RETHINKING THE OFFENCE OF RAPE AS VIOLENCE AGAINST WOMEN UNDER ISLAMIC LAW: A PARADIGM SHIFT

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"A rapist is worse than an animal. He has no moral rectitude. He throws overboard, the limit of his legal right and he can, shamelessly, deprive another person (more painfully, female children of under age) of their God given rights of protecting the chastity and sanctity of their body and mind. He is all out to pollute such chastity and sanctity. He has no respect for human beings! He can commit any atrocity. He is a cancer in the society. What ashame!"

Isa v. State (2016) 6 NWLR (Pt.1508) 243. Per I.T. MUHAMMAD J.S.C*

Abstract

This article examined the phenomenon of rape in the Northern part of Nigeria, particularly in the eleven states with an entrenched Islamic legal regime with a view to proffering solution within the Islamic law, for the latter to serve more as a sword than a shield for rapists. It evaluated the current regime and found that it is very influenced by the position of Ibn al-Qāsim such that rape is perceived as a variant of *zina*, thereby requiring from the victim a very high standard of proof. Using doctrinal research methodology, the article found that the adoption of this view has made impossible for the Sharia court to convict a suspected rapist on the strength of evidence of four reliable witnesses. It further found that a paradigmatic shift is possible particularly, as during the formative period of Islam, rape was considered an independent offence of violence against women with flexible means of proof. It therefore behoves the States in the Northern part of Nigeria to consider amending their respective Sharia penal codes to properly contain or combat the menace of rape.

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1.0 Introduction

The incessant and horrific incidences of rape and sexual assault, especially of minor girls, have presented a gloomy picture of the state of legal helplessness in the Northern states of Nigeria, in particular and the country at large. Nowhere is most hit by this phenomenon than the Muslim populated states with entrenched Islamic criminal law regime. For instance, in the first six months of 2020, Sokoto State Hisbah Commission has recorded 155 rape cases.[2]The most horrific side of this problem is that children are rampantly falling prey for these rapists. The 2014 case of a teenage girl who was infected with HIV by a 63-year-old man, Ubale Saidu Dutsa will forever remain indelible in our memory.[3] This is about the only case of rape where the culprit was convicted by an Upper Sharia court in the whole Northern states. The court recorded this feat because the culprit volunteered a confession. It is therefore very convenient for state prosecutors to prosecute the culprits before the English-styled High Courtin all the states of Northern Nigeria. The recent conviction of Usman Shehu Bashir to death by hanging for raping to death of a two-year old girl by a Kaduna State High Court was actually charged under culpable homicide punishable with death under section 221 of the Kaduna State Penal Code.[4]

The public appears disenchanted with the existing penalty, as the more rape is being punished the more people commit the offence. This prompted some activists like International Federation of Women Lawyers (FIDA) to advocate stiffer punishment for rapists in Nigeria.[5]Even senior lawyers[6] and some members of the National Assembly are supporting stiffer punishment like

[2]Daily Trust, Sokoto Hisbah records 155 rape cases **(**July 2020**)** https://www.dailytrust.com.ng/sokoto-hisbah-records-155-rape-cases.html last visited 03/07/2020

[3] Spotlight Reports, Kano Court Sentences Man to Death for Raping a 12-yr-old(April, 2014),www.spotlighyreports.com. Last visited 03/07/2020

[4] Daily Post, Man sentenced to death for raping to death two-year-old girl (June 2020) https://dailypost.ng/2020/06/04/man-sentenced-to-death-for-raping-to-death-two-year-old-girl/ last visited 03/07/2020.

[5]All Africa, Nigerians Call for Stiffer Punishment As Reported Rape Cases Increase (July 2020) https://allafrica.com/stories/202006080243.html last visited 03/07/2020.

[6]The Nation, Penile Amputation' ll Deter Rapists, Says AfeBabalola(July 2020) https://thenationonlineng.net/penile-amputationll-deter-rapists-says-afe-babalola/ last visited 03/07/2020.

penile amputation.[7]Ironically, the Sharia Courts, notorious for awarding stiffer penalties, are being avoided by agents of state like plague. One begins to wonder what could have been responsible for this state of affairs. How will a State avoids the Sharīʿah system it worked tirelessly to nurture and entrench amidst international condemnation, and continue to patronise the English-styled court despite the public discontent towards the sentences it passes?

The reason for this state of affairs is not farfetched. A rape victim (prosecutrix) before the Sharia court is required to produce four unimpeachable witnesses similar to those required for *zina* (consensual sex); this volume of witnesses is difficult to come by even in consensual sex. If the prosecutrix is unable to produce the required number of witnesses she risks being penalised by the State for *qadhf*, in addition to what she suffered from her tormentor. Placing such an onerous burden on a child victim of sexual assault is even more worrisome.

It is against this backdrop that this article examines the current Islamic jurisprudential paradigm which produces this state of affairs with a view to ascertaining whether a paradigmatic shift is possible for the Sharīʿah regime, for the regime to serve more of a sword than a shield for the predator who pounced on innocent souls to satisfy their sexual urge or superstitious beliefs. Nowadays, the seemingly normal people, motivated by quest for material gains, are the perpetrators of this horrible act of child sexual assault. Moreover, the scourge of HIV/AIDS pandemic has added another dimension to this problem. There is belief common in South Africa called 'virgin cleansing myth' or 'HIV/AIDS virgin cure' that sexual intercourse with minor girls as young as nine months old can cure HIV/AIDS.[8] The victims, mostly female infants in the range of five months to 11 years, are subjected not only to physical injury but may also be infected with terminal disease of HIV/AIDS in the name of tradition. Research has shown that women, particularly young girls, subjected to sexual violence, are more vulnerable to contacting HIV/AIDS owing to risk of tearing in the course of the attack.[9] The impact of the violence is more on minor girls because of their immaturity.

[7] Daily Post, Castrate any man who rapes women – Reps member, Kazaure [VIDEO](June 2020). https://dailypost.ng/2020/06/04/castrate-any-man-who-rapes-women-reps-member-kazaure-video/ last visited 03/07/2020.

[8] See Meel, BL., 'The Myth of Child Rape as a Cure for HIV/AIDS in Transkei: A Case Report' vol. 43(1), 2003, *Medical Science Law,* pp.85-88; Baleta, A., 'Alleged Rape of Nine Months Old Baby Shock South Africa' vol. 358 (9294), 2001, *Lancet*, pp 170-7.

[9]Dunkie, KL., et al. 'Gender-based Violence, Relationship, Power and Risk of HIV infection in Women attending Antenatal Clinics in South Africa' vol. 363(9419) 2004, *Lancet* 363(9419) pp.1415-1421.

Such horrible beliefs might have influenced the likes of Ubale Saidu Dutsato engage in such condemnable and nefarious practice.

The article argues that as long as rape and *zina* are treated as though of the same genre in terms of evidential burden, culprits will always get away with their delict. The victims, on the other hand, would mostly choose the path of concealment to avoid double suffering, i.e., sexual violence and penalty for *qadhf.* To this end, the article recommends that the offence of rape under Islamic law be considered as an independent crime, with distinct ingredients and means of proof. This approach, it is argued, may provide a better way of establishing culpability of a suspected rapist, as it would allow the employment of medical or forensic evidence to corroborate the assertion of a rape victim. The article is divided into five sections. After the introduction which among other things provides the background to the research and mainly demonstrating the enormity of rape in Nigeria, including what stakeholders recommended for rapists owing to the state of helplessness of Northern states with entrenched Sharia penal regime, section two provides insights into the juristic discourses on the concept of *zina* and how it impacted on the current Islamic legal regime in Northern states and its implications on rape victims and the society. Section three discusses how rape is proved under the existing framework and the consequences demonstrated using a judicial decision of the Supreme Court of Sudan. Section four proposes a paradigmatic shift and further argues the justification for making rape an independent offence citing instances from the formative period of Islam. Finally, section five concludes the article.

2.0 Juristic Discourses on *Zina* and its implications on Rape victims

Bearing in mind the many textual provisions,[10] Muslim jurists articulated and extrapolated the said provisions, and come up with very deep analysis of the concept of *zina* (unlawful consensual sexual intercourse).This juristic discourse has enormous consequences on how *iġtiṣāb*(forcible/non-consensual sexual intercourse/rape) was viewed by the classical *fiqh* jurists taking into account utilization of sex organs as the basic commonality between the two.

According to Abū Ḥanīfa, *zina* is committed where an adult man had sexual intercourse through the frontage of a woman that is neither married to him nor is their semblance of marriage.[11] This definition signifies that, *zina* is an

[10]Such as Q 24:2; Q17:32; Q25:68 and 60:12.

[11]Ibn al-Hammām, MK., *Fatḥ al-Qadīr* (Beirut, Dār al-Fikr, n.d.), vol. 5, p. 247.

act that can only be possible between members of the opposite sex. There must be contact between male and female genitalia. Anal sex or penile insertion through the anus of either a male or a female does not amount to *zina*. From the perspective of this school, the male is the active partner and must necessarily be a sane adult while the female is the passive partner who can be of any age.

The position of Abū Ḥanīfa is premised on the notion of 'male-activism' and 'female passivism.' Meaning that, penile insertion (*ʾīlāj*) is the major element to be considered as the *actus reus* of the male partner, while enablement (*tamkīn*) on the part of the female is what makes her liable, as she is considered as the site (*maḥal*) of sexual act.[12] It is on this basis that Abū Ḥanīfa believe that only women can be raped. A man can have intercourse with a sleeping woman, just as he can also coerced her into submission. On the other hand, a man cannot be coerced by a woman to have sex with her by instilling fear or threat of death or injury in him, as erection and fear can hardly co-exist.[13] As far as Abū Ḥanīfa and some of his disciples are concerned the plea of the male culprit that he was forced by the woman will not absolve him of *ḥadd* of *zina.*[14]

Another point discernible from this definition is that the act of illicit sexual intercourse between female adult and a minor child or mad person may in fact qualify as *zina* but legally not, since the latter, which is the active partner in the circumstances, lacks legal capacity or criminal liability.[15] The consequence of this is that *ḥadd* of *zina* will not be inflicted on the female partner since her role in the exercise is passive. She will only be punished under *taʿazīr,* because the active partner is not criminally liable. On the other hand, a sane man who has carnal knowledge of a small girl or a mad woman is liable to *ḥadd* of *zina* since both in fact and in law he is the active partner and has legal capacity.[16]

The idea of 'activeness' and 'passiveness' of male and female respectively, however is contested by Imām Mālik, Shāfiʿi, Ahmad b Ḥanbal, Zufar and Abū Yūsuf, who employed an individualistic approach.[17] This approach allows considering each sex partner as fully responsible on his individual circumstances. Meaning that, to constitute *zina*, the determining factor is not

[12] Ibid, p.272.

[13] Al-Sarakhsi, A., *Al-Mabsūṭ* (Beirut, Dār al-Maʿarifah, 1993), vol. 9, p 59.

[14] Ibid

[15] Ibid, p. 271; Al-Kāsāni, AM, *Badāʾiʿ al-Ṣanāʾiʿ fi Tartīb al-Sharāʾiʿ,* 2nd Edition, (Beirut, DārKutub al-ʿIlmiyyah, 2003), vol.9, p. 184; Al-Sarakhsi, A., op. cit, vol. 9, p 55.

[16] Al-Sarakhsi, A., op. cit, vol. 9, p 55.

[17] Ibn al-Hammām, MK., op. cit, vol. 5, p. 271.

the active partner's legal capacity but the capacity of each is considered in its own right. Thus the fact that the female partner has legal capacity makes her criminally liable for the act of *zina* and will not be absolved by her so-called passiveness. The minor child or the insane, who in all intent and purpose is the active partner will not suffer the penalty of *zina*.[18] These jurists rely on the verse of the Holy Qurʾān which places both men and women on equal footing in the act of *zina*, as long as they are adult. *'The woman and the man guilty of adultery or fornication- flog each of them with a hundred stripes.'(Q24:2)*. Their argument is that gender particularisation in this verse put both the man and the woman on the same pedestal. Besides, if anybody falsely accused a woman of *zina,* he/she would be liable to *ḥadd.*[19] As such, it would be erroneous to regard woman as only a passive partner. Thus the fact that there is no legal capacity on the part of the seeming actor, like the insane man or minor, is no reason to reduce the penalty of a woman to a mere *taʿazīr*.[20]

Although Māliki School's position on activeness and passiveness of male and female respectively agrees with the majority, its definition of *zina* has brought another dimension to the debate with considerable legal consequences. Maliki School defines *zina* as the intentional insertion of the glans of an adult Muslim into the 'opening' of another human being upon whom he has no right or lawful cause.[21] From this definition that the scope of the offence has been widened by the use of the phrase 'opening of another human being'. This would include intercourse between opposite sexes through the vagina and also through the anus of either a man or a woman.[22]Therefore, sodomy (*liwāṭ*) fits into this definition but lesbianism (*musāḥaqah*) does not because it is committed by two female partners and does not involve penile insertion.[23]Similarly, the definition will not accommodate bestiality (*bahīmiyyah*) because the penile insertion occurs through the opening of an animal.[24]

[18] Al-Sarakhsi, MA.,op cit., Vol.9, p.55.

[19] Ibn al-Hammām, MK., op. cit, vol. 5, p. 271.

[20]Al-Sarakhsi, MA., op. cit., vol.9, p.55

[21]Alīsh MA., *Minhul-JalīlSharhMukhtaṣarKhalīl,* (Beirut, Dār al Fikr, 1989), vol.9, p.245.

[22]Mālik, A., *Al-Mudawwanat al-Kubra*, 1st edition (Beirut, DārKutub al-ʿIlmiyyah, 1994), vol.4, p.517.

[23]Alīsh, MA., op. cit., vol.9 p 246.

[24] Compare this with S. 125 of the Harmonised Sharia Penal Code, Law, Zamfara State Law No.5 of 2005 'Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in

The fact that the phrase 'human being' is used for both partners in the act here signifies that the act is still categorized as *zina* even if one of the partners is not a sexually matured person.[25] However, this position is not shared by other Māliki jurists like Ibn ʿArafat and Ashhab. As far as they are concerned, raping or luring a minor girl into sexual intercourse may not qualify as *zina* liable to *ḥadd* on the part of the manunless it is established that the girl is sexually matured.[26] The reason for this according to Ibn Abdul Ḥakam is that a person can only be a *muḥṣan* if he married and had intercourse with a sexually mature woman.[27]Therefore since an immature girl cannot make him a *muḥṣan,* in the same token *ḥadd* cannot apply. However, Ibn al-Qāsim opines that such act is liable to *ḥadd* on the part of the man even if the girl is five years old.[28] Thus, illicit sexual intercourse with a minor girl who is sexual immature is considered as rape which, in addition to the *ḥadd* punishment, the perpetrator will also be liable to the payment of *ṣadāq al-mithli*.[29] Ibn al-Qāsim's view appears more plausible for it gives protection to minor girls of all ages as rightly observed by Muḥammad Aḥmad Alīsh.[30] This must have motivated the drafters of the Sharia Penal Codes in Nigeria to incorporate Ibn al-Qāsim's view in the Code.[31]

3.0 Proving the Offence of Rape

The Maliki School appears to place more emphasis on sexual act, giving little or no wait to other adjoining acts, such as threat, act of violence and coercion against the victim that make the sexual intercourse possible. It is provided in such a way that once sexual activity is established to have against the will of the female victim, the culprit is regarded as having committed *zina* on his own part. His victim is however left free and unpunished for the act was not wilful on her own part. In addition to the criminal penalty, a civil element of payment of dower of her equal is also added.

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circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina'.*

[25]Alīsh, MA., op cit., p 247.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Malik, A., op. cit., vol.4, p.509

[30]Alīsh, MA., op cit., vol. 9 p.247.

[31]S. 127.(1) (e) of the Harmonised Sharia Penal Code, Zamfara State Law No. 5 of 2005 provides: 'A man is said to commit rape who, save in the case referred in subsection (2),has sexual intercourse with a woman in any of the following circumstances:

...

(e) with or without her consent, when she is under fifteen years of age or of unsound mind.'

The term *ightiṣāb* is derived from *ghaṣb,* which refers to seizing someone else's property wrongfully by force, and goes beyond land and other tangible items to include transgression against the honour and dignity.[32] Usually in *ghaṣb,* the item forcibly seized is returned to the owner and compensation is ordered if it is lost or destroyed. In the same token, *ightisāb* which is transgressing the honour of woman by having forcible sex with her entitles her claim monetary compensation.

Under the current paradigm, to entitle her to compensation, the woman must adduce evidence which Ibn al-Qāsim put as four witnesses. The view of the prominent Maliki jurist, Ibn al-Qāsim as reported by Asbagh suggests that rape is like *zina*, thus establishing it requires four male witnesses, failing which no punishment is inflicted on the perpetrator. Indeed, it is the same of proof that is required to enable her receive monetary compensation, i.e., *ṣadāq al-mithli.*[33]

قال أصبغ: سألت ابن القاسم فقلت له المغتصبة التي يجب لها الصداق على من اغتصبها هل يجب ذلك لها بشهادة رجلين؟ قال لي لا يجب ذلك عليه إلا بما يجب به الحدود، وذلك أربعة شهداء.

Asbagu said: I asked Ibn al-Qāsim about a victim of rape whether testimonies of two witnesses suffice to entitle to the dower of her equal *(ṣadāq al-mithli)*, and he said that volume of witnesses that will make the culprit liable to *ḥadd, i.e.,* fourwitnesses is what is required before she is entitled to the dower of her equal *(ṣadāq al-mithli)* for being violated.[34]

قال سحنون: قال ابن القاسم : لو شهد رجلان أنهما رأيا رجلاً اغتصب امرأة فأدخلها منزلاً وغاب عليها، وشهدا على ذلك. فادعت المرأة أنه أصابها وأنكر ذلك الرجل، حلفت المرأة مع شهادتهما واستوجبت الصداق صداق مثلها ولم يكن عليه في ذلك حد.

Suhnūn also reported Ibn al-Qāsim as arguing that the fact that two male witnesses saw a man eloped or went into hiding with a woman, who later claimed that the man had sexual intercourse with her but he denied, is not sufficient evidence to warrant penalizing him for the offence of rape. To entitle her to the dower of her equal *(ṣadāq al-mithli)*, in addition to the two

[32]Al-Sarakhsi, A., op. cit, vol. 11, p.49

[33]Ibn Rushd, M A., *Al-Bayānwa al-taḥṣīlwa al-Sharḥwa al-Tawjīhwa al-Ta'līl li Masā'il al-Mustakhrajah*, (Hajji, M., et al eds) (Beirut, Dār al-Ghurb al Islamī, 1988), vol.16, p. ٣١1.

[34]Ibid.

witnesses, she has to swear to an oath, but no penalty will be inflicted on the culprit.[35]

Interestingly, it is position of Ibn al-Qāsim that was adopted hook, line and sinker and incorporated into the Sharia penal codes of the eleven states in Northern Nigeria. For instance, to clear any doubt on proof of *zina* and rape the explanatory note to the Kano State Sharia Penal Code (KSSPC) is apposite and hence reproduced for emphasis.

"The conditions for proving the offences of *zina* (fornication or adultery) or rape in respect of a married person are as follows: (a) Islam; (b) maturity; (c) sanity; (d) liberty; (e) valid marriage; (f) consummation of the marriage; (g) four witnesses; or (h) confession. If any of the above conditions has not been proved by the person alleging *zina* or rape there is no punishment of stoning to death.

Of course, not all the Maliki jurists are with him on this. Other jurists accept other means of proof like evidence that he eloped with her for a period that sexual intercourse is possible, and the lady claimed he had sex with her, and that will entitle her to *ṣadāq al-mithli.*[36]

The implication of treating rape as a subset of *zina* as evident from the explanatory note of Kano State Sharia Penal Code cited has enormous consequences on rape victims and the society at large. It would simply mean that the court will seek high evidential requirement of four reliable witnesses from the rape victim, and such high evidential requirement is practically impossible even in consensual sexual intercourse. Being a forcible act, rape it is hardly committed where people can witness it. Therefore, if four witnesses are required for rape it is very easy for culprits to get away it by simple refusal to admit. Unfortunately, this position has received legal certification in the Sudanese case of ***Sudan Government v. Al-Sir Muhammad al-Sanussi.***[37] In that case, the conviction of the suspect, who was accused of raping a six year-old girl, was quashed by the Supreme Court of Sudan on ground of absence of definitive confession or testimony of four male reliable witnesses. This judgement was passed despite the medical evidence, the account of the victim, blood stain found on the suspect's clothes

[35]Ibid.

[36]Al-Tasūli, Ali b Abdussalām, *Al-BahjahSharḥ al-Tuḥfa* , (Dār al-Rashād al-Ḥadītha, 1991), vol. 2, p 673.

[37]*Sudan Government v. Al-Sir Muhammad al-Sanussi,* SC/CC/5/87.

and the identification of the suspect by the victim's playmates, among other things.[38]

Abdel Salam Sid Ahmed produced the fact of the case as follows:

> 'A man reported to the local police station the case of a six year-old girl whom he found lying unconscious nearby a football stadium with clear indications that she had been sexually assaulted. Authorized medical investigation confirmed that the six year-old child had indeed been raped. The police then launched an investigation which led to the arrest of the suspect al-Sir al-Sanussi on charges of raping a minor. It was revealed that the suspect had picked the victim who was playing with her siblings and other playmates in front of their house. Pretending that he wanted to buy her sweets, the suspect took the girl to a remote spot where he sexually assaulted her and left her unconscious. The Criminal Court found the suspect-al-Sir al-Sanussi guilty as charged on grounds of the compelling evidence gathered by the investigators which comprised:
>
> i. the medical evidence confirming that the victim had been raped;
>
> ii. the testimonial account of the victim which confirmed the events leading to her ordeal and corroborated other pieces of evidence collected from other witnesses who also pointed to the suspect;
>
> iii. the fact that the victim and her playmates easily recognized the suspect in an identity parade;
>
> iii. the fact that the blood stains which were found on the suspect's clothes belonged to the same blood group as that of the victim.[39]

Given the historical link between the Sudan Penal Code and the Sharia Penal Codes of the eleven Northern states, and the fact that both countries adhere to the Maliki School, it is certain this type of judgement is expected. If it is a

[38]Sidahmed, A., 'Problems in Contemporary Application of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women' vol. 28(2), 2001, *BritishJournalofMiddleEasternStudies,*pp187-204 at 200.
[39]Ibid, p. 199-200.

herculean task for an adult woman to establish a civil claim against her assailant, as discussed above what more of a minor girl. Of course, this principle may encourage paedophilic tendencies for people with penchant of having sex with minors. It may turn minor girls as easy preys, since a person is only punished when it is proved beyond doubt as per the high evidential requirement of four reliable witnesses. Besides, the *avalanche* of evidence as seen in Al-Sir Muhammad al-Sanussi will not make any difference. Little wonder, in some Northern states of Nigeria, suspects of rape would prefer to be arraigned and prosecuted before the Sharia Court knowing the impossibility of proving a rape case before that court. Notice that a rape case, if established before a High Court, carries a maximum sentence of life imprisonment or for any less term.[40]

As against the hard-line approach adopted by the Supreme court of Sudan in al-Sanussi's case, some jurists do not consider having sex with an immature child (*paedophilia),* who under normal circumstances is not engaged in sexual activity as sexual intercourse, per se. They characterise it as sexual assault that will not only require payment of *ṣadāq al-mithli* but other forms monetary compensation depending on the injury caused to her.[41]Such that the culprit is made to pay of the dower and monetary compensation (*diyah*), which can either be full or a fraction thereof. He is liable to full *diyah* when his action caused an injury to the girl leading to continuous involuntary discharge of urine. This is because his action has caused permanent destruction of an organ that is single. But where despite the injury caused, urine retention is still possible, he may be liable to one-third of full *diyah*, as stipulated compensation for injury extending to body cavity of the trunk (*jāʾifah*).[42] More importantly, they also stipulate that the culprit will be liable to *taʿazīr* for transgression. This allows the State to stipulate any penalty, including death penalty for any person found guilty of sexual assault against a child.

Of course, this approach would lessen the standard of proof having moved child sexual assault from the realm of *ḥudūd* to the *jināyāt (*bodily harm*)*. The justification for moving child sexual assault to the genre of bodily harm is the woman who possesses the venue (*maḥal*) that makes sexual intercourse possible. Therefore, lack of maturity eliminates one necessary element of the offence of *zina*. Hence, the exclusion of child sexual assault from the domain of *zina* to the class of *jināyāt*.

[40] See for instance section 283 the Penal Code of Kano state of Nigeria.

[41]Al-Sarakhsi, MA., vol. 9, p75-6.

[42] Ibid

4.0 Rape as Independent Offence: A Proposed Model

From the discussion above, child sexual assault may have been taking care of as an offence of bodily harm. What follows in this part is a discussion on justifications for a paradigm shift in the way the offence of rape is viewed generally. From the discussion above, it is obvious that unless consensual sex and rape are delinked by making the latter as an independent offence there will hardly be any conviction of suspected rapist on the strength of four reliable witnesses. What is proposed here is to consider rape as offence of violence against women, and is predicated on the fact that most of the prescriptions under the existing paradigm were principles developed by jurists (*fuqaha*) who only theorized but did not have practical knowledge, or may never witnessed any real case of rape and the agonies associated with it. The section will demonstrate, using what transpired during the formative stage of Islam, that jurists who doubled as judges like the Caliphs had viewed rape as independent offence with distinct means of proof.

Asifa Quraishi advances an opinion that an act of rape shall be viewed as a form of *ḥirābah* in which the accused used sexual organ as weapon to attack his victim. Quraishi's analysis of the opinions of jurists like Ibn Al-ʿArabi and Ibn Ḥazm suggests that rape is an independent offence and not a subset of *zina*.[43] Ibn Al-ʿArabi', a foremost Maliki jurist who was also a judge views rape as offence that is worse than armed robbery. A case was brought before the court of Ibn Al-ʿArabi in which a certain community was attacked by armed robbers and in the course of the attack a woman was raped. The contention of the suspected robbers was that their action was not robbery since they did not take anything but only raped the woman. Responding to this self-serving argument Ibn Al-ʿArabi rules:

أَلَمْ تَعْلَمُوا أَنَّ الْحِرَابَةَ فِي الْفُرُوجِ أَفْحَشُ مِنْهَا فِي الْأَمْوَالِ، وَأَنَّ النَّاسَ كُلَّهُمْ لَيَرْضَوْنَ أَنْ تَذْهَبَ أَمْوَالُهُمْ وَتُحْرَبَ مِنْ بَيْنِ أَيْدِيهِمْ وَلَا يُحْرَبُ الْمَرْءُ مِنْ زَوْجَتِهِ وَبِنْتِهِ، وَلَوْ كَانَ فَوْقَ مَا قَالَ اللَّهُ عُقُوبَةٌ لَكَانَتْ لِمَنْ يَسْلُبُ الْفُرُوجَ،

> 'Didn't you know that sexual robbery is much worse than robbing one of his property? Generally, people would prefer to lose their property and possessions than lose the dignity of their wives or daughters. Indeed, if there is any punishment higher than what

[43]Quraishi, A., 'Her Honour: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' vol. 18 No. 2, 1997, *Michigan Journal of International Law*, (Winter), pp 287-320 at p 316.

> Allah prescribed (in Q5: 33) it is most appropriate for the person who rapes women.'[44]

During the reign of ʿUmar b Khaṭṭāb, a case was brought before him of a lady who was in love with a certain young man. The lady did all she could to lure him to satisfy her sexual urge but the young man refused. She then deceitfully got a fresh egg, removed the yolk and poured the albumin on her thighs and clothes. She then went before Caliph ʿUmar and alleged that she had been raped by the young man. Caliph ʿUmar called on some women, who confirmed that the specimen was semen on her body and clothes. The Caliph sent for the man with a view to penalizing him, but he denied it, protesting that he did not rape the lady and that she had been making advances but he refused to do her wishes that is why she implicated him. ʿUmar b Khaṭṭāb then turned to ʿAli b Abī Ṭālib and sought for his opinion. On his part, ʿAli b Abī Ṭālib demanded for very hot water than reaches boiling point and poured the hot water on the lady's clothes only for the specimen there to coagulate. ʿAli then smelled and tasted it and found it was actually albumin of egg and not semen. When confronted with the evidence, the lady confessed.[45]Naturally, when albumin is boiled with hot water it coagulates and transformed to white.

What is evident from this *athar* is that it was a case of rape that was adjudicated by Caliph ʿUmar b Khaṭṭāb. The Caliph obviously did not ask the lady to produce four witnesses but resorted to *qarīnah* and expert opinion, and when it was given he sent for the young man with the view to punishing him. It was upon the man's denial that the Caliph then brought in ʿAli b Abī Ṭālib, who, in his own wisdom, did what in the modern world is referred to as forensic analysis. This analysis was what exculpated the young man, otherwise he would have been penalised. Another point worth noting is the fact that this incident was a real case brought before the Caliph and he invoked his judicial powers. Obviously, had the forensic analysis inculpated the young man the Caliph would have punished him.

Given the above incident, it is the position of this article that during the formative period of Islam rape was never classified as a subset of *zina* with equally the same evidential burden on the victim. Indeed, if the experiment conducted by ʿAli b Abī Ṭālib was anything to go by, then it is imperative to rethink the way rape cases are handled or proved. Unfortunately, such experiments are mostly classified as 'exhibition of wisdom by ʿAli b

[44] Ibn al-ʿArabi, MA.,*Aḥkām al-Qurʾān, (*Beirut: DārKutub al-ʿIlmiyyah, 2003), vol.2, p.95.

[45]Ibn al-Qayyim, MA.,*Al- Ṭuruq al Ḥukumiyyah,* 1st edition, (Beirut: Maṭbaʿat al Mu'ayyad, 1979), p.44.

AbīṬālib, hence scholars neglect to extract legal principles from them. It is pertinent to note that Prophet Muḥammad SAW had admonished the Muslim faithful to observe his Sunnah and the Sunnah of his rightly guided Caliphs after him.[46]

To further strengthen this position, there was a rape case reported during the lifetime of the Prophet Muḥammad SAW, as reported in the books of Aḥmad, Abū Dāud and Tirmidhi. A lady, on her way to the mosque, was attacked by somebody who blindfolded her and then had carnal knowledge of her and fled. A passer-by asked her what happened, and she explained to him and pointed at the direction the attacker followed, and he pursued the attacker. While looking for her attacker, a group of people met her, and they too joined in chasing the attacker. However, they mistakenly arrested the man who went in pursuit of the attacker. These people brought the man before the court of the Prophet Muhammad SAW, and the lady identified the man as her attacker. Upon hearing that the Prophet that he be put to death for raping the woman. Incidentally, the actual attacker who was present in the mosque stood up and surrendered himself and confessed that it was him that raped her and not the other man.[47]

عَنْ عَلْقَمَةَ بْنِ وَائِلٍ ، عَنْ أَبِيهِ قَالَ: خَرَجَتْ امْرَأَةٌ إِلَى الصَّلَاةِ فَلَقِيَهَا رَجُلٌ فَتَجَلَّلَهَا بِثِيَابِهِ فَقَضَى حَاجَتَهُ مِنْهَا، وَذَهَبَ وَانْتَهَى إِلَيْهَا رَجُلٌ فَقَالَتْ لَهُ: إِنَّ الرَّجُلَ فَعَلَ بِي كَذَا وَكَذَا. فَذَهَبَ الرَّجُلُ فِي طَلَبِهِ فَانْتَهَى إِلَيْهَا قَوْمٌ مِنَ الْأَنْصَارِ، فَوَقَفُوا عَلَيْهَا، فَقَالَتْ لَهُمْ: إِنَّ رَجُلًا فَعَلَ بِي كَذَا وَكَذَا. فَذَهَبُوا فِي طَلَبِهِ. فَجَاءُوا بِالرَّجُلِ الَّذِي ذَهَبَ فِي طَلَبِ الرَّجُلِ الَّذِي وَقَعَ عَلَيْهَا، فَذَهَبُوا بِهِ إِلَى النَّبِيِّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ، فَقَالَتْ: هُوَ هَذَا، فَلَمَّا أَمَرَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ بِرَجْمِهِ، قَالَ الَّذِي وَقَعَ عَلَيْهَا: يَا رَسُولَ اللَّهِ، أَنَا وَاللَّهِ هُوَ، فَقَالَ لِلْمَرْأَةِ: "اذْهَبِي فَقَدْ غَفَرَ اللَّهُ لَكِ" وَقَالَ لِلرَّجُلِ قَوْلًا حَسَنًا، فَقِيلَ: يَا نَبِيَّ اللَّهِ، أَلَا تَرْجُمُهُ، فَقَالَ: «لَقَدْ تَابَ تَوْبَةً لَوْ تَابَهَا أَهْلُ الْمَدِينَةِ لَقُبِلَ مِنْهُمْ" أخرجه أحمد (٤٥/ ٢١٣)٢٧٢٤٠ وأبو داود (٤٣٧٩) والترمذي) ١ / ٢٧٤).

From the foregoing hadith of the Prophet, the penalty for rape is clear, just as the means of proving it. Apart from the lady who was violated nobody witnessed the incident. Yet, as a pragmatic and practical person, the Prophet did not ask her to bring four witnesses before her story was believed. Her

[46]Abubakar, MU.,*Gender Justice in Islamic Law: Homicide and Bodily Injuries*, (Oxford: Hart Publishing, Bloomsbury Publishing Plc, 2018), p.38.

[47] See MultaqaAhlul Hadith https://www.ahlalhdeeth.com/vb/showthread.php?t=359791 last visited 29/06/2020

version and the fact that the arrest of the first man was contemporaneous with the fact in issue made the Prophet to give a verdict. The Prophet equally did not enquire about the marital status of either the first man or even the second one who actually confessed to committing the act. Interestingly also, in the earlier narration, no such enquiries were made by ʿUmar b Khaṭṭāb.

Analysis of scholars of Hadith suggests that the man that confessed was pardoned and not stoned. For instance, Muḥammad Nāṣiruddīn Albāni (1914 – 99 AD) is of the view that the man was pardoned by the Prophet.[48] However, other scholars believe otherwise, holding that the man was eventually stoned as the reports of Abū Dāud and Tirmidhi clearly showed that the Prophet ordered that the man be stoned. Bayhaqi further argued that the fact that the man repented will not absolve him from being punished just as the repentance of Mā'iz, al-Jahniyyah and al-Ghāmidiyyah did not prevent the Prophet SAW from meting out the punishment against them.[49] Furthermore, it is an established principle of law that once a case is established before a judge with concrete evidence the repentance of the suspect will not absolve him from punishment.[50]

It is therefore the position of this article that there are avalanche of authorities to justify a paradigm shift from the position of the Maliki School, which views the offence of rape as a variant of *zina* thereby placing impossible evidential burden on the prosecutrix. Rape should be viewed as independent offence of violence against women. The proof of it should be flexible enough to allow corroborative evidence in the form of expert evidence. This may provide an answer to our present predicaments or state of helplessness.

5.0 Conclusion

In the foregoing, the article examined the phenomenon of rape and the state of helplessness the Northern states, particularly those with entrenched Sharia penal regime finds themselves. The article identified the problem as legal in the sense that the Sharia Penal Codes enacted by these states incorporated position of Ibn al-Qāsim of Māliki School of thought which characterises rape as a variant of *zina* under the Hudud and Hudud related offences. The article found that it is only by severing or delinking rape from *zina* that the perpetrators of rape can be tackled, as that would mean the heavy evidential burden placed on the victims who have been lessened by allowing forensic evidence. It further showed that child sexual assault has since been severed

[48] Ibid., p.8
[49] Ibid., p.8.
[50] Ibid.

from the realm of *ḥudūd* to the *jināyāt (*bodily harm*)*, this transformation has provided a window within which the State can stipulate penalties, including death penalty for people who find pleasure in sexually assaulting children. It also demonstrated using real cases during the formative stage of Islam that the Prophet Muhammad SAW and his rightly guided Caliphs were pragmatic and practical in their approach to cases of rape. In view of this, the article proposed a paradigm shift from construing rape as sub-set of *zina* to making an independent offence with flexible means of proof.