Chapter 9
Islamic Legal Maxims for Attainment of Maqasid-al-Shari‘ah in Criminal Law: Reflections on the Implications for Muslim Women in the Tension Between Shari‘ah and Western Law

Luqman Zakariyah

Abstract The legal procedural system of Islamic criminal law has been criticised, either constructively or destructively, over a period of time. Some of the most recent cases in the twenty-first century are the cases of Safiyyatu of Sokoto State and Amina of Kastina State of Nigeria respectively, who were convicted on adultery and later acquitted due to technical legal faults. One of the reasons for criticism of the two cases is based on the lack of incorporating the objective of Islamic Law through "intertextualizing" the textual evidence, on one hand, and on the other failure to extrapolate all sources available for "dynamizing" the Shari‘ah legal system. This chapter will address how these legal maxims can be explored to ensure that the purposes of Islamic criminal law are comprehended and that justice is established in Islamic legal procedure. In doing so, the two cases cited above will be used as empirical case studies. Some of the issues raised in the chapter are: Was criminal intention of the accused women considered? In other words, is it certain that the accused women intentionally committed the crime? Is there any shubha for giving them benefit of the doubt as required by law? Is it possible for someone to report a case of adultery to the authorities? Why were the two cases reported? Does retraction of a confession abate punishment of the accused? These questions will be answered through some relevant basic legal maxims of Islamic law which depict "maqasid al-Shari‘ah".

Introduction

The legal procedural system of Islamic criminal law has been criticised, either constructively or destructively, over a period of time. Some of the most recent cases in the twenty-first century are the cases of Safiyyatu of Sokoto and Amina of Kastina state of Nigeria respectively, who were convicted of adultery and later acquitted

L. Zakariyah (✉)
Lecturer in the Study of Islam and Muslims Al-Maktoum College,
124 Blackness Road, Dundee DD1 5PE, Scotland, UK
e-mail: luqmanzakariyah@444.hotmail.com

T. Lovat (ed.), *Women in Islam: Reflections on Historical and Contemporary Research*,
DOI 10.1007/978-94-007-4219-2_9,

owing to technical legal faults. One of the reasons for criticism of the two cases is based on the lack of incorporating the objective of Islamic Law through "intertextualizing" the textual evidence, on the one hand and, on the other hand, failure to extrapolate all sources available for "dynamizing" the *Shari'ah* legal system (Zakariyah 2010, p. 251). This article will address how these legal maxims can be explored to ensure that the purposes of Islamic criminal law are comprehended and that justice is established according to Islamic legal procedures. In doing so, the two cases mentioned above will be used as empirical case studies. Some of the issues raised in this article are: Was criminal intention of the accused women considered? In other words, is it certain that the accused women intentionally committed the crime? Is there any *shubha* for giving them the benefit of the doubt as required by law? Is it possible for someone to report a case of adultery to the authorities? Why were the two cases reported? Does retraction of a confession abate punishment of the accused? These questions will be answered through some relevant basic legal maxims of Islamic law which depict "*maqasid al-Shari'ah*".

Importance and Role of Islamic Legal Maxims

Islamic legal maxims, as a subject, is a name given to a particular science in Islamic jurisprudence. It denotes a certain discipline in Islamic studies. The subject-matter aphoristically subsumes the entire spectrum on which the tenets of Islamic law rest. It is normally defined as "a general rule which applies to its particulars to deduct rules from it." (al-Nadwi 1998/1418, p. 40) It can be defined in a broader manner that Islamic legal maxim is general in application, regardless of any exclusion that may occur from it. Zakariyah (2009) asserts that legal maxims of Islamic law are "… legal rules, the majority of them universal, expressed in concise phraseology that depict the nature and objectives of Islamic law and encompass general rules in cases that fall under their subject." (p. 30) They pithily and axiomatically subsume all the spectrums through which the objectives of *Shari'ah* are promoted and are seen as vibrant mechanisms through which the dynamic and universal features of Islamic law could be accomplished.

As with the nature of any vibrant discipline, Islamic legal maxims have played a vital role in understanding the spirit of Islamic law as they synthesize the scattered views of Islamic jurisprudence, so harmonizing the thought of Islamic jurists from different schools. In fact, it has become mandatory and a *sine qua non* for any Islamic jurist and judge today to master a certain level of *al-Qawā'id* in order to be able to dispense Islamic verdicts and to make accurate judgments together with mastering and memorizing large sections of the Qur'an and Hadith. The intensive attention of Islamic authors on this subject since the third century of *Hijrah* clearly emphasizes the importance attached to it. Moreover, the utterances of scholars on it show the significance accredited to the subject. Imam al-Qarrafi (1998/1418, vol. 1) affirms thus:

> These maxims are very important in Islamic jurisprudence, great knowledge. By it, the value of a jurist is measured. Through it, the beauty of *Fiqh* is shown and known. With it, the methods of *Fatwa* are clearly understood. …Whoever knows *Fiqh* with its maxims

> (*Qawā'id*) shall be in no need of memorizing most of the subordinate parts 'of *fiqh*' because of their inclusion under the general maxims. (p. 3)

It is noted that, during the development of *fiqh*, many of the Islamic jurists produced *fiqh* literatures in piecemeal form and in fragmented styles. This was because the majority of those writers were producing their work independently, without the influence of any government or institution that could unify the style of their presentation. From such a lack of monitoring, allied with many other factors that could be considered as reasons for the wide diversity of opinion in jurisprudence literature, Islamic Legal Maxims emerged to produce general guidelines that articulated the scattered theoretical abstracts among the various schools of Islamic jurisprudence. Remarking on this important role of Islamic Legal Maxims, al-Zarqā, (1983/1383, vol. 2) observed that "… were it not for the legal maxims, the rules would have remained dispersed without any ideational connection." (p. 935) This role aids judges in comprehending the basic tenets of Islamic law on any contentious issue. For instance, if it is established in the mind of a judge that *hudūd* (fixed punishments) is to be averted in the face of doubt, this will stand as significant value in identifying the aim of Islamic law in offences related to *hudūd.* Exploring this opportunity would also give scholars, judges and jurists of Islamic law the ability to deliver sound and just legal judgments.

There are many Islamic Legal maxims progressively codified for specific periods of times. However, there are five legal maxims unanimously classified as basic and grand from which many others spring. These are: (1) intention and action; *al-'umur bi maqasidiha* (actions are considered according to the intention); (2) certainty and doubt, *al-yaqin la yazul bi al-shakk*, (certainty cannot be repelled with doubt); (3) hardship and facility, *al-mashaqqah tajlib al-taysir*, (hardship begets facility); (4) eliminating of harm, *al-darar yuzaal*, (harm must be eliminated); and, (5) custom as authoritative *al-'adah muhakkamah* (Custom is given authoritative status) (al-Suyuti 1983/1403; Ibn Nujaym 1993/1413). For the purpose of this chapter, these five maxims will be adhered to, however, throughout the discussion reference may be made to other relevant maxims.

Overview of the Cases of Safiyyatu Hussaini and Amina Lawal

Safiyyatu's case was one of the first adultery cases tested under the re-Islamization of criminal law in Northern Nigeria. The accused was arraigned before the Upper *Shari'ah* Court Gwandabawa, in Sokoto State Nigeria, as the court of first instance, based on the First Information Report (F.I.R) given to the Police in which the accused was alleged to have had illegal sexual intercourse with her co-accused, Yakubu Abubakar (referred to hereinafter as Yakubu). The Upper *Shari'ah* Court of Gwadabawa convicted her based on her confession and appearance of pregnancy and sentenced her to death by stoning on the 9 October 2001 based on section 128 and 129 of the Sokoto State *Shari'ah* Penal Code Law 2000. In the case, it was said that the co-accused, Yakubu, denied the accusation and was therefore discharged and acquitted, but Safiyyatu confessed and pleaded guilty to the offence in the first instance.

The accused woman appealed against the judgment which was delivered on 9 October 2001 on the grounds that, *inter alia,* the Upper *Shari'ah* Court took the admission/confession of the appellant without giving her the right of defence or having witnesses present during the confession, and that the confession was not admissible by law as the appellant did not understand the charge, the details and essentials of the offence. On 25 March 2002, the *Shari'ah* Court of Appeal quashed the decision of the Upper *Shari'ah* Court on the grounds of legal technicalities, including confession, and the appellant was acquitted and discharged. I shall refer to the said accused hereinafter as Safiyyatu.

Amina Lawal's case was also one of the most famous cases arraigned in the *Shari'ah* Court of Bakori, Kastina State of Nigeria on 20 March 2002. The accused was sentenced to death by stoning according to section 124 of the Kastina State *Shari'ah* Penal Code Law No 2 of 2001. It was reported that the accused person had known Yahaya Muhammed (2nd accused) for 11 months and they were planning to marry; however, they were engaging in sexual intercourse with each other before legal marriage which resulted in pregnancy and the delivery of a baby girl. The 2nd accused denied the charges against him and was therefore discharged and acquitted, but Amina was convicted based on her confession and other exhibits (a baby girl without legal marriage). Amina appealed against the judgement of the *Shari'ah* courts, and on 25 September 2003, the Kastina State *Shari'ah* Court of Appeal quashed the decision of the lower courts and acquitted Amina of the charges based on errors in the procedures of the lower court. One of the errors was the legality of her confession on which the conviction was based. It was argued that Amina was misled into confession of her guilt, which is deemed as involuntary confession in Islamic law. In this chapter, I will refer to her as Amina. (This section is a direct quotation from Zakariyah 2010, p. 253, Yawuri 2004, pp. 183–204; Peters 2006, pp. 219–241; Ladan 2005, pp. 117–120).

Intentionality in the Islamic Criminal Act

The basic maxim implored to debate the credibility of the two cases is the maxim a*l-'Umur bi maqasidiha* (actions are considered together with their intentions) (al-Suyuti 1983/1403, p. 8; Ibn Nujaym 1993/1413, p. 27; al-Hamawi 1985/1405, vol. 1, p. 37; al-Zarqa 1989/1409, p. 47). Hereinafter, the translation of *al-umur bi maqasidiha-* will be used except when there is need to mention the maxim in its Arabic form. This maxim is one of the basic general maxims agreed upon by Islamic scholars because of its consistency with, and relevance to, Islamic jurisprudence. It implies that any action, whether it is done physically or verbally, should be considered and judged according to the intentions of the actor. The appropriate interpretation of this maxim should therefore be that the rulings to be made for or against a case should be in conformity with the intention of the person concerned with the case.

Intentionality in Islamic criminal law ranges from overtly expressed utterances of perpetrators which could be in the form of confession, defamation and blas-

phemy to physical objects used for committing a crime. For an overt expression, there is not much debate to establish intentionality if a straightforward and clear grammatical usage is used to depict the crime. Problems arise however when the language used to express the criminal act is ambiguous. In that case, to determine whether a crime of *hudud* (fixed) or *qisas* (retaliatory) is committed will be a matter of controversy. Thus, the punishments of *hudud* or *qisas* will be dropped and *ta'zir* (discretionary) punishment may be imposed, as deemed by the judge.

The cases of Amina and Safiyyatu could be argued on the basis of lack of intentionality in committing the alleged offence (Northern Nigeria Law Report 2003, p. 496; Human Right Watch 2004, pp. 34–35, 61) This is because they lived in a society where traditional practices, norms and values have significantly intertwined with the Islamic Legal tenets and have sometimes produced legal results which are fundamentally outside Islamic law.

The accused persons were villagers and, as such, they might not have had the intention of violating the Islamic rules but, rather, were following the dictates of the society in which they live. It is the responsibility of the courts as representative of the Government to verify the core objective of Islamic Law, namely establishing criminal intent, before passing any *hadd* punishment on them. Had criminal intention been investigated properly, those accused women might not have been convicted in the first instance; moreover, Section 63(2) of Kastina State *Shari'ah* Penal Code Law 2001 provides that one shall not be found guilty of an offence without criminal intention. The two accused women were eventually acquitted, among other reasons, on the grounds of their ignorance of the fact of the law, as will be explained in the following maxim.

Factors That Render Action Non-concurrent with Intention

There are factors that render action inconsistent with intention and so, in effect, a verdict may not be reached because of these factors. Some of these factors will be discussed here: namely, *jahl* (ignorance); *Ikrãh* (coercion); *nisyãn* (forgetfulness); and, *sighar* (puberty).

Ignorance (jahl)

Ignorance of the law or of the fact of the law has an effect in determining the criminal intent of the accused. Ignorance of the law can only be an excuse in Islamic law for someone who is a new convert or who is living in non-Muslim territories. This includes, to some extent, those who are living in a remote area where knowledge of Islam has not been spread so much, as opposed to ignorance of the fact of law which can be claimed by all and sundry of Muslims (Awda 1997, vol. 1, p. 430). Thus, Islam recognizes the effect of this detriment in three

people: a person who is asleep, an infant, and an insane person, as the Prophet is reported to have said: "Recording of deed is closed for a sleeping person until he wakes up, and an infant until he attains the age of puberty, and an insane person until he regains his sense." (al-Trimithi 1995, hadith 1446) For example, if a fat man sleeps beside a small baby and rolls over on him, and thus suffocates him to death, the act shall not be considered as intentional homicide because the act cannot be assumed to have been committed intentionally. Any crime committed while one is asleep, in the state of insanity or immaturity shall not be deemed as intentional because of lack of criminal intent. (al-Qayrawani, n.d., pp. 121–131). It is reported that Ubaidullah, son of Umar, committed *zina* with a woman while she was asleep, and the offender was punished while the woman was acquitted (Doi 1984/1404, p. 227).

Coercion (ikrah)

Action committed under duress is considered to be beyond the bounds of intention. This is based on the tradition of the Prophet: "My *Ummah* (nation) will be forgiven for crimes it commits under duress, in error, or as a result of forgetfulness." (Ibn Majah, hadith no. 2045). Thus, if someone is under duress to commit any crime, it is generally assumed to be unintentional; as such, no legal responsibility shall be placed on the actor. Nonetheless, acts committed under duress can be categorized in two ways: first, a crime involving the right of man, and, second, a crime involving the right of God. In the case of the former, no one should allow himself to be coerced into an act, especially if that act is capable of terminating life, as no person's life is more precious than that of another. If the action does not involve eliminating life, however, the person can act upon what he was asked to do, especially if his life is in danger. At the same time, he, or the person placing him under duress, or both, shall be legally responsible for the damage caused. The reason why the person under duress is not allowed to act upon the threat of the person placing him under duress, and is held to be partly or wholly responsible for the damage, is that, according to Islamic jurists, duress is of two kinds: *ikrah mulji* and *ikrah ghayr muliji*. The *ikrah mulji* is a kind of duress wherein the person under duress has no option other than to act upon the request, as failure to do so could endanger his life, with the assurance that the life of a third party is not involved. In such a case, if the person under duress acts, his action shall not be considered intentional, and any crime resulting from that – if it is solely the right of God – means that he will be acquitted. If the right of man is involved, however, he, or the person placing him under duress, or both, will be responsible for the damage.

In the case of '*Ikrah ghayr mulji'*, where the person being coerced has the choice to either accept or reject the demand placed on him, or where his life is not in danger, if in such a case he should then choose to succumb to the pressure, his action would be regarded as being intentional. In that context, both he and the one

who coerced him will be considered responsible (Doi 1984/1404, pp. 227–228). In general, there are debates about whether the claim of those legal impediments can sufficiently render the accused unpunished. The fact is that if any crime is committed and one of those impediments is involved, there are two ways to prosecute the offender. First, if the crime involves the absolute right of God, then the claim of ignorance, coercion and forgetfulness could at least commute the punishment of *hadd* to *ta'zir*. However, if the crime involves the right of an individual, compensation may be given in order to balance between the two individuals. For example, if the crime originally attracts *qisas,* in the case of criminal intent being established, the *qisas* may be reduced to *diyah,* simply because of these legal impediments.

Consideration of intention in placing criminal liability is observed in the Zamfara State Penal Code Law (SPCL 2000, www.zamfaraonline.com). In section 63 of the code, it is stated that "… there shall be no criminal responsibility unless an unlawful act or omission is done intentionally or negligently." The words "intentionally" and "negligently", in that provision, have rendered any criminal act in which intention or negligence of the perpetrator cannot be established not chargeable. This includes any crime of *hudud*, *qisas* and *ta'zĩr*. Nonetheless, the provision does not specify from which criteria intention can be inferred, or which elements constitute it.

Common knowledge of the "material fact" proves the intentionality of criminal acts unless there is other evidence that makes it ineffective. For example, if a person knows that *zina* is a crime punishable with *hadd*, but has no knowledge of what constitutes the legal definition of *zina* because such knowledge is not common knowledge, then that person may not be punished with *hadd* of *zina*, but rather *ta'zir* may be accorded. In that case, if Safiyyatu in Safiyyatu v. Sokoto State of Nigeria, as a villager, claims ignorance of the details or legal connotations of *zina*, her conviction can be dropped or reversed, although she may be awarded *ta'zir* and she may not depend on her previous status. The basis for this assertion is the *hadith* of the Prophet, in which the Prophet apparently casts doubt on the intentionality and acquaintance of Ma'iz to the crime to which he confessed (al-Shinqiti 1995/1415, vol. 5, p. 386).

The Zamafara SPCL (2000, www.zamfaraonline.com) section 64 observes this fact and states thus: "A person is presumed, unless the contrary is proved, to have knowledge of any material fact if such fact is a matter of common knowledge." Any crime committed by negligence is presumed to have been committed intentionally, unless that negligence is formed involuntarily. For instance, a person committing unlawful sexual intercourse, theft, defamation, or murder when in a state of voluntary intoxication will be presumed to have committed those crimes intentionally. If that negligence is involuntary, however, such as one who is drugged and commits criminal offences in that state of inducement, then that person will not be originally convicted of those offences because of the absence of intention, in accordance with the *hadith* mentioned above. Thus, an induced person who has lost his consciousness, an insane person or one who is asleep would fall into this category.

Mistake (khata) and Forgetfulness (nisyan)

Forgetfulness is considered one of the impediments to ascertaining the criminal intent inherent in the crime, solely involving God's right and also removing the punishment of the hereafter. Forgetfulness however cannot be an excuse for committing crimes that incur punishment for the perpetrator. This is because to open such a door would prejudice the rights of the public and would also render the law inactive (Awda 1997, vol. 1, pp. 430–440; Awdah 1968/1388; Ibn al-Qayyim al-Jawziyyah 1973, vol. 2, p. 140; al-Ghazãlĩ 1993/1414, vol. 1, p. 84).

By mistake or by accident is another concept that serves as an impediment for intent to be established. Mistake also constitutes the assumption of unintentionality of a criminal act, if the accused is believed to have committed it in good faith. For instance, take the case of a man and woman who have sexual intercourse together before "proper marriage", believing that the consent of their parents regarding the affair is enough proof for the legality of their relationship. Despite the fact that they are cognisant that *zina* is punishable with *hadd*, their action shall nonetheless be construed as "a mistake of the fact", according to Zamafara SPCL (2000, section 66). A "mistake of the fact", but not a "mistake of the law" renders an act inoffensive or innocuous. It states thus:

> Nothing is an offence that is done by any person who is justified by Law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it. (Zamafara SPCL 2000, www.zamfaraonline.com, section 69)

Thus, if someone drinks a substance that he believes to be lawful, but it turns out to be an intoxicant, or if a man meets a woman on his bed and by mistake sleeps with her and has sexual intercourse with her, both such actions will not be punished with *hadd*. In the latter case, however, *mahr al-mithl,* a "fair dowry", may be imposed because of the right of the woman involved. Similarly, if one intends to throw an arrow at an animal but, by mistake, it hurts a person and causes his death, the thrower shall not be given *qisas* as it was a mistake, and the killing was unintentional. In the case of a doctor whose patient dies as a result of the drug prescribed for him, the doctor shall not be convicted of murder if that drug was prescribed in good faith, with proper care and caution. This is because there was no criminal intention in the act of the doctor (Zamafara SPCL 2000, www.zamfaraonline.com, section 69).

Puberty

As for puberty, a criminal act committed by a minor or anyone below the age of puberty, is believed to have been committed unintentionally, based on the *hadith* quoted at the outset of the discussion. However, in *hudud* related cases, if there is no right of the individual involved, the accused minor shall not be punished with *hadd,* but *ta'zĩr* may be adjudged instead. If the individual right is attached, however, then compensation

such as *diyah,* in the case of homicide, and an equivalent value in the case of *sariqah* (theft) will be imposed (Zamafara SPCL 2000, www.zamfaraonline.com, sections 71a and b).

Certainty and Doubt in Islamic Criminal Law

The second legal maxim is the implications of *shakk* and *shubhah* to *yaqiin* (certainty) in Islamic criminal law. The legal maxim that says *al-Yaqin la yazul bi al-Shakk* (certainty cannot be repelled with doubt) (al-Suyuti 1983/1403, p. 430; al-Zarqa 1989/1409, p. 79; al-Burnu 2002/1422, p. 166).

The maxim is rooted in the Qur'an and the tradition of the Prophet. The Qur'an says: "And most of them follow nothing but conjecture, certainly conjecture can be of no avail against the truth" (Qur'an 10 verse 36). It is reported that Abdullah bin Yazid al-Ansari asked Allah's Messenger (SAW) about a person who he thought had passed wind during the Prayer *salat*. Allah's messenger replied: "He should not leave his *salat* unless he hears sound or smells something." (Ibn Hajar 1996/1416, pp. 39–40. hadith 76). Al-Nawawi (1992/1392, vol. 4, pp. 49–50) in his comment on this hadith, remarks that this hadith serves as one of the pillars of Islam and is an important maxim of Islamic jurisprudence. It indicates that things remain in their original status until otherwise established, and that there is no case for any accidental doubt.

There are many sub-legal maxims which are directly related to the issue of certainty and doubt in Islamic criminal law. Suffice here to mention and analyse the ones that are more appropriate to the cases in question. There are, *Al-'asl bara' al-dhimmah*-The fundamental principle is freedom of liability, *Al-'asl al-'adam*- the fundamental principle is the non-existence of something, (al-Suyuti 1983/1403, p. 52; Ibn Nujaym 1993/1413, p. 59), *al-Iqrar hujjah qasirah* – Confession is an intransitive evidence, (Ibn Nujaym 1993/1413, p. 255) *al-Mar' mu'akhadh bi iqrarihi* – One is responsible for his confession (Haydar, n.d., vol. 1, p. 70) and *al-hudud tusqat bi al-shubhat* – fixed Punishments should be averted in the case of doubt/suspicion (al-Suyuti 1983/1403, p. 123; Ibn Nujaym 1993/1413, p. 127; al-Zarkashi 1985/1405, vol. 1, p. 400).

It is fundamentally established in Islam that one cannot be held responsible for any claim, or be said to have obligation to others, until it is proved. All litigations have two sides – the one claiming the existence of the right over something, and the one refuting the claim. There is no justice in accepting the mere claim of the *muthbit* (the one making the claim) until the claim is proven. The assumption in justice is that a claim does not exist until it is proven. This position appears to be in favour of the offender. If someone lays claim to a piece of jewellery in the possession of a jewellery seller, it is apparent that the seller holds the *asl* (fundamental proof) and the claimant needs to argue his case with another proof (al-Zarqa 1989/1409, pp. 107–100).

This can be found in many discussions on criminal penalties and liabilities in Islamic literature. Although the approach of each school in applying the maxim

may be different, there are some aspects that are common to all of them. In the case of defamation, for example, if someone accuses another falsely of being unchaste and the accused denies this but refuses to take an oath before the court, the accused will not be punished with *hadd* because the issue attracts *hadd* and the fundamental principle is the innocence of the accused (Ibn Qudamah 1999, vol. 12, p. 409).

Where there is ambiguity in criminal cases which stand as impediments to justices, there are different approaches to each case. A case that involves human rights indubitably needs to be investigated in order to retrieve the rights and restitute the victim. In contrast, a case that involves the right of God may not need to be investigated. This is because the right of God is based on clemency. (Zakariyah 2010, pp. 257–259)

In retrieving the right of the victim, some modern Islamic writers have suggested that modern methods of crime detection such as DNA, laboratory analysis, photography and sound recording could be used in establishing criminal offences, instead of claiming *shubhah*. They claim that those means are more reliable and efficient than verbal testimony. Noorslawat (1977), for instance, suggests that one of the bases of this assertion is that the means of securing the objectives of Islamic law are always "… flexible and remain open to consideration". (pp. 16–17) This hypothesis could be used in the cases of Amina and Safiyyatu (above). Since the crime of adultery can never be committed unilaterally, and the co-accused persons in the two cases denied their involvements in the allegation, Zakariyah (2010) suggests that "thorough investigation to determine the truth of their denial" (p. 260) should have been done by using modern evidence and not ascribing *hadd* punishment indiscriminately on these helpless women. In doing that, it would have the better result in exploring the spirit of Islamic law.

In Safiyyah and Amina's cases, the learned judges based their verdict on their confession and appearance of pregnancy. The first point of observation is whether pregnancy can be used to convict a single woman of fornication or not (Sanusi 2002 www.nigerdeltacongress.com/artciles/amina_lawal). As earlier argued, there is no evidence to support the acceptability of pregnancy as reliable evidence for fornication. Among the schools of jurisprudence, only Malikites accept such circumstantial evidence as proof of fornication, while others have a contrary view (Ibn Qudamah 1999, vol. 10, p. 192). The reasons that pregnancy cannot be accepted as evidence for fornication are: it only proves evidence of intercourse not of consent because a woman could be raped while she was conscious or unconscious; she may even have the impression that the contract was legitimate in the context of a temporary marriage, considered lawful by some *shi'ah* and as reported by Ibn Abbas (Muslim 1997/1417, p. 3320); it may also be that she is one who does not consider the consent of the guardian as a condition for the validity of the marriage contract, and thus she gave herself for marriage without the consent of her guardian (*waliyy)*; or, she became pregnant without coitus, in which case a man's sperm went through her vagina by means other than sexual intercourse, as debated on the Nigerian Television Authority's (NTA) Newsline on Sunday 18th March 2001 where a 10 year old virgin girl was said to be pregnant (Sanusi 2005, www.nigerdeltacongress.com/carticles/class%20).

All these constitute *shubhah* against the acceptability of pregnancy as sole evidence to convict a woman of committing adultery or fornication.

The second point of observation of the learned judges in the Safiyyah and Amina cases is whether, in such cases, the confession of an accused person could be taken without a given right of retraction or benefit of doubt. It is reported that the Prophet gave Ma'iz the chance to retract his confession as well as *al-Ghamidi* when both came to him confessing their guilt of adultery. Throughout Safiyyah's and Amina's cases, nowhere did the judges systematically give them the benefit of the doubt or introduce them to the right of retraction as the Prophet did for the two companions.

It is a settled rule that confession is considered when it is uttered unilaterally and it should not be transitive: *al-Iqrar hujjah qasirah* – Confession is intransitive evidence. (Ibn Nujaym 1993/1413, p. 255) Nevertheless, *al-Mar' mu'akhadh bi iqrarihi* – One is responsible for his confession (al-Zarqa 1989/1409, p. 401). Confession is one of the *prima facie* bases for establishing the liability of a criminal act, especially if the crime is of disclosure (Zakariyah 2010, p. 251). In fact, it is believed to be the highest evidence of guilt (Mirfield 1985, p. 49). The culprit is said to be innocent until it is proved beyond any reasonable doubt that he is guilty of the alleged crime, *actori incumbit onus probandi* (Kamali 2000, pp. 297–309; Baderin 2005, p. 103). In order to establish justice and, at the same time, to balance the right of the defendant and the offender, Islamic law enacts the legality of confession.

In Safiyyatu's case, one of the reasons given by her counsels was that the actual date, time and where the offence was committed were not stated in the court procedure. This legal procedural error and others cast gnawing doubt on the credibility of the verdict (Yawuri 2004, p. 196). Also, the issue of acceptability of pregnancy as evidence to convict an accused is contestable and tainted with doubt. Even in the Malikite school of thought, one may conceive of a pregnancy lasting for 7 years; thus, Safiyyatu might have conceived her pregnancy when she was in the custody of her former husband and there was no evidence to prove otherwise before the court handed down its judgment (Peters 2006, p. 236). In other words, it is possible that the baby which Safiyyah gave birth to could have been fathered by her former husband. All these constitute what the *Shari'ah* terms as *shubhah* which must be considered in averting *hadd* punishment; *al-hudud tusqat bi al-shubhat* (fixed Punishments should be averted in the case of doubt/suspicion) (al-Suyuti 1983/1403, p. 123; Ibn Nujaym 1993/1413, p. 127; al-Zarkashi 1985/1405, vol. 1, p. 400). Almost all schools of Islamic jurisprudence accept the maxim in principle and apply it in different ways and various locations. The exception is Zahiri, who object to it based on their rejection of the hadith, reported in respect of the maxim (Ibn Abdu al-Barr 1987/1387, vol. 15, p. 34; al-Shinqiti 1995/1415, vol. 5, p. 392; Ibn Qudamah 1999, vol. 9, pp. 116–119, 123, 259; Ibn Hazm al-Zahiri n.d. vol. 11, pp. 153–156).

The same argument can be resonated in Amina Lawal *v.* Kastina State, where there is a contention on whether a retraction of confession made by the accused/defendant's representative is acceptable or not. The legal procedure followed in Amina's case also casts doubt on the credibility of the allegation. In the response of

the *Shari'ah* court of Appeal, Kastina, the learned judge poses some credible questions to discredit this allegation. He says thus:

1. Why did these policemen not file cases against the two accused before, since it was claimed that they had been cohabiting for 11 months?
2. Did the accusers catch them in the actual act of (ZINA) or were they informed? (NNLR 2003, pp. 498–499)

It is remarkable to state that doubt may be created in an admission where the admission has lost any of its validity. In the case of Safiyyatu, the first procedural error that led to her confession was that someone reported the case to the police, although within the statute regarding the crime of adultery, concealment is recommended (Zakariyah 2010, p. 256) It is reported by Ibn Umar that Allah's messenger said: "Avoid these filthy things which Allah SWT has forbidden, and if anyone commits any of them he should conceal himself with Allah's most High Veil and turn to Allah in repentance…" (Ibn Hajar 1996/1416, hadith no. 1048)

Thus, the interrogation of someone regarding the crime of adultery is questionable. This is because all the adultery offences in the life of the Prophet had punishments that were based on voluntary confession, rather than on imposition or enforcement. In addition, if someone confesses to this crime, the benefit of the doubt should be given – and that is absent in the case of Safiyyatu. It is reported by the authority of Imran Ibn Husain that a woman of Juhaina (tribe) came to the Prophet when she was pregnant owing to fornication, and said, "O Allah's messenger I have committed something for which a prescribed punishment is due, so execute it on me." Allah's messenger called her guardian and said, "Treat her well and when she delivers bring her to me". It is also reported in the hadith Abu Hurarah that a man, among a group of Muslims, came to the Prophet in the mosque and called, "O Allah's messenger I have committed adultery." The Prophet turned away from him. The man confessed to that four times and, when four people witnessed his claim, the Prophet asked him, "Are you an insane?" The man replied, "No", and then the Prophet asked him, "Have you been married before?" He replied, "Yes", and then the Prophet ordered him to be stoned (Ibn Hajar 1996/1414 hadith n. 1041, pp. 432–433). From the two traditions, it is clear that, in such situations, as Zakariyah (2010) argues, it is the right of the confessor "to be given the benefit of the doubt and it is the responsibility of the judge not to admit the confession in the first instance" (p. 257).

Hardship and Provision of Facility in Islamic Criminal Law

The third and fourth legal maxim which considers the effect of hardship in criminal law and the provision of facility given to the perpetrator for the elimination of that hardship are; *al-mashaqqah tajlib al-taysir* – hardship begets facility (al-Suyuti 1983/1403, p. 76; Ibn Nujaym 1993/1413, p. 74, al-Zarkashi 1985/1405, vol. 3, p. 169; Mahmassani 2000, p. 152); and, *al-darar yuzal* -harm must be eliminated

(al-Suyuti 1983/1403, p. 83; Ibn Nujaym 1993/1413, p. 85). One of the beauties of Islamic law is in its recognition of the fallibility of human beings in carrying out their spiritual and mundane activities. In addition, it comprehends the difficulties they will face in achieving both spiritual and mundane objectives. Thus, Islamic law endorses breaching some certain rules in any dire necessity (eg. Qur'an 2, verse 173; Qur'an 6, verse 145; Qur'an 16, verse 115). The maxim which establishes this and is supported by sound evidence from the Qur'an, hadith and consensus is *al-mashaqqah tajlib al-taysir*, or Hardship begets facility.

The maxim that "hardship begets facility" is one of the basic general maxims agreed upon among Islamic jurists. It is applicable to almost all issues and branches of Islamic jurisprudence. Because of its important role in Islamic law, it is now being recognized as a fundamental maxim. (al-Shatibĩ 1975, vol. 2, pp. 136–156). It is a maxim used as a legal concession for any recognized hardship in Islamic law. Thus, it serves the purpose of Islamic law in lessening and removing burdens from people (Ibn Nujaym 1993/1413, p. 85).

The maxim is profoundly useful in suggesting that the status quo of the Muslims in those regions where full implementation of *Shari'ah* was introduced requires that consideration be given to the hardship in distinguishing between what constitutes adultery under Islamic law and which therefore legally incurs the fixed punishment. It is a settled rule in Islamic law that the states of '*usr* (difficulty), *umuum al-balwa* (general necessity) and *jahl* (ignorance), among others, are cause-effects for the provision of facility in Islam (al-Suyuti 1983/1403, p. 77).

Thus, in the cases of Safiyyah and Amina, lack of consideration for this settled rule which, in turn, led to the assumption that all citizens have enough knowledge of the details of Islamic law in regard to adultery, conceivably led to the accusation of the two women being guilty of committing adultery. Had the law enforcement agencies had insight into this status quo, perhaps none of these cases would have seen the light of arraignment in the courts of law.

The prohibition and elimination of *darar* in Islamic criminal law is also at the heart of the core and frame model of attainment of the spirit of Islam. The maxim implored to establish this provision is *al-darar yuzal* (harm must be removed) (al-Suyuti 1983/1403, p. 83; Ibn Nujaym 1993/1413, p. 85) on the basis of the tradition of the prophet which runs thus: *la darar wa la dirar* (no injury or harm shall be inflicted or be reciprocated) (al-Atasi and al-Atasi 1949/1349, vol. 2, p. 52).

Preventing harm is a fundamental principle generally agreed upon and widely applied in Islamic jurisprudence. The Qur'an prohibits any oppression and transgression on people's lives, properties and subjects. Islam denounces any unnecessary infliction of harm and injury. It prohibits any unjust affliction of punishment and penalty on human beings. It also strives to eliminate the occurrence of such *darar* whether it occurs through aggression or reciprocally. If that is one of the overall objectives of Islam, some of the cases judged in Northern Nigeria during the re-enforcement of full *Shari'ah* are open to being subject to criticism.

In the cases of Safiyyah and Amina, as said above, reporting them to the authority despite the fact that their actions did not directly affect the public raised concerns of infringing on their rights and violating their privacy. In addition, acquitting them

of the alleged crimes by the appeal courts suggests the inflicting of unnecessary harm of defamation. By extension, the harm also affects their co-accused, alleging them to be guilty of fornication.

By law, where there is contradiction between *al-yaqin* (certainty) and *al-zahir* (appearance), such as the appearance of pregnancy and the claim of the absence of four eye witnesses in the case of adultery, the best interests of Islam would be served by establishing whose rights are involved in this case. If there is no allegation of rape in such a case, the higher proof would be accepted; that is, four eye witness accounts in order to eliminate the *darar* in executing the *hadd* punishment.

Even the investigation of cases of adultery, alcohol consumption or apostasy – if they were not committed publicly – can be considered as infringing on human rights since those offences do not necessarily affect the general public directly. In other words, any crime that does not directly involve human rights is, according to the spirit of Islamic law, not rightfully a subject for investigation; indeed, investigating it can be considered as inflicting undue *darar* on the accused. In the instances of Safiyyatu and Amina, the way their cases were reported (submission of Safiyyatu Husaini's counsel) was considered to be impinging on the rights of the accused persons, and so to be inflicting harm on them (Peters 2006, p. 241). This is itself a violation of basic tenets of Islamic law.

It is argued that challenging Amina of conceiving pregnancy was an act of inflicting unwarranted harm on her, since it is a settled law even in the Malikite school that "… a woman may carry pregnancy for five years before delivery." (NNLR 2003, p. 496). Thus, because Amina had divorced her former husband less than 5 years ago (at the time of the case), it should have given her the provision of benefit of doubt.

Custom as Authoritative

The last maxim to be explored here for the attainment of the spirit of Islamic law in the cases in question is *"al-Adah muhakkamah"*-custom is given authoritative status. (al-Suyuti 1983/1403, p. 89; Ibn Nujaym 1993/1413, p. 92; al-Zarkashi 1985/1405, vol. 2, p. 356) which focuses on the authoritativeness and effects of custom in Islamic criminal law, according to the use of language in a particular custom. It was argued that, since Safiyyatu and Amina were Hausa native speakers, it was the responsibility of the court to explain the details of *zina* and its conditions to the accused persons. In other words, since the accused persons were not Arabic speakers, in order to justify the validity of the verdict, the word must be interpreted into their customary language (Ladan 2003; Peters 2006, p. 241; Yawuri 2004, p. 197).

This standard practice was actually rebutted by the co-judge in Amina *v.* State where it was remarked that the term *zina* "… is no longer an Arabic word. It is basically a Hausa word. As such, Hausa people have no suitable word for this." (NNLR 2003, p. 513). Of course, the word *zina* has been localized and it could be

very hard to prove that Muslims do not know the connotation of the term. Nonetheless, it could also be argued that, while the term is known literally, the legal ingredients and consequences may be unknown to the vast majority of Nigeria Muslims. Despite the fact that Ma'iz was an Arab, the prophet did not take his confession in the first instance, but he further inquired from him whether he knew the meaning of what he said.

In Amina Lawal's case, there was the assumption that Amina accepted sexual intercourse with Yakubu in the belief that custom allowed it. It could be that the *modus operandi* before the full implementation of *Shari'ah* was to give consent before proper marriage (Yawuri 2004, p. 197).

By and large, it could be said that, before the full implementation of *Shari'ah* law in the northern regions of Nigeria, it could be assumed that the *Shari'ah* legal terms had faded out in the domain and that people might not be *au fait* with the consequences of the crimes they committed. It could also be argued that some practices that became unlawful and punishable in penal codes of the states implementing *Shari'ah* were the prevailing customs and practices of some people in those states, such as consenting to sexual intercourse before marriage, utterance of some expressions deemed defamatory, and the taking of someone's property without intending theft. Thus, people need to be enlightened before enforcing the penal codes. Such a provision is, in itself, central to the standards of compassion and justice that lie at the heart of Islamic law.

Conclusion

This chapter has critically analyzed, observed and evaluated the cases of Safiyyatu and Amina in light of some basic Islamic legal maxims. It highlights the need for "intertextualizing" and "contextualizing" the concepts and the contexts of *Shari'ah* (Islamic law) in order to bring about a comprehensive codification which will cater for the novel issues in this generation. It espouses departure from sticking to one *madhhab* by adopting the systems of *talfiq* and *takhyir*; the two systems incorporate the broad range of strategies required to deal with the sensitive issues which may arise in any state adopting full implementation of *Shari'ah*.

In this context, five basic legal maxims have been explored to summon Islamic criminal jurists and judges to establish the overall objectives of *Shari'ah* in a quest for justice in each criminal case. This is because the ultimate goal of Islamic law as Baderin (2005) observes is to "… promote the benevolent nature of Islam, especially where the reasoning for such …is commensurate with prevalent needs of social justice and human well-being." (p. 220)

The Nigerian *Shari'ah* Council, as one of many such councils in the Islamic world, needs to establish different arms in order that each can act as a counter balance to and keep watch over the activities of the other. Justice can be achieved through judicial professionalism and qualified judges. It is expected that professional and qualified judges "… demonstrate a clear rational perspective of issues

based on evidence placed before them and not only to be biased by emotions and zealousness." (Baderin 2005, p. 224) These different arms would, to some extent, help curb miscarriages of justice and block blind criticism of the legal system of the states.

As we have seen through a detailed analysis of cases judged in the states implementing full *Shari'ah* law in northern Nigeria, some of those cases were quashed when they were brought to the appeal courts. Had the defendants sought not to apply to the appeal court, they would have been unjustly punished. It is a settled rule in Islamic law that a judge who has used his personal exertion to deliver a judgment, based on what his exertion dictates for him, should be rewarded. If the judgment subsequently turns out to be wrong, however, and consequently affects the rights of human beings, the remedy should be provided for the affected person from the government who employed the service of the judge. This ensures that, while the judge is not held responsible for any miscarriage of justice because of his fallibility, justice would be done to the victim of the miscarriage of justice.

Equally, there is a need for all *Shari'ah* implementing states to ensure that necessary infrastructure is put in place before embarking on full implementation. That would accord with the practice and strategy of the Prophet in transmitting *Shari'ah* from the purifying to punitive stage. The social welfare of the members of the states is paramount to minimizing their criminal activities. As Sanusi notes, *Shari'ah* critics point out that, in the absence of any change in the "… material living conditions of the masses of the population" "…all appearances of change are cosmetic." (Sanusi 2005, p. 255)

To justify the execution of criminal convictions, there must be an extension of justice to government officials. If Islamic states allow malpractice in public office, such as the embezzlement of public funds, and no action is taken against the government officials responsible, then undoubtedly *Shari'ah* itself will be besmirched and its reputation will be tarnished.

References

al-Atasi, K., & al-Atasi, M. (1949/1349). *Sharh al-majallah* (Vol. 2). Damascus: Hams Press.

Awda, A. S. (1997). *Atharal-'urf fi al-tashri' al-Islami* (Vol. 1, n.p.).

Awdah, A. Q. (1968). *al-Tashri al-Jinai al Islami, muqaranan bi al-Qanun al-wadha'i* (5th ed.). Beirut: Mu'assasat al-Risalah.

Baderin, A. M. (2005). *International human rights and Islamic law*. Oxford: Oxford University Press.

Burnu, M. S. A. (2002/1422). *al-Wajiz fi 'idah qawa'id al-fiqhiyyah al-kulliyyah* (5th ed.). Beirut: Muhassasah al-Risalah.

Doi, A. R. (1984/1404). *Shariah: The Islamic law*. London: Ta Ha Publishers.

al-Ghazālī, A. H. M. (1993/1414). *al-Mustasfã mi 'ilm al-usũl* (3rd ed., Vol. 1). Beirut: Dar 'Ihya' al-Turath al-Arabi/Mu'assasah al-Ta'rikh al-Arabi.

al-Hamawi, A. I. M. (1985/1405). *Ghamz 'uyun al-basa'I sharh al-ashba' wa al-nazair* (Vol. 1). Beirut: Daru al-Kutub al-'Ilmiyyah.

Haydar, A. (n.d.). *Durar al-hukkam sharh majallah al-ahkam* (Vol. 1). Beirut: Daru al-Kutub al-'Ilmiyyah.

Human Rights Watch. (2004). "*Political shari'a"? Human rights and Islamic law in northern Nigeria*, *16*(9A). www.hrw.org/reports/2004/nigeria 0904
Ibn Abdu al-Barr, Y. I. A. (1987/1387). In M. A. al-Alawi (Ed.), *al-Tamhid lima fi al-mu'atta' mina al-ma 'ani wa al-asanid* (Vol. 15). Morocco: Ministry of Endowment and Islamic Affairs.
Ibn al-Qayyim al-Jawziyyah, M. I. A. B. (1973). *'Ilam al-muwaqqi'in an rabb al-'alamin* (Vol. 2). Beirut: Dar al-Jil.
Ibn Hajar, A. I. A. A. (1996/1416). *Bulugh al-maram* with translation. Riyadh: Dar us-Salaam Publications. (Original work published 1416)
Ibn Hazm, A. I. A. I. H. (n.d.). *al-Mahallah* (Vol. 11). Beirut: Dar al-Afaq al-Jadid.
Ibn Mãjah, M. I. Y. (n.d.). *al-Sunan* (Hadith 2045). Beirut: Dar al-Fikr.
Ibn Nujaym, Z. A. I. I. (1993/1413). *al-Ashbah wa al-naza'ir 'ala madhhab abi hanifah al-nu'man*. Beirut: Daru al-Kutub al-'Ilmiyyah.
Ibn Qudamah, A. I. A. (1999). *al-Mughni li Ibn Qudamah* (Vols. 5, 9, 10 and 12). Riyadh: Dar 'Alam al-Kutub.
Kamali, M. H. (2000). *Principles of Islamic jurisprudence* (2nd ed.). Kuala Lumpur: Ilmiah Publishers.
Ladan, I. (2003). *Safiyyatu's Case* (I. Ladan, Esq. trans.). Sokoto: Women's Aid Collective (WACOL).
Ladan, M. T. (2005). *A handbook on Sharia implementation in northern Nigeria: Women and children's rights focus*. Kaduna: LEADS.
Mahmassani, S. R. (2000). *Falsafat al-tashrĩ' fi al-Islam* [The philosophy of jurisprudence in Islam] (J. Farhat, Trans.). Kuala Lumpur: The Open Press
Mirfield, P. (1985). *Confession*. London: Sweet and Maxwell.
al-Nadwi, A. A. (1998/1418), *al-Qawã'id al-Fiqhiyyah* (4th ed), Damascus: Dar al-Qalam
al-Nawawi, Y. (1992/1392). *Sharh Sahih Muslim* (2nd ed., Vol. 4). Beirut: Dar 'Ihya' al-Turath al-Arabi.
Noorslawat, S. (1977). *The basic principle of Shari'a for the enforcement of hadd punishment for theft*. ,M. A. dissertation, Birmingham University, Birmingham.
Northern Nigeria Law Report (NNLR). (2003). *Amina Lawal vs. Kastina State Government*, p. 496.
Peters, R. (2006). The re-Islamization of criminal law in Northern Nigeria and the judiciary: The Safiyyatu Hussaini case. In M. K. Masud, R. Peters, & D. S. Powers, (Eds.), *Dispensing justice in Islam: Qadis and their judgments* (p. 200, 236). Leiden-Boston: Brill.
al-Qarrafi, A. I. I. (1998/1418). *Anwar al-Buruq fi Anwa' al-Furuq* (Vol. 1). Beirut: Dar al-Kutub al-'Ilmiyyah.
al-Qayrawani, A. Z. (n.d). *al-Risalah*. Beirut: Dar al-Fikr.
Qur'an 1 verse 173.
Qur'an 16 verse 115.
Qur'an 6 verse 145.
Sanusi, L. S. (2001). *Class gender and the political economy of Sharia* (p. 4 of 7). At www.nigerdeltacongress.com/artciles/amina_lawal. April 28, 2011.
Sanusi, L. S. (2005). The west and the rest: Reflection on the intercultural dialogue about Shari'ah. In P. Ostien, J. M. Nasir, & F. Kogelmann (Eds.), *Comparative perspectives on Shari'ah in Nigeria* (pp. 255–274). Michigan: Spectrum Books.
al-Shatibĩ, I. I. M. (1975). *al-Muwafaqãt fi usul al-Shari'ah* (Vol. 2). Beirut: Dar al-Ma'rifah.
al-Shinqiti, M. A. (1995/1415). *Adwa' al-baya*. Beirut: Dar al-Fikr.
al-Suyuti, A. A. I. A. B. (1983/1403). *al-Ashbah wa al-naza'ir*. Beirut: Daru al-Kutub al-'Ilmiyyah.
al-Trimidhi, M. I. I. (1995). *Sunan al-Tirmithi*. Beirut: Dar Ihua' al-Turath al-Arabi.
Yawuri, A. M. (2004). Issues in defending Safiyyatu Hussaini and Amina Lawal. In J. Ibrahim (Ed.), *Sharia penal and family laws in Nigeria and in the Muslim world* (p. 196). Abuja: ABU Press Limited.
Zakariyah, L. (2009). *Applications of legal maxims in Islamic criminal law with special reference to Shariah law in Northern Nigeria (1999–2007).* Unpublished Ph.D. thesis, University of Wales, Lampeter.

Zakariyah, L. (2010, June). Confession and retraction: The application of Islamic legal maxims in Safiyyatu and Amina's cases in Northern Nigeria. *Journal of Muslim Minority Affairs, 30*(2), 251–263.

Zamafara SPCL. (2000). *Sections 71 (a) and (b)*. At http://www.zamfaraonline.com/sharia/schedule.html. Viewed last May 25, 2009, 10:20 am.

Zamfara State of Nigeria Shariah Penal Code Law (SPCL), Vol. 3. (2000, June 15). Zaria: Gasikiya Corporation Limited.

al-Zarkashi, M. I. B. D. (1985/1405). *al-Manthur fi al-qawa 'id* (2nd ed., Vols. 1 and 3). Kuwait: Ministry of Endowment and Islamic Affairs.

al-Zarqa A. (1989/1409). *Sharh al-qawa'id al-fiqhiyyah* (4th ed.). Damascus: Dar al-Qalam.

al-Zarqā, M. (1983/1383). *al-Madkhal al-Fiqhī al-'Amm* (Vol. 2). Damascus: Matba'ah Jami'ah.