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**Author**

Lydon, Ghislaine

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# Inventions and Reinventions of Sharia in African History and the Recent Experiences of Nigeria, Somalia and Mali\*

Ghislaine Lydon

## Abstract

*This essay provides a reflection on how the concept of “sharia” has been re-invented in recent African history. It sketches the history of Islamic legal practice among African Muslims, with a particular focus on women’s rights and the question of adultery (zinā), in an effort to place in context contemporary events in Nigeria, Somalia and Mali. Its overarching conclusion is that the recent actions by extreme Muslims groups in Africa, in the name of so-called sharia, are far removed from the spirit of Islamic law.*

The meaning of the word *sharī‘a* has shifted considerably in modern times. In its unadulterated sense it is the divinely ordained path or way, as per the Qur’ānic verse 45:18 (“We have set you on a *sharī‘a* of command, so follow it”).<sup>1</sup> In other words, the *sharī‘a* is God’s ideal pathway for governing the affairs of men and women. Muslims, being mere mortals and prone to error, can only but strive to act and be judged in accordance to the divine pathway. This is achieved by consulting the classic sources of sacred knowledge, namely the Holy Book and the Sunna, or the body of knowledge about Prophet Muḥammad’s model existence.<sup>2</sup> *Sharī‘a*, therefore, refers neither to substantive law (the body of rules and general principles expressed in legal manuals), nor to procedural law (due process and how rules are applied). For both conceptually and in practice, the *sharī‘a* is a discursive tradition.

“Sharia,” as understood in the Western media, by and large, is a construct. Its use originated in Orientalist discourse and the colonial encounter with Muslim communities in Africa and elsewhere. In French parlance, the word is a relatively recent addition, substituted for the nineteenth-century expression *code (du culte or du rite) musulman*. Sometime in the twentieth century, the

word sharia replaced the descriptor “Mahometan law” in the English language. This meaning of sharia diverges from the *sharī‘a*, defined above as a divine directive and not a legal system *per se*. The Western understanding derives from an epistemology in which the law was conceived of as a rigid code. In line with Western stereotypes about Muslims and “Orientals,” sharia was seen as a set of rules containing barbaric punishments, such as death by stoning for adultery and amputation for theft. Westerners further imagined Islamic legal practice to be characterized by the arbitrariness and irrationality of Muslim judges (*qādīs*). Max Weber captured this notion in his expression *kadijustiz*, which he used to signal that Muslim judges operated in a vacuum of either substantive law or procedural law.<sup>3</sup> According to Weber, the *qāḍī* “sits in the market place and, at least seemingly, renders his decisions without reference to rules or norms but in what appears to be completely free evaluation of the particular merits of every single case.”<sup>4</sup> Due to its “irrational” nature, Weber further argued, adjudication among Muslims was not rule bound, and therefore lacked consistency and predictability.

In the past decades, the term “sharia” became charged with connotations of radicalism, violence, injustice, and female oppression. This characterization was fueled in the 1990s by Taliban reinventions of Islamic legal practice in Afghanistan. The Taliban, together with succeeding fundamentalist Muslim movements, share an aim to “re-Islamize” or purify society by a return to the tradition of Islam’s forefathers. Their coercive weapon of choice is “the law.” Ironically, many Muslim extremists would end up embracing “sharia” –regarded in much the same way as former European colonizers. In other words, they treat sharia as a codified law of Muslims with strict, coercive rules. For disciples of the Taliban, al-Qā’ida, and the so-called Islamic State alike, sharia is central to their rhetoric and “Islamic” projects. It is interesting to note how these groups would come to adopt as an identity marker and a qualifier of their militancy yet another Western concept, that of “Islamism.” The word is derived from the French “*islamisme*,” which originally was synonymous with Islam, as Ousmane Kane notes.<sup>5</sup> Only relatively recently did radical Muslim groups begin using the adjective *islāmī/ya* to describe their projects. Its plural form, *islāmīyūn* (Islamists), is also a new addition in the Arabic language.

How the Western concept of sharia was acquired by radical movements and reinvented in Muslim legal discourse is not the subject of this essay. Nor is it about “Islamists” and their ideological agendas. Rather, this is a modest attempt to understand the legal foundations, if any, of the recent reinventions of “sharia,” particularly visible in rulings targeting Muslim women. This paper examines broadly the evolution of Islamic legal institutions and ideologies in African history. It draws on recent experiences in Nigeria, Somalia, and Mali with a particular focus on sentences for adultery (*zināʾ*) and the applications of criminal punishments. One of its underlying arguments is that Weber’s descriptions of Muslim legal practice are more applicable to today’s world than they ever were.

### **Islamic Legal Practice in Africa in Brief**

The religion of Islam made some of the earliest converts in Africa. Muslims travelled to Ethiopia during Muḥammad’s living. The religion spread across North Africa from the 640s, and to the East and West of the continent thereafter. The eighth and ninth centuries witnessed the compiling of Islamic legal treatises across the various Sunni and Shiʿa traditions. With noted exceptions, these legal traditions are quite similar for they draw on the same foundational texts, namely the Qurʾan, and the Prophet’s model life (*Sunna*), and his recorded sayings (*ḥadīth*). Of the four law schools of Sunni Islam, two in particular are followed in Africa. East Africans tend to abide by Shāfiʿī law, whereas most North and West Africans follow the Mālikī school. The Ḥanafī school, favored by the Ottomans, is the third one practiced in certain parts of Africa.<sup>6</sup>

The Mālikī doctrine is named after the legal scholar Mālik ibn Ānas (c.713-795), whose teachings were based on the legal practices of the city of Medina. It is considered somewhat more flexible than most traditions, especially in its treatment of local customs and legal practices (*ʿāda* and *ʿurf*) as legitimate legal sources. Moreover, certain circumstances, such as constraint (*ḍarūra*) and necessity (*ḥāja*), could overrule Mālikī law. The Mālikī practice places primacy on the public interest (*maṣlaḥa al-ʿamma*) in the deliberation of legal outcomes. The primary legal manual, the *Muwattaʾ* (‘the Beaten Path’), is a series of legal questions and Mālik’s answers organized in thematic chapters. Another

basic text is the *Mudawwana al-Kubrā* compiled by Saḥnūn, who recorded the teachings of his mentor Ibn al-Qāsim, Mālik's star student. The two most common Mālikī reference manuals used in Africa were the *Risāla*, a treatise of jurisprudence by the tenth-century Tunisian Abū Muḥammad 'Abdallah Ibn Abī Zayd al-Qayrawānī, and the fourteenth-century Egyptian Khalīl Ibn al-Ishāq's compendium chiefly known as *Al-Mukhtāṣar*. The text by Khalīl, designed in prose to be memorized, became the most influential reference in West Africa. Judges also relied on a selection of works by other Mālikī scholars and occasionally scholars of other legal traditions, as well as the opinions of local jurists.

The Mālikī legal tradition gained prominence in northwestern Africa at the hands of eleventh-century Muslim reformers, known as the Almoravids (*al-murābiṭūn*). They sought a return to traditional Muslim worship. At the same time, they came to dominate trans-Saharan trade routes from Wagadu (also known as Ancient Ghana) to Morocco. In so doing, they displaced practitioners of the Ibādiyya sectarianism followed by early Muslims in the region. They also may have restricted the worship and movement of Jewish communities, although nothing is known on this subject. With the Almoravid reformers, the Mālikī legal school gained prominence. Scholarly traditions of Islamic learning would eventually flourish precisely in the areas under former Almoravid influence, in present-day Mauritania, Mali and Senegal. In time, Mālikī legal principles would influence non-Muslim legal cultures, especially in certain areas of civil and family law. As already noted, Mālikī practice absorbed elements of customary law, since it was considered a legitimate legal source in cases where Islamic references did not provide answers. In other words, the intermixing of Mālikī law with indigenous legal and cultural traditions gave a certain "hybridity" to the Islamic legal landscape.

The judge (*qāḍī*), who made rulings, and the jurist (*muftī*), who produced jurisprudence, were the two main legal stations. Muslim judges adjudicated based on his knowledge of texts, interpretation of principles and local customary norms, and judgment of the merits of individual cases. In addition to these sources, they consulted with jurists, especially on difficult or unprecedented cases. About the legal system in the Maghrib in the period before the sixteenth century, David Powers describes how *muftīs* engaged in jurisprudence (*fiqh*) and provided counsel to *qāḍīs* by writing

legal opinions (*fatāwā*).<sup>7</sup> Indeed, consultative exchanges between *muftīs* and *qāḍīs* were central to the legal practice. Of course, far from agglomerations and/or the centers of learning, practices may have been more rudimentary, with the most learned men arbitrating to the best of their knowledge of the foundational principles.

As for criminal law, it involved three types of punishments: for prohibited acts (*ḥadd*; *ḥadūd*), homicide and bodily harm (*qiṣās*), and other offenses not described in the sources for which sanctions were left to the discretion (*ta'zīr*) of judges.<sup>8</sup> *Ḥadd* crimes are those subject to mandatory punishments, which include amputation of hands for theft, and flogging and stoning to death for adultery. These forms of punishment generally have attracted much controversy. Stoning, also known as lapidation, is a torturous form of capital punishment whereby the condemned is buried to the waist or neck, and pummeled to death with rocks and stones. In theory, such sentences were executed not by judges but by the local authority. Early Western specialists of Islamic law, starting with Joseph Schacht, noted that despite their elaborations in legal reference manuals, punishments such as amputation and lapidation rarely were applied in practice.<sup>9</sup>

With colonization, European powers imposed their legal codes and judicial systems, but in time, they set up courts for the legal needs of the colonized. Colonial legal infrastructures featured courts where the relevant French, British or other European codes were enforced. So-called native courts or *tribunaux indigènes* were established for adjudication based on local customary laws including, where applicable, Islamic law. To administer customary laws, codes were created, and oftentimes invented, through the synthetic process of codification.<sup>10</sup> Basic texts describing African legal customs were compiled under the rubric of 'native law' (or *justice indigène*). For Muslim cases, Mālikī texts were translated and codified. N. Seignette's 1878 translation of Khalīl's *Mukhtaṣar* became a standard reference manual in French colonies. However, the fact that European institutions were secular in nature posed special problems for governing religious communities. While it contradicted their principle of institutional secularism (*laïcité*), the French were pragmatic in dealing with the anomaly of running faith-based institutions such as Muslim courts.

In most colonial contexts, penal and criminal law was the jurisdiction of colonial courts. Customary law courts were

restricted to matters pertaining to civil, personal and family law (namely governing inheritance, marriage, divorce and domestic settlements). In other words, penal and criminal matters were the jurisdiction of colonial courts, and physical punishments considered “repugnant” were commuted to fines and prison terms. This was especially the case in regions with strong Muslim institutions, such as Mali, Mauritania, Nigeria, Senegal, Somalia, and the Sudan. However, there were significant differences between British and French colonial justice systems, stemming, in part, from the former’s indirect rule policy. In Northern Nigeria, for instance, where Mālikī principles were enforced, courts adjudicated criminal as well as civil cases. Although corporal punishments, such as mutilation and torture, were commuted to fines and prison terms, Muslim judges enforced punishments, such as flogging and even death penalties. Since it was not a local practice, however, stoning was not enforced.

In certain French colonial territories, special Muslim tribunals were established, alongside “native justice” courts.<sup>11</sup> This began as early as 1857 with the creation of the *Tribunal musulman* in Senegal’s port city of Saint Louis. It is important to note that this was a local initiative, realized by Muslim notables who, for years, had petitioned the French governorship.<sup>12</sup> In time, especially after the French legal reform of 1903, Muslim tribunals were set up in other Senegalese and Malian towns. Under British rule, Alkali courts (from the Hausa for ‘the *qāḍī*’) were meant to serve the needs of colonized Muslims in northern Nigeria. Some scholars have determined that Muslim women, more than men, were the primary users of court systems where Islamic law was enforced.<sup>13</sup> Moreover, they most frequently initiated divorce litigation. This was because, unlike Muslim men who legally could pronounce a divorce by declaring it thrice in the presence of witnesses, a woman needed the mediation of a judge to make a divorce claim, or otherwise settle marital disputes.

The colonial justice system made no use of African jurists, and this was especially problematic in the case of Muslim courts. Consequently, they operated in a vacuum of the discursive practice of Islamic jurisprudence; a point often missed by scholars of colonial legal systems.<sup>14</sup> In other words, colonial *qāḍīs* no longer consulted *muftīs* because the latter were left out of colonial legal systems altogether. Indeed, Muslim jurists were completely

marginalized. Still, many continued to provide legal services as of old, operating beyond the realm of colonial states. Many would continue making a living by dispensing occult services to their communities, including amulet making.

With the exclusion of jurists and the codification of Islamic law, the colonial context created new legal practices. In French West African colonies, the justice system was reformed once again in 1912, with the imposition of strict legal directives on African judges. By then, the French had barred the use of Arabic in the colonial administration of Muslim affairs, including Muslim tribunals. Court clerks began keeping records in French, referencing only codified texts in French translation. In the case of the above-mentioned *Tribunal musulman* in Senegal, records demonstrate a progressive disengagement with Mālikī principles, as evidenced by the drop in legal references.<sup>15</sup> Muslim judges increasingly adjudicated based on opinions of the merits of individual cases, but also local customary laws. This was especially the case after 1911, the year of the Arabic ban, which would have further eroded knowledge of Islamic law.<sup>16</sup>

The colonial justice system was not unlike Weber's notion of *kadījustiz*, whereby Muslim judges made rulings by rote, with little legal deliberation and no jurisprudence. This was a new form of Islamic legal practice, far removed from the original intent of the *sharī'a*. Knowledge and legal practice became "arcane and mummified," to borrow Judith Tucker's descriptions of the Ottoman courts.<sup>17</sup> Moreover, justice rendered in these courts had an artificial, stifling, and inflexible quality, as it did not allow for legal innovation. This routinization was amplified by the fact that 'colonial qadi justice' was disconnected from the discursive practice of the law. Through the process of "domesticating Islam," colonial justice systems truncated and transformed the legal practice of Muslims. Moreover, the routinization of Islamic legal practice in colonial courts contributed an element of arbitrariness to the system. In such contexts, and given the lack of legitimacy of colonial states, corrupt practices were bound to emerge. This state of affairs was characteristic of many colonial legal systems, including the Ottoman Empire.<sup>18</sup>

The postcolonial African legal landscape differs from one country to the next, but for the most part, colonial infrastructures have endured in their various forms. Justice systems based



on French (no one presumed innocent), British (innocent until proven guilty), or other European legal principles, were reconfigured by African states. Governments crafted legal codes typically molded on those of former rulers. The French civil code and principle of *laïcité* provided the institutional framework for many African francophone countries. But, for the most part, African customary law courts, including so-called Muslim tribunals, were phased out after independence.

Eventually, several African countries with majority Muslim populations reformed their justice systems in order to introduce Islamic criminal and penal elements. Such was the case in Mauritania, where an Islamic legal code was instituted in 1980. It served as the law of the land in civil matters, except in certain so-called modern areas, such as nationality law or litigation involving corporations, automobiles, and aircraft. In Nigeria, political debates about reforming the justice system began in the 1976. But not until the passing of the 1999 Constitution were provisions made for legislative decentralization, which resulted in twelve northern states implementing “sharia” as state law. To the exceptions of Saudi Arabia, Afghanistan, Pakistan, Iran and the Republic of Sudan, northern Nigeria was added to the list as a region where Islamic criminal law is enforced.<sup>19</sup> With its multi-imperial legacy (Egypt/Ottoman, Ethiopian, British, Italian, French), the legal history of Somalia is somewhat more complicated, as discussed below.

In the past decades, many African countries have witnessed the breakdown of governance and the capacity to enforce law and order. This is the case of Libya, northern Mali, northern Nigeria, South Sudan and Somalia. The reputed inefficiencies of formal courts, together with the high cost of adjudication, including paying off corrupt officials, has meant that the demand for legal services often is met “informally.” More frequently today than in colonial times, many Malians rely on Muslim legal entrepreneurs, who operate in a parallel economy, for their legal needs. As Benjamin Soares explains for the case of Mali, these legal specialists mediate disputes and compute inheritances.<sup>20</sup> Similarly, a parallel legal system exists in neighboring countries such as Niger.<sup>21</sup> The breakdown of state control and institutions has left wide-open spaces for political entrepreneurs to join the radical Islamists’ bandwagon. In the early twentieth century, the group Al-Shabāb in Somalia, and Al-Qā‘ida in the Islamic Maghrib (hereafter

AQMI) and its affiliates, such as Ansar Dine in Mali, imposed new legal regimes in their occupied territories. Brandishing the law as their holy weapon, such groups have proceeded to reinvent sharia, creating local brands with new rules. These Islamist movements thrive on shock and awe, and grabbing international headlines. Their sharia regimes aim to terrorize populations into submission through the performance of public, violent and exemplary sentences of real or perceived transgressors. It is not accidental that the area of legal predilection of all such Islamist projects is the policing of women's sexuality by issuing flogging or stoning sentences for the crime of adultery.

### **The Crime of Adultery (*Zinā'*)**

*Zinā'* is the unlawful act of sexual intercourse. It applies both to adultery (intercourse between a woman and a man not married to one another) and fornication (which, in its strictest sense, implies both parties are unmarried). *Zinā'* can be established by two means, by either the voluntary confession (i.e. without compulsion) of an adulterous party, or the sworn affidavit of four Muslim males of good repute who witnessed the illicit act. The Mālikī legal doctrine contains additional methods to prove adultery. Unlike all other schools of law, it considers the visible pregnancy of an unmarried woman grounds for an adultery conviction. Moreover, depending on Mālikī sources, the gestation period of a pregnancy can last up to five or seven years; a case known as the "sleeping fetus." Both the Mālikī and Ḥanafī traditions require that the adulterers be of the Muslim faith.<sup>22</sup>

Death by stoning is the punishment for the offense of *zinā'* under specific conditions. Firstly, the accused must be a *muḥṣan* (male) or *muḥṣana* (female), meaning a *compos mentis*, free Muslim adult who has had sexual relations in matrimony, regardless of whether the marriage still exists. A person who is not *muḥṣana* is punishable by one hundred lashes, sometimes followed by banishment for one year according to some sources. An enslaved person is punished with fifty lashes for adultery sentences. A rape victim must produce witnesses to substantiate her allegation, otherwise she is considered adulterous and subject to punishment.

The classic legal sources for *zinā'* are the Qur'ān and the *ḥadīth*. The holy book recommends lashing as punishment for adultery or false accusations thereof, but not stoning. It discusses stoning of non-Muslims, but not in relationship to adultery.<sup>23</sup> The Qur'ān mentions adultery in several places, noting that it is an evil and shameful act. It lays out the following recommendations:

... the woman (*al-zāniya*) and the man (*al-zānī*) guilty of adultery or fornication, flog each of them with one hundred lashes; let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day: and let a party of believers witness their punishment. Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an unbeliever nor let any but such a man or an unbeliever marry such a woman: to the believers such a thing is forbidden (*Sūrat al-nūr*, 24:2-3).<sup>24</sup>

The next twelve verses discuss how to establish legitimacy in adultery charges. They contain prescriptions, such as the need for four male witnesses to establish proof of adultery. Also stated, is the punishment of eighty lashes for transgressors who bring forth false testimonies, slander and/or unfounded accusations (*qadhf*).

The death penalty by stoning for *zinā'* is based on information contained in the *ḥadīth*, especially as related by Abū Hurayra, Saḥīḥ Bukhārī, Muslim and 'Umar b. al-Khaṭṭāb. It must be noted that such a practice was well established before the rise of Islam. In fact, it was the punishment for adultery in Jewish law as defined in the Torah.<sup>25</sup> All Sunni schools of law are in agreement on the death sentence for *muḥṣan* adulterers.<sup>26</sup> The most cited source is by Abū Hurayra, who related Prophet's conversation with a Bedouin as follows:

My son worked as a laborer for this man and he fornicated with his wife. I was told that my son deserved to be stoned to death, so I ransomed him for a thousand sheep and a female slave. I then asked the people of knowledge and they informed me that my son deserved 100 lashes and banished for one year and that the woman deserved to be stoned to death." The Prophet answered " By the One who holds my soul in His hand, I shall certainly pass judgment between you in accordance to God's book. As for the slave girl and the sheep they must be returned to you. Your son deserves 100 lashes and banishment for one year. Go, Unays, to this

man's wife and if she confesses, stone her to death." Thereupon Unays went to the woman and she confessed. Then the Prophet ordered her to be stoned.<sup>27</sup>

The following Prophetic saying is narrated by Saḥīḥ Bukhārī, and quoted in Mālik's *Muwaṭṭa*, in justification for the execution of a pregnant adulteress.

On the authority of 'Abd Allah b. Abī Mulaika : a woman came to the Messenger of God and told him, while she was pregnant, that she has had unlawful sexual relations. The messenger of God said to her: "Go away until you have given birth." After she has given birth she came back and the Messenger of God said to her: "Go away until you have finished suckling him." After she had finished suckling him, she came back and he said: "Go away and entrust him [to someone]." She then entrusted him to someone and came back. Thereupon he ordered her to be stoned.<sup>28</sup>

Short of a voluntary (not coerced) confession, the rules of evidence make it practically impossible to convict adulterers, men or women. As per the *Risāla* of Abī Zayd al-Qayrawānī, the adulterer will not be punished unless there is "an acknowledgement, a visible pregnancy or the testimony of four free adult men of good repute ('udūl) who have seen [the act] like the kohl stick entering the kohl container [*ka al-murūd fī-l-mukḥula*]."<sup>29</sup> Arguably, this explains why the execution of such severe punishments as stoning evidently was rare in the past. In effect, the need for four witnesses, instead of the usual two male (or one male and two female) witnesses required in all other legal cases, makes it extremely difficult to prove the occurrence of *zinā*'. This is especially the case since all four witnesses must testify independently to having seen the man's sexual organ penetrating the woman. The witnesses must have observed the act in its most intimate detail. If the testimony of the witnesses does not satisfy these requirements, then the witnesses are subject to punishment. Indeed, should any of the four witnesses contradict the other three in any fashion, the four witnesses are charged with slander and sentenced to eighty lashes each.

Even if the offense has been determined, punishment can be averted in the event of uncertainty or doubt (*shubha*) about the lawfulness of the proven act. Uncertainty can be established, for

instance, if the intercourse occurred either among a previously married couple, between a master and a female slave, or in the case of a blind man who mistook another for his wife or concubine. There are grounds for *shubha* concerning the pregnancy of an unmarried woman, including if she pleads that the pregnancy occurred whilst she was sleeping, and that she had no knowledge of it, or that it occurred without penetration (intercourse between the thighs without penetration). The occurrence of rape, however, is difficult to prove. Such a case must be substantiated by circumstantial evidence, such as if she bled (in the case of virginity), or if she was noticed entering her village screaming for help. If she cannot produce such evidence, her defense is not acceptable, and if she identifies her attacker, she could be liable to prosecution for making a false accusation.

Scholarship on gender and the law in the history of Muslim Africa is a small yet dynamic field. The bulk of the research focuses on the colonial period, and consequently little is known about adultery cases before the nineteenth century. A cursory examination of a collection of fatwas and shorter legal questions by Al-Sharīf Ḥama'ullah al-Tishīṭī (d. 1755), reveals only one mention of *zinā*.<sup>30</sup> Al-Tishīṭī was a respected jurist from the town of Tichitt, a town in today's central Mauritania, whose legal opinions were popular across the region, including in the centers of learning of Mali, where copies of his writings are preserved. The question concerned whether the property of an adulterous man (*muḥṣan*) belongs to the local treasury (*bayt al-māl*). In other words, could an adulterer's property, seized as punishment for his crime, be used for the public good. Like most short legal opinions, the specifics of the case are not provided. The jurist stated he knew of no legal opinion in the Islamic legal literature that dealt with such a case. But he notes that in accordance with Mālikī law, adulterers retained full ownership of their property during their living and as inheritance. This case sheds light on what may have been customary in this region of West Africa, namely the practice of fining in lieu of whipping, stoning and/or banning adulterers. Such customary (and perhaps pre-Islamic) rules governing adultery may have been commonly applied, instead of Mālikī rules in this region.

Further evidence of the practice of fining adulterers is contained in Richard Roberts' book on court activity in

neighboring Mali during the early colonial period. Concerning adultery, he notes:

Under custom, adulterers were subject to corporal punishment—usually whipping, sometimes the shearing of the culprit's hair—and to damages. The cuckolded husband usually received compensation from the adulterer in the form of cash or cattle. In Sokolo, a region of Mali located several hundred miles to the southeast of Tichitt, the prevailing compensation in 1909 was 2,500 cowries although it was as high as 50,000 cowries in neighboring Gumbu.<sup>31</sup>

Particularly revealing is the report Roberts cites written in 1906 by the French administrator of Gumbu:

Accusations of adultery had been very frequently presented to the provincial court, especially by animist Bamabara [*sic*], who viewed adultery as a source of profit since their customs obliged the accessory to indemnify the husband. *Before our arrival, the indemnity consisted of the confiscation of all the adulterer's goods*, but since then it was been limited to 50,000 cowries (Fr50). Little by little we have transformed adultery from a civil action into a penal one. . . This has resulted in a nearly complete disappearance of charges of adultery, because there is no longer anything to be earned from the suit.<sup>32</sup>

This source would suggest that the practice of dispossessing adulterers (also discussed by the eighteenth-century Al-Tishīṭī, located in Tichitt, which is a short distance from Mali's Gumbu) was customary. The treatment of such cases clearly shifted in the course of the colonial period, with adultery being increasingly considered a criminal and not a civil offense. Roberts then notes that flogging sentences were commuted to prison sentences, as the execution of corporal punishment was not permitted in customary courts.<sup>33</sup> Obviously, an investigation into the history of legal practices pertaining to cases of adultery remains to be carried out. This cursory examination points to the prevalence of customary laws ruling adultery sentences even among certain West African Muslims. This may also perhaps have been true among northern Nigerians.

## Adultery Sentences in Nigeria's so-called Sharia States

The history of Nigeria's Muslim communities has generated much research. But since the creation of the so-called sharia states in the northern part of the country, scholarly interest has peaked, especially among legal scholars and political scientists. The attention grew in the early 2000s, after human rights organizations and the international media put the spotlight on the death-by-stoning convictions of several Nigerian women, and the earlier and lesser-known sentencing of a thirteen-year old rape victim accused of adultery.

Communities and polities in Nigeria and bordering Niger and Chad, where Islam predates the eleventh century, long have upheld Islamic institutions. This is especially so in the Kanem-Bornu Kingdom, and in several Hausa city-states. In the early nineteenth century, an Islamic theocratic state known as the Sokoto Caliphate was founded in today's northern Nigeria, after a successful jihad. Across its regional emirates, this state operated a justice system inspired by Mālikī law. Under British rule, this Muslim justice system was maintained, with some modifications and colonial oversight. The British also preserved the system of the emirs' courts, which served as courts of appeal. So-called Alkali courts were run by local *qāḍīs* who applied Mālikī principles, with minimal interference by the British local resident. As noted above, the colonial state abrogated Islamic corporal punishments they found reprehensible or morally 'repugnant,' commuting them to fines and imprisonment. In Rudolph Peters' words, "Islamic law was 'domesticated' and made to conform to Western--and especially British--notions of criminal justice."<sup>34</sup> It is important to underscore that neither amputations nor death-by-stoning sentences were at all common, if ever practiced in pre-colonial northern Nigeria.<sup>35</sup> Alkali courts carried out corporeal punishments, namely flogging sentences on men only, since "the British objected to women being flogged: if they were sentenced to be flogged, the sentence would be commuted to imprisonment or a fine."<sup>36</sup> In 1933, during a new phase of reform of the colonial justice system, the British tried to further restrict flogging.<sup>37</sup> Another important change was the replacement of Arabic, as the language of record, with Arabic transliterations of local languages, primarily Hausa, which later was written in the Latin script only.<sup>38</sup>

As in the Senegalese case discussed above, there was a progressive erosion of knowledge of, and training in, Islamic law among court judges adjudicating Muslim cases.<sup>39</sup> Moreover, many Nigerians were of the opinion that the British had tampered with Islamic law, “severely limiting” its scope, consequently weakening or negating “Sharia.”<sup>40</sup> For his part, the legal scholar Abdulmumini Adebayo Oba, writes: “The colonial concept of ‘Islamic personal law’ stunted the growth of Islamic law.”<sup>41</sup> The system was viewed as a “hybrid ‘Anglo-Mohammedan Law,’” which was, in the words of Sulaiman Kumo, “neither fish nor fowl.”<sup>42</sup> Overtime, even suits involving Muslim parties, were not necessarily tried in accordance with Islamic rules if the parties did not “regard themselves as being bound by Islamic law.”<sup>43</sup> In this case, customary laws were enforced. This appears to have been the case in adultery sentences which rarely were executed, judging by a colonial report tallying all cases tried in the customary courts of Nigeria until 1947.<sup>44</sup> It may well have been the case that, just as in the regions of Tichitt and neighboring Gumbu discussed earlier, pre-Islamic legal rules on adultery prevailed. This would explain why the records of the Emir of Kano’s judicial council for the years 1913-1914, studied by Allan Christelow, contain no adultery cases.<sup>45</sup>

At independence, the Nigerian government created a constitution and penal code modeled on the British system. The national justice department limited even further Islamic practice by abrogating Islamic criminal law entirely. As in colonial days, Islamic law remained classified as customary law. Northern Nigeria was considered by some to be a “defunct” region, on account of its Islamic institutions. A specific Penal Code was adopted for the Muslim north. Based essentially on English common law, it limited the scope of Alkali courts, removing entirely their jurisdiction over criminal law. As Oba explains, “[t]hey reduced its civil aspects to mere customary law applicable only as personal law.”<sup>46</sup> By 1968, the Alkali courts were completely dismantled, replaced with a national court system. It is interesting to note that in the 1960s, it was still called “Moslem law,” but during the heated political debates of the 1970s and 1980s, the word sharia came into common use.

The “sharia question” became divisive during the drafting of a new constitution by the 1976 transitional military government of Olusegun Obasanjo. Then there was discussion of creating a



Federal Sharia Court of Appeal to hear personal law cases only. In the 1980s, the Nigerian Constituent Assembly debated whether sharia courts of appeal should be established across the federation, and not simply in the North.<sup>47</sup> Many opined that Islamic law should become state law in certain places, and that it should be expanded beyond personal law to cover everything from Islamic taxes to *hadd* offences. These discussions, which exacerbated sectarianism among Christians and Muslims, continued for more than two decades until 1999, when Obasanjo returned to power as a democratically elected president. The new constitution opened the door for changes in the application of Islamic law, as it gave greater powers to state legislators.

The change was brought about by the singular actions of one man, the Governor of Zamfara. Ahmed Sani Yerima had successfully campaigned for the governorship, vowing to establish “total Sharia.” A new Sharia penal code was passed in December 1999, and became state law on January 27, 2000. Eleven of the 36 Nigerian states followed suit, drafting sharia penal codes and promptly setting up sharia courts. Northern Nigeria then became “the only region in the Islamic world where Islamic criminal law is implemented within the framework of a non-Islamic and essentially secular constitution.”<sup>48</sup> Hastily drafted, many sharia codes contained problems of coherence, including wording and contradictions. They reestablished partially what had been current under the British colonial legal system, and introduced new punishments, namely amputation, flogging and stoning sentences. Certain state legislators also invented laws. In Zamfara, new rules, all carrying flogging punishments, include the segregation of women and men in public transportation, the prohibition for members of the opposite sex to ride together on motorcycles, and the unlawfulness of indecent or immoral behavior.<sup>49</sup> In the first two years, two right hand amputations for theft were performed. Other individuals sentenced for theft ended serving prison terms instead of having their right hand severed. This has become the pattern in Zamfara and other states, where relatively few amputations have been executed to date. Penal sentences for adultery also quickly ensued.

The first adultery case to draw international attention was the sentencing in Zamfara, the first “sharia state,” of a teenage girl named Bariya Ibrahim Magazu. In September 2000, just weeks after the Sharia penal code went into effect, the police arrested

Magazu in her village for being pregnant. When asked in court to identify the father of her unborn child, she explained that she had been raped, and she named three middle-aged farmers from her village as possible fathers. Magazu's testimony was not heeded, and she was sentenced to 100 lashes for engaging in pre-marital sex and 80 additional lashes for making false claims (*qadhf*). As per the Mālikī rules examined above, the visible pregnancy of a never-married woman (non-*muḥṣana*) was proof of *zinā'*. Before Magazu's sentence was carried out, human rights groups appealed to the Zamfara governor for clemency. With the help of the Baobab Center for Women's Rights (headquartered in Dakar), she was able to hire a lawyer to appeal the case. Asifa Quraishi, a legal scholar who had produced briefings on similar cases in Pakistan, compiled legal argumentation to overturn the sentence based on the question of doubt (*shubha*).<sup>50</sup> But in January 2001, Magazu was flogged one week ahead of schedule, even as her appeal was pending.<sup>51</sup> The false accusation claim had been dropped, for some reason, but she was still punished for adultery with one hundred lashes. In other words, the Zamfara court ignored due process in the face of mounting national and international pressure. No man was ever tried in connection to this case. Given that this was the first sentence of its kind since the legal reform, Governor Yerim Hussaini clearly was eager to set an example.

The cases of Safiyatu Hussaini (2000-2002) and Amina Lawal (2002-2003), both overturned on appeal, caused a great deal more international attention, and prompted protest demonstrations across Africa and beyond. Safiyatu Hussaini successfully appealed her death sentence for adultery in a precedent-setting trial. Peters offers an insightful examination of the court records. He had access only to the English translation of the original Hausa transcript, which was faulty and made it especially tricky to decipher the references to Islamic legal texts.<sup>52</sup>

Sometime in December 2000, then a few months pregnant, Safiyatu Hussaini was arrested by policemen in her home village of Tungkar Tudu. Under duress she was forced to confess to having engaged in unlawful sexual intercourse, and placed behind bars. The court acquitted Yakubu Abukakar, the alleged father of Hussaini's unborn child, after he denied the charges. On October 9 2001, the Upper Sharia Court of Gwadabawa (Sokoto) pronounced her death sentence by stoning for *zinā'*. According to the

Sokoto Sharia Penal Code (Sections 128 and 129), an adulterer is punished “by a caning of one hundred lashes if unmarried and shall be liable for imprisonment for a term of one year,” or “if married, with stoning to death.”<sup>53</sup> The execution was delayed until she had finished breastfeeding her infant daughter.

After hiring a team of eleven lawyers, Hussaini appealed her sentence at the Sharia Court of Appeal. She then withdrew her confession made during the first trial, retracting a previous statement to assert that the father of her child was not Abukakar, but her former husband. Her lawyers presented additional grounds for dismissal. They claimed that the lower court lacked jurisdiction, had not followed proper procedure, and had erred in the application of the law. The jurisdictional issue had to do with the fact that Hussaini was sentenced on the strength of a bill (the Sokoto Sharia Penal Code) that was signed into legislation on January 25, 2001. It therefore was not in force when Hussaini was arraigned on December 23, 2000. In other words, her offense had been committed before the new sharia penal code was in force. The appellant’s counsel also submitted that the police did not follow proper procedure in their investigation of the alleged adultery. Furthermore, it was argued that the trial court failed to establish whether the accused was indeed or not a *muḥṣana* (as defined above). In response to the claim that her pregnancy was visible proof of *zinā*, Hussaini’s counsel succeeded in establishing doubt based on the Mālikī principle that the gestation period of a pregnancy can last up to seven years. This is in reference to the aforementioned “sleeping fetus” clause. It was successfully argued that Hussaini’s pregnancy might have been caused by her ex-husband from whom she had been divorced for five years.

On 25 March, 2002, the Sharia Court of Appeal of Sokoto State overturned the decision of the Upper Sharia Court of Gwadabawa, admitting the soundness of the defense’s case. Safiyatu Hussaini’s death sentence for *zinā* was overturned. According to Peters, the fact that the sentence had been issued on relatively thin legal grounds was “perhaps motivated by enthusiasm and zeal for Islamization and a desire for an Islamic moral order.”<sup>54</sup> The international attention to this case and pressure it brought to bear on the Sokoto governorship could not have been inconsequential to the outcome.

The Sharia Court of Appeal of Katsina would make a similar decision in September 2003, dismissing a death-by-stoning sentence in the better-known case of Amina Lawal.<sup>55</sup> Accused of out-of-wedlock intercourse, manifest by her pregnancy, her case was eventually appealed, based on some of the same legal reasoning presented in Hussaini's case. It was concluded that Lawal had not been given a fair trial. The Hussaini and Lawal decisions set a precedent in northern Nigeria, seriously restricting enforcement of the penalty of death by stoning. In the words of Margot Badran, their acquittal was a "triumph of the principles of Islamic equality and justice over patriarchal inequities."<sup>56</sup> These cases mobilized Muslim women, lawyers, and activists into developing strategies to navigate the new sharia penal codes and avoid criminal punishments.<sup>57</sup> To date, all death-by-stoning sentences either have been overturned on appeal or commuted to prison terms. While death sentences for adultery have since been avoided in Nigeria, this is not the case elsewhere. The first stoning victim in Africa was executed some five years later at the hands of Al-Shabāb in Somali, discussed next.

Since the creation of sharia courts in the 12 northern states, many politicians claim to have simply "returned" sharia to the region, from which it had been stripped since colonial times. The brands of so-called Islamic justice performed today are just as removed from the discursive legal practices of pre-colonial Muslims. Innovation, without jurisprudence, takes place only to enact new rules designed to police social behaviors in the name of so-called Islamic moral codes. But beyond these reinventions, the adultery cases examined here demonstrate the failure on the part of sharia courts in Zamfara and Sokoto to follow due process, by ignoring or contravening the rules of evidence for establishing *zinā'* (voluntary confession or testimony of four witnesses), or ignoring appeals (as in Magazu's case). Clearly, legal magistrates have displayed their imperfect understanding of Islamic law. As argued earlier, the execution of stoning and amputations sentences is unprecedented in this region. This is to say nothing of random flogging sentences, death penalties for homosexuality, and extra-judicial violence carried out in the name of so-called sharia. On another note, since 2000 Christian-Muslim conflict has escalated in Nigeria. The sharia reforms also provided the trigger for the emergence of Boko Haram. This Salafi-inspired group aims to

impose its own sharia but within an Islamic state, and not a Western-style secular democracy.<sup>58</sup> Still, since 2002, when Boko Haram Islamists began their campaign of terror, bombing mosques, killing Muslims, and kidnapping children, none of their actions follow Islamic legal principles.

### **Al-Shabāb's Version of Sharia in Somalia**

The country of Somalia is grossly under-researched, which is why the following information about its legal history is sketchy at best.<sup>59</sup> Muslims first travelled to the Horn of Africa in the seventh century, during Prophet Muḥammad's living. Centuries later, the Muslim globetrotter Ibn Battuta described the Islamic institutions in the 1330s and the role of the chief *qāḍī* at the sultan's court in Mogadishu.<sup>60</sup> By at least the fifteenth century, the 'Adl Sultanate, which, incidentally, derives its name from the Arabic word for justice, ruled along the coast of today's Somalia. Islamic law structured, to some extent at least, the affairs of this Muslim polity. But its practice would have receded after the collapse of the Sultanate in the sixteenth century. In the early twentieth century, the colonial administration of British Somaliland created a system of district courts grafted on pre-existing Somali institutions for dispute resolution, wherein local customary law known as *xeer* was enforced. The British set up so-called Akil Courts (later renamed subordinate courts), which dealt with conflict resolution based on *xeer* law. They later created a parallel system of "Kadi courts" for the adjudication, in accordance with Islamic legal principles, of family law only. In Somalia, the Shāfi'ī doctrine of Islamic law was preferred, but for the most part *xeer* and not *sharī'a* regulated the affairs of most Somali Muslims before the twentieth century.<sup>61</sup>

However, Islamic law became a central feature of British colonial policy in Somaliland. An early colonial ally of the British, before declaring himself a Mahdi and leading the war of independence, was Sayyid Muḥammad 'Abdullah Ḥassan (the man the British pejoratively nicknamed "the Mad Mullah"). According to I. M. Lewis, this Somali legal scholar who had studied in Mecca, preached "a rigid interpretation of the shafi'i school of Islamic law."<sup>62</sup> Although he died before reaching his goal, Sayyid Ḥassan (d.1920) successfully united a divided clan-based and hierarchical society dominated by nomadic pastoralists. Sayyid

Ḥassan embodies Somali nationhood of the kind never achieved since. His legacy lives on today, and his anti-colonial poetry is still recited. In fact, Al-Shabāb Islamists have acquired some of his poems, often replacing the word “British” with “American” or the United States.<sup>63</sup>

The first strong ruler after independence, Said Barre, was overthrown in 1991 after two decades of dictatorship and economic mismanagement. In the stateless status quo that followed, civil organizing with increasing Islamist tendencies became the alternative to government. Moderate Wahhabi-inspired Muslims pushed the application of Islamic law to restore order. The movement culminated in early 2006 with the creation of the so-called Islamic Courts Union (ICU) that arose in opposition to Somalia’s Transitional Federal Government (TFG). The movement took over the country, setting up a number of Islamic courts from June to December 2006, at which point it was crushed by an American-backed Ethiopian army. In the wake of its downfall, a militant splinter group of ICU, known as the *Ḥarakat al-Shabāb al-Mujāhidīn* (Striving Youth Movement, or Al-Shabāb) emerged to take its place. Pushed out of Mogadishu by an African Union-led coalition supporting the TFG, Al-Shabāb retreated for a while. Then, in August 2008, Al-Shabāb fighters battled government forces to secure control of the southern port of Kismayo, where they established their base.

Controlling much of southern Somalia, Al-Shabāb Islamists proceeded to pursue a rather vague program focused on imposing their own version of so-called sharia. Not only did they start inflicting the most severe punishments, but also, as in the Nigerian case, they invented new rules. They imposed codes of conduct and dress under the threat of public floggings. For instance, they forced men to grow beards and women to don socks, leggings and veils. In October 2009 a new law forbade women from wearing padded bras, an undergarment Islamist leaders considered a deception to men. Masked Al-Shabāb men rounded up women perceived to have firm busts, demanded they remove their padded bras and publicly whipped them as punishment. One woman named Halima, whose daughters were thus whipped, reportedly said: “Al Shabaab forced us to wear their type of full veil and now they order us to shake our breasts. . . They first banned the former veil and introduced a hard fabric which stands stiffly on women’s

chests. They are now saying that breasts should be firm naturally, or just flat.”<sup>64</sup> The following year, Al-Shabāb invented a new set of “sharia” rules. They banned the listening of music, including musical ringtones on phones, and other forms of entertainment such as viewing films. Social control through the issuance of new rules in the name of sharia is effectively beating the Somali people into submission. As with many Islamist movements, including the legal reforms discussed above, Al-Shabāb’s legal regime is one of extreme violence, and the policing of morals, behaviors and sexuality. Rather than operate in a particular legal framework or institutional environment, its actions are random and arbitrary.

On October 27, 2008, Al-Shabāb Islamists carried out Africa’s first death-by-stoning sentence on record. This horrific act took place just two months after Al-Shabāb had reclaimed control of the port city of Kismayo. That day, Aisha Ibrahim Duhulow was summarily stoned for adultery. Her family members insisted that she had been raped by three men on her way to Mogadishu to visit her grandmother earlier that month. They had attempted to report the rape to Al-Shabāb militia in Kismayo, but this action resulted in Duhulow being accused of adultery and detained. There appears to have been no trial or due process. Moreover, none of the men she may have accused of rape reportedly was interrogated or arrested. Al-Shabāb claimed Duhulow had confessed to committing adultery, and that she had agreed to the sentence. By claiming that she had admitted her guilt, the Islamists fabricated legal proof to proceed with the death sentence. Only, they applied the wrong sentence, as Duhulow was a girl who was not previously married, and therefore not a *muḥṣana*.

Days after her arrest, Duhulow was taken to the stadium of Kismayo. She was buried to the neck and slaughtered by about fifty men. They pummeled her with rocks provided by Al-Shabāb in a public execution witnessed by about a thousand people.<sup>65</sup> The crowd had been summoned that morning by Al-Shabāb men in a pickup truck equipped with loudspeakers. Just before the stoning, an Al-Shabāb official reportedly said: “We will do what Allah has instructed us.”<sup>66</sup> According to an eyewitness account, armed men surrounded those performing the stoning, shooting anyone who attempted to intervene. In the process, an eight-year-old boy was killed, and several others were wounded. Several who witnessed the horrendous act reported that at one point during the stoning,

nurses were sent to confirm Duhulow's death. They removed her from the ground, determined she was still breathing, and placed her back in the hole for the stoning to continue.

Many Somalis expressed an overwhelming sense of outrage. One remarked: "people were saying that this is not good for shari'a law . . . this was not good for human rights. This is not good for anything. People were saying that."<sup>67</sup> When interviewed, after the fact, Aisha Ibrahim Duhulow's father clarified that, contrary to Al-Shabāb's reporting that she was a grown woman, Aisha was only thirteen years old and had not yet reached legal marrying age. In other words, the death-by-stoning sentence contravened Islamic legal rules since she was not a *muḥṣana*. If proven by the Islamic rules of evidence, the punishment for adultery of a person never married is one hundred lashes, as in the case of Bariya Ibrahim Magazu discussed earlier.

Al-Shabāb's actions demonstrate incoherence, misunderstanding, and misapplication of fundamental Islamic legal principles. Indeed, the source of power of this radical Islamist movement is its mangling of the arm of justice through the reinvention of sharia. Al-Shabāb thrives on the enactment of random rules decreed in the name of "sharia." Increased policing of women's bodies, sexuality, movements and occupations followed the arbitrary and cruel killing of Duhulow in 2008. For example, in 2010 women were banned from engaging in commerce and all other public activities.<sup>68</sup> As in northern Nigeria, forms of sexual segregation were enforced. Worse still, women were reportedly raped and forcefully married, at the threat of being beheaded.<sup>69</sup>

On 25 October 2012, four years almost to the day after Duhulow's senseless execution, a second woman was stoned to death by Al-Shabāb, this time, in the town of Jamama just north of Kismayo. All that is known about this unnamed victim is that she was a young woman accused of adultery, and executed in the exact same manner as Duhulow.<sup>70</sup> There seemingly was no due process or trial, whether or not she was *muḥṣana* apparently was not determined, the male adulterer involved was not mentioned, and a crowd was summoned to watch the stoning. An Al-Shabāb official pronounced a perfunctory verdict, declaring that the woman had "admitted having out-of-marriage sex," and that "punishments that are compatible with the Sharia will be administered."<sup>71</sup> This story, reported by one Somali source only, was not taken up



by the international media. Then, two years later, Safia Ahmed Jimale became the third victim of a death-by-stoning sentence in Somalia, as far as can be determined from online sources. Little, too, is known about her case, which received limited coverage. In late September 2014, this 33-year-old woman was executed in the coastal town of Barawe, which lies between Mogadishu and Kis-mayo. According to the Al-Shabāb self-styled judge who issued the sentence in yet another monkey trial, Jimale, a mother of three, was found guilty of polyandry, having married three men.<sup>72</sup> It is uncanny how similarly erratic and atrocious were the actions of those engaged in the recent Islamist take-over of northern Mali.

### **Reinventions of Sharia in Recent Malian History**

Mali, historically, was the epicenter of West Africa's golden age of statecraft, power and prestige. Islam gained adherents there by at least the ninth century. In time, it became the religion of state leaders, who would have been knowledgeable of at least the rudiments of Mālikī law; the legal tradition that became common sometime after its spread at the hands of the eleventh-century Almoravids. The ostentatious pilgrimage to Mecca in 1324-5 of one of the most famous emperors of Mali, Kankan Mansa Musa, is legendary. About two centuries later, Mālikī law had become the official law of Songhay, the last great medieval empire of West Africa.<sup>73</sup>

Among the Muslims of the cities of Gao, Timbuktu and Jenné, and the Saharan-Sahelian countryside, were great scholars. Specializing in Islamic sciences, poetry and law, they compiled impressive manuscript collections, and some of their writings circulated far and wide.<sup>74</sup> Mali's famed *muftī*, Aḥmad Bābā (d.1627), author of some forty works, spent time training other legal scholars in Morocco at the Sultan's request. In places such as Timbuktu, where Bābā was from, the chief *qāḍī* was a central figure of authority. Islamic law, though not necessarily followed by all Muslims, was the subject of lively scholarly debate. In the eighteenth and nineteenth centuries, the region of today's Mali witnessed the emergence of Muslim state builders, such as Ahmadu Lobbo (d.1844) and the 'Umār Tal (d.1864). Inspired by competing Sufi traditions, these leaders led jihads, created short-lived polities and imposed legal regimes. For the most part, they were inspired by puritanism and were against religious innovation (*bid'a*).

Moreover, they imposed new behavioral codes, such as forbidding tobacco, for followers of the Tijāniyya Sufi order. Both Lobbo and Tal entertained relations with the leaders of the above-mentioned Sokoto Caliphate. The use of Islamic contractual law, for the recording of property rights and commercial matters, including transactions in slaves, is attested from this time.<sup>75</sup> As elsewhere, the brand of Mālikī law practiced in the region reflected local customs.

During the French colonial era, the legal landscape of Mali, then known as the Soudan Français, was transformed. The French created ‘native courts,’ including several Muslim tribunals, as discussed earlier, in which the application of Mālikī law was limited to personal and family law. Roberts’ careful reading of court records from the late nineteenth and early nineteenth centuries, reveals the extent to which marital relations and disputes over property and debts, were the most common sources of court conflict in Mali. As was the case in the Muslim tribunal in Senegal, women more frequently than men appeared in court, mostly seeking divorces. Roberts noted a shift in the treatment of women’s divorce cases after 1910s, as the French colonial administration sought to curb the dissolution of marriages.<sup>76</sup>

At independence, the Republic of Mali under socialist leadership produced a constitution very much modeled after the French secular code. It therefore did not include any institutions or structures “that were directly inspired by, or served to promote, Islamic normative principles.”<sup>77</sup> The legal system was reformed to exclude Islamic legal elements. Still, it recognized polygamous marriage, set the legal marrying age, and imposed limits on marriage payments (bridewealth) for Muslim and non-Muslim citizens alike. As noted in the first part of this essay, a parallel system run by Muslim legal experts long has operated beyond the purview of Mali’s rather dysfunctional court system. Successive presidents have sought to promote the interests of Malian Muslims. In 2004, the government created a commission of Islamic affairs (Haut Conseil Islamique du Mali (HCIM)), charged with advising on public policy. Over the years, successive presidents of the HCIM have held an increasingly radical position, at times siding with the actions of Islamists. This may explain the Malian government’s decision in 2015 to create a new ministry for religious affairs, so as to gain direct oversight of Mali’s Muslim matters. Since the latest round of constitutional reform, starting in 2009, Malian Muslims have lobbied for the official

inclusion of *Mālikī* principles in the national family code.<sup>78</sup> Indeed, popular demand for Islamic legal reform in Mali has been on the rise for decades, but has gained new momentum in recent years.

Until March 2012, when its former President Amadou Toumani Touré was ousted in a military coup, Mali had been touted as one of Africa's most successful democracies. This was despite the decades-long struggle of disenfranchised communities in the northern part of the country. Since the 1950s, a nationalist separatist political movement developed among Tuareg groups aspiring to secede from Mali to form an independent state, named Azawad. Historically this was the name of the region around Timbuktu and Araouane, but it later came to designate most of northern Mali in the separatist language of Tuareg nationalists, including the cities of Gao and Kidal.<sup>79</sup> In the 1990s, the Tuareg "rebellion" was instrumental in ousting the regime of Moussa Traoré, which triggered the democratic transition. Today, some observers wonder if the Republic of Mali might be heading towards an 'Islamic Republic of Mali.'<sup>80</sup> Others, such as Ahmedou Ould Abdallah, former United Nations Envoy to West Africa and Somalia, describe Mali as potentially "a second Afghanistan, or rather a second Somalia."<sup>81</sup> Several inter-related events in recent Malian history have caused consternation. The first is the protracted Azawad separatist movement in northern Mali. Another is the rise since the late 1990s of the Islamist movement known as the Group Salafiste pour la Prédication et le Combat (GSPC), which joined the Al-Qā'ida franchise in 2007, and renamed itself Al-Qā'ida in the Islamic Maghrib (AQIM). Other destabilizing factors include the fall of Mu'amar Qadhafi's Libyan state in 2011, and the Malian putsch one year later. Finally, Muslims' contestation over Mali's 2009 new family code, mentioned above, led to a revised code in 2012 that remains hotly debated. Much of the conflict has underscored the contradiction of Mali's institutional secularism in the face of its majority Muslim population.<sup>82</sup>

What unfolded is reminiscent of the Somali experience, so much so that one wonders if Islamists in Mali (which include Algerians, Libyans, Malians, Mauritians, Moroccans, Nigerians and Nigeriens), did in fact find inspiration in the actions of Al-Shabāb. In their wanton destruction of cultural monuments and objects, they also followed patterns established by the Taliban, and now the Islamic State. A group of Tuareg freedom fighters,



Image source: <http://diaconescotv.canalblog.com/archives/2013/03/12/26628870.html>

members of the National Movement for the Liberation of the Azawad (MNLA), seized an opportune moment in early 2012 to launch a new rebellion.<sup>83</sup> They first occupied three northern towns, including Aguelhok, located near the Algerian border. The MNLA, then backed by AQIM, formed a coalition with another politico-Islamist group known as the Ansar Dine (from the Arabic *anṣār al-dīn* or followers of the faith), led by Malian Tuareg and so-called Moors (or “Arabs”). A third recently formed Malian group, the Movement of West Africa for Divine Unity and Jihad (MUJAO), joined the coalition. Much of their activities, equipment, and firepower were financed through: hostage taking and ransoming; drug trafficking (Latin American cocaine transported across the Sahara to Europe; Moroccan hashish traded south and

eastward towards the Middle East) and trading in other contra-band goods, such as cigarettes; Al-Qā'ida network funding; and the recycling of material and men from the Libyan and Malian armies. The alliance of these four groups shifted in the course of time. In fact, the MNLA distanced itself from the militant Islamists immediately after an erratic sharia regime unfolded in occupied territory.

In April 2012, the AQIM-led coalition entered the UNESCO-world-heritage-city of Timbuktu. One of their first moves was to erect signs near the city's main entrances, bearing statements in Arabic and in French such as "Timbuktu is a city built on Islam and it will be governed only by the *sharī'a* of Islam (*sic*)."<sup>84</sup> These Islamists proceeded then to administer their own version of sharia, with seemingly no coherence, coordination or information. They set up makeshift "Islamic" courts, and began policing dress codes and conducts, subjecting offenders to public floggings. They entered homes and whipped unveiled women on the spot. They invented or enforced laws banning all forms of entertainment, from playing music, video games and soccer, to smoking tobacco.<sup>84</sup> They proceeded to destroy or desecrate shrines, mausoleums and mosques dedicated to local Muslim Sufi saints, and to burn any Arabic manuscript they deemed unorthodox.<sup>85</sup>

Two months into their occupation of Timbuktu, the Islamists apparently arrested an unwedded couple and parents of a young child. Hamaradane and his fiancé Zebou were sentenced by a local *qāḍī* to one hundred lashes each for the crime of adultery (although it remains unknown whether their non-*muḥsan* status was confirmed). On June 20, 2012, the couple was taken to Timbuktu's main square where Islamist militia wearing masks performed the flogging. A large crowd was at the scene, notified by the local radio station now controlled by the Islamists. An elected official of Timbuktu and eyewitness, Mohamed Ould Baby, reportedly said: "It was like a spectacle, people watched it. It is Ansar Dine that organized the flogging. . . It is the first time that I see this."<sup>86</sup> As with Duhulow's execution in Somalia, this exemplary new sharia-type justice clearly was designed to shock the people of Timbuktu into submission. The couple was forced to marry after the ordeal.

The violence carried out in 2012, in Timbuktu and elsewhere in northern Mali, apparently was not orchestrated. The Islamists' reckless actions caused consternation even at the level of AQMI's

leadership. An incomplete document authored by its chief commander Abdelmalek Droukdel (alias Abū Muṣā‘b al-Waddūd), makes this clear. Droukdel commanded the war from his roving operating base in Algeria, and probably he rarely set foot in Mali. The typewritten document dated 20 July, 2012 (20 Ramadhān 1433) was addressed “to his brothers the emirs and members of the council (*shūra*) of the organization, and Anṣār al-Dīn, in the greater Sahara (*al-ṣaḥrā’ al-kubrā*).”<sup>87</sup> Droukdel addressed a number of topics and set general guidelines for the “Islamic Jihad Project (*sic*) in Azāwād.” Tellingly, he referred to the Almoravids, the above-mentioned eleventh-century Muslim reformers of northwestern Africa. He compared AQIM’s mission to that of the Almoravids, the past “defenders of the Muslim community,” and he likened himself to their leader Yūsuf Ibn Tashfīn. He also mentioned Ṣalāḥ al-Dīn, the twelfth-century founder of the Ayyubid Caliphate, who led wars against European crusaders. It is interesting to note that one of the latest Islamist organizations created in northern Mali, an outgrowth of the MUJAO group, named itself Al Mourabitoune after the Almoravids.

The main focus of Droukdel’s missive was the sharia question. He reprimanded his followers for their recent actions. He condemned the desecration of mausolea in Timbuktu as too hasty at that early stage of the occupation. He strongly criticized the reported use of force to correct “illicit behavior,” including excessive flogging, but also the application of sentences of *zinā’*. He writes: “All of these actions, if they are true, even isolated [cases], are contrary to the custom of our *salāf* (Muslim forefathers; a reference to the aims of Salafis) in the application of the precepts of Islam, and reforming [the behavior] of the people.” He stressed instead that the “establishment of *sharī‘a*” must take place in stages. Addressing himself directly to those who carried out the occupation of Timbuktu, he writes:

... we consider [your recent actions] as senseless policies that do not serve our Islamic project in the region, and they must be corrected as soon as possible [because these actions could have] negative repercussions on our project. . . Among your senseless policies is the precipitation of the application of the *sharī‘a* without taking into consideration the principle of its progressive application in an environment where the people ignore religious precept since centuries [*sic!*]. Experience has

shown that the application of *sharī'a* without calculating the consequences repulses the people and pushes them to reject the religion and detest the jihadists (*mujāhidīn*), and leads to failure. . . Rather we must focus on the first phase [which is] preparing the terrain for the application of the *sharī'a*, beginning with predication, preaching and teaching.

Somewhat contradicting his statement about Malian people not practicing the faith “since centuries,” he then recommended the coalition enlist the services of local scholars and notables versed in Islamic legal literature. Finally, he discussed the plan to set up an Islamic council charged with the protection of the sharia (*ḥimāya al-sharī'a*).

Nine days after Droukdel wrote his memorandum, Ansar Dine Islamists stoned to death a young unmarried couple. This was probably the first death by stoning carried out in Mali’s history. It took place on July 29, 2012 in Aguelhok, just four months after Ansar Dine occupied this northern town. The couple apparently lived some 20 kilometers away with their two children, including a six-month-old baby. They were taken from their home, and brought to Aguelhok for the execution. There is no information about how they were accused of adultery, nor is there evidence of any legal procedure or trial. According to one witness account, an Ansar Dine spokesman named Sanda ould Bouamama reached by phone after fact, simply said “These two people were married and had extra-conjugal relations. Our men on the ground in Aguelhok applied sharia . . . They both died right away and even asked for this application. We don’t have to answer to anyone over the application of sharia.”<sup>88</sup> The couple was buried side by side up to the neck in the town square in front of a crowd forcefully summoned for the occasion to witness the horrific scene. Masked Islamist rebels executed the stoning. “They killed them like animals,” expressed another witness.<sup>89</sup>

Before and since this brutal act, countless people reportedly were executed, raped, amputated, and flogged at random for various infractions. Gao suffered some of the worst atrocities during the nine-month Islamist occupation when militants enforced their sharia regime. In August 2012, in the town of Ansongo, south of Gao, the Islamists amputated in public the hand of a young man accused of stealing cattle. Amputations, it must be emphasized,

were unprecedented in Mali's history. Other amputations followed, including amputations of other limbs.<sup>90</sup> Clearly, such acts, which targeted both Malian women and men, were committed outside of any legal framework.

More than four years after the French-backed Malian army regained control of the north in 2013, the Islamist movement, with reconfigured alliances and new groups, continues its reign of terror in towns such as Kidal. At the same time, the Islamists and their sharia regime, has garnered popular appeal among some groups of Malian Muslims throughout the country. As noted earlier, the support for the inclusion of Islamic legal principles in Mali's family code has been mounting in recent years. In 2015, another radical Islamist group emerged, this time in the Mopti region, composed, in large part, of former MUJAO fighters. Known as the Front de Libération du Macina, the group makes reference to the abovementioned Malian leader Ahmad Lobbo, who created the so-called Macina Caliphate in the nineteenth century. The following year, a MNLA-splinter group, the Movement pour le Salut de l'Azawad (MSA), was formed to bring back in focus the initial claims of Azawad separatists.

The recent sharia regime in northern Mali was carried out by a motley crew of Islamists, who seemingly do not abide by faith-based principles or coherent laws. Although they set up Islamic courts in places such as Timbuktu and Gao, and solicited the input of local learned men, the brand of sharia implemented there is, for the most part, far removed from normative Islamic legal practice. AQIM's leader Droukdel has a degree in chemistry. Despite claims he personally studied the Qu'rān and the *ḥadīth*, the founder of Ansar Dine, Iyag ag Ghali, has no legal training. Nor do the members of the MNLA. The following statement, about the future drafting of the Azawad constitution, made by the head of the MNLA, Bilal Ag Acherif, suffices to expose his limited knowledge base: "Our constitution will be based on the Qur'ān, as well as other principles drawn from international treaties that do not contradict Islam."<sup>91</sup> As discussed in a previous section, the holy book of Muslims is but one of the sources of Islamic law.

Just as in the case of Somalia, the Islamists in northern Mali are incoherent in their so-called application of sharia. It is therefore deeply worrying that their sharia regime should be having an influence on mainstream Malian politics. This is manifest in the debates surrounding the revised Family Code of 2012. Alex



Thurston predicts that “Mali’s next government is unlikely to base laws on Islamic scriptures, but such moves may foreshadow a scenario where the next Malian constitution will make broad symbolic references to Sharia—or even call Mali an “Islamic Republic.”<sup>92</sup> Still, future legislative changes of the kind experienced in Nigeria are not inconceivable, given the recent activities in the northern part of the country, the political developments at the center, and sharia’s strong popular appeal. Indeed, while Islamists continue their violent sharia regimes in the north, large sections of Muslims throughout the country have expressed broad support for incorporating sharia into public life.

A longitudinal view of Islamic legal practice in Africa reveals some striking parallels between the eleventh-century Almoravid movement and Islamist regimes in Mali, some thousand years later. The first is the political economy of Islamic reform, and the fact that both groups financed their activities, in part, through trans-Saharan trade. The Almoravids controlled the gold trade and, arguably, access to West Africa’s gold supplies was a significant motivation in their occupation of the Wagadu/Ghana Empire. AQMI and its affiliates generated funds through the trafficking of drugs and weapons within and across the Sahara. These activities have lured their followers in one of the most deprived economic regions of the world. A parallel could also be drawn with Al-Shabāb’s control of the southern ports and access to Somali pirates’ booty. The second similarity is the focus on Islamic legal reform. Just as the Almoravids of yonder pushed a new legal canon, the Mālikī doctrine, so too are recent Islamists focused on imposing their versions of “sharia law.” But the comparison between these two groups must stop here, for unlike today’s Islamists, Almoravid leaders were God-fearing men who upheld the Islamic faith. What is more, their actions were guided by intellectuals, who were versed in and contributed to Islamic legal scholarship.

## **Conclusion**

From Somalia to Mali, the Islamists’ weapon of choice is a brand of sharia that is invented and reinvented in the heat of radical acts of violence. To some extent, this was also the case during the early years of northern Nigeria’s new sharia regime (1999-2003). There are obvious reasons for the general fixation on adultery and

fornication. Promiscuity is highly disapproved of in the Islamic legal sources, starting with the Qur'ān. As Wael Hallaq explains, of all the rules concerning crime and punishment, sexuality outside of marriage (*zinā'*) is "regarded as the primary cause of social discord, to be avoided at any cost."<sup>93</sup> Islamic legal principles are designed to ensure all sexual activity occurs within the institution of marriage. But, as this essay has shown, short of a voluntary confession, the rules of evidence make it virtually impossible to prove *zinā'*. For this reason, Muslim societies rarely in the past have applied the punishments of stoning and flogging for adultery.

What has been taking place in recent years in Africa, and elsewhere, is what Ziba Mir-Hosseini has called "the criminalization of sexuality."<sup>94</sup> *Zinā'* laws have been revived, and new laws punishing promiscuity, gender proximity, and bodily exposure have been created that target women and justify social violence. The recent focus on policing sexuality, performing violence, and exhibiting punishments is designed to instill the fear and attain the submission of Muslim communities. However, this criminalization, carried out in the name of Islam, has little bearing on Islamic legal traditions or principles. Somali and Malian Islamists, and Nigerian court officials alike, have systematically flouted Islamic rules of evidence. *Zinā'* sentences have been issued through forced confessions, fabricated evidence, unsubstantiated conditions, and unfair or fictitious trials. This was also the case in the Republic of the Sudan where, in 2012, a woman was sentenced to death-by-stoning by a judge under Sudan's 1991 Criminal Act, based on a forced confession (hers and other such cases have successfully been appealed). Islamists, but also some court officials, have very little, if any, training in substantive or procedural law, and their actions demonstrate fundamental misunderstandings of the tenants of the Islamic faith. As one informant from Timbuktu remarked, concerning the brand of "sharia" wielded by Islamists in northern Mali, "they bring out their *own* Qur'an" ("ils font sortir leur Coran à eux").<sup>95</sup> The new sharia rules, invented in Nigeria, Somalia, and Mali, resemble senseless acts carried out elsewhere, such as the stoning to death of a young Pakistani woman in July 2013 for "possessing a mobile phone."<sup>96</sup> Clearly, these new forms of violence have nothing to do with religion, and everything to do with gender oppression.

This essay has argued that the invention of "sharia" began in the colonial period when Islamic legal practice was reengineered

in colonial courts. Far removed from the *sharī'a*, this sharia was the product of colonial experimentations in “domesticating Islam.” Islamic legal principles were synthesized, codified, translated into European languages, and enforced by colonial “*qāḍīs*.” The system excluded legal jurists and eliminated legal innovation. In post-colonial times, this version of sharia, as a rigid code of oppressive laws, has been refashioned. Indeed, Weber’s flawed concept of *kadijustiz*, as the irrational and arbitrary rule of Muslims, is more relevant to today’s world, except that what is taking place is *kadijustiz* without *qāḍīs*. How new “sharias” are reinvented, by recent militant Islamists seeking to establish new tyrannical regimes, is a phenomenon that must be better understood.

### Notes

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<sup>1</sup> Based on the translation by Abdullah Yusuf Ali, *The Qur’an: Text, Translation and Commentary* (Elmhurst, N.Y.: Tahrike Tarsile Qur’an, Inc. 2008).

<sup>2</sup> “*Sharī'a*,” *Encyclopaedia of Islam* (Second Edition). P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, eds.. Brill Online, 2013. Reference. University of California Los Angeles (UCLA). November 2, 2013. [http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/sharia-COM\\_1040](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/sharia-COM_1040)

<sup>3</sup> For a discussion of Weber’s problematic term see David S. Powers, *Law, Society and Culture in the Maghrib, 1300-1500* (Cambridge: Cambridge University Press, 2002), 1-2 and Johansen Baber, *Contingency and Sacred Law: Legal and Ethical Norms in Muslim Fiqh* (Leiden: Brill, 1999), Chapter 1.

<sup>4</sup> Weber, *On Law in Economy and Society* (Boston: Harvard University Press: 1954), xlvi.

<sup>5</sup> Ousmane Kane, "L'islamisme d'hier et d'aujourd'hui. Quelques enseignements de l'Afrique de l'Ouest," *Cahiers d'Etudes Africaines* 52, nos. 2-3 (2012): 206-207, 545-574.

<sup>6</sup> For a general survey of Islamic legal traditions, see Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press 2009). See also Léon Buskens and Baudoin Dupret, "L'invention du droit musulman, genèse et diffusion du positivisme juridique dans le contexte normative islamique," in François Pouillon and Jean-Claude Vatin, eds., *Après l'orientalisme: L'Orient créé par l'Orient* (Paris: Karthala, 2011), 71-92.

<sup>7</sup> Powers, *Law*, 18-22. See also Muhammad Khalid Masud, Rudolph Peters, and David Powers, "Qadīs and Their Courts: An Historical Survey," in Masud, Peters, and Powers, eds., *Dispensing Justice: Qadis and their Judgments* (Leiden and Boston, MA: Brill, 2005), 1-44; Lydon, *On Trans-Saharan Trails: Islamic Law, Trade Networks and Cross-Cultural Exchange in Nineteenth-Century Western Africa* (Cambridge, New York: Cambridge University Press, 2009), Chapter 6, for a general discussion of pre-colonial legal practice in Mauritania and Mali.

<sup>8</sup> Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (New York, Cambridge: Cambridge University Press, 2005).

<sup>9</sup> Joseph Schacht, *Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 7. Interestingly, Schacht was hired to produce studies of Islamic legal practice in Africa, including Nigeria and Algeria. Moreover, he taught for several years in Cairo. See also Ziba Mir-Hosseini, "Criminalising Sexuality: Zina Laws as Violence against Women in Muslim Contexts." *International Journal on Human Rights* 8, no. 15 (2011), 7.

<sup>10</sup> Much has been written on the subject of the codification of African legal systems in the colonial period. For a discussion pertaining to French West Africa, see Roberts, *Litigants and Households. African Dispute and Colonial Courts in the French Soudan, 1895-1912* (Portsmouth: Heinemann, 2005), especially, 36-48. For a study of colonial justice system in Algeria, see Allan Christelow, *Muslim Law Courts and the French Colonial State in Algeria* (Princeton: Princeton University Press, 1985).

<sup>11</sup> Dominique Sarr and Richard Roberts, "The jurisdiction of Muslim tribunals in colonial Senegal, 1857-1932," in Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa* (London: Heinemann, 1991), 131-45.

<sup>12</sup> Lydon, "Droit islamique et droits de la femme d'après les registres du Tribunal des Musulmans de Ndar (St. Louis du Sénégal), 1850s-1920s," *Canadian Journal of African Studies*, 41, no. 2 (2007): 289-307; and Lydon, "Obtaining Freedom at the Muslims' Court of Ndar: Colonial *Kadijustiz* and Women's Divorce Litigation in Senegal," in Shamil Jeppie, Richard Roberts and Ebrahim Moosa, eds., *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam: Amsterdam University Press, 2010), 135-164.

<sup>13</sup> Ibid.; Roberts, *Litigants and Households*; Emily Burrill, *States of Marriage: Gender, Justice, and Rights in Colonial Mali* (Athens: Ohio University Press, 2015). See also the work of Marie Rodet, "Islam, pluralisme juridique et relations de genre dans les 'tribunaux indigènes' du Soudan français, 1900-1925," *Outre-Mers. Revue d'histoire*, 99, nos. 370/37 (2011): 173-183. For a study of East African colonial courts, see Elke E. Stockreiter, *Islamic Law, Gender and Social Change in Post-Abolition Zanzibar* (Cambridge University Press, 2015).

<sup>14</sup> Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1600* (Cambridge: Cambridge University Press, 2001), especially her discussion of Islamic legal systems, 102-107. While she notes the absence of appellate courts in Muslim legal systems, she does not discuss the role of *muftīs* and fatwas.

<sup>15</sup> For pertinent studies of Mali and Niger, Emily Burrill, *States of Marriage: Gender, Justice, and Rights in Colonial Mali*. Athens: Ohio University Press, 2015, especially Chapter 2, for a discussion of the colonial legal system in Mali; Barbara Cooper, "Injudicious Intrusions: Chiefly Authority and Islamic Judicial Practice in Maradi, Niger," in Jeppie, Roberts and Moosa, eds., *Muslim Family Law*, 183-218.

<sup>16</sup> Lydon, "Obtaining Freedom," 136-40.

<sup>17</sup> Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998), 11.

<sup>18</sup> For the Ottoman context, see Tucker, *In the House of the Law*, 11-12; and Peters, *Crime and Punishment*, 69-102

<sup>19</sup> For studies of legal systems, including in Mali and Nigeria, see Jan Michiel Otto, ed., *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010).

<sup>20</sup> Benjamin Soares, "Islam in Mali in the Neoliberal Era," in Soares and Ottayek, eds., *Islam and Muslim Politics* (New York: Palgrave, 2007), 211-226.

<sup>21</sup> Barbara Cooper, "Secular States, Muslim Law and Islamic Religious Culture: Gender Implications of Legal Struggles in Hybrid Legal Systems in Contemporary West Africa." *Droit et Cultures* 59:1 (2010): 97-120.

<sup>22</sup> Wael Hallaq, *Sharia*, 312-3.

<sup>23</sup> The following verse is sometimes wrongfully invoked as Islamic legal sanction of stoning: "For if they should come upon you, they would stone you or force you to return to their cult, and in that case ye would never attain prosperity" (Qur'an 18:20). This verse specifically describes the modus operandi of non-Muslims. Another verse describes the conversations of Shu'ayb with non-Muslims he is seeking to enlighten about the faith, who reply to him "O Shu'ayb. . . were it not for thy family, we should certainly have stoned thee!" (11:91).

<sup>24</sup> Yusuf Ali, *Qur'an*. It is important to note another verse (4:15), which recommends life confinement for the crime of lewdness (*fāḥisha*), of women specifically. Many commentators see this as a reference to adultery or fornication, but in Yusuf Ali's opinion (*Qur'an*, 183 note no. 523) this refers to what he terms "unnatural crime between women," meaning, undoubtedly, homosexual relations. In such a case too, four witnesses are required to establish guilt.

<sup>25</sup> See, for example, Deuteronomy 22:23-7: "If a young woman who is a virgin is betrothed to a husband, and a man finds her in the city and lies with her; then you shall bring them both out to the gate of that city, and you shall stone them to death with stones. . .so you shall put away the evil from among you." Other laws authorized the rape of virgins in exchange for payment or forced marriage (Deuteronomy 22:28-29). The old testament prescribes death by stoning or burning for adulterers of all kinds, homosexuals, non-virgins at marriage, men who have sex with their father's wife or son's wife, men who copulate with animals, and masturbation (Leviticus 20: 9-21). On the subject of the punishment of death by stoning for the non-virginity of a young girl see Isaac Klein, *The Code of Maimonides Book Four, The Book of Women* (New Haven: Yale University Press, 1970), 337. Also of interest is John Chapter 8 of the New Testament, which discusses Jesus' shaming of those about to stone to death an adulterous woman. I thank Ken Bedes for this information.

<sup>26</sup> Peters, "Zinā or Zinā'." *Encyclopaedia of Islam*, Second Edition. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs, eds. (Brill Online Reference Works), Accessed on November 2, 2013. [http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/zina-or-zina-SIM\\_8168?s.num=8&s.f.s2\\_parent=s.f.cluster.Encyclopaedia+of+Islam&s.q=stoning+](http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/zina-or-zina-SIM_8168?s.num=8&s.f.s2_parent=s.f.cluster.Encyclopaedia+of+Islam&s.q=stoning+)

<sup>27</sup> Cited in Peters, "The Re-Islamization of Criminal Law and the Judiciary in Northern Nigeria: The Case of Safiyyatu Hussaini," in Masud et al., eds., *Dispensing Justice*, 230-1.

<sup>28</sup> *Ibid.*, 227.

<sup>29</sup> Ibn Abī Zayd, *La Risāla ou Epître sur les éléments du dogme et de la loi de l'islam selon le rite mālikite (texte et traduction)*, ed. Léon Bercher (Alger, 1968), 252-3.

<sup>30</sup> Muḥammad Mukhtār wuld Al-Sa'ad (Ed.), *Nawāzil Ḥama'ullah al-Tishīti (h.1107-1169 / m.1693-1755)*. Damascus: Dā'ira al-Quḍā', 1431/2010, 368.

<sup>31</sup> Roberts, *Litigants and Household*, 92 (emphasis added).

<sup>32</sup> *Ibid.*, note 69.

<sup>33</sup> *Ibid.*, 51.

<sup>34</sup> Peters, *Crime and Punishment*, 119.

<sup>35</sup> Muhammad Sani Umar, *Islam and Colonialism: Intellectual Responses of Muslims of Northern Nigeria* (Leiden: Brill, 2006), 45. See also Schacht, *Introduction* and Peters, *Crime and Punishment*.

<sup>36</sup> Peters, *Crime and Punishment*, 123. On the changes to Islamic legal practice implemented by the British, see A. H. Yadudu, "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria," *Journal of Legal Pluralism*, 32 (1992): 103-139; and Sulaiman Kumo, "Sharia Under Colonialism – Northern Nigeria," in N. Alkali, A. Adamu, A. H. Yadudu, R. Moten and H. Salihi, eds., *Islam in Africa: Proceedings of the Islam in Africa Conference* (Ibadan: Spectrum Books Ltd., 1993), 1-22.

- <sup>37</sup> Christelow, "Islamic Law and Judicial Practice in Nigeria." *Journal of Muslim Minority Affairs* 22, no. 1 (2002): 191.
- <sup>38</sup> Abdulmalik Bappa Mahmud's *A Brief History of Shariah in the Defunct Northern Nigeria* (Jos: Jos University Press, 1988), 6-9.
- <sup>39</sup> Abdulmumini Adebayo Oba is a legal historian who has written extensively about the colonial and postcolonial periods ("Islamic Law as Customary Law: The Changing Perspective in Nigeria," *International and Comparative Law Quarterly* 51, no. 4 (2002): 827.
- <sup>40</sup> Justice Mahmud cited in Bappa Mahmud, *A Brief History of Shariah*, 14. See also Chinedu N. Ubah, "The Historical Roots of the Sharia Question in Nigeria," *Journal of Muslim Minority Affairs* 11, no. 2 (1990): 321-33.
- <sup>41</sup> Oba, "Islamic Law," 833.
- <sup>42</sup> Cited in *ibid.*, 835.
- <sup>43</sup> *Ibid.*, 828.
- <sup>44</sup> Christelow, "Islamic Law," 191.
- <sup>45</sup> Christelow, *Thus Ruled Emir Abbas* (East Lansing: Michigan State University Press, 1994).
- <sup>46</sup> Oba, "Islamic Law," 826.
- <sup>47</sup> For information on this period, see Oba, "Kadis (Judges) of the Sharia Court of Appeal: The Problems of Identity, Relevance and Marginalisation within the Nigerian Legal System," *Journal of Commonwealth Law and Legal Education* 2, no. 2 (2008): 49-71.
- <sup>48</sup> Peters, "Re-Islamization," 225. This may no longer be the case since October 2013 when the Sultanate of Brunei did the same.
- <sup>49</sup> In Zamfara, for example, a group of male and female youngsters was sentenced to 25 lashes each for participating together in a bridal picnic.
- <sup>50</sup> Asifa Quraishi, "What if Sharia weren't the enemy: Rethinking International Women's Rights Advocacy on Islamic Law," *Columbia Journal of Gender and Law* 22, no.1 (2011): 173-241.
- <sup>51</sup> Carina Tertsakian, "Nigeria's Political Islam?" *Human Rights Watch* 16, no. 9 (2004): 61-62; Rhoda E. Howard-Hassman, "The flogging of Bariya Magazu: Nigerian politics, Canadian pressures, and women's and children's Rights," *Journal of Human Rights* 3, no. 1 (2004): 3-20.
- <sup>52</sup> Peters, "Re-Islamization."
- <sup>53</sup> *Ibid.*, 226. It is interesting to note the use of the verb 'to cane' (a once common British activity), because the Islamic sources, starting with the Qur'ān, refer to flogging (*jalada*) with a leather whip (*jilda*, c.f. 24:2, 4).
- <sup>54</sup> *Ibid.*, 240.
- <sup>55</sup> For details on this and other cases of *haḍūd* punishments, see "Political Shari'a? Human Rights and Islamic Law in Northern Nigeria." *Human Rights Watch* 16, no. 6 A (September 2004).
- <sup>56</sup> Badran, *Feminism in Islam: secular and religious convergences* (Oxford: One World, 2009), 287.

<sup>57</sup> See, for example, the guidelines produced by Hauwa Ibrahim, *Practicing Shariah Law: Seven Strategies for Achieving Justice in Shariah Courts* (Chicago: American Bar Association, 2012).

<sup>58</sup> For more on Boko Haram's positions, see Alex Thurston, "'The disease is unbelief': Boko Haram's religious and political worldview." *Brookings Center for Middle East Policy*, Paper No. 22 (January 2016).

<sup>59</sup> An important resource for the legal history of Brava, in former Italian-dominated Somalia, is the collection of court records compiled by Alessandra Vianello and Mohamed M. Kassim (*Servants of the Sharia: The Civil Register of the Qadis' Court of Brava 1893-1900* (Leiden: Brill, 2006)).

<sup>60</sup> Said Hamdun and Noel Quinton King, *Ibn Battuta in Black Africa* (Princeton: Markus Weiner Publishing, 1994), 13-25.

<sup>61</sup> J. N. D. Anderson, *Islamic Law in Africa* (London: HMSO, 1954), 40-57. While dated, this remains an important reference compiled by an Arabic-trained legal expert.

<sup>62</sup> I. M. Lewis, *A Modern History of the Somali* (London: James Currey, 2002), 81.

<sup>63</sup> Hussein Solomon, "Somalia's Al Shabaab: Clans vs Islamist Nationalism." *South African Journal of International Affairs* 21, no. 3 (2014): 354.

<sup>64</sup> Abdi Sheikh, "Somali islamists whip women for wearing bras." *Reuters*, World News, 16 October 2006, <http://www.reuters.com/article/oukoe-uk-somalia-conflict-bras-idAFTRE59F1K420091016>.

<sup>65</sup> Daniel Howden, "'Don't kill me,' she screamed. Then they stoned her to death." *The Independent*, 8 November 2008, <http://www.independent.co.uk/news/world/africa/dont-kill-me-she-screamed-then-they-stoned-her-to-death-1003462.html>.

<sup>66</sup> "Stoning victim begged for mercy." *BBC News*, Tuesday 4 November 2008, <http://news.bbc.co.uk/2/hi/7708169.stm>.

<sup>67</sup> *Ibid.*

<sup>68</sup> Human Rights Watch, "Harsh War, Harsh Peace" (2010), 27, <https://www.hrw.org/report/2010/04/19/harsh-war-harsh-peace/abuses-al-shabaab-transitional-federal-government-and-amisom>.

<sup>69</sup> There are reports of women being beheaded in Somalia for refusing a forced marriage. Hugh Macleod and Annasofie Flamand, "Fleeing Somali Women Recount Tales of Terror." *BBC News*, 7 October 2010, <http://www.bbc.com/news/world-africa-11437595>. See also Shukri Abdulkadir, "Al Shabab's Impact on Peace in Somalia and the Horn of Africa." *Africa Portal Backgrounder*, no. 23, February 2012.

<sup>70</sup> Abdulkader Khalif, "Al Shabaab Order Woman Stoned to Death for Sex Offence," *Africa Review*, October 26, 2012, <http://www.bbc.com/news/world-africa-11437595>.

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

<sup>72</sup> Arefayné Fantahum, "Somali militants stone woman to death," *Ethiopian Observer*, September 27, 2014, <http://www.ethiopiaobserver.com/2014/09/somali-militants-stone-woman-to-death/>.



<sup>73</sup> See John Hunwick, *The Replies of al-Maghili to the Questions of Askia Muhammad* (London: Oxford University Press, 1985).

<sup>74</sup> Graziano Krätli and Lydon (Eds.), *The Trans-Saharan Book Trade: Arabic Literacy, Manuscript Culture, and Intellectual History in Islamic Africa* (Leiden: Brill, 2011).

<sup>75</sup> Lydon, *On Trans-Saharan Trails*, is informed by such commercial records. For information on legal documents pertaining to transactions in slaves, Lydon, “Slavery, Exchange and Islamic Law: A Glimpse for the Archives of Mali and Mauritania.” *African Economic History* 33 (2005): 117-48; Lydon “Islamic Legal Culture and Slave Ownership in Nineteenth-Century Sahara.” *International Journal of African Historical Studies* 40, no. 3 (2007): 391-439; Lydon and Bruce Hall, “Excavating Arabic Sources for the Writing on Slavery in Western African History,” in Martin Klein, Sandra Green and Alice Bellagamba, eds., *African Voices on Slavery and the Slave Trade: Essays on Sources and Methods* (Cambridge: Cambridge University Press, 2016), 3-49.

<sup>76</sup> Roberts, *Litigants and Households*.

<sup>77</sup> Dorothea Schulz, “Sharia and National Law in Mali,” in Otto, ed., *Sharia Incorporated*, 537.

<sup>78</sup> Benjamin Soares, “Family Law Reform in Mali: Contentious Debates and Elusive Outcomes,” in Margot Badran, ed., *Gender and Islam in Africa: Rights, Sexuality and Law* (Washington DC: Woodrow Wilson Center Press, 2011), 263-90.

<sup>79</sup> See Baz Lecocq, *Disputed Desert: Decolonisation, Competing Nationalisms and Tuareg Rebellions in Northern Mali* (Leiden: Brill, 2010), 529-552.

<sup>80</sup> Alex Thurston, “Towards an Islamic Republic of Mali?” *The Fletcher Forum of World Affairs* 37, no. 2 (2013): 45-66.

<sup>81</sup> Cited in Hussein Solomon, “Mali: West Africa’s Afghanistan,” *The Rust Journal* 158, no. 1 (2013): 12-19.

<sup>82</sup> For an informed analysis see B. Lecocq, G. Mann, B. Whitehouse, D. Badi, L. Pelckmans, N. Belalimat, B. Hall, W. Lacher, “One Hippopotamus and Eight Blind Analysts: A Multivocal Analysis of the 2012 Political Crisis in the Divided Republic of Mali, Extended Editors Cut” ([https://www.academia.edu/3820665/One\\_Hippopotamus\\_and\\_Eight\\_Blind\\_Analysts\\_a\\_Multivocal\\_Analysis\\_of\\_the\\_2012\\_Political\\_Crisis\\_in\\_the\\_Divided\\_Republic\\_of\\_Mali\\_](https://www.academia.edu/3820665/One_Hippopotamus_and_Eight_Blind_Analysts_a_Multivocal_Analysis_of_the_2012_Political_Crisis_in_the_Divided_Republic_of_Mali_)).

<sup>83</sup> A useful guide to these events was co-written by Alex Thurston and Andrew Lebovich (“A Handbook on Mali’s 2012-3 Crisis.” *Institute for the Study of Islamic Thought in Africa*, Working Paper no. 13-001, September 2, 2013).

<sup>84</sup> The ban on tobacco harks back to the legal regimes of nineteenth-century Sufis, such as the Tijānī ‘Umār Tal. Ironically, while anti-smoking laws are a Sufi tendency, the AQIM group would seek to destroy all forms of Sufi worship.

<sup>85</sup> Thankfully, many manuscript collections were transported to the capital Bamako, and other safe locations before the Islamists took the city. In August 2016, the International Criminal Court began its first trial against an Islamist held

responsible for carrying out some of these activities. In September 2016, Ahmed al Faqi was convicted to 9 years in prison after pleading guilty and asking for forgiveness.

<sup>86</sup> Armin Arefi, "Mali: la charia fait fureur à Tombouctou." *Le Point International*, June 21, 2012. [http://www.lepoint.fr/monde/mali-la-charia-fait-fureur-a-tombouctou-21-06-2012-1476076\\_24.php](http://www.lepoint.fr/monde/mali-la-charia-fait-fureur-a-tombouctou-21-06-2012-1476076_24.php).

<sup>87</sup> Document No. 234/33 Organization of AQMI, was found by journalists Nicolas Champeaux et Jean-Louis Le Touzet in 2013, after the French-backed Malian army regained control of Timbuktu. A poorly scanned and therefore difficult to read copy of the original, and a rough French translation, appeared on the *Radio France Internationale* website in July 2013. A rough English translation is featured on the Associated Press website ([http://hosted.ap.org/specials/interactives/\\_international/\\_pdfs/al-qaida-manifesto.pdf](http://hosted.ap.org/specials/interactives/_international/_pdfs/al-qaida-manifesto.pdf)).

<sup>88</sup> Adama Diarra, Cheick Diourara, Joe Bavier, and Michael Roddy, "Mali Islamists stone couple to death for adultery," Reuters, July 30 2012. <http://www.reuters.com/article/us-mali-crisis-stoning-idUSBRE86T1I220120730>.

<sup>89</sup> Armin Arefi, "Mali: les islamistes lapidés de jeunes amants," *Le Point International*, July 30, 2012. [http://www.lepoint.fr/monde/mali-les-islamistes-lapide-de-jeunes-amants-31-07-2012-1491370\\_24.php](http://www.lepoint.fr/monde/mali-les-islamistes-lapide-de-jeunes-amants-31-07-2012-1491370_24.php).

<sup>90</sup> Kassim Traoré, "Amputations liées à l'application de la charia: Les victimes réclament justice," *MaliActu.net*, March 15, 2015 (original source: Le Reporter). <http://maliactu.net/mali-amputations-liees-a-lapplication-de-la-charia-les-vic-times-reclament-justice/>.

<sup>91</sup> Baba Ahmed, "Mali – Bilal Ag Achérif (MNLA): "Ansar Eddine peut obtenir qu'Aqmi quitte l'Azawad," *Jeune Afrique*, June 13, 2012. <http://www.jeuneafrique.com/175643/politique/mali-bilal-ag-ach-rif-mnla-ansar-eddine-peut-obtenir-qu-aqmi-quitte-l-azawad/>.

<sup>92</sup> Thurston, "Towards an Islamic Republic of Mali?" 60.

<sup>93</sup> Wael Hallaq, *Sharia*, 271.

<sup>94</sup> Mir-Hosseini, "Criminalising Sexuality."

<sup>95</sup> Mohamed Lamine Ould Najim, personal communication (November 3, 2013).

<sup>96</sup> Emma Batha, "Special report: The punishment was death by stoning. The crime? Having a mobile phone," *The Independent* (Sept. 29 2013).

