has been enacted with legitimacy, and why this creates difficulties in the pursuit for legal reform.

The Struggle for *Shari'a* Implementation

Appeals were allowed from the Native Courts to the superior 'British' courts during the colonial era, and this was worrisome to the Muslim populace.⁷³ The introduction of the Moslem (*sic*) Court of Appeal was later championed as a safeguard from appeals being referred to the 'British' courts.⁷⁴ This was not successful, as criminal law was under the jurisdiction of the Moslem Court of Appeal, so appeals were nonetheless often referred to the 'British' High Court.⁷⁵ Furthermore, until 1960, northern Nigeria was the only region outside of Arabia where substantive and procedural Islamic criminal law was applied.⁷⁶ Therefore,

⁶⁹ Masaji Chiba, *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*, (1st edn, Tokai University Press, Tokyo, 1989) 1-2.

⁷⁰ *ibid* 5-6.

⁷¹ (n 70) 6.

⁷² (n 60) 125.

⁷³ Philip Ostien and Albert Dekker, 'Sharia and National Law in Nigeria' in J M Otto (eds), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden, Leiden University Press 2010) 565.

⁷⁴ E A Keay and S S Richardson, *The Native and Customary Courts of Nigeria* (1st edn, Sweet & Maxwell, London, 1966), 56.

⁷⁵ *ibid*.

⁷⁶ N Anderson, *Law Reform in the Muslim World* (1st edn, Athlone Press, London, 1976) 27.

due to the East and West's cultural differences with the North, much of the country felt legal reform in the North was necessary, especially regarding Islamic criminal law.⁷⁷

The 'Settlement of 1960'

Shortly before independence, the North's leaders agreed for its legal system to be federated with the East and West, in the 'Settlement of 1960'.⁷⁸ All forms of criminal law were replaced with new Penal and Criminal Procedure Codes, and were applicable in all courts, regardless of religion. Thus, all matters of criminal law became part of state law.⁷⁹ This compromise was reached because it was believed to be the North's best attempt to 'keep up with the pace set by the Eastern and Western Regions in the race for independence', however, it was supposedly less 'ready' than the others.⁸⁰ The agreement established a new plural legal structure consisting of state, religious and customary law. It is submitted the North reached such a compromise because of an engrained mind-set that non-Western legal systems are wholly dependent on Western legal structures, particularly so when creating a federal structure. Chiba added:

Western law is normally regarded as universal when considered from the fact that it has been received and utilised by non-Western countries as the basis of their own state legal systems. It is accordingly natural that jurisprudence ... tends to observe the development of a non-Western legal system as a history of received Western law.⁸¹

Chiba's assertion appears valid. Clearly, there was pressure on the North to conform with the political and legal climate set by the regions that were inherently more welcoming of a Western-style legal structure. In response, the Sharia Court of Appeal was established by the northern ruling elite. It was given the same judicial standing as the Regional High Court,⁸² and had jurisdiction over both personal and civil Islamic law disputes, which were

⁷⁷ (n 74) 566.

⁷⁸ (n 14) 33.

⁷⁹ (n 3) 124.

⁸⁰ (n 74) 567.

⁸¹ Masaji Chiba, *Asian Indigenous Law in Interaction with Received Law*, (1st edn, KPI, London, 1986) v.

⁸² (n 74) 567.

unappealable.⁸³ Chiba's theory of *official law* appears to explain how the North's ruling elite could legitimately establish the Sharia Court of Appeal under the state legal system, but with its own developing body of law; '...religious law may be partially included in or accommodated by state law, but partially functioning out of the jurisdiction of the latter, thus forming its own system from state law'.⁸⁴

Despite it being said that the North was not as 'ready' to be incorporated into a federal legal system, it seems that commendable attempts were made to preserve a Muslim identity whilst remaining adequately flexible in a pluralistic legal system. Until the 'Settlement of 1960' dissolved in 1979, it has been claimed the arrangement for the most part worked properly and effectively.⁸⁵ Unfortunately, further setbacks to the Muslim identity ensued.

1979 Constitution of Nigeria

Following a military takeover, two state creation exercises meant that Nigeria was divided into 19 states by 1976,⁸⁶ 10 of which were situated in the northern region.⁸⁷ It has been said that the creation of states made the North 'more palatable to the rest of the country', however it must also be highlighted that at the time, all of the states were merely legal replicas of the regions from which they originated.⁸⁸ A result of the state creation exercises was the proposal to include a Federal Sharia Court of Appeal to the new constitution.⁸⁹ The proposal was highly contentious and is referred to as the '*Shari'a* debate of 1976-1978'. During this time, the 'Christian opinion on the Federal Sharia Court of Appeal had polarised and hardened'.⁹⁰ The Christians had the majority of the votes, therefore the proposal was subsequently ruled out.⁹¹ It is submitted that this further oppressed the Muslim population's identity, culture and

⁸³ Furthermore, the Moslem Court of Appeal was removed as a result, however as the Muslim jurists were now additionally seated on the Native Courts Appellate Division of the High Court. Thus, they were given a role in determining the development of not only Islamic Law, but all legal matters before the Native Courts. see (n 3) 124.

⁸⁴ (n 82) 5-6.

⁸⁵ (n 74) 567.

⁸⁶ *ibid* 570.

⁸⁷ *ibid*.

⁸⁸ (n 74) 570.

⁸⁹ Whereas having one *Shari'a* Court of Appeal for the northern region during the 'Settlement of 1960', there became 10 separate *Shari'a* appellate courts, i.e. one for each state. The judgments from these courts were unappealable. However, despite being legal replicas, conflicting judgments between each appellate court was possible, and thus a new federal appellate court that could deal with matters concerning the *shari'a* was seen by many as the best solution. see (n 74).

⁹⁰ (n 74) 571.

⁹¹ *ibid*.

autonomy of *shari'a*. Once again, the space to later politicise a patriarchal interpretation of Islam expanded.

The resulting 1979 Constitution further oppressed the recognition of Muslims in the plural system. Importantly, it also changed the structure from the Westminster-style system, to a presidential system similar to the United States. *Shari'a* appellate courts were allowed, 'for any state that requires it', under Article 240(1).⁹² However, decisions from these courts could then be heard before the Federal Court of Appeal, which could then appear before the Supreme Court.⁹³ This was not favourable amongst the Muslim populace;

As the Muslims saw it, these new losses for Islamic law in Nigeria were the result, not of a negotiated settlement voluntarily entered into by the Muslim leadership, as in 1960, but of humiliating defeat at the hands of Nigeria's Christians.⁹⁴

The *shari'a* courts had lost autonomy over Islamic 'personal' law matters, and the previous right for Sharia Court of Appeal judges to sit in the High Court was eradicated.⁹⁵ Three years later the country was again under military rule, and various sections of the constitution were suspended.⁹⁶

The Present Constitution: 1999 Constitution of Nigeria

After two failed attempts at creating a constitution before the end of another military regime, the current 1999 Constitution was eventually introduced. All states are empowered to enact criminal legislation. The Constitution is 'essentially the 1979 constitution reinstated'.⁹⁷ Chapter VII of the 1999 Constitution establishes a five-level court hierarchy. At the top level is the Supreme Court, and the *shari'a* trial courts are at the bottom level. The jurisdiction of the *shari'a* appellate courts must be considered. Article 277(1) stipulates:

⁹² Constitution of the Federal Republic of Nigeria 1979, Article 241(1).

⁹³ (n 3) 124.

⁹⁴ (n 74) 572.

⁹⁵ *ibid.*

⁹⁶ (n 3) 124.

⁹⁷ (n 74) 574.

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.⁹⁸

Therefore, with consideration given to Article 277(2), this section appears to hold that a state's *shari'a* appellate court is competent to deal with matters concerning guardianship, marriage, divorce and inheritance. Furthermore, when read against Article 277(1), the *shari'a* appellate courts seemingly have jurisdiction in these areas, 'in addition to such other jurisdiction as may be conferred upon it by the law of the State'. Additionally, Article 277(2) provides that *shari'a* appellate courts may also be competent to deal with 'any other question' of Islamic personal law. The wideness of this provision has led to some describing it as the 'delegation clause', because it can quite easily be interpreted in a way that delegates power to *shari'a* appellate courts to hear matters of Islamic criminal law.⁹⁹ This is precisely what happened in the northern states, and the constitutionality of this will be discussed in Section II.C.1. Furthermore, 'Independent Sharia Panels' (ISPs) exist in some southern states, and are not included in Chapter VII.¹⁰⁰ Thus, ISPs would be considered *unofficial law* under Chiba's model, as they are bodies applying Islamic law in states without *shari'a* courts.¹⁰¹ ISPs appear to be a type of private arbitration or alternative dispute resolution, established by Muslims desiring remedies in accordance with Islamic law.¹⁰² Despite mostly hearing matters of Islamic personal law and family law, ISPs have ruled on criminal cases. In 2002, an ISP convicted Sulaiman Shittu of *zina* in Oyo state. As an unmarried man, he was punished with 100 lashes.¹⁰³ It is difficult to conclude whether the ISP would have considered *rajm* to be within its jurisdiction had Shittu been married. Clearly, the application of criminal law would be in contravention to the Constitution and the law of Oyo state. Thus, capacity for gender-bias rulings from ISPs that are relatively unrecognised, is particularly concerning.

⁹⁸ Constitution of the Federal Republic of Nigeria 1999, Article 277(1).

⁹⁹ (n 74) 580.

¹⁰⁰ (n 74) 577.

¹⁰¹ Chiba claims the *unofficial law* category applies to 'those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words[,] those which distinctively supplement, oppose, modify or undermine any of the official laws, including state law'. see (n 82) 6.

¹⁰² (n 3) 126.

¹⁰³ (n 74) 577.

The Constitution appears to have curtailed development of less gender-biased judicial decisions. Decades before the 1999 Constitution, evidence suggests departures from the 'markedly gender-biased' Maliki *fiqh* in Islamic personal and family law cases before *shari'a* appellate courts.¹⁰⁴ It is submitted judges deliberately departed from Maliki doctrines in cases concerning inheritance, marriage, divorce and guardianship,¹⁰⁵ to decide cases in a manner that was culturally relevant to the developing Muslim community.¹⁰⁶ However, since the introduction of the 1999 Constitution, evidence suggests that such promising judgments have been significantly reduced,¹⁰⁷ due to 'fear and intimidation, cultivated by the rise of Muslim right-wing politics'.¹⁰⁸ In addition, the plural system under the Constitution continues to provide religion as an ongoing topic of political debate.¹⁰⁹ This appears to be a method of arousing public attention and controversy rather than political importance. Furthermore, it is unhelpful in the pursuit for gender-equality. Hamzic argued many resulting statutory changes have been deeply patriarchal, 'whereby concerns for gender justice would be either completely neglected or politically misused in order to repudiate an opposing view'.¹¹⁰ Nasir highlighted that the opinions of Muslims in politics and law have almost exclusively been represented by males,¹¹¹ adding that any deliberation and enactment of laws have 'unquestionably been... conceived and driven along by core groups of Muslim men, who tapped into deep reservoirs of emotion among the Muslim masses'.¹¹² The clear reluctance to recognise the positive attributes of mixed-gender representation in politics and law for all Muslims, displays Crowley's assertions in practice. Clearly, *culture* is the weapon continuing what the *traditional* female societal role *was*, and avoiding any consideration of what it *ought* to be.

Constitutionality of Islamic Criminal Law

¹⁰⁴ (n 3) 128.

¹⁰⁵ *Sharia Implementation in Nigeria: The Journey So Far* (1st edn, BAOBAB for Women's Human Rights, Lagos 2003) 4.

¹⁰⁶ (n 3) 128.

¹⁰⁷ (n 106) 5.

¹⁰⁸ (n 3) 128.

¹⁰⁹ AA Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crisis of Jurisdiction' [2004] *Am J Comp L*, 859.

¹¹⁰ (n 3) 125.

¹¹¹ J Nasir, 'Sharia Implementation and Female Muslims in Nigeria's Sharia States' in Ostien P (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Ibadan, Spectrum Books Ltd 2007) 94-95.

¹¹² *ibid* 93.

Before considering the constitutionality of Islamic criminal law, the political approach behind its implementation must be considered. Public support for the new Muslim penal codes was achieved by the ruling elite praying upon the historic oppression of the Muslim identity. Indeed, religious-type language can be as charged as any 'secular' language of power.¹¹³ Ahmad Sani Yerima was elected Governor of Zamfara State on 9 January 1999.¹¹⁴ He stated that during his campaign for leadership in the province that was over 90% Muslim:¹¹⁵

[I]n any town I went to, I first started with... chanting Allahu Akbar 10 thrice. Then I always said, 'I am in the race not to make money, but to improve on our religious way of worship, and introduce religious reforms that will make us get Allah's favour. And then we will have abundant resources for development'.¹¹⁶

Of course, such statements have little relevance with Islam's 'deeper mystical truths'.¹¹⁷ Governor Sani used Islam as a tool to gain secular power and political authority.¹¹⁸ Furthermore, by putting faith at the forefront of his campaign, he was able to relegate matters usually of great political importance in a modern context, for example, appropriate utilisation of state resources to encourage economic growth. For a man who was supposedly determined to improve the Muslim way of worship, and explicitly stating he was not 'in the race to make money', it is interesting to note that throughout his position of leadership, he was persistently accused of bribery,¹¹⁹ as well as misappropriating and mismanaging federal funds.¹²⁰ The Zamfara State Shari'a Penal Code,¹²¹ was legislated on 27 January 2000, and conferred power to the lowest *shari'a* courts to determine Islamic civil *and* criminal matters.¹²² This was popular amongst the Muslim population because it was perceived as a reclamation of autonomy over the Islamic criminal law they conceded in the 'Settlement of 1960'.¹²³ As a result, political

¹¹³ (n 7) 12.

¹¹⁴ (n 74) 575.

¹¹⁵ *ibid.*

¹¹⁶ (n 74) 575.

¹¹⁷ (n 7) 103.

¹¹⁸ *ibid.* 105.

¹¹⁹ (n 3) 130.

¹²⁰ M Abubakar, 'Groups Petition Anti-Graft Panel over Alleged Fraud in Zamfara' (2002)

<<http://news.biafranigeriaworld.com/archive/ngguardian/2002/jun/15/article09.html>> accessed 21 March 2016.

¹²¹ Zamfara State Shari'a Penal Code 2000.

¹²² (n 3) 129.

¹²³ (n 74) 575.

leaders of the 11 other northern states also took advantage of the new constitutional power to implement similar legislation.¹²⁴

The constitutionality of criminal matters being heard in the *shari'a* appellate courts is unclear. Save for Article 277, all other relevant Articles of the Constitution clearly stipulate the *shari'a* appellate courts' jurisdiction concerns only 'Islamic personal law'.¹²⁵ Adding to the confusion, appeals from *shari'a* appellate courts are to appear before the Federal Court of Appeal. However, under Article 244(1), the Federal Court of Appeal only has jurisdiction to deal with 'civil proceedings before the Sharia Court of Appeal with respect to any question of *Islamic personal law* which the Sharia Court of Appeal is competent to decide'.¹²⁶ Thus, what appears to be an accurate interpretation leads to the unreasonable conclusion that *shari'a* appellate courts are indeed the final courts of appeal for all Islamic criminal law cases. Furthermore, there has been no explicit or implicit guidance offered by the Supreme Court on the matter.¹²⁷ However, the High Courts of Borno and Niger have declared any matters heard beyond those of Islamic personal law are unconstitutional,¹²⁸ and thus appeals from *shari'a* appellate courts in these states go to the High Courts.¹²⁹ As already mentioned, Article 10 explicitly establishes that the federation of Nigeria and its states are secular, and criminal law does not appear on the Exclusive Legislative List.¹³⁰ Indeed, '[i]f Article 277 is read by itself, the position of sharia states looks strong. If it is read in the light of its history and of the rest of constitution (*sic*), the position looks much weaker'.¹³¹ A more detailed analysis of the *hudud* sections of these codes will be discussed in Section III.

Domestic & International Human Rights Breaches

Fundamental rights are supposedly guaranteed in Chapter IV of the 1999 Constitution. It is submitted the new Muslim penal codes, as well as the mechanisms for implementation,

¹²⁴ *ibid.*

¹²⁵ Gunnar J. Weimann, 'Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice' in David Powers (ed) *Islamic Law and Society* (Amsterdam, Brill 2010) 91.

¹²⁶ (n 74) 581 (emphasis added).

¹²⁷ (n 3) 126.

¹²⁸ (n 126) 91.

¹²⁹ (n 74) 581.

¹³⁰ Constitution of the Federal Republic of Nigeria 1999, Part 1 Second Schedule.

¹³¹ (n 74) 581.

'violate *all* of these constitutional rights'.¹³² Article 42 sets out the right to freedom from discrimination,¹³³ and yet many of the rules of evidence are explicitly gender-biased. For example, a female witness's testimony being half of a male's, or in some cases, not allowing female witnesses at all.¹³⁴ Article 19 guarantees the right to freedom of expression, despite some of the Islamic Penal Codes explicitly forbidding 'acts of gross indecency by way of kissing in public,... and other related acts of similar nature capable of corrupting public morals'.¹³⁵ Such provisions also appear to breach the supposedly guaranteed right to freedom of thought, conscience and religion under Article 38. Quite clearly, *rajm* and lashing for *zina* offences would also be an infringement on the right to life (Article 33), and freedom from torture or other inhuman or degrading treatment (Article 34(1)(a)), respectively. Shivji argued that such reluctance to adequately protect fundamental rights in post-colonial nations stems from the fact that the 'human rights ideology is part of an imperialist ideology'.¹³⁶ This issue carries varied opinion, and it is not within the ambit of this article to consider in full. Nonetheless, it does not provide valid justification for inadequate protection of fundamental rights. All Nigerian constitutions have included a chapter safeguarding human rights since its independence.¹³⁷ It could be argued the provisions are merely 'window dressing', encouraged by the engrained mind-set that Western law should form the basis of non-Western legal systems.¹³⁸ Nevertheless, it is most certainly clear the ruling elite do not feel ensuring freedom of discrimination based on gender to be of much political importance. This is supported by Nigeria's compliance with its international human rights obligations.

Nigeria is party to a considerable number of international human rights treaties.¹³⁹ Parties to such treaties are required to implement the relevant human rights provisions by removing or amending any national legislation that would be in breach. However, despite the country ratifying such treaties, they are not applicable in domestic law until they have been 'domesticated', as per Article 12 of the Constitution. Domestication requires enactment from

¹³² (n 3) 127.

¹³³ Constitution of the Federal Republic of Nigeria 1999, Article 42.

¹³⁴ (n 3) 127.

¹³⁵ Philip Ostien et al, 'Changes in the Law in the Sharia States Aimed at Suppressing Social Vices' in Philip Ostien (ed), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook* (Ibadan, Spectrum Books Ltd 2007) 53.

¹³⁶ Issa G. Shivji, *The Concept of Human Rights in Africa* (1st edn, Codesria Book Series, London 1989) 3.

¹³⁷ (n 3) 127.

¹³⁸ As argued by Chiba. see Section III.B.1.

¹³⁹ The African Charter on Human and Peoples' Rights 1987; the Convention on the Elimination of All Forms of Discrimination against Women 1979; the International Covenant on Economic, Social and Cultural Rights 1966; the International Covenant on Civil and Political Rights 1966; the Convention on the Rights of the Child 1989.

the National Assembly, ratification by the majority of the individual states' houses of assembly, and signing by the Nigerian President.¹⁴⁰ This provision has allowed for international human rights treaties to be unenforceable in practice. Hamzic highlighted that treaties of regional political importance have been domesticated with little difficulty,¹⁴¹ and yet numerous treaties aiming to protect the fundamental rights of woman remain without force.¹⁴² This supports the argument that Nigeria's human rights obligations will only be upheld and protected if they are underpinned by ulterior political motives. This is problematic in the pursuit for gender-equality partly because, as already discussed, women are significantly under-represented in politics and law. Furthermore, many provisions of international law are protected by the *jus cogens* principle.¹⁴³ Therefore, the very existence of *zina* provisions clearly shows that Nigeria is unquestionably in violation of international human rights law, regardless of the caveat under Article 12. Menski argued that 'African people, despite legal attempts to root out discrimination are... made to feel that they cannot achieve those global standards, because these are predicted on "white" models and ideals'.¹⁴⁴ It is inaccurate and unhelpful to discuss in general terms, the legal, political and social climate of Africa as a continent. It is accepted that recognition of human rights in Nigeria as a legal concept is more recent than in Western jurisdictions. However, the supposed 'legal attempts to root out discrimination' have been largely perfunctory and superficial. Realistically, it is the ruling elite which maintains its autocratic rule by conveniently minimising its engagement in democratic processes that explains Nigeria's poor adherence to international human rights standards.¹⁴⁵ Indeed, the Human Rights Watch 2015 World Report placed government corruption and reluctance to suppress political violence as significant reasons for the reduced status of human rights in Nigeria.¹⁴⁶

III. ZINA LAWS IN CONTEMPORARY NIGERIA

¹⁴⁰ (n 74) 598.

¹⁴¹ For example, the African Charter on Human and Peoples' Rights 1987.

¹⁴² (n 3) 134.

¹⁴³ For example, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

¹⁴⁴ (n 60) 467.

¹⁴⁵ (n 3) 135.

¹⁴⁶ Anonymous, 'World Report 2015: Nigeria' (Report 2015) <<https://www.hrw.org/world-report/2015/country-chapters/nigeria>> accessed 27 February 2016.

Despite the Penal and Criminal Procedure Codes (PCPC) of the North being evidently patriarchal, Hamzic submitted that its 'negative impact on access to gender justice has been relatively low compared to the detrimental consequences of the new *hudud*... provisions'.¹⁴⁷ Promising judgments in *zina* appellate cases received widespread domestic and international coverage, however there are numerous factors that firmly establish the fundamental rights of women under these provisions remain inadequately protected.

***Hudud* Provisions, Social Status and Rape**

The Muslim penal codes all share similarities in relation to *zina*.¹⁴⁸ *Zina* appears under the 'Hudud and Hudud-Related Offences' section of these codes, and is described in the following manner:

Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital (*sic*) of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*.¹⁴⁹

If the convicted is married, the punishment is *rajm*. If unmarried, the convicted receives 100 lashes.¹⁵⁰ Furthermore, it is submitted that *zina* laws under the current procedure codes are absent of the previous provisions that presented difficulties for the prosecution in securing *zina* convictions:¹⁵¹

Despite reproducing some 89 per cent of the 1960 Penal Code's sections,¹⁵² the Muslim penal codes are organised and articulated in an unprecedented way; they take Muslim-specific criminal justice to an extreme, liminal realm, infused with both the neo-conservative interpretations of some classical Maliki *fiqh* and the

¹⁴⁷ For example, despite the PCPC providing that women can only be accused of *zina* by their father, husband or *wali* (custodian), the current Muslim procedure codes omit this provision, and therefore *zina* accusations can be made by anyone who wishes to do so. see (n 74) 590.

¹⁴⁸ (n 74) 590.

¹⁴⁹ *Shari'a* Penal Code Law 2002 (draft), Article 125.

¹⁵⁰ Depending on the state, a term of imprisonment may also be added to the punishment of 100 lashes for unmarried offenders. This is perhaps suggestive of the legacy left behind from the colonial regime, and thus would appear in line with Allot's assertions regarding the colonial transformation of Islamic legal structures and procedures. see (n 32).

¹⁵¹ (n 3) 130.

¹⁵² (n 74) 589.

‘innovative’ compoundable injunctions that make the scope of ‘Islamic’ crimes and punishments even wider than in the old jurists’ books.¹⁵³

In addition, almost all women charged with *zina* have been poor, and from rural backgrounds.¹⁵⁴ This appears to support the argument that rights afforded to women in Nigeria continues to be largely determined by social status, in a similar way to Nana Asma’u receiving a formal education in pre-colonial Nigeria.¹⁵⁵ It has been submitted that ‘[i]t is curious that the [*hudud*] cases involve mostly the hewers of wood and the drawers of water in the society... why are the rich not also targets of this system?’¹⁵⁶ It is argued the upper echelons of Nigerian Muslims have suffered significantly less under the *hudud* provisions, partly because they were deliberately enacted to dictate public morality, and ‘ensure social control..., [and] to mask the less-palatable vices of the ruling elite’.¹⁵⁷ Emir Sanusi claimed, ‘...even a cursory student of Islamic history knows that all the trappings of gender inequality present in Muslim Society have socio-economic as opposed to religious roots’.¹⁵⁸ Hamzic added, ‘[p]oor women... have been chosen to stand *hudud* trials because they are expected to have the least political and social connections, and legal and religious education, necessary to understand their situation’.¹⁵⁹ Case law strongly supports this claim, as will be discussed in Section III.B.

Moreover, also included under the *hudud* provisions are, *inter alia*, *qadhif* (false accusation of *zina*) and rape. In regard to rape, the provisions hold that any ‘[s]exual intercourse by a man with his own wife is not rape’.¹⁶⁰ Furthermore, patriarchal selection of Islamic evidential rules have allowed for female rape victims to be convicted of *zina*, whilst males are acquitted due to lack of evidence. All of the most prominent classical *fiqh* do not consider pregnancy as proof

¹⁵³ (n 3) 130.

¹⁵⁴ Ayesha Imam and Sindi Medar-Gould et al, 'How Not to Help Amina Lawal' (Open Letter 2003) <<http://www.counterpunch.org/2003/05/15/how-not-to-help-amina-lawal/>> accessed 10 December 2015.

¹⁵⁵ Discussed in Section I.B.2.

¹⁵⁶ (n 106) 26.

¹⁵⁷ (n 3) 131.

¹⁵⁸ (n 1).

¹⁵⁹ (n 3) 131.

¹⁶⁰ *ibid.*

of *zina*,¹⁶¹ save for Maliki *madhhab*.¹⁶² The majority position is that a defendant cannot be prosecuted solely on circumstantial evidence. Moreover, in absence of a confession, the Quran explicitly requires four witnesses to prove *zina*.¹⁶³ However, Nigerian case law suggests otherwise. On 19 January 2001, *Bariya Ibrahim Magazu*, an 'unschooled and poor rural teenager',¹⁶⁴ received 100 lashes under the by-laws of Zamfara state.¹⁶⁵ The 13-year-old had been impregnated when raped by three men, as payment for her father's debts.¹⁶⁶ Unable to meet the high evidential threshold of four respectable male Muslim witnesses,¹⁶⁷ Magazu's pregnancy (i.e. circumstantial evidence) was considered to be proof of *zina*, as per Maliki *fiqh*. The men were acquitted due to lack of evidence.¹⁶⁸ This decision was significantly gender-bias, even under Maliki *fiqh*. A fundamental *shari'a* principle is that *hadd* punishment should not occur where there is *any* element of doubt.¹⁶⁹ Thus, the pregnancy evidence should have been negated by Magazu's clear claims of coercion and lack of consent. In support of Hamzic's statement above, this case certainly displays how the penal codes have capacity to take Islamic criminal law to new brutally patriarchal territory. This becomes particularly clear when the previously mentioned *zina* case during colonial times is considered, where even the woman's confession of *zina* was not sufficient evidence to secure a conviction.¹⁷⁰

Case Law and Precedence

*Safiyatu Hussaini*¹⁷¹ was the first to be sentenced to *rajm* for *zina* under the new penal codes, following conviction in the Gwadabawa Upper Shari'a Court in Sokoto. Hussaini was allegedly raped by Yakuba Abubakar.¹⁷² Pregnancy, *inter alia*, was considered evidence of *zina*.

¹⁶¹ For example, Hanafi, Shafi'i and Hanbali *fiqh* hold that unmarried pregnancy is not admissible evidence of *zina*, in absence of four witnesses or confession. see Quraishi A, 'Islamic Legal Analysis of Zina Punishment of Bariyu Ibrahim Magazu' (Legal Analysis 2001) <http://www.mwlusa.org/topics/marriage&divorce/islamic_legal_analysis_of_zina.htm> accessed 8 March 2016.

¹⁶² Ogbu Kalu, 'Safiyya and Adamah: Punishing Adultery with Sharia Stones in Twenty First Century Nigeria' [2003] African Affairs Vol 102 Issue 408 389, 396.

¹⁶³ Quran: Surah 24: verses 2-4.

¹⁶⁴ (n 155).

¹⁶⁵ (n 3) 7.

¹⁶⁶ (n 162).

¹⁶⁷ Yuksel Sezgin, 'The Role of Alternative Legalities in Bringing about Socio-legal Change in Religious Systems' [2010] J Comp L 245, 255.

¹⁶⁸ The trial court even convicted Magazu of *qadhif* in addition to *zina*, however the charge was lifted on appeal.

¹⁶⁹ (n 162).

¹⁷⁰ (n 45) 444.

¹⁷¹ *Safiyatu Hussaini Tungar-Tudu* USC/GW/F1/10/2001.

¹⁷² Anonymous, 'The Real Crime is Being a Woman' (News Article 2002) <<http://www.scotsman.com/lifestyle/the-real-crime-is-being-a-woman-1-594303>> accessed 12 March 2016.

Abubakar was released for lack of evidence. The court refused to perform DNA testing on the child to establish whether Abubakar was the father, as it was 'contrary to Muslim law'.¹⁷³ Interestingly, other jurisdictions where Islam is constitutionally declared as the State religion, have held DNA testing should be mandatory in cases where rape has been alleged.¹⁷⁴ Moreover, the victim's social status contributed to her conviction, and many claim she was ignorant to the fact she could have even committed an offence.¹⁷⁵ In Hussaini's own words, '[i]t is because I am poor, my family is poor, and I am a woman [translation from Hausa as in the original]'.¹⁷⁶ Hussaini was later acquitted by the Sokoto Shari'a Court of Appeal on 26 October 2001. Moreover, the new Muslim procedure codes permit *zina* charges to be made by anyone, including police.¹⁷⁷ Promisingly, this judgment appears to have barred police from being empowered to file *zina* charges in Sokoto state.¹⁷⁸ At time of writing, no *zina* charges appear to have been filed by police in Nigeria since the judgment.

At present, the most widely publicised Nigerian *zina* trial is the case of *Amina Lawal*.¹⁷⁹ Lawal was charged with *zina* on 15 January 2002, and was later sentenced to *rajm* by the *shari'a* trial court at Bakari in Katsina state. Lawal's new-born daughter, Wosilat, was considered proof of *zina*. Whilst the Quran stipulates *zina* is gender-neutral, the male defendant – Yahayya Muhammad, was acquitted for lack of evidence. Once again, Lawal was uneducated,¹⁸⁰ and her confession was made when not understanding the charge.¹⁸¹ Lawal's second appeal succeeded before the Katsina Shari'a Court of Appeal and she was acquitted on 25 September 2003. Lawal's defence purposefully did not contest the qualities of *shari'a*.¹⁸² Instead, the central reasons for the positive judgment were procedural flaws and the Maliki doctrine of the 'sleeping embryo', as Lawal was a divorcee.¹⁸³ This judgment is promising as it seems to have established precedent that pregnancy or childbirth by an unmarried women is not, by

¹⁷³ (n 107) 13.

¹⁷⁴ The Supreme Court of Pakistan (2013 SCMR 203) held that, '[a]dministration of DNA tests and preservation of DNA evidence should be mandatory in rape cases'.

¹⁷⁵ (n 48) 46.

¹⁷⁶ (n 173).

¹⁷⁷ (n 74) 590.

¹⁷⁸ (n 106) 14.

¹⁷⁹ *Amina Lawal* USC FT/CRA/1/02.

¹⁸⁰ Jeff Koinange, 'Woman Sentenced to Stoning Freed' (News Article 2004) <<http://edition.cnn.com/2003/WORLD/africa/09/25/nigeria.stoning/>> accessed 12 March 2016

¹⁸¹ (n 180).

¹⁸² (n 168) 255.

¹⁸³ The Maliki doctrine of the 'sleeping embryo' provides that a divorcee may carry a pregnancy for up to 5 to 7 years. Therefore, Lawal's child was deemed to have been fathered by her ex-husband. see (n 180).

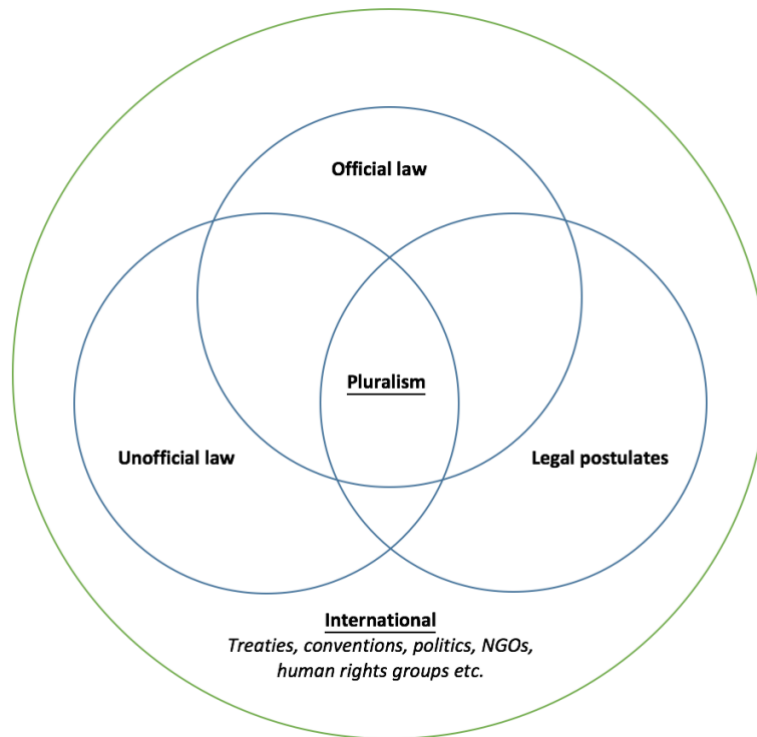
itself, sufficient evidence of *zina*.¹⁸⁴ Despite the precedent only existing formally in Katsina state, there have not been any subsequent *zina* proceedings at time of writing. In contrast, it is not entirely certain whether the precedent will only apply to previously married women. If so, females in similar circumstances of Magazu would not be protected, especially if a confession is obtained due to a misunderstanding of the offence or inadequate legal representation.

IV. LEGAL REFORM: THE SOLIDARITY STRATEGY

All of the previously mentioned cases attracted international attention and scrutiny. International pressure can significantly impact legal systems in a modern context. However, it is important to ensure these pressures are not counter-productive. This Section advocates for a *solidarity strategy* that ensures all international and domestic efforts are best utilised to achieve realistic and longstanding legal reform. Consideration of international influences appears to add a fourth system to Chiba's model. It is submitted legal pluralism in 21st century Nigeria is more accurately reflected in the following model:

Figure 2

¹⁸⁴ (n 3) 139.



International Pressures: Western Misunderstanding of Muslims in a Nigerian Context

An appreciation of how international interference impacts Nigerian gender rights in practice is crucial in ensuring solidarity. Unfortunately, international pressures have been more damaging than beneficial at times. It has been argued that '[d]ominant discourses and the mainstream international media have presented Islam (and Africa) as the barbaric and savage Other'.¹⁸⁵ When many of the Western populace choose to believe the structurally racist and xenophobic media portrayals of Islam, ineffective attempts for change can result from clear misunderstandings by even the well-intentioned. It provides glib justification for the 'claims of right-wing politico-religious extremists' in all societies,¹⁸⁶ and this was exemplified in Magazu's sentence. An international letter campaign ensued and many contained misunderstood and inaccurate claims. This motivated Governor Sani to bullishly resist and react to the 'letters from the infidels'.¹⁸⁷ Magazu's sentence was illegally brought forward,

¹⁸⁵ (n 155).

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

despite the court holding that no punishment would occur before a minimum period of one year.¹⁸⁸

One may be forgiven for assuming that mere letters from concerned individuals could not significantly impact on the outcome of *zina* cases. However, letter campaigns and petitions have been encouraged by international women's rights groups, unequipped with sufficient knowledge of Islam in the context of Nigeria. This was criticised by Imam and Medar-Gould,¹⁸⁹ in a public letter during the Lawal case.¹⁹⁰ It was highlighted there is an 'unbecoming arrogance in assuming that international human rights organisations... know better than those directly involved', and this results in 'actions that fly in the face of... express wishes.'¹⁹¹ Indeed, international pressure has never resulted in a victim being pardoned for *zina*.¹⁹² It is accepted that people will naturally want to help the victims and thus take immediate action. This carries great risk in practice. A common criticism of many Western feminisms is the misconception that '[f]eminism aspires to represent the experiences of all women'.¹⁹³ However, any aspirations to represent the experiences of *all* women is misguided, and not particularly helpful. Mohanty criticised the way some Western feminisms attempt to 'appropriate and "colonize" the fundamental complexities and conflicts which characterize the lives of women of different classes, religions,... [and] cultures'.¹⁹⁴ This is particularly problematic when such appropriations are attached to the view that Islam as a religion is an oppressive and patriarchal blockade in the pursuit for gender equality. To be in solidarity for legal reform, many Western activists must abandon the misconception that reforming gender-bias laws is simply a case of rescuing Muslim women from overtly-dominant Muslim men. Imposing morals without engaging in political, legal and religious understanding is a great omission in the pursuit to reform Nigerian *zina* laws. Of course, numerous knowledgeable non-governmental organisations (NGOs) and women's rights groups are central components

¹⁸⁸ *ibid.*

¹⁸⁹ Ayesha Imam (Board Member) and Sindi Medar-Gould (Executive Director) are part of 'BAOBAB for Women's Human Rights' – a NGO that focuses on protecting the rights of women, men and children in Nigeria, and in particular, those who have been convicted under new penal codes since 2000.

¹⁹⁰ (n 155).

¹⁹¹ *ibid.*

¹⁹² However, it is accepted that international attention could possibly encourage the appellate courts to make less gender-bias judgments.

¹⁹³ Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' [1983] *Journal of Women in Culture and Society* Vol 8 No 41 635, 637.

¹⁹⁴ Chandra T Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', in Ashcroft B et al (eds), *Post-Colonial: Studies Reader* (Routledge 2003), 260.

to the solidarity strategy,¹⁹⁵ and will be discussed below. There are however, numerous ways that international human rights groups and concerned individuals can be of assistance without negatively impacting the pursuit of *zina* reforms. For example, by providing financial assistance to the victims and defence teams when possible,¹⁹⁶ gaining an understanding of Islamic feminism in a Nigerian context, and attempting to eradicate the many Western misconceptions of gender roles in Islam as a religion, through dialogue and discussion.

Islamic Feminism and the Central Roles in the Solidarity Strategy

The central argument of Islamic feminism is that the Quran establishes the principle of equality for all people, but that the principle has been distorted by patriarchal interpretations, practices and ideologies.¹⁹⁷ When misogyny is asserted into select words of the Quran, the egalitarian nature of the scripture in its totality is weakened.¹⁹⁸ Indeed, for the elite's own interests of having institutional control, they clearly treat Islam as a type of territory that they supposedly fight for, and then essentially stop those who do not comply with their interpretation from having access to it,¹⁹⁹ i.e. establishing the identity of 'the bad Muslim' or 'the sinner'. Thus, when consideration is given to the prominence of Maliki *fiqh*, promoting the non-patriarchal principle behind Islamic feminism is crucial.²⁰⁰ Despite research suggesting awareness of Islamic feminism is increasing, it remains somewhat limited, and the idea is controversial in many communities.²⁰¹ Therefore, reforming *zina* provisions necessitates a long-sighted approach. Case law displays how *shari'a* can both uphold and violate women's rights. *Zina* acquittals in the appellate courts show that evidence and procedure can be changed by forcing the judiciary i.e. part of the ruling elite, to admit convictions were illegal under *shari'a*. Whereas, yielding to international pressure only

¹⁹⁵ For example, BAOBAB, Women's Rights Advancement and Protection Alternative (WRAPA), the National Coalition on Violence against Women, and the International Federation of Women's lawyers.

¹⁹⁶ (n 155).

¹⁹⁷ Margot Badran, *Feminism in Islam: Secular and Religious Convergences* (1st edn, Oneworld Publications, Oxford 2009) 4.

¹⁹⁸ Asma Barlas, 'Globalizing Equality: Muslim Women, Theology, and Feminism', in Fereshteh Nourai-Simone (ed), *Shifting Ground: Muslim Women in the Global Era* (New York, Feminist Press 2005) 96.

¹⁹⁹ (n 7) 103.

²⁰⁰ It is submitted that the phrase 'Islamic feminism' is less important than the promotion of the principle that the Quran establishes equality for both women and men.

²⁰¹ Margot Badran, 'Islamic Feminism Means Justice to Women' (Q&A 2004) <<http://www.milligazette.com/Archives/2004/16-31Jan04-Print-Edition/1631200425.htm>> accessed 9 December 2015.

suggests forgiveness for the guilty.²⁰² Therefore, the legal and non-legal defence teams in such cases play a *formal* role in the solidarity strategy. The appellate courts are less gender-biased than the lower courts.²⁰³ However, by this stage the accused have suffered the trauma of social punishment, and the uncertainty of an appeal. Social change may result from acquittals, and subsequently encourage *informal* solidarity mechanisms as a result.

Beyond inadequate statutory drafting, Weimann argued that gender-bias judgments have arisen out of *shari'a* trial courts due to insufficient knowledge of Islamic criminal law.²⁰⁴ This appears true, however the deep-seeded patriarchal ethos of a male judiciary would provide stronger reasoning for such outcomes. Thus, part of the strategy should be to encourage gender-neutral interpretations of Islam, by ultimately forcing the law to reflect the beliefs of society in judgments from all *shari'a* courts.²⁰⁵ Indeed, Chiba's model establishes how beliefs can re-shape what is *official law*.²⁰⁶ MacKinnon pessimistically claimed, 'it may be easier to change biology than society'.²⁰⁷ In contrast, Imam quite rightly asserted part of the strategy should involve convincing the Muslim community, 'not to accept injustices even when perpetuated in the name of strongly held beliefs'.²⁰⁸ It would be inaccurate to conclude this assertion calls for a type of Marxist revolution by only the poor communities. This article has already shown that patriarchy can stronghold the weapon of 'culture' equally as much as it is grounded in economic control. Therefore, in summary, *zina* reform firstly requires the *formal* involvement of appropriate organisations to work within the states' legal structures and achieve positive outcomes in the courts. This encourages the community to recognise religious manipulations in politics and legislation, and therefore *informally* support local counter-discourses.²⁰⁹ Another common misconception is that women in poor communities are too concerned with basic survival to consider the status of their fundamental rights. This is not entirely correct. Adesina highlighted the dissent expressed by numerous women from poor communities during the Lawal case, primarily because they felt the gender-neutral principle

²⁰² (n 155).

²⁰³ *ibid.*

²⁰⁴ (n 126) 104.

²⁰⁵ As seen in the less patriarchal judgments of the for decades prior to the advent of the 1999 Constitution. (As discussed in Section II.C.).

²⁰⁶ Chiba's model 'indicates... that a state may have to accept (and in that sense receive) bodies or elements or rules from other, non-state sources, which may then be formally incorporated into the official law, but were not made or created by it'. see (n 60).

²⁰⁷ (n 194) 636.

²⁰⁸ (n 155).

²⁰⁹ *ibid.*

of *zina* in the trial judgment was ignored.²¹⁰ This suggests clear engagement with Islamic feminism at the communal, and thus, *informal* level. In support, Crowley argued, '[i]nformal forms of solidarity are central to the development of such local initiatives which can be used to challenge... patriarchal power structures'.²¹¹

A strategy of solidarity has already proven to be effective in numerous ways. For example, there has been a decrease in forced marriages following activism by appropriate NGOs, in conjunction with changing social opinion, and not coincidentally, opposition by *shari'a* courts.²¹² More specifically, during both of the Hussaini and Lawal cases, members of the community spoke publicly on the incorrect application of *shari'a*, and actively protected the victims from fundamentalist vigilantes, which would not have occurred prior to involvement of BAOBAB.²¹³ It has been said that following a general increase in women's public opposition to some of the gender-bias provisions in Nigerian *shari'a*, politicians now appear less empowered to endorse them.²¹⁴ Thus, the execution of this strategy must continue.

CONCLUSION

The *hudud* sections of the new Muslim penal codes have allowed Islamic criminal law in Nigeria to exist in a new territory of immense patriarchal dominance. Following the *few* promising judgments discussed, it might be claimed that *zina* laws no longer pose any threat to the rights of women. This claim would be incorrect. The relevant provisions remain unchanged. While this is the case, the law remains in an unsatisfactory state. *Zina* is a gender-neutral principle, and classical *fiqh* provided rulings to ensure legitimate paternity. Acquitting the male defendant whilst convicting the female, does not ensure legitimate paternity. Convicting a victim of rape does not ensure legitimate paternity. Women are still at risk.

There are multiple facets contributing to the formalised standing of Nigerian *zina* laws. Discussion of Islamic law and gender roles in pre-colonial, colonial and post-colonial Nigeria highlighted the Muslim populace's longstanding desire to have autonomy of *shari'a*, and

²¹⁰ (n 48) 53.

²¹¹ (n 9).

²¹² (n 3) 122.

²¹³ (n 155).

²¹⁴ (n 3) 140.

strengthen the Muslim identity. From the reluctant compromise to conform with the legal structure of the more secular South and East in the 'Settlement of 1960', to the unfavourable further loss of legal autonomy under the 1979 Constitution, encouraged astute utilisation of certain provisions under the 1999 Constitution which resulted in increased autonomy of Islamic criminal law. Moreover, Crowley's argument clearly depicts how *culture* can be deliberately confused with the *traditions* of over-glorified pre-colonial times. This has ultimately created a blockade in the law considering what women's societal role and control over their own bodies *ought* to be. In support of this, Greenwald accurately highlighted the risks of such post-colonial movements, arguing that it results in acceptance and refusal to rectify gender-inequality. This article has clearly shown that both arguments are valid in the context of Nigeria. The analysis of religious politics has proven that solely for the benefit of the ruling elite, *culture* has been used as an impenetrable barrier guarded by patriarchal *traditions*, rather than accurately as a dynamic concept that embraces change. The applicability of *zina* laws were clearly not the main concern of the ruling elite. Governor Sani explicitly claimed money was not his concern. He will be tried for the equivalent of £3.5m fraud this year, under the common law system.²¹⁵ Sani also stated improving the Muslim way of worship was his aim, then did nothing whilst only Magazu was punished for *zina* – the gender-neutral concept he legislated, in violation of fundamental rights guaranteed by the Constitution and international law. Quite clearly, maintaining the appearance of restoring an oppressed *culture* was of greater importance than gender justice. Reforming *zina* laws cannot be left to men of similar moral substance to Sani. Thus, activism must continue.

This article has also highlighted the discrepancy regarding the *shari'a* appellate courts jurisdiction of Islamic criminal law, and how the constitutionality of such is unclear. Moreover, that the Constitution could even be interpreted to suggest the *shari'a* appellate courts are the final courts of appeal for all Islamic criminal law cases. As has been shown, this ambiguity can have significant impact on Nigerian citizens, and yet, any substantial authority to clarify the jurisdiction of *shari'a* appellate courts is seemingly non-existent. It seems absurd that the outcome of Magazu, Hussaini, and Lawal's cases could have been decided by potentially unconstitutional courts in regard to *zina*. The argument that gender-rights are of

²¹⁵ Yusuf Alli, 'Ex-Governor Sani to face trial for alleged N1 billion fraud' (2016) <<http://thenationonlineng.net/ex-governor-sani-face-trial-alleged-n1-billion-fraud/>> accessed 16 March 2016.

little importance to the ruling elite cannot be refuted. The political claim to strengthen the Muslim identity through *shari'a* implementation have included contradictory inconsistencies that have conveniently affirmed patriarchal practices.²¹⁶ In fact, the strongest pre-colonial element existing in contemporary *zina* laws appear to be that the rights of women are largely dictated by social class rather than gender alone. This must not continue. Regardless of the 'domestication' caveat under Article 12 of the Constitution, Nigeria must respect the *jus cogens* principle that underpins international treaties it is party to, and ensure the fundamental rights of *all* women are protected, irrespective of class. Thus, activism must continue in a way that incrementally dismantles *zina* laws, ensuring that women are not subjugated to live under patriarchal interpretations of *shari'a*, and forces Nigeria to fulfil its domestic and international human rights obligations.

As the majority of the Muslim populace's beliefs are grounded in habitually patriarchal interpretations of Islam, the strategy for *zina* reforms require a long-term approach. In addition, when people from all systems under the pluralist model in Figure 2 are part of a *solidarity strategy*, the ruling elite are not as strongly positioned to ignore issues concerning gender-inequality. International pressures should be reoriented in a way that aims to achieve change by working within the Nigerian *shari'a* structure. The legal changes already achieved as a result of *formal* work by NGOs for gender-equality in Nigeria supports this claim. Importantly, *informal* activism holds considerable strength in the pursuit of reforming *zina* laws. Through the Muslim community engaging in dialogues that emphasise the equality principles of Islam, the elite will be forced to refrain from encouraging patriarchal religious practices and power-structures, that solely benefit their own power games. To conclude, attention turns to the words of James C. Scott, who claimed that:

[T]he main function of a system of domination is... to define what is realistic... and to drive certain goals and aspirations into the realm of the impossible, the realm of dreams, of wishful thinking.²¹⁷

²¹⁶ For example, as previously discussed, evidence shows *hijab* was *optional* in pre-colonial times, but is now *compulsory* in the supposed 'restored culture'. In addition, the burden of proof for *zina* was historically so high that it became practically obsolete. No evidence or documentation of *rajm* for *zina* offences existed in the entirety of Nigerian history, until *shari'a* implementation after the 1999 Constitution.

²¹⁷ James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1st edn, Yale University Press, New York 1985) 326.

This article has shown that despite *zina* existing in a system of immense patriarchal domination, gender-equal legal reform need not remain as mere wishful thinking; it can be a reality. However, execution of the *solidarity strategy* must be persistent. *Zina* laws must not continue as the *forgotten problem*.

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