

ILESANMI, O.O. 2010. Sexual offences in a Muslim world: a socio-ethical reflection on Zamfara State (Nigeria) v. Bariya I. Mugazu. *International journal of human rights* [online], 14(2), pages 215-232. Available from: <https://doi.org/10.1080/13642980802542704>

# Sexual offences in a Muslim world: a socio-ethical reflection on Zamfara State (Nigeria) v. Bariya I. Mugazu.

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2010

*This is the accepted manuscript version of the above article. The published version of record is available to purchase from the journal website: <https://doi.org/10.1080/13642980802542704>*

**Sexual Offences in a Muslim World:**  
**A Socio-Ethical Reflection on *Zamfara State (of Nigeria) v Bariya I. Mugazu***

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Abstract

On Friday morning, January 19, 2001 Bariya Ibrahim Mugazu was given 100 lashes. Zamfara State of Nigeria tried and punished this young woman for having sex unlawfully in the previous year. Until this case between Zamfara state of Nigeria and unmarried Bariya Mugazu, controversies surrounding the full adoption of Islamic law (*Shari'ah*) in northern Nigeria seemed to remain only a local issue.

Section 10 of the Constitution of the Federal Republic of Nigeria bars any of its federating units from adopting "state religion". These states are however at liberty to adopt any suitable legal regime. So, when about 12 states in the North of the federation opted for *theocracy* in 1999, the predominantly Muslim public of the region claimed to act within the confines of the municipal law in introducing *Shari'ah*. As such, the relationship between this religious and legal order and Nigeria's human-rights-friendly constitutions remains controversial.

Fornication or adultery may not constitute an offence deserving criminal prosecution in the non-Muslim secular world. As shall be made apparent in this study however, within the world of Islam, individuals' sex lives are highly regulated. Since Islamic regimes strongly condemn fornication and adultery, this paper is concerned with reviewing *Zamfara v Bariya* so as to establish whether the case succeeded in reflecting an Islamic concept of justice. If so, to what extent was the administration of justice by *Shari'ah* court(s) of law in Zamfara consistent with the ideals and teaching of Islam?

# **Sexual Offences in a Muslim World: A Socio-Ethical Reflection on Zamfara State (of Nigeria) v Bariya I. Mugazu**

Olufemi O. Ilesanmi\*

## I. Introduction

On Friday morning, January 19, 2001 Bariya Ibrahima Mugazu was given 100 lashes.<sup>1</sup> Zamfara State of Nigeria tried and punished this young woman for having sex unlawfully in the previous year.<sup>2</sup> Until this case between Zamfara state of Nigeria and unmarried Bariya Mugazu, controversies surrounding the full adoption of Islamic law (*Shari'ah*) in northern Nigeria seemed to remain only a local issue.<sup>3</sup>

Section 10 of the Constitution of the Federal Republic of Nigeria bars any of its federating units from adopting "state religion". These states are however at liberty to adopt any suitable legal regime.<sup>4</sup> So, when about 12 states in the North of the federation opted for *theocracy* in 1999, the predominantly Muslim public of the region claimed to act within the confines of the municipal law in introducing *Shari'ah*. As such, the relationship between this religious and legal order and Nigeria's human-rights-friendly constitutions remains controversial.

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<sup>1</sup> See generally Charles Cobb Jr., "New Zeal for *Shari'ah* Penalties Reflects Political Climate, Say Rights Activists," in *AllAfrica Global Media* (Washington, DC November 13, 2003) Available at <http://allafrica.com/> THISDAY, "*Sharia*'H: Single Mum flogged in Zamfara," in THISDAYonline Available at <http://www.thisdayonline.com/archive/2001/01/23/20010123news20.html> Also, "Nigerian Teen Mother receives 100 lashes," in *Africa* (January 22, 2001) Available at [http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=68&art\\_id=qw98015934110B252](http://www.int.iol.co.za/index.php?set_id=1&click_id=68&art_id=qw98015934110B252)

<sup>2</sup> Ibid. See also Philip Ostien, "Islamic criminal law: what it means in Zamfara and Niger states", in *Journal of Public and Private Law* (University of Jos) 4/4, 2000, 1-18.

<sup>3</sup> For further studies, see for example Sanusi Lamido Sanusi, "The west and the rest: reflections on the intercultural dialogue about *shari'ah*", in Philip Ostien, Jamila M. Nasir, and Franz Kogelmann, *Introduction to the New Volume on Comparative Perspectives on Shari'ah in Nigeria*, 251-74. Available at <http://www.gamji.com/article4000/NEWS4700.htm> See also Dan Isaacs, "Islam in Nigeria: Simmering Tension," in *BBC News* (Lagos, Nigeria: September 24, 2003) Available at [http://news.bbc.co.uk/go/pr/fr/-/And Asifa Quraishi, "Islamic Legal Analysis of the Zina Punishment of Bariya Ibrahim Magazu," in \*Islam for Today\*. Available at <http://www.islamfortoday.com/zinanigeria.htm>](http://news.bbc.co.uk/go/pr/fr/-/And Asifa Quraishi, )

<sup>4</sup> For an expository discourse, see generally Muhammed Tabiu, "*Shari'ah*, Federalism, and the Nigerian Constitution" presented at the *Nigerian Muslim Forum* (London: International Conference on *Shari'ah* 14<sup>th</sup> April, 2001). Available at [http://www.shariah2001.nmnonline.net/tabiu\\_paper.htm](http://www.shariah2001.nmnonline.net/tabiu_paper.htm) Accessed June 1, 2005

Fornication or adultery may not constitute an offence deserving criminal prosecution in the non-Muslim secular world.<sup>5</sup> As shall be made apparent in this study however, within the world of Islam, individuals' sex lives are highly regulated. Since Islamic regimes strongly condemn fornication and adultery,<sup>6</sup> this paper is concerned with reviewing *Zamfara v Bariya* so as to establish whether the case succeeded in reflecting an Islamic concept of justice. If so, to what extent was the administration of justice by *Shari'ah* court(s) of law in Zamfara consistent with the ideals and teaching of Islam?

Investigating religion beyond a normative framework can be highly sensitive. Ms Mugazu's case and the accompanying reactions have thus been subjected mostly to an intra-faith scrutiny. A normative approach is especially considered because of the nature of the religio-legal order and practice:<sup>7</sup> 1) the Muslim law is by nature casuistic as Muslims arguably identify with Abrahamic traditions where law and morals are rarely separate. 2) Rather than an analogous case study typical of most positive law traditions of the West, one takes into cognizance the discretionary power of judges in almost all faith-based legal traditions to deviate and make judgment with little or no regard to precedents or previous authoritative rulings.<sup>8</sup>

It must be added that the study is case-specific<sup>9</sup> to Zamfara State in relation to the administration of justice in *Zamfara v Bariya*. Apart from the fact that Zamfara state was the first to introduce the *Shari'ah* in northern Nigeria, Bariya's case is arguably the first

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<sup>5</sup> Rhoda Howard-Hassmann, "The Flogging of Bariya Mugazu: Nigerian Politics, Canadian Pressures, and Women's and Children's Rights," *Human Rights Day Forum* (Canada: University of Toronto Law School March 15, 2001), 13

<sup>6</sup> For the Penal Code of the Shari'ah implementing Zamfara visit the official site of the state at <http://www.zamfaraonline.com>

<sup>7</sup> See generally Olufemi O. Ilesanmi, "A World of Difference: Contemporary Theocracies and Human Rights" PhD Thesis (University of Aberdeen, September 2007), at Chapter 2. See also Patrick H. Glenn *infra* note 24

<sup>8</sup> *Ibid.* See the section on Talmudic tradition in particular. A decision in *Shari'ah* court in Zamfara may not technically constitute a binding precedent, except within the state itself. However, it could have strong persuasive influence on other cases outside Zamfara. The acts on which charges are brought do not differ much. For further studies on how Zamfara acts compare to others, see for example, Ruud Peters, *Re-Introduction of the Islamic Criminal Law* (Lagos, Nigeria: EU 2001) at 11. See also Charles Cobb Jr, *supra* note 1

<sup>9</sup> In view of the timing and nature of the regime in the pioneering Zamfara, a critical exegetical study of the case is preferred to a comparative discourse on how the law applies in various theocratic states within the country.

in Zamfara. Lack of an accessible written determination as well as the virtually-closed trials by these *Shari'ah* courts also make independent review of cases extremely difficult.<sup>10</sup> Meanwhile, before discussing the nature of the Nigerian *Shari'ah* as well as reactions that Ms Mugazu's case attracted, the background of the study is overviewed.

## II. Background

When states in northern Nigeria started in 1999 to embrace the full-blown *Shari'ah* as state law, the officials claimed to be serving the interest of members of the public who were seeking solace in the law and governance of Islam.<sup>11</sup> Prior to this, most Nigerians had lost confidence in Nigerian governance and systems under successive military regimes. The need arose to curb social vices such as bribery and corruption, to restore traditional values, and to narrow the gap between the rich and the poor.<sup>12</sup> Hence, except in some members of the military junta and its surrogates in the corridors of power, the desire for change in Nigerians was burning and obvious.

Zamfara state actually led the way in the institutionalisation of the Islamic code for criminal cases in northern Nigeria.<sup>13</sup> The existence of a world of difference between religio-legal regimes the traditional Muslim world and secular democracies was moreover reiterated in *Zamfara v Bariya*:<sup>14</sup> In late 2000, the state *hisbah* group (i.e. the religious police) heard that in the village of Tsafe Ms Mugazu, an unmarried woman, was pregnant. Acting on behalf of the state in enforcing *Shari'ah*, the *hisbah* group presumed and charged Bariya with *Zina*, or unlawful sexual intercourse. Ms Mugazu was declared guilty at a *Shari'ah* court of having unlawful sexual intercourse (*Zina*) and of false

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<sup>10</sup> See for example Philip Ostien *supra* note 3. Activists and legal scholars have sometimes had to glean information from the Media even when such reports "were often conflicting, often very obviously biased or confused, and always frustrating and incomplete".

<sup>11</sup> Musa Tabiu *supra* note 4.

<sup>12</sup> *Ibid.*

<sup>13</sup> See for example Philip Ostien, "Ten good things about the implementation of *Shari'ah* in some states of Northern Nigeria", in *Swedish Missiological Themes*, 90/2, 2002, 163-174

<sup>14</sup> For Media reports, see Chalse Cobb Jr., *supra* note 1. See also Stephanie Nolen, "Birth Over, Nigerian teen awaits flogging," *The Globe and Mail*. (Thursday, December 28, 2000) Available at <http://archive.theglobeandmail.com/>

accusation (*Qadhf*). Purportedly in compliance to the *Shari'ah* regime in Zamfara, the pregnant girl was then sentenced to a total of 180 lashes: *Zina* (100 strokes) and *Qadhf* (80 strokes).<sup>15</sup>

A virgin birth picture was not to be given in relation to Ms Mugazu's pregnancy. She admitted to having pre-marital sex but added also that she was forced into the act: three middle-aged associates of Bariya's father raped her, the expectant mother alleged.<sup>16</sup> She indicted her own biological father for arranging and pressurizing her into having sex with his creditors in payment of a debt he had incurred: "There is an ancient custom in Africa of "pawning", by which," in the words of Howard-Hassmann, "a parent may give a child to a creditor to work off a debt. The child returns to its parents' home once the debt has been paid in full. Women or girls could become pawn wives, with fewer rights than free wives. Daughters could also be given as a gift to influential men."<sup>17</sup> When asked to identify the father of the child she was carrying in her womb, Bariya maintained that any of the three men with whom she had had sexual intercourse could have been the biological father.

### III. Nature of the Nigerian *Shari'ah*

Scholars have written extensively on the uniqueness of *Shari'ah*.<sup>18</sup> Law and religion constitute an integral whole in most religiously-based regimes, traditional Abrahamic theocracies in particular. Islam identifies with the Abrahamic tradition and, by extension, the casuistic nature of its laws. Consequently, Islamic regimes continue to regulate almost every aspect of the life of members of the *Ummah*, which is the Muslim community of faith.<sup>19</sup> *Shari'ah*, as shall be made apparent, characteristically rules on issues that, from a secular viewpoint, are outside law.

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<sup>15</sup> See Asifa Quraishi *supra* note 3. Cf. Ruud Peters, *Islamic Criminal Law in Nigeria*, Ibadan: Spectrum Books Limited, 2003

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* Cf. Rhoda Howard-Hassmann *supra* note 5.

<sup>18</sup> For a normative discourse, see for example A. A. Oba, "Islamic Law as Customary Law: The Changing Perspective in Nigeria," In *International Comparative Law Quarterly* (ICQL) Vol. 51, October 2002, 817-850 at 821 Cf. Olufemi O. Ilesanmi *supra* note 7. Also Patrick Glenn *infra* note 24

<sup>19</sup> *Ibid.*

Meanwhile, drawing a distinction between civil and criminal law as in the secular west can be quite misleading in regard to Shari'ah. As administered in Zamfara for example, the Nigerian Shari'ah makes "no such separation".<sup>20</sup> Many outside the world of Islam might, therefore, find it difficult to grasp why and how justice is administered under a *Shari'ah*-implementing regime.

*Shari'ah's* primacy over any other municipal regimes in an Islamic theocracy is also not without implications:<sup>21</sup> Members of the public (debatably excluding non-Muslims) are under compulsory *Shari'ah* jurisdiction. Since supreme *Shari'ah* is a sacred regime, judgments are considered perfect, right and usually unquestionable.<sup>22</sup> Such an understanding of law, it would seem, readily permits the trend of passing judgments without accompanying determinations. Research on cases such as *Zamfara v Bariya* can be very demanding, given that official documentations are often difficult to come by.

More to the point, whereas Muslims have a common belief in the sacredness and supremacy of *Shari'ah*, the relevance, interpretation as well as actual application of this sacred law all remain subjects of debate.<sup>23</sup> The problems of interpretation will in the meantime be mentioned briefly.

Usually, the differences in theological or political orientations between Sunni and Shiites determine how Islamic law is interpreted and applied in states within the Muslim world.<sup>24</sup> Islamic law as interpreted or applied in Iran, for example, is informed by the Shiite doctrine. This extensively explains why in Shiite Iran legal principles and practices might become parallel to and sometimes contradict legal norms of a Sunni society, such as Saudi Arabia or northern Nigeria.

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<sup>20</sup> This was the conclusion of Sir C.R. Niven who was the President of the defunct Northern House of Assembly, Nigeria. He gave the address that follows before a joint meeting of the Royal African Society and the Royal Empire Society on January 27, 1955. For a copy of the report see C.R. Niven, "Recent Developments in Nigeria" in *African Affairs*, Vol. 54, No. 215 (Oxford: Oxford UP, April, 1955), 121-128

<sup>21</sup> See A. A. Oba *supra* note 18

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* Cf. Abdel Salam Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions" In *British Journal of Middle Eastern Studies*, Vol. 28, No. 2, 187-204, at 201ff. See also Abdullahi A An-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, New York: Syracuse University Press, July 1996), 253.

<sup>24</sup> See generally H. Patrick Glenn, *Legal Traditions of the World* (Oxford UP, 2000)

Within the Sunni world itself parallel and opposing views exist on how to interpret or apply *Shari'ah*.<sup>25</sup> The differences in theological position culminated in Sunni Islam's four major schools of law: Hanafi, Shafi'I, Hambali, and Maliki. For example, on what constitutes proof of *Zina* by an unmarried person, most schools of Islamic law hold that pregnancy is not admissible, being only circumstantial evidence. Asifa Quraishi writes:

The majority of the major Islamic schools of law take the Qur'anic verses on *Zina* as establishing an exclusive method of proof of the crime –that is it must be established by eyewitness testimony (or confession) only. Anything else is merely circumstantial evidence and not admissible in a *hadd* prosecution.<sup>26</sup>

As Ms Mugazu was arrested and charged on the basis of being pregnant outside wedlock, the Maliki School of law deserves special mention. Unlike Hanafi, Shafi'l, and Hambali schools of law, the Maliki allows pregnancy as proof of *Zina*.<sup>27</sup> This seems to explain why some human rights activists, such Asifa Quraishi, maintain that the Maliki remains the most patriarchal and strictest of all the main schools. Maliki is incidentally the dominant school of thought in northern Nigeria.<sup>28</sup> So, when Muslims in the region agitated for a theocracy, they sought an Islamic regime that is based on the Maliki tradition. And when the *Shari'ah*-compliant state of Zamfara rolled out its new statute, it was purportedly in consonance with the Maliki legal doctrine – a legacy inherited likewise by the people of Zamfara.<sup>29</sup>

#### IV. Sex and Zamfara Law

One must pay close attention to Zamfara law<sup>30</sup> itself for an appreciation of the influence of the theocratic regime on the administration of justice in *Zamfara v Bariya*. Islam extensively shares with traditional Judaism and Christianity a common disposition

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<sup>25</sup> Asifa Quraishi *supra* note 3 Cf. Abdel S. Sidahmed, *supra* note 23

<sup>26</sup> Asifa Quraishi *supra* note 3 Cf. Abdel S. Sidahmed, *supra* note 23 And the Qur'an 24:2-4

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* See also A. A. Oba *supra* notes 18

<sup>29</sup> *Ibid.* See also Philip Ostien *supra* note 2

<sup>30</sup> For further studies on Islamic law in this pace-setting theocratic State, see the Penal Code *supra* note 6 See also Ruud Peters *supra* note 8 See also Patrick Glenn *supra* note 24

towards sex and sexuality.<sup>31</sup> Adopting a religio-legal order that is built on Islam in Zamfara therefore means that sexual intercourse is considered a spirito-moral and legal affair. Rape (*Zina-bi'l-jabr*) [as well as adultery or fornication (*Zina*)] in the Muslim world consequently constitutes a serious breach of divine injunction.

Islamic scriptures warn against illicit sex (Qur'an 17:32): come not near to the unlawful sexual intercourse. Verily, it is a *Fahishah* (i.e. any thing that transgresses its limits: a great sin), and an evil way (that leads one to hell unless Allah forgives him).” Sex and sexual transgression is thus addressed in Chapter VIII of Zamfara law supposedly based on the teaching of Islam but only as understood and promoted by the Maliki School of law. Sections 126-141 of the Penal Code specifically rule on sex and sex related offences under ‘*Huduud* and *Huduud* related offences’.<sup>32</sup>

Sex is to be enjoyed and appreciated by adherents of the faith. However, Islamic law generally prohibits sex that does not conform to the “order of nature”. It also forbids sex outside marriage. These two rules are to be followed strictly and therefore deserve further mention.

Firstly, sexual intercourse must be between humans and has to be heterosexual to be regarded as being consistent with the “order of nature”.<sup>33</sup> Zamfara law condemns bestiality (*watal-Bahimah*) just as it expressly disapproves of homosexuality (*liwat*). However, it is only from a Maliki perspective that the meaning of Zamfara law’s “order of nature” can be easily understood. This is because the school continues to influence doctrines in northern Nigeria.

When it is taken into account that Zamfara law is based on a strict Maliki school of law, one readily sees a rationale for some of the *Huduud* enshrined in the Penal Code. Section 130 for instance rules against *liwat* –sodomy (or ‘gay practices’ in conventional parlance). *Hadd liwat* attracts the death penalty (*rajm*) according to Section 131b. Lesbianism (*sihaq*) or bestiality in the same law attracts only flogging and imprisonment.

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<sup>31</sup> Ibid. Like Jewish and Christian Scripture, Muslim sacred texts list sexual intercourse outside marriage as capital crime. See for example Qur'an 17:32. Compare with the Old Testament (Exodus 20:17, Leviticus 18:20; 20:10, Deuteronomy 22:23). See also the New Testament (John 8:1-11).

<sup>32</sup> *Huduud* (*Hadd* singular) refers to crime expressly defined in Islamic scripture, the Qur'an in particular.

<sup>33</sup> Ibid.

Secondly, sex must be “through the genitals”<sup>34</sup> and within marriage: The right to sex is confined to marriage. However, the law goes further to set some boundaries for marriage, as a social relationship. This is categorically mentioned in section 132 where incest is defined, and in section 133 that stipulates the punishment for *hadd Zina*.

Ms Mugazu was suspected of having had consensual sex in violation of the newly adopted Zamfara law. The *Shari’ah* regime which came into effect in January 2000 in Zamfara clearly prohibits sex outside marriage –whether pre-marital or extra-marital.

Penalties for *hadd zina* are set out Article 127 of the penal code:

- a) Whipping of one hundred strokes if (the person is) unmarried, and liability to imprisonment for a term of one year; or
- b) If married, then stoning to death (*rajm*)

Additional punishments could be attracted in a case of rape (*Zina bi’l-jabr*): as it involves forced sexual intercourse with a woman with whom a man has no sexual rights. Article 129(C) requires that convicted rapists “also pay the dowry of her equal (*sadaq al-mithil*)” in compensation to his victim. Commissioned and empowered to keep watch over religious activities in the state, the *hisbah* group wanted the accused to be tried and punished according to the tenets of Islam. Chapter 24 verse 2 of the Muslim scripture provides: “The woman and the man guilty of illegal sexual intercourse flog each of them with a hundred stripes. ...If you believe in Allah and the Last Day.”

It appears that Zamfara law is a women-friendly code, given the fact that there are no provisions addressing or envisaging situations where men might themselves be victims of rape. A forced sexual act that occurs within a marital setting may, however, not be pressed as a criminal offence. According to section 128(2) of the penal code, “sexual intercourse by a man with his own wife is not rape.” This may rightly be interpreted to mean that 1) the law does not foresee the possibility of the use of force within a marital context; and 2) even if it happened that a woman was coerced, rather than having given her consent to sex with her husband, Zamfara law might still not see that as a crime. Rape

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<sup>34</sup> Traditionally, this refers to the reproductive organs. Oral or anal sex is thus prohibited.

charges involving sexual intercourse by a man with his wife may consequently not be heard in Zamfara (criminal) court.<sup>35</sup>

To establish a rape charge that occurs outside wedlock, the theocratic regime places the burden of proof arguably on women.<sup>36</sup> A victim must at least prove that the act was against her will; without her consent, or with her consent, when that consent had been obtained by putting her in fear of death or hurt. Exception is however made with regard to a minor (who is under 15 years old) or persons of unsound mind.<sup>37</sup>

A woman can be wrongly condemned for falsely accusing her sex partner. In provisions closely related to the aforementioned forced sexual act, the *Shari'ah* regime in Zamfara forbids false accusation, *hadd Qadhif* (Article 139). Article 140 stipulates: “whoever commits the offence of *Qadhif* shall be punished with eighty lashes of cane; and his testimony shall not be accepted thereafter unless he repented before the court”.

While Zamfara law is silent on when such *hadd* punishment ought to apply, traditional *Shari'ah* seems to provide that such a sentence should not be carried out until 40 days after the birth of the child.<sup>38</sup> It was officially reported that Ms Mugazu withdrew her accusation of rape.<sup>39</sup> A higher *Shari'ah* court subsequently overturned the decision of the lower court, which had sentenced the expectant mother to a total of 180 lashes. Possibly as respite, Bariya's punishment was reduced to *hadd zina*: 100 strokes.

Bariya's *hadd* punishment was in the end carried out within a month after the delivery of her baby, supposedly in conformity with the version(s) of *Shari'ah* in Nigeria.<sup>40</sup> Her withdrawal of false accusation, it was claimed, moved the higher court to overturn

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<sup>35</sup> For example, see generally Philip Ostien, *A study of the court systems of Northern Nigeria, with a proposal for the creation of lower sharia courts in some northern states*, Jos: Centre for Development Studies, University of Jos, 1999. See also Ashifa Quraishi *supra* note 3

<sup>36</sup> “Mugazu, Zamfara, and *Shari'ah*,” and “Zamfara Displays Two Faces of *Shari'ah*” in *THISDAYonline* Available at <http://www.thisdayonline.com/archive/2001/06/03/20010603pol03.html> Compare with the draft of a protest letter sent by the Muslim Women's League to Governor Alhaji Ahmed Sani (Los Angeles: MWL, February 12, 2001) See also KARAMAH: Muslim Women Lawyers For Human Rights. Available at <http://www.karamah.org>

<sup>37</sup> There are conflicting reports and positions on Bariya's actual age especially because she is an illiterate who does not know her date of birth. But it was officially given as 17 –Many argue that this was only to make her answerable to the *hadd zina*.

<sup>38</sup> Asifa Quraishi *supra* note 3

<sup>39</sup> See Stephanie Nolen *supra* note 14

<sup>40</sup> *Ibid.* See also “*Sharia 'H*: Single Mum flogged in Zamfara,” *supra* note 1 Cf. “Nigerian Teen Mother receives 100 lashes,” *supra* note 1

Bariya's conviction for the false accusation, *hadd qadhif*. Officials of Zamfara flogged Bariya in full view of dozens of her neighbors despite widespread criticism and appeals from both home and abroad, significantly by Muslims.

## V. Critics and the Judgment

Members of the public might be silenced or silent within states that implement *Shari'ah*. In reality however, since the renewed identification with theocracy in northern Nigeria, adherents of the faith continue to struggle with the application of the adopted legal regime.<sup>41</sup> The question of whether the administration of *Shari'ah* in the pioneering Zamfara State sets a legal standard that forms a real precedent has led to the emergence of an ever increasing number of highly articulate critics who are themselves Muslims.<sup>42</sup> These critics decry what they see as injustice and oppression that characterizes a condemnable case, which neither promotes the course of justice nor meets legal standards known to civilized people. What remains a key issue of concern in *Zamfara v Bariya* is whether, within the confines of Zamfara law, the *Shari'ah* courts erred in judgment? Reactions against the judgment usually come from two different but related perspectives: these are the legal and the ideological. Before a tangential mention of the ideological

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<sup>41</sup> See for example Sanusi Lamido Sanusi, "Thinking Aloud: How Not to Debate The *Shari'ah*," paper presented at the Zamyn "Thinking Aloud" seminar on Culture and Globalisation (London School of Economics and Political Science, June 16 & 17, 2005) at 3. See also his "Amina Lawal: Sex, Pregnancy and Muslim Law," (Lagos, Nigeria: August 22, 2002). Compare generally with Abdullahi A An-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, New York: Syracuse University Press, July 1996), 253. For the activities of Ayesha Imam visit the official websites of the Canadian based Rights and Democracy Available at <http://www.ichrdd.ca/english/commdoc/humphrey2002/ayeshabio.pdf>

<sup>42</sup> Ibid. See also Rhoda Howard-Hassmann supra note 5 (In Nigeria there are both secular and Muslim women's groups. FOMWAN, the Federation of Muslim Women's Associations in Nigeria, was formed in 1985. Its goal is to "liberate Muslims within the parameter of Muslim law", taking the position that it is culture and the tradition, not the precepts of Islam, that subordinate women. Educated Hausa Muslim women were also involved in establishing the more radical WIN (Women in Nigeria). WIN originally based its platform on the Universal Declaration of Human Rights. It admonishes that women be taught about the rights they should enjoy in their own religion. It has also sought the rationalization of legal systems in Nigeria, so that laws that discriminate against women –religious or otherwise- are eliminated, and so that laws that violate the federal constitution are invalidated.)

problem discussed by critics, some of the legal questions raised in relation to the case are considered in the following passage:

First, in her letter of protest to Governor Sani Yerima of Zamfara state, Asifa Quraishi queried: “is *Zina* the proper *Shari’ah* punishment for an unmarried pregnant girl, who claims that the pregnancy resulted from unwanted sexual relations with three men in an arrangement made by her father as payment for his debt?”<sup>43</sup> Like most other critics, Quraishi expected the trial judge to have found out the circumstances of the sexual intercourse that resulted in Bariya’s pregnancy.

Another issue is whether Ms Mugazu did have sex willingly. Bestiality was not an issue since her pregnancy resulted from actual intercourse with some specific named men. It behoved the court to determine the culprit before sentence was passed. Other queries are thus raised:<sup>44</sup> should sentence be passed without finding out the real culprit(s)? Why should the men not be tried and why was a deoxyribonucleic acid (DNA) test not carried out to ascertain paternity?

Bariya's sexual partners were scarcely tried for any crime – not even for alleged involvement in sex outside marriage, *Zina*.<sup>45</sup> This also left critics puzzling as to the transparency and fairness of the judgment. So they asked further: supposing it was proven that the accused partners actually had sex outside marriage with Bariya, would it not be wrong to punish the female partner alone? Can one argue that the accused men were as a matter of fact victims of rape? If so, is there any evidence to support a male-victim theory in *Zamfara v Bariya*? And in the whole of Bariya’s ordeal, where were her parents –her father in particular?

Bariya reportedly produced seven witnesses to testify to her claim of rape. Her witnesses were turned down for no given reason. She was instead charged with *hadd Qadhif* for

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<sup>43</sup> For the Draft of a Letter Sent to the governor of Zamfara, Nigeria About the Adultery Case, See <http://www.mwllusa.org/news/governornigeria.htm> Accessed December 2006. Compare with Rhoda Howard-Hassman *supra* note 5, and Asifa Quraishi *supra* note 1

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.* The three men in question denied the charge and were acquitted; the court claimed to lack sufficient evidence against them. See A.S Sidahmed *supra* note 23. Also BAOBAB “*Shari’ah* Implementation in Nigeria: the Journey so far,” in *BAOBAB for Women’s Human Rights* (Lagos, Nigeria: 2003). Available at <http://www.baobabwomen.org/Sharia%20&%20BAOBAB%20publication.pdf>

falsely accusing the supposed sex partners. By passing a *hadd* verdict against Bariya, the court seems to be suggesting that she actually consented to the sexual act.

It is argued that there was a serious miscarriage of justice, unless it can be established that Bariya actually raped her partners.<sup>46</sup> Where consensual intercourse has taken place outside marriage and in the absence of evidence to support coercion, the *parties* shall be guilty of violating section 126 of the *Shari'ah* penal codes. Section 127 also states: “*whoever* commits the offence of *Zina* shall be punished.” So, if *Zamara v Bariya* was actually a case of *Zina* as ruled by the judge, the failure to punish the men alongside their female partner, it is argued, violates Zamfara law. Questions relating to the fairness of the legal environment are therefore to be addressed.

Thirdly, why and how Ms Mugazu withdrew her claim of rape was not officially explained. Many insinuate that during the course of prosecution some informal out-of-court deals were reached, which influenced the decision of the judge.<sup>47</sup> Bariya’s villagers, it was alleged, pressurised her to confess to *Zina* so as to drop the rape charges being pressed against the men. *Zina* attracts a lesser punishment for an unmarried person. Sentencing a young woman to flogging, according to this view, was preferable to a death sentence on a married culprit with parental and other family responsibilities. By releasing those men however, the judgement concluded that they were innocent and therefore victims of false accusation.

Critics believe that the refusal to allow Bariya’s witnesses to testify to her claim of rape may not be unconnected with surreptitious moves<sup>48</sup> by 1) the villagers who see the flogging of an innocent as a lesser evil; 2) a judge who has reason to doubt the justice of condemning the male culprits alone (without convicting the biological father of the girl-victim who, it was alleged, aided and abetted the crime); and 3) public officials themselves, many of whom are said to lack the moral courage to apply truly a strict Islamic regime.

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<sup>46</sup> Ibid.

<sup>47</sup> Asifa Quraishi *supra* note 43 Cf. Rhoda Howard-Hassman *supra* note 5

<sup>48</sup> Ibid.

Besides, in its ruling, the court never seemed to take into consideration 1) Bariya's mental age –which they argue is less than 15; 2) her legal status as a dependent and vulnerable teenager who needs some degree of protection; and 3) her right to a free and fair hearing, as an individual entitled to legal support or representation. Not only is it regretted that Ms Mugazu was denied such legal representation, critics are also disappointed that the court failed to consider her status as a child, her circumstances as a dependant, and her rights as an individual and a citizen. In all, the refusal to answer legal questions that critics raise in relation to *Zamfara v Bariya* makes many suspicious of the Nigerian *Shari'ah*.

Critics and activists are generally appalled at what they see as a gross miscarriage of justice in the name of religion.<sup>49</sup> Some pay attention to how women are treated<sup>50</sup> in the name of *Shari'ah* under Islamic theocracies.<sup>51</sup> This is because many also view the system as being too patriarchal –a system that inherently discriminates against women. As far as most are concerned, the case of *Zamfara v Bariya* only reinforces “the image of an innocent girl victimized by men, namely, her father, her rapists, and the male *Shari'ah* judge”.<sup>52</sup>

At an ideological level, almost all Muslims believe in the ideals of Islam and its law as divine. But how justice is administered in the name of *Shari'ah* has often been criticized and sometimes condemned<sup>53</sup> by Muslims such as Sanusi Lamido Sanusi, Ayesha Imam, and Abdullahi A. An-Naim. These critics doubt the relevance of a legal regime based on medieval thoughts to a 21<sup>st</sup> century society.<sup>54</sup> Among adherence of the faith therefore, the debate is rarely on the principles of *Shari'ah*. The practical administration of such religio-

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<sup>49</sup> See particularly Irshand Manji, *The Trouble with Islam: a Muslim's Call for Reform in Her Faith* (Canada: Random House, January 2004).

<sup>50</sup> Ibid. But many lone male voices can still be heard. See, for example, Sanusi L. Sanusi, *supra* note 41

<sup>51</sup> For example, for the Malaysian experience, see particularly Sisters In Islam, “Third Issue (Islam and Human Rights: Conflicting or Complementary?)”. Available <http://www.sistersinislam.org.my/pubs-baraza.htm> Accessed in October 2007

<sup>52</sup> Rhoda Howard-Hassmann *supra* note 5 Cf. Asifa Quraishi *supra* note 43

<sup>53</sup> Ibid. See for example Sanusi Lamido Sanusi, *supra* note 41

<sup>54</sup> Ibid.

legal order remains the prime cause of complaint.<sup>55</sup> Some advocates of full-blown *Shari'ah* thus continue to ignore problems accompanying the implementation of a divine law in human society.

## VI. Apologists Defend the Regime

Ms Mugazu's trial and punishment by an Islamic court of law in Zamfara extensively put the state on the defensive. On one hand, the fairness of the trial and the nature of Bariya's punishment were subjected to heavy scrutiny. On the other hand, the relevance or appropriateness of applying a classically based regime in a human rights environment was being questioned.

Although the restoration of democracy in May 1999 was highly appreciated in the predominantly Muslim states of northern Nigeria, that historical change in governance from military to civilian rule was, in the eyes of many Muslims, only to serve as a stepping-stone. A greater need to establish a 'Godly society' that aims at genuine respect for human worth and dignity was perceived. This, according to advocates of the Nigerian *Shari'ah*, requires Islamization of regimes of federating units in the North and, by implication, a departure from traditional democracies that continually separate church from state.<sup>56</sup>

Prior to Ms Mugazu's case, many advocates of Nigerian *Shari'ah* were confident that Islamic law must be applied in order to rescue the nation, the northern regime in

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<sup>55</sup> Ibid. See also Irshand Manji, *supra* note 49

<sup>56</sup> Musa Tabiu, *supra* note 4. (Adopting the religiously- based regimes is not without some historical precedent. There was the Fulans' 'holy war' as well as its accompanying religio-political hegemony in the region prior to the British conquest in the 19<sup>th</sup> century. With such parallel and sometimes opposing ideologies on how law and religion ought to interact or operate, conflicts seemed inevitable. This was compounded by the exposure of the multi-cultural groups that made up the northern Nigerian populace under previous colonial ideologies and powers to conflicting worldviews: first, the Muslim world, and then the West. Her independence never really solved the problem, as Nigeria has evidently inherited a legacy of political crises, often fought in the name of religion. The constitutions of the Federal Republic of Nigeria, it appears, have continued to allow for clashes of interest and ideology.)

particular. On the relationship between an orderly society and Islamic religio-legal order, Muhammed Tabiu for instance claimed:<sup>57</sup>

Through the implementation of *Shari'ah*, Muslims in these states want to discharge their religious obligations as true believers by enabling the law of God to govern their lives. They want to enjoy the goodwill and peace and progress that obedience to God engenders. They want to rehabilitate their present society from its present state of corruption, widespread crime and social neglect. They want to do away with resultant inefficiency, backwardness and social dislocation.

Apologists of the Nigerian *Shari'ah* maintain that the divine law must continue to govern the predominantly Muslims states – any error in *Zamfara v Bariya* notwithstanding. These advocates of a theocracy resting on Islamic law doggedly defend the Nigerian *Shari'ah*. Whenever critics debate the administration of *huduud* in Bariya's case, state officials as well as members of this brigade of advocates see themselves as principal custodians of the faith who must rise to defend its religio-legal tradition. In all, one suspects a link between the commitment to Islamic law and the benefits which a political structure resting on Islam might offer to the *Shari'ah* contingent.<sup>58</sup>

As custodians of the religious and legal tradition,<sup>59</sup> apologists of the Nigerian *Shari'ah* have a duty to defend the integrity of the Islamic regime. Defending the regime comes with a responsibility to ensure that subjects recognize institutional authority. Alongside this is the authority's task, as prime defender of Islamic faith, to articulate its distinct policies to the outside world.<sup>60</sup> A two-pronged strategy is thus involved: One is to warn against the pervasive and subversive ideology that influences renegades and nominal members of the religious public into condemning divine law as pariah and unjust regime.<sup>61</sup> Apologists bewail the “westoxication”<sup>62</sup> of the Muslim elite through exposure

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<sup>57</sup> Ibid. Cf. A. A. Oba *supra* note 18.

<sup>58</sup> Members of *hisbah* group –the State religious police are all Muslims; the state now pays the salary of clerics; academics and prominent individuals are given religious-related political appointments by the State; and the all-Muslim emirs have some direct-from-source allocation from state allocations. Some argue that these privileges would suggest why many would want the order retained at any cost. For further studies see generally Peter M. Lewis “Islam, Protest, and Conflict in Nigeria,” in Africa Notes (No 10) (Washington, DC: Centre for Strategic and International Studies, December 2002) Available at <http://www.csis.org>

<sup>59</sup> THISDAY *supra* note 36. See also BBC Team, “Nigeria *Shari'ah* Architect Defends Law,” in NBC News Available at <http://news.bbc.co.uk/1/hi/world/africa/1885052.stm>

<sup>60</sup> Ibid.

<sup>61</sup> See A. A. Oba *supra* note 18

to western education and media, which, they claim, destroys the fabric of Islamic theocracy. The other task is educating fellow Muslims on the integrity and uniqueness of Islam and its law, which these theocrats promote (anecdotally) as preferable to any known regimes or systems of governance.<sup>63</sup> The multifaceted approach of the apologists can be detailed as follows:

1) Drawing a distinction between Muslim and non-Muslim worldviews is considered necessary. For instance, an investigation into the attitudes that shaped Canadian public opinion on *Zamfara v Bariya* correspondingly shows a reasonable shift in understanding of sex and sexuality.<sup>64</sup> In view of the Canadians' reaction to *Zamfara v Bariya*, Hassmann expounded: "they reflected a worldview now prevalent in Canada, that issues of sexuality such as adultery, pre-marital sex, even homosexuality, are strictly private matters, and thus of no interest to society as a whole nor a concern of the courts".<sup>65</sup>

In other words, sex is largely a moral issue in the contemporary West. The consent of the individuals involved is what really matters in such private affairs. It is therefore difficult for a *Shari'ah* court to tolerate western sexual liberalism any longer: "To them, it made no difference whether she had been raped (for which, under Muslim law, her rapist should have been punished) or had agreed to have sexual relations (for which, under Muslim law, she and her male partner should have been punished)."<sup>66</sup> Protecting its vulnerable subjects from strange teachings<sup>67</sup> was even more urgent. Apologists therefore warn fellow Muslims against dangerous ideas propagated by people they condemn as infidels, lacking any sense of moral rectitude.

The West seems to promote individualism, the breakdown of social mores, and lack of responsibility to the collectivity. In the west, sex and marriage are not the family and collective affair they are elsewhere: they are individual choices. Indeed sex appears to be completely outside the realm of social regulation, and completely devoid of reticence or modesty.<sup>68</sup>

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<sup>62</sup> Sanusi L. Sanusi *supra* note 3 (Sanusi, a scion of the house of the Emir of Kano and unquestionably an orthodox Sunni Muslim, is for example considered to be "Westoxicated"-spoiled in his mind by his western education. He has also been a long-time gadfly of the Northern Muslim establishment)

<sup>63</sup> BBC Team *supra* note 59. See Ibraheem A. Waziri, "*Shari'ah* and the Practicalisation of Ideological Postulates: Between Sanusi Lamido and the rest of us," in *AmanaOnline* (September 13, 2002) Available at [http://www.amanaonline.com/Articles/art\\_267.htm](http://www.amanaonline.com/Articles/art_267.htm)

<sup>64</sup> See generally Rhoda Howard-Hassmann *supra* note 5

<sup>65</sup> *Ibid.*, at 6

<sup>66</sup> *Ibid.*

<sup>67</sup> See Ibraheem A. Waziri, *supra* note 63

<sup>68</sup> Rhoda Howard-Hassmann *supra* note 5 at 6

2) Non-Muslim humanists and critics' description of the Nigerian *Shari'ah* as being an inherently cruel, unusual and degrading<sup>69</sup> because of the punishment meted out to Bariya is unacceptable to the apologists. Perhaps, without critical perception, Muslims do not see the application and enforcement of *hadd* as being cruel.<sup>70</sup> The definition of what is "cruel" or "cruelty" in itself can be relative and tricky.<sup>71</sup> Zamfara state therefore saw a need to educate the outside world on *Shari'ah* being a legal culture unique to (and for) Muslims.<sup>72</sup>

The dogmatic nature and prescription of *huduud* punishments<sup>73</sup> is not without implications for the reaction of Muslims to attacks on the severity of Islamic criminal law.<sup>74</sup> The following explains their position: firstly, *huduud* are prescribed by the all-knowing and all-loving God, therefore the divine law may not be said to be cruel. Secondly, and more importantly, mortal man has no business questioning, but does have a duty to obey the will of the sovereign God as enshrined in the *huduud*. Thirdly, any attempt to disobey or criticise Islamic law must be resisted by Muslims. So the state government rose to the task of defending the religio-legal penology<sup>75</sup> when its court gave a normative rationale for Bariya Mugazu's punishment:

The flogging was not cruel or unusual; it was a regulated normal punishment. There was no intention to be cruel to Bariya: rather, the intention was to impress upon her the enormity of her crime in deviating from Islamic law's (as the court interpreted it) rules of sexual behaviour.<sup>76</sup>

Bariya was reported to have walked a few miles back to her village following the flogging.<sup>77</sup> This at least suggests that there was no physical harm that could have attracted serious criticism. The psychological pain of being beaten in the presence of her neighbours, it is believed, is significant to Islamic penology. This is corroborated in an

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<sup>69</sup> Charles Cobb Jr *supra* note 1 at 3, 4 Compare generally with Mohammed S. El-Awa, *Punishment in Islamic Law: A Comparative Study* (Indianapolis: American Trust Publishers, 1982). See also Abdullahi Ahmed An-Naim, *Toward an Islamic Reformation*, (Syracus, New York: Syracuse University Press).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> See generally Zamfara State official website, *supra* note 38 See also, A. A. Oba *supra* note 18

<sup>73</sup> *Ibid.*

<sup>74</sup> BBC Team, *supra* note 59

<sup>75</sup> *Ibid.*

<sup>76</sup> Rhoda Howard-Hassmann *supra* note 5 at 7

<sup>77</sup> *Ibid* at 4

interview granted by Mahmoud Shinkafi, the deputy Governor of Zamfara.<sup>78</sup> In his defence of the *hadd zina*'s punishment against Bariya, Shinkafi agrees that public flogging does have psychological implications for the young woman, but posits: "the sentence was also meant to act as a deterrent to others"<sup>79</sup> who might be contemplating *Zina* within the social and legal environment. Shaming a moral deviant is, after all, seen as a social good<sup>80</sup> –whether to the degraded Bariya or to the *Ummah*, the community of Islamic faith in Zamfara.

3) There seems to be a link between the intensity of international reactions and Bariya's punishment.<sup>81</sup> Within the normative rhetoric, "human rights (norms) are frequently taken to be an imposition of western culture upon "the rest" including the Islamic world."<sup>82</sup> Advocates of the Nigerian *Shari'ah* have the impression that, on the one hand, external critics were not well informed about the penal codes;<sup>83</sup> and, on the other, many that attempted to understand the Islamic law fell victim to "pre-existent anti-Muslim stereotypes".<sup>84</sup> These climaxed in an unceasing condemnation of the Islamic regime as "barbaric and savage".<sup>85</sup> Some have thus argued that outside interference and pressure have always increased the propensity of theocrats to violent interpretation as well as pushing authorities to take more precipitate action.<sup>86</sup>

As far as Zamfara State was concerned, neither the *demonization* of its legal culture<sup>87</sup> nor the activity of so-called western-influenced 'human rights groups'<sup>88</sup> could intimidate the

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<sup>78</sup> THISDAY "Sharia'H: Single Mum flogged in Zamfara," *supra* note 1 Also, "Nigerian Teen Mother receives 100 lashes," *supra* note 1

<sup>79</sup> THISDAY "Sharia'H: Single Mum flogged in Zamfara," *supra* note 1 Also, "Nigerian Teen Mother receives 100 lashes," *supra* note 1

<sup>80</sup> *Ibid.*

<sup>81</sup> For further studies on the role of international pressure on the administration of Islamic criminal law in Nigeria see generally the Ayesha Imam Charles Cobb Jr *supra* note 7 at 1,4 Whereas pressure can often be counter-productive, Bariya's case shows how important such could be. From Imam's standpoint the relevance might have to vary "from case to case, and may vary at different stages within a particular case".

<sup>82</sup> Rhoda Howard-Hassmann *supra* note 5 at 7

<sup>83</sup> Charles Cobb Jr. *supra* note 1 at 4

<sup>84</sup> Rhoda Howard-Hassmann *supra* note 5 at 5

<sup>85</sup> Charles Cobb Jr *supra* note 1 at 4

<sup>86</sup> *Ibid.*, at 2

<sup>87</sup> *Ibid.*

<sup>88</sup> See for example the draft of a letter sent in protest by the Muslim Women's League to Governor Alhaji Ahmed Sani (Los Angeles: MWL, February 12, 2001) See also KARAMAH: Muslim Women Lawyers For Human Rights *supra* note 4

government into changing its decision to implement the Islamic law in full.<sup>89</sup> After flogging Bariya, the State authority was asked about the rationale for carrying out Bariya's punishment before the 40-day period known to traditional *Shari'ah*.<sup>90</sup> The response by Bashir Sanda, a spokesperson of the State, was simple but significant:<sup>91</sup> "to stave off criticism!"<sup>92</sup>

4) Officials seem to focus on the doctrinal implication of the *Shari'ah*-project and their argument appears to come solely from a religio-legal perspective.<sup>93</sup> Whereas a judgment in Islamic legal tradition may be overturned through an appeal, no amount of criticism from any people perceived to be devoid of moral code<sup>94</sup> may coerce an Islamic judiciary into a reversal of judgment "unless he (the judge) believes that he has erred in passing the judgment in the first place."<sup>95</sup>

To show further how inflexible an Islamic legal culture may be when compared to others, especially to the West, Governor Sani of Zamfara state claimed that in a *hadd* case in particular, "once the judgment is passed, it has to be executed".<sup>96</sup> As far as Governor Sani was concerned, not even in his capacity as chief executive of the state would he overturn a pronounced judgment: "In Islam, there is no place for the prerogative of mercy, nor is there allowance for executive interference in the work of the judiciary."<sup>97</sup> Although Governor Sani focused on the doctrinal implication of the law, it may not be wrong to see his reaction as essentially resentment expressed in religio-legal parlance.

In short, defending the Nigerian *Shari'ah* appears to be pervaded by politics of resentment.<sup>98</sup> Orientalists are frequently thought to be Westerners imposing crude

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<sup>89</sup> See "Nigerian Teen Mother receives 100 lashes," *supra* note 1

<sup>90</sup> *Ibid.* See also Rhoda Howard-Hassmann *supra* note 5 at 4

<sup>91</sup> Stephanie Nolen *supra* note 14 at 2 See also Charles Cobb Jr *supra* note 1 at 3

<sup>92</sup> BBC Team *supra* note 59 See also "Nigerian Teen Mother receives 100 lashes," *supra* note 1 Cf. "Nigerian flogging condemned," Available at <http://news.bbc.co.uk/1/hi/world/africa/1132168.stm>

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.* See also Bashir Adamu Aliyu Birni Kudu, *supra* note 53

<sup>95</sup> *Ibid.*

<sup>96</sup> Human Rights Watch "Human Rights Violation Under *Shari'ah* in Northern Nigeria," Available at <http://www.hrw.org/reports/2004/nigeria0904/nigeria0904.pdf>

<sup>97</sup> *Ibid.*

<sup>98</sup> See generally Rhoda Howard-Hassman *supra* note 5; and Charles Cobb Jr *supra* note 1

stereotypes on to non-Western societies. There is however a common Occidentalst stereotype of the West too, which presents the West as a confusing and sometimes enraging culture that promises “a sinful, libidinous world of infinite pleasure” – an unrestrained hedonism.<sup>99</sup>

## VII. Islamic Justice and the Nigerian *Shari'ah*: A Reflective Analysis

Ms Mugazu’s trial and punishment continue to draw the attention of people within the world of Islam itself to Nigeria:<sup>100</sup> If building a healthy society is the intrinsic objective and intention of the law,<sup>101</sup> many who had advocated the introduction of *Shari'ah* now seemed disappointed, frustrated, and apprehensive that Nigerian *Shari'ah* did not appear to promote the cause of justice.<sup>102</sup> Non-Muslims mostly find the *hadd* crime and penalty inexplicable, probably because Bariya was one of the very first to be tried under the new *Shari'ah* dispensation in northern Nigeria. Significantly, more Muslims now seem to consider the dominant conceptions, interpretations, and applications of *Shari'ah* as being inherently problematic. It is the increasing number, of critics however that seems more disturbing to the apologists, the religious and political establishment in particular.

Muslims, irrespective of their various doctrinal orientations, may agree on what Islam ideally seeks: (*adalah*) balance, justice, and harmony within a Muslim state.<sup>103</sup> Ms Mugazu’s case reveals cracks in the walls of the Muslim world. Parallel and sometimes opposing schools of thought do exist among adherents of the faith, the *Ummah*.<sup>104</sup> In

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<sup>99</sup> Ibid, at 6

<sup>100</sup> See also Joy Ngozi Ezeilo, Mohammed T. Lawal, and Abiola A. Akiyode (eds) *Shari'ah Implementation in Nigeria: Issues and Challenges on women's Rights* (Abuja, Nigeria: Women's Aid Collective Feb., 25-28 2003) Available at <http://www.boellnigeria.org/documents/Sharia%20Implementation%20in%20Nigeria.pdf>

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, at 2

<sup>103</sup> See Asifa Quraishi, “Zina, Rape, and Islamic Law: An Islamic Legal Analysis of the Rape Law in Pakistan,” A Position Paper by KARAMAH (Muslim Women Lawyers for Human Rights) Available at [http://www.karamah.org/docs/Zina\\_article\\_Final.pdf](http://www.karamah.org/docs/Zina_article_Final.pdf)

<sup>104</sup> For example, see generally, Hauwa Mahdi, “*Shari'ah* in Nigeria: A Reflection on the Debates” Presented at A World in Transition: New Challenges for Gender Justice (Indian International Centre, New Delhi: 13-15 Dec., 2006).

Islam, the legal systems are characterized by varied interpretations and traditions. It is therefore not unusual that the administration of justice in the Muslim world still generates heated debate, especially from among the Muslim population.<sup>105</sup> Even when appear to be silent or silenced, Muslim critics insist that *Shari'ah* in northern Nigeria does not operate within Islamic (alleged) intrinsic objective and intention of promoting *adalah*<sup>106</sup> - balance, justice and harmony.

Advocates of Nigerian *Shari'ah* continually focus on how non-theocratic regimes, military as well as civilian, have brought the nation to its knees. A sure way to build and protect a healthy society, they imply, is to have a legal system that is truly Islamic, where the legal perspective is consistent with the core principles of *adalah*. Incorporating *huduud*, from this viewpoint, is a comprehensive process guided by social and moral values that works in harmony with the desire to build a society where peace and justice may reign.<sup>107</sup> *Huduud*, in other words, is more than punishing wrongdoers and criminals.

*Zamfara v Bariya* would suggest that a huge gulf exists between the ideals of Islamic law and the practical administration of *Shari'ah* in Nigeria. In view of the significant difference between the promised ideal and the reality of the case, it becomes questionable whether Nigerian *Shari'ah* is truly Islamic. Why and how the Nigerian *Shari'ah* appears to depart from the much-heralded traditions of Islam continues to require examination.

Ms Mugazu's trial does not appear to be compatible with the rule of law as encoded in Zamfara law. And there is, of course, the question of justice: how free, safe, or protected are the minorities and the weak from fear of discrimination or oppression under the new *Shari'ah* dispensation(s) in the country?

- 1) For a version of *Shari'ah* to be considered Islamic, the principles and practices of the regime must not conflict with Islamic scripture, tradition, or other recognized sources of the religio-legal order. Any interpretation or application inconsistent

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<sup>105</sup> For further studies, see for example Ann E. Mayer *Islam and Human Rights* (Boulder: Westview Press, 4<sup>th</sup> edition, 2006).

<sup>106</sup> For further studies on this subject: *adalah* see generally Asifa Quraishi, "Zina (Fornication/Adultery) in *World of Islam*. At <http://www.worldofIslam.netfirms.com/zina.html>

with such a norm may easily be discarded as being unIslamic. An exploration of classical jurisprudence and *Huduud* confirms that canonized standards of engaging Islamic law exist. However, differences in schools of thought and approaches as well as accompanying traditions, which vary and sometimes conflict, often make it difficult to determine whether or not a judicial activity in the name of *Shari'ah* is truly Islamic.

Thus, based on orthodoxy, observers had hoped that the young woman might not be punished until forty days after childbirth. With the flogging of Bariya obviously contravening the dominant traditional legal opinion, some conservative jurists might argue that the execution of the *hadd Zina* was inappropriate and unIslamic. It is however not impossible to find some sort of situational precedents in the wide variety of Islamic traditions. So, whether or not the Nigerian *Shari'ah* is seen as Islamic would depend on the standpoint or perspective of an individual, theocrat or critic of the Islamic regime.

- 2) Is it lawful to have punished Bariya alone? With a codified law, if the court gave a written determination that stated the verdict and reason for the decision reached, it would have been easier to compare or determine the lawfulness of the sentence. The accused men had only to take an oath of denial to refute Bariya's claim that she had been raped. While taking an oath to be released from prosecution is allowed in traditional *Shari'ah* [for the benefit of doubt?], the absence of any judicial document on the rationale for freeing the men in itself casts some doubt on the whole judgment. Finding it difficult to reckon with the male-victim theory, critics expected that all partners in what appears to be a consensual sexual relationship be punished. This standpoint is pursuant to Articles 127 and 128 of Zamfara law, which provides that *whoever* (male or female) is found guilty of sex outside marriage be punished accordingly. Outwardly, and without any reasonable or acceptable justification of the court's decision, sentencing of Bariya alone for *hadd Zina* (without bringing her sex-partners to book) is in violation of the *Shari'ah* penal codes of Zamfara state. The judges therefore erred in judgment.

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<sup>107</sup> Muhammed Tabiu, *supra* note 4 Compare with Asifa Quraishi *supra* note 43

- 3) There is the unresolved issue of social injustice.<sup>108</sup> In view of codes and procedures in *Zamfara v Bariya*, can the legal environment be said to be congruent with the course of justice? This is considered systematically.

The Muslim Women's League believes that the application of Islamic law in *Zamfara v Bariya* "did not meet the basic requirements of justice under the *Shari'ah*".<sup>109</sup> Apart from the failure by the court itself to comply with the stipulated rule of law, some of the provisions in the penal codes are considered to be too patriarchal: an inherent problem that many have argued allows for discrimination against women.

A typical example of such misogynist interpretation of Islamic law, as observed, is Article 128 (2): "Sexual intercourse by a man with his own wife is not rape." From the critics' standpoint, this not only deprives women of choice in whether or when to have sex, but also constitutes a refusal to defend the cause of Muslim women when forced against their will by their husbands to have sex. Such has been the fate of rape victims. Therefore, in a protest letter to Governor Sani, the Muslim Women's League lamented that the Nigerian *Shari'ah* is not a reflection of the Islamic scripture: "The Qur'an goes out of its way to provide protection to women, recognizing their vulnerability."<sup>110</sup> As far as those Muslim women are concerned, any regime that has no respect for the vulnerable may not be considered pious or just.

Critics have also argued that the court procedures in *Zamfara v Bariya* were incapable of bringing about social justice. Activists have argued: "In terms of the correct understanding of the *Shari'ah*, the judgment against Bariya and the subsequent punishment were unjust and not consistent with the Islamic requirements of evidence."<sup>111</sup> The role of Bariya's parents, the needs of Bariya as a young and dependent woman, the circumstances of her pregnancy, the situation

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<sup>108</sup> Asifa Quraishi *supra* note 43 Compare with Rhoda Howard-Hassman *supra* note 5. See also Joy Ngozi Ezeilo et al *supra* note 100

<sup>109</sup> *Ibid*,

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

that led to her withdrawal of her rape claim, the question of doubt, witnesses, and testimonies (among others) are all relevant to the ruling under *Shari'ah*. Critics say that the administrators of the Nigerian *Shari'ah* cannot claim to be pursuing social justice when in *Zamfara v Bariya* many of the rules of procedure, which are supposedly based on Islamic ideals, were simply overlooked.

- 4) When the government of Kelantan State in Malaysia introduced Islamic criminal legislation, critics protested that implementing the legislation might have a negative impact “upon women and upon society in general”.<sup>112</sup> The judgment in *Zamfara v Bariya* corroborates how the standpoint of Malaysian critics may represent a universal scepticism about the practice of *Shari'ah*, its intention and ideals notwithstanding.<sup>113</sup> While Bariya’s case is one of the first in northern Nigeria,<sup>114</sup> subsequent high profile cases have likewise attracted criticism<sup>115</sup> because of perceived injustice against the vulnerable, the underprivileged and especially against women.<sup>116</sup> Both within and outside Zamfara state, cases of discrimination and selective justice are still being documented.<sup>117</sup>

## VIII. Conclusion

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<sup>112</sup> See particularly Rose Ismail “Women and Islam in Malaysia”. In *Sisters In Islam supra* note 51

<sup>113</sup> *Ibid.*

<sup>114</sup> See Rhoda Howard-Hassman *supra* note 5. Compare with Joy Ngozi Ezeilo et al *supra* note 100.

<sup>115</sup> Compare with Joy Ngozi Ezeilo et al *supra* note 100. Compare with *Sisters In Islam supra* note 6

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* See also *BAOBAB supra* note 45.