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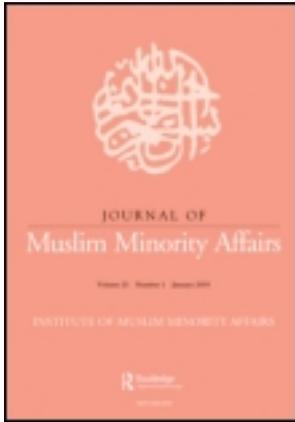
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Confession and Retraction: The Application of Islamic Legal Maxims in Safiyyatu and Amina's Cases in Northern Nigeria

LUQMAN ZAKARIYAH

Abstract

The legal procedural system of the Islamic law has been constructively or destructively mounted with criticisms. One of the reasons for these criticisms is assumingly based on the lack of incorporating the objective of the Islamic Law through "inter-textualizing" the textual evidences on one hand and failure to extrapolate all sources available for "dynamizing" the legal system of the Shari'ah (Islamic law) on the other. The criticisms that trailed Amina Lawal and Safiyyatu Husaini's cases in Nigeria are, in our opinion, based on the above phenomenon. "Islamic legal maxims" as a subject is one of the sciences which aphoristically subsume all the spectrums promoted by the Shari'ah. In Islamic jurisprudence, there are many legal maxims, including legal maxims of confession and retraction, on which the tenets of Islamic law are based. This article focuses on how these legal maxims can be explored to ensure justice in Islamic criminal procedures, as it is established that confession is recommendable in crimes that involve rights of men as opposed to crimes that involve rights of God, in which confession is detestable. Some of the questions raised in this article are; is it possible for someone to confess to a criminal act and to retract later? When is retraction of confession allowed in Islamic judiciary procedure? What is the effect of retraction? And in what offences can retraction avert the punishment assigned to the offence?

Introduction

Confession is defined technically as a piece of information given by a person to state his involvement in an alleged offence or to state that someone has a right on him.¹ This definition comprehends a civil right and criminal liability. Retraction is also defined as the act of taking or withdrawing a state of confession or renunciation.² Confession is one of the *prima facie* evidences to establish the liability of a criminal act, especially if the crime is of disclosure. In fact, it was believed to be the highest evidence of guilt.³ The culprit is said to be innocent until it is proved beyond any reasonable doubt that he/she is guilty of the alleged crime, *actori incumbit onus probandi*.⁴

However, to establish justice and at the same time to balance the right of the defendant and the offender, Islamic law enacts the legality of confession. There are many cases in which evidence can be somewhat unattainable. These cases could involve both the rights of God and men. In the right of God, confession may not be commendable as the right of God is based on forgiveness and is pardonable. However, in the rights of men, confession is seen as paramount and as an indispensable means of proof, especially where there is a deadlock of evidence. By confessing, the confessor is bound by it and retraction from it is only accepted in claims that absolutely involve the rights of God,

such as the claims of adultery and drinking, or those that are partly the rights of God and the rights of men, as it will be explained herein later. In the former, a dowry is mandatory while for the latter, compensation of the value of the stolen property is accorded to the plaintiff.⁵

The legality of confession is based on the Qur'an; the Hadith (the sayings of the Prophet); *'ijmaa'* (consensus); and *qiyaas* (analogy). For instance, the Qur'an says:

O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. . . And the witnesses should not refuse when they are called (for evidence). . . You should not be weary to write it (your contract), whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence. (Qur'an 2:282)

This Qur'anic verse is not only an evidence for the legality of confession but also an evidence for the acceptability of written confession or testimony in respect of others' rights in one's possession.

Also, there are quite a number of the Prophet's traditions on the legality of confession. One of such traditions is that reported about two companions of the Prophet, Ma'iz ibn Malik and al-Ghamidi who both confessed to adultery during the life of the Prophet and were punished on the basis of their confessions.⁶ According to the tradition narrated by Ibn Abbas, in order to ascertain that it was a true confession, the Prophet said to Ma'iz bin Malik: "Perhaps you only kissed or touched or looked at the woman" but he replied "No, O Allah's Messenger".⁷

There is no disagreement among Islamic scholars on the general acceptability and legality of confession. In the realm of *qiyaas*, scholars have argued that if the eye witnessing is acceptable under the law of evidence in the *Shari'ah*, then confession becomes even more acceptable. Moreover, it is irrational that someone would confess against himself when he is fully aware of the severe consequences of such confession.⁸ To eliminate the benefit of doubt in the validity of confession, Islam stipulates some conditions which are that the confessor must be a *baaligh* (i.e., one who has attained puberty), he must be sane and of sound mind. Thus, the confession of a minor, an insane person or a person who has been coerced is not valid. Moreover, the confessor must not be under suspicion in his confession and the statement of confession must be explicit. If someone is to confess to adultery, he must use the legal terms of adultery such as: "I had sexual intercourse with her" as opposed to "I slept with her"; and in the case of theft, he should confess thus: "I stole the man's property" and not "I took his property".⁹

However, it should be noted that by confessing involvement in an offensive act, the confessor thus accepts liability for the consequence of the offence. In the case of theft for instance, if one should confess that he stole someone else's property, such confession is an indication of readiness to accept liability and to return the property or face the consequence. This kind of evidence (i.e., confession) is the most highly proven before the court of law.

In Islamic jurisprudence, many maxims (*qawaa'id fihiyyah*) exist relating to confession. These are discussed under various headings in books of Islamic jurisprudence. In treating the cases of Safiyyatu and Amina which are the focus of this discourse, we will cite maxims, primarily from the ones included in the book of Islamic maxims while relating them to others mentioned in other books. Efforts shall also be made to present the maxims in such a way that will make for easy analyses.

Safiyatu Husaini and Amina Lawal's Cases

Safiyatu Husaini's case was one of the first adultery cases tested under the re-islamization of criminal law in Northern Nigeria. The accused was arraigned before the Upper Shariah Court Gwandabawa, in Sokoto State, Nigeria as the court of first instance based on the First information Report (F.I.R) given to the Police in which the accused was alleged to have had illegal sexual intercourse with her co-accused Yakubu Abubakar (referred to hereinafter as Yakubu). The Upper Shariah Court of Gwandabawa convicted her based on her confession and appearance of pregnancy and sentenced her to death by stoning on 9/10/2001 based on section 128 and 129 of the Sokoto State Sharia Penal Code Law 2000. In the case, it is said that the co-accused, Yakubu, denied the accusation and was therefore discharged and acquitted but Safiyatu confessed and pleaded guilty of the offence in the first instance.

The accused woman appealed against the judgment which was delivered on 9/10/2001 on the grounds that, *inter alia*, the Upper Sharia court took the admission/confession of the appellant without giving her the right of defense or bringing witnesses during the confession; and that the confession is not admissible by law as the appellant did not understand the charge, the details and essentials of the offence. However, on March 25, 2002, the Sharia Court of Appeal quashed the decision of the Upper Shariah court on the grounds of legal technicalities in which confession was one of them and the appellant was acquitted and discharged. I shall refer to the said accused hereinafter as Safiyatu.¹⁰

Amina Lawal's case was also one of the celebrity cases arraigned in the Sharia Court of Bakori, Kastina State of Nigeria in March 20, 2002 in which the accused was sentenced to death by stoning according to section 124 of the Kastina State Sharia Penal Code Law No 2 of 2001. It was reported that the accused person had been befriending Yahaya Muhammed (2nd accused) for 11 months with the aim of marriage but having sexual intercourse with each other before legal marriage which resulted in pregnancy and delivery of a baby girl. The 2nd accused denied the charges against him and was therefore discharged and acquitted but Amina was convicted based on her confession and other exhibits (a baby girl without legal marriage). Amina appealed against the judgment of the Sharia courts and on 25th September 2003, the Kastina State Sharia Court of Appeal quashed the decision of the lower courts and acquitted Amina of the charges based on the errors in the procedure of the lower court. One of the errors is the legality of her confession on which the conviction was based. It is argued that Amina was misled into confession of her guilt, which is deemed as involuntary confession in Islamic law. In this article I will refer to her as Amina.¹¹

From the above citations, the following points become clear:

- Firstly, according to the courts of the first instance, both Safiyah and Amina confessed to the alleged crime of adultery. They were consequently convicted based on their confessions and proof of pregnancy in the case of Safiyah and a baby in the case of Amina.
- Secondly, Yakubu AbuBakar and Yahya Muhammad who were the co-accused of Safiyah and Amina, respectively, both denied the allegation. They were consequently discharged and acquitted based on their denial.
- Thirdly, both Safiyah and Amina later appealed against the judgment of the court of the first instance by retracting their confession in the Courts of appeal.

- Fourthly, their appeal was upheld on the ground that Safiyyah was not properly made to understand the charge made against her and that she was not given the right of defense or bringing witness during the confession. And, in the case of Amina, it is argued that she was misled into confession of her guilt, which is deemed as involuntary confession in Islamic law.

Appraisal of Safiyyatu and Amina's Cases

In the following discussion, using Islamic legal maxims as our reference point, we are going to do an appraisal of the judgments delivered by the two courts of first instance in which both Safiyyatu and Amina were convicted while Yakubu and Yahya were discharged and acquitted; and that of the courts of appeal that allowed the retraction of Safiyyatu and Amina's confessions and discharged and acquitted them.

Conviction Based on Confession

On Safiyyatu and Amina's conviction by the law courts of first instance and discharge of Yakubu and Yahya, the judgments find support in the maxim which says: *al-Mar' mu'aa-khadh bi 'iqraarihi* (translation: One is held responsible for one's confession).¹² This maxim gives effectiveness to confession in Islamic Law. As confession stands as evidence and a way of testimony in the court, it is assumed that the confessor is being truthful with regard to what actually happened. For that reason, he is bound by his own admission. This admission is, however, not transferable to any other accused. For instance, if two persons or more were being accused of murder and in the first instance, all of them denied the charge but one of them, without any duress or circumstance beyond his capacity, later came forward and confessed his involvement in the crime and stated that the offence was actually committed by him and some other people. In such a case, he would be liable based on his confession, whereas the other co-accused would not be convicted based on his confession until some other proof emerged to establish their involvement. However, if the offence is adultery and he confessed his and others' involvement in it but if later, his incrimination of the others was found to be untrue, or there is no sufficient required proof, he would be punished for the said offence and also for the offence of *qadhif* (i.e., false accusation of the unchaste).

One of the reasons for convicting Safiyyatu and Amina by the Sokoto and Kastina law courts in the first instance was that the accused both confessed to committing the alleged crime of adultery; and since confession is not transferable, both Yakubu and Yahya who denied the allegation could not be convicted for an alleged crime they did not confess to. Only the confessor will be liable for his or her confession.

Confession made Under Duress

Another issue that needs to be given consideration regarding Safiyyatu and Amina's conviction is the situation surrounding their confession: What were the procedural grounds for their confession? Did they make the confessions under duress or not? If yes, what is the legal implication of confession made under duress?

The legal maxim that says: *al-'Ikraah yamna' sihah al-'iqraar* (translation: coercion prevents the validity of confession)¹³ is of apt reference here. In Islamic law, there is unanimous agreement among jurists that a faithful person should not be subjected to coercion whatsoever. It is however generally agreed upon that a healthy confession

made without force, or any other unusual condition, shall be accepted. In other words, confession must be voluntary and must have been obtained under good felicity in which it could not reasonably be considered as rendering it untrustworthy.¹⁴

However, if a confession is made under coercion and by any other means of compulsion, scholars differ on the acceptability of that kind of confession as proof in a law court. While a few jurists hold the view that confession in any case, whether voluntary or involuntary, should be accepted, the majority of scholars do not accept confession made under duress.

The jurists in the first category base their argument on the case of the woman who Hatib bn 'Abi Balta'ah sent to the pagans of Makkah with a letter. Reports have it that the woman was forced to produce the letter after she had denied being in possession of the letter. The other category of jurists who hold the view that confession should be made voluntarily and that any confession subject to coercion, duress or any conditional force is invalid, however argue that the evidence that the woman carried a letter was a divine revelation from God to His messenger. This revelation cannot be denied by any human being and is accepted by all faithful Muslims. That is why those to whom the Prophet sent to her had to take all measures to secure the fact.

To validate their position that confession should not be extracted by coercion, references are made to Qur'anic verses, statements of the Prophet and logical arguments. The Qur'anic verse cited by these jurists to establish their position is where God says in the Qur'an:

Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with faith. (Qur'an 16:108)

Al-Shirbini in his commentary on this verse argues that if an utterance made under compulsion is not regarded as a nullification of one's faith, then the same is applicable to confession made under coercion.¹⁵ It is equally unanimously agreed upon by scholars that any false witness is unacceptable in establishing fact, thus a confession made under compulsion should not be considered as it could be false.¹⁶ The Hadith reference upon which the jurists base their submission is the one in which the Prophet said:

God will ignore what men think in their minds to do till they do it or talk about it and also He will leave out of the reckoning of man's acts under compulsion.¹⁷

The Hadith categorically dismisses any act of compulsion. According to a report, Umar Ibn Khatab dismissed a confession extracted from coercion. He is reported to have said:

A person would not be secure from incriminating himself if you made him hungry, frightened him or confined him.¹⁸

'Abdullah Ibn 'Umar also rejected the confession of a man who was accused of theft and was beaten until he confessed.¹⁹ Thus, based on these reports, any confession made under coercion shall not be accepted.

From a logical perspective, confession is regarded as one of the valid forms of evidence that should not proportionally contain errors, if it is based on the natural will of the confessor. However, if it is based on coercion, there is high probability that the confessor may lie, which will not serve the purpose it is meant for.

The only situation, the jurists further explain, where confession could be obtained by force is if the accused person is known to be a disreputable person and there are other circumstantial evidence(s) to prove his/her involvement in the alleged crime. They however brand this measure as "injustice similar to justice".²⁰

Conventionally, the right to fair trial is guaranteed under Islamic law and emphasized under the International Human Right Convention. Article 14 (3) (g) of the International Covenant on Civil and Political Rights (ICCPR) states thus:

In determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality; (g) Not to be compelled to testify against himself or to confess guilt.²¹

Thus, no one should be subjected to torture or cruelty during criminal investigation. In other words, use of torture, in any case, contradicts not only common law, but also all civilized laws.²² It is relevant to observe that the notion of rejecting involuntary confession was first introduced in English law in 1783.²³ The first case, in which voluntary confession requirement was referred to, was that of *White v. R* (1741).²⁴ In his case it was remarked that his confession was extorted by threat or drawn from him through promise.

In the case under examination, the reports of the courts of appeal argue that during the police investigation of the reported cases by those who saw Safiyyatu and Amina impregnated outside wedlock, there is no evidence to show that due process was followed to ensure that the two accused women were not intimidated before they made confession to the alleged crime. It is also argued that suspecting them of such a crime by a third party is considered to be an act of prying in people's personal affairs which is regarded as another crime in Islamic law.²⁵ In addition, it is claimed that the police and the trial courts failed to consider all the requirements of confession such as; full confessional statement and the state of the confessor; whether she was sane or she had any legal impediment.²⁶

In our opinion therefore, the first procedural error that led to their confessions was that someone reported the case to the police, although within the statute regarding the crime of adultery, concealment is recommended. It is reported by Ibn Umar that God's messenger said: "Avoid these filthy things which God SWT has forbidden, and if anyone commits any of them he should conceal himself with God's most High veil and turn to God in repentance..."²⁷

The Benefit of Doubt

Under the Islamic Law, if someone confesses to the crime of adultery, the benefit of doubt should be given. This is perfectly in line with the legal maxim that says: *al-'asl baraa' al-dhimmah*—the fundamental principle is freedom of liability or: *al-'asl al-'adam*—the fundamental principle is the non-existence of something.²⁸ When all the cases of adultery decided upon by the Prophet are considered, it would be seen that they were based on voluntary confession, rather than imposition or enforcement.

It is reported by the authority of Imran Ibn Husain that a woman of Juhaina (tribe) came to the Prophet when she was pregnant due to fornication, and said, "O God's messenger I have committed something for which a prescribed punishment is due, so execute it on me." God's messenger called her guardian and said, "Treat her well and when she delivers bring her to me".

It is also reported in the Hadith of Abu Hurayrah that a man among a group of Muslims came to the Prophet in the mosque and called, "O God's messenger I have committed adultery." The Prophet turned away from him. The man confessed to that four times and when four people witnessed his claim, the Prophet asked him, "Are you an insane?" The man replied, "No", and then the Prophet

asked him, "Have you been married before?" He replied, "Yes", and then the Prophet ordered him to be stoned.²⁹

From the two traditions, it is clear that in such situations, it is the right of the confessor to be given the benefit of the doubt and it is the responsibility of the judge not to admit the confession in the first instance. This procedure is recognized and observed in the ICCPR article 14 (3) (a) which stipulates that the confessor should be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. This is to give the suspect, especially in crimes that solely involve rights of God, a clear picture of the nature of the charge so that he/she is not at all in doubt of the charge;³⁰ and to also give him/her the opportunity to think deeply on the consequence of his/her action (i.e., confession) and perhaps he/she may change his/her mind. Also Article 14(3) (b) gives the accused the right of defense: and to communicate with a counsel of his choice who is only to aid him in his defense. In this regard, the Supreme Court of New Jersey remarks thus: "A person is only entitled to counsel to aid him in his defense, not to save him from his own voluntary act".³¹

From the foregoing discussion, it becomes clear that the confessor has the right to be informed clearly of the implication and consequences of the confession and that opportunity should be given to reflect on the action and if need be, retract the confession. Thus by implication, one who confesses to the crime of adultery is not to be interrogated.

According to the reports of the courts of appeal on Safiyatu and Amina's cases, these procedures were not followed by the courts of first instance that pronounced the death sentence on them. And, it was on that basis that they called for the retraction of their earlier confession at the courts of appeal when they were properly enlightened as to the consequences of their actions.

Retraction of Confession

Retraction of confession is one interesting issue deliberated upon by jurists under the rule of confession in Islamic criminal law. It emphasizes the importance of establishing criminal justice in Islam to protect the rights of victims, and at the same time to prevent inflicting severe punishment on an innocent accused. In the realm of confession and its retraction, it is fundamentally important to identify the nature of the crime and the punishment accorded to it. In doing so, it will be easy to decide whether retraction is allowed or not and when is it allowed.

By looking into the nature of the liability involved, crimes are divided into three categories as follows:

(1) Crimes that solely involve rights of man

Crimes that solely involve the violation of the right of man (*haqq al-'aadami*) include murder, defamation and rape. In the category of these kinds of crimes, the victim or his relatives may pardon the culprit, and this pardon will be effective. Regarding this, the jurists unanimously agreed that, once a confession is made in such a sensitive case, the culprit has no right of retraction even if the confession is made out of his free-will without any force and all requirements are met. The Islamic legal maxim in respect of this is: *al-'iqraar fii huquuq al-'ibaad laa yahtamil al-ruuju*—Retraction of confession is not allowed in rights of men.³²

The reason why this is so is because if retraction were to be allowed in such instances, it would ultimately lead to prejudice against people's rights and justice would not be established.³³ For example, if someone confessed that he had killed another person and later

retracted his confession, his retraction would not be heard because of the right of the individual involved and the acceptability of retraction in such a situation would jeopardize criminal liability.

(2) *Crimes that solely involve rights of God*

Crimes that solely involve the violation of the right of God (*haqq Allah*) are exemplified as adultery and intoxication. There is disagreement among scholars on the acceptability of retraction in this category. Most scholars approve of the retraction of confession if the crimes solely involve the violation of the rights of God. They argue that:

- When Ma'iz ibn Malik came to the Prophet confessing his commission of adultery, the Prophet said to him: "Probably you only kissed (the lady) or winked or looked at her!" He replied, "No, O God's apostle!"³⁴ It can be inferred from the Prophet's question that HE meant to give Ma'iz a chance of retracting his confession.³⁵
- When Ma'iz fled and was caught and stoned to death, the Prophet was reported to have said: "Why didn't you leave him? Perhaps he may repent and God will forgive him".³⁶ This comment from the Prophet denotes that repentance made after a confession stands as a retraction.
- Because confession is an information that involves truth and falsehood, for a person to retract shows the contrary which raises doubt, while the *Shari'ah* principle is to avert capital punishment (*hadd*) if doubt exists.³⁷ Ibn 'Abd al-Barr (d. 463) reports that there is consensus among Islamic jurists on the invalidity of a confession or testimony that has been retracted in any capital (*huduud*) punishment.³⁸

Another opinion claims that when a crime that solely involves the violation of the right of God is confessed to, then retraction is not accepted. They claim that:

- If retraction is allowed, the companion must have been ordered by the Prophet to pay *diyyah* compensation for the killing of Mu'iz. Thus, the absence of such judgment indicates that retracting a confession in such an instance is not acceptable.³⁹
- It is reported by 'Abu Hurayrah that a man accused a woman of committing adultery with his son. The Prophet said to Unays: "O Unays, go to this woman in the morning and if she makes a confession then stone her".⁴⁰ It is canvassed that if a retraction is accepted, the Prophet must have explained that to Unays, as there is probability that the woman might want to retract her confession.
- If retraction is not allowed in the crimes involving man's right, then logically it should not be allowed in the crimes involving the right of God.⁴¹

However, it can be said that the argument for the latter opinion is by no means unacceptable, as in the first claim the Prophet must have asked them to pay *diyyah*. However, the Prophet did not ask them because Ma'iz had not made clear his retraction and, as such, we cannot assume that his running away from the punishment denotes his retraction. In the second claim, there is a probability that the Prophet did not tell him about the retraction as he might have known all the conditions relating to confession, including that of retraction.

The last claim can be rebutted on the basis that the two rights are very different in principle. The right of God is based on forgiveness and remission, while the right of man is

based on contention. Therefore, in the right of God, one can escape its punishment by means of repentance and forgiveness from God, while in the right of man an effort must be made to balance justice among mankind. Furthermore, one is not obliged to make a confession in any crime involving the right of God, as opposed to the right of man, in which a confession is favorably required.⁴²

In the case of Safiyyatu, it is argued that she retracted her confession and thus she should have been acquitted on that ground. However, the retraction of Safiyyatu is said to have been made not by herself, but by her legal representative.⁴³ Based on that, her retraction was undermined in the first instance. Moreover, the State counsel argued that the retraction of a confession can only be made in the case of *qisaas*, according to section 166 and 188, (1), (2) of Sokoto State Sharia Penal Codes (SSPC). But this is not true. According to the maxim above, retraction is only unacceptable in cases that involve man's right, and the case in question is the absolute right of God.

(3) Crimes that involve both rights of God and rights of man

Examples of crimes that can be classified as involving the rights of both God and man are the crimes of defamation and theft. Due to the disagreement on the legality of retracting confession in the categories discussed above, there is a slight disagreement as to whether retraction is allowed in crimes involving both the right of God and the right of man. This disagreement could be summarized as follows:

If retraction is made in a crime involving both rights, the *hadd* punishment should be dropped. This is because of the *shubhah* (ambiguity) that beclouds it. But the right of man should be claimed back from the confessor if it can be established that his confession was made when he was of sound mind, and that the confession was not extracted by means of force.

According to the majority of Islamic scholars, if someone confesses to defamation the punishment due for the crime must be meted out and no retraction should be accepted. This is because the right of man prevails in that crime. However, if the accused confesses to theft and later retracts the confession, it is agreed that the punishment will be dropped, not only because it is the right of God, but also because that retraction has constituted *shubhah* (doubt) in that confession, and thus the accused cannot be justly convicted. However, the right of man that is involved in this matter has to be reclaimed from the confessor, because the right of man cannot be undermined and, as the confessor was not forced to confess, he is thus responsible for the claim.⁴⁴

On Whom is Confession Bound?

Another important issue which we have *albeit* touched briefly when treating the first maxim is the effect of confession which we are bounding only on the confessor. A maxim to that effect says: *al-'iqraar hujjah qaasirah* (translation: confession is intransitive evidence).⁴⁵ In a criminal investigation where two people are accused, one may inculpate himself by confessing to the alleged crime. He may also inculpate his co-accused or exculpate himself and inculpate the other accused. The basic and conventional rule stands that confession is only held against the confessor.⁴⁶ This means that if someone confessed on himself and on another, the effect would be given to the confessor alone, and not on the co-accused. This is because the evidence of a confession is supposed to be made voluntarily, but obviously this is not so in the case of the co-accused. For example, if someone admitted to killing someone but claimed that another person was involved in it, his confession will be effective on him, but not on the alleged co-accused. However, the co-accused may be found guilty in the case from

another source of evidence but not by the alleged confession forced on him by the other party.⁴⁷

This maxim has been observed in the case of Safiyyatu and Amina and their co-accused (Yakubu and Yahya, respectively) in which the Shariah courts turned down the alleged accusation of Safiyyatu and Amina that Yakubu and Yahya, respectively, were responsible for their pregnancies and thus Yakubu and Yahya were acquitted.⁴⁸ Although it could be argued that since the prime accused (Safiyyatu and Amina) implicated another party in this same accusation, it is the right of the authority to summon the co-accused and investigate the allegation thoroughly. Reports have it that the authority did summon Yakubu and Yahya regarding the allegation, but they both denied it.⁴⁹ It is however our contention that the authority failed to carry out enough thorough investigation to determine the truth of their denial.

Another way of turning the case to balance the equation is to regard the matter as one involving *shubhah* (doubt) and thus a *huduud* punishment can be averted. This is because in the crime of adultery, as pointed out earlier, a single person cannot commit such a crime. This is one of the reasons why the Qur'an mentions both genders when prescribing the punishment, although it can be said that a confessor of adultery during the period of the Prophet was punished on his own, without any questioning of his co-accused. This indicates that a single person can be punished for adultery. Of course, Mu'iz and al-Ghamidi were punished on their own, and the Prophet did not question their co-accused as they had already voluntarily confessed and did not allege that anyone else was involved. Thus, their cases are quite different from the case of Safiyyatu and Yakubu and that of Amina and Yahya in which case the authority should have carried out further and thorough investigation.

Conclusion

Using the Islamic legal maxims relating to confession and retraction in Islamic criminal law as its reference point, this article has appraised the celebrated cases of Safiyyatu and Amina which were decided in Sokoto and Kastina States of Northern Nigeria, respectively. In this article, it is established that confession is recommendable in crimes that involve rights of men as opposed to crimes that involve rights of God in which confession is detestable. This is because, in the right of God, there is the notion of forgiveness and remission, while in the rights of men, there is the notion of contention. Before retraction could be made in any healthy confession, the right of the one to whom the confession is attached should be clarified. If the right attached to the confession is solely of men, retraction would not be allowed. This is to protect the rights of men from being exploited. However, if confession is attached to the rights of God, retraction is allowed even at the last minutes of the execution.

In the case of Safiyyatu and Amina, the confession was doubtful because of the alleged retractions made by the confessors/representatives. This rendered the prescribed punishment to be averted in line with the maxim that says "*al-huduud tudra' bi al-shubhaat* (capital punishments should be averted where there exists even an iota of doubt). Though there were arguments that the retractions were made by the accused's representatives, we however wish to argue that that would still not undermine the rights of defense guaranteed for the accused under the Islamic law.

Because of the legal technicalities involved as extensively discussed above, the two cases eventually won appeal and the two women were acquitted of the alleged crimes.

It is therefore suggested that before any crime of this nature is arraigned before any Islamic law court in any Islamic State where the Islamic penal law is in force, all the Islamic legal techniques should be explored to ensure that the spirit of Islamic law is observed and justice is carried out. The Islamic States should see this as a paramount responsibility in order to protect the image of Islam and not subject it to ridicule in the hands of its antagonists.

NOTES

1. Muhammad al-Raazii, *Mukhtaar al-Sihah*, ed. Muhammad Khaatir, Lebanon: Maktabat al-Lubnaan, 1995/1415, p. 529; Ahmad Muhammad al-Fayyuumii, *al-Musbaah al-Muniir*, Beirut: Maktabat al-'Ilmiyyah, Vol. 2, p. 681; Muhammad al-Fayruusabaadii, *al-Qaamuus al-Muhiit*, Beirut: Mu'assasat al-Risaalah, n.d. p. 593; Ibn Farhuun, Ibrahiim Ibn Ali, *Tabsirat al-Hukkaam fii Usuul al-Aqdiyah wa manaahij al-'ahkaam*, Beirut: Daar al-Kutub al-'Ilmiyyah and al-Amiriyyah Press, 1301 H, Vol. 2, p. 53. Cf. Fred Kaufman, *The Admissibility of Confession*, 3rd edition, Toronto, Canada: Carswell Company Limited, 1979, pp. 4–5.
2. Brayan A. Garner (ed.), *Black's Law Dictionary*, 8th edition, USA: Thomson West Group, 1999, p. 1342; Early Jowitt and Clifford Welsh, *Jowitt's Dictionary of English Law*, 2nd, London: Sweet and Maxwell Limited, 1997, Vol. 2, p. 1573.
3. Peter Mirfield, *Confession*, London: Sweet and Maxwell, 1985, p. 49.
4. Islamic Law emphasizes on this principle under the doctrine of *istisnaab* (presumption of continuity) See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, Malaysia: Ilmiah Publishers, 2000, pp. 297–309; Mashood Baderin, *International—Human Rights and Islamic Law*, Oxford: Oxford University Press, 2003, p. 103.
5. Abdullah Ibn Ahmad Ibn Qudaamah, *al-Mughni li Ibn Qudaamah*, eds Abdullah al-Turki and Abdu al-Fattah al-Hilu, Riyadh: Daar Alam al-Kutub, 1999, Vol. 5, p. 164; I.A. Ibn Farhuun, *Tabsirat*, *op. cit.*, Vol. 2, p. 54.
6. See note on the Hadith of Ma'iz in Muhammad Ibn Abdullah al-Naysaburi, *al-Mustadrak alaa Sahiihayn*, ed. Mustafa A. Ata, Beirut: Daar al-Kutub al-'Ilmiyyah 1990/1411, Vol. 4, p. 402, Hadith No. 8077 and Ghamidi in Muslim, *Kitaab Sahiih Muslim*, n.p., n.d., Hadith no 1695.
7. al-Bukhari, Abu Abdullah, Muhammad Ibn Isma'id, *Kitaab Sahiih al-Bukhaari* n.p. n.d. Hadith no. 6438 and Muslim, *Sahiih op. cit.*, Hadith no 1695 (Muslim narration contains the story of al-Ghamidiyyah who came to the Prophet confessing her adulterous act.
8. Muhammad Siddiq Ibn Ahmad al-Barnu, *Mawsuu'at al-qawaa'id al-fiqhiyyah*, (encyclopaedia of Islamic Legal Maxims), n.p., 1416 A.H., Vol. 2, p. 227.
9. *Op. cit.*, Ibn Qudamah, *Mughni*, Vol. 5, p. 149; Abu Bakr Ibn Mas'uud al-Kasaani, *Badaa'i al-Sanaa'i* Beirut: Daar al-Kutub al-'Ilmiyyah, 1997/1418, Vol. 7, p. 222; Abdul Karim Zaydan, *Nizaam al-qadaa fi al-Sharii'ah al-Islamiyyah* (Judicial Procedure in Islamic Law), Baghdad: Matba'at al-'Ayni, 1404 A.H., p. 157.
10. Muhammed Tawfiq Ladan, *A Handbook on Sharia Implementation in Northern Nigeria: Women and Children's Rights Focus*, Kaduna, Nigeria: League of Democratic Women-Leads-Nigeria, 2005, pp. 107–116; A.M. Yawuri, "Issues in defending Safiyyatu Husseini and Amina Lawal" in *Sharia Penal and Family Laws in Nigeria and in the Muslim World*, ed. Jibrin Ibrahim, ABU Nigeria: Ahmad Bello University Press Limited, 2004, pp. 183–204; P. Rudolph, "The Re-Islamization of Criminal Law in Northern Nigeria and the Judiciary: The Safiyyatu Husaini Case" in *Dispensing Justice in Islam Qadis and Their Judgments*, eds Muhammad Khalid Masud, et al., Leiden-Boston: Brill, 2006, pp. 219–241.
11. See the details of the two cases in A.M. Yawuri, "Issues in defending Safiyyatu Husseini and Amina, *op. cit.*, pp. 183–204; P. Rudolph, "The Re-Islamization of Criminal Law, *op. cit.*, pp. 219–241; M.T. Ladan, *A Handbook on Sharia*, *op. cit.*, pp. 117–120.
12. Ali Haydar, *Durar al-Hukkaam Sharh Majallat al-Ahkaam*, ed. Fahmi al-Husayni, Beirut: Daar al-Kutub al-'Ilmiyyah, n.d., Vol. 1, p. 70; Ibn Hajar al-Asqalaanii, *Fath al-Baari Sharh Sahiih al-Bukhaari*, ed. Muhibddin al-Khatiih, Beirut: Daar al-Marifah n.d., Vol. 8, p. 476; Ahmad Ibn Shaykh al-Zarqa, *Sharh al-Qawaa'id al-Fiqhiyyah*, 4th edition, Damascus: Daar al-Qalam, 1996/1417, p. 401, and similar codification in Abdul Rahman al-Suyuuti, *al-Ashbaa' wa al-Nazaa'ir* Beirut: Daar al-Kutub al-'Ilmiyyah, 1403 A.H., p. 464.

13. Ibn Amir al-Haaj, *al-Taqrir wa al-Tahbiir*, Beirut: Daar al-Fikr, 1996/1417, Vol. 2, p. 42; cf. Ahmad al-Nafraawii, *al-Fawaakih al-Daani*, Beirut: Daar al-Fikr, 1415, Vol. 2, p. 178.
14. F.F. Inban and J.E. Reid, *Criminal interrogation and Confession*, Baltimore, USA: The Williams and Wilkins Company, 1967, p. 143.
15. Muhammad al-Shiribini, *Mughni al-Muhtaj*, Beirut: Daar al-Fikr, n.d., Vol. 2, pp. 240–241.
16. Al-Kasaani, *Bada'i' op. cit.*, Vol. 7, p. 223.
17. Ibn Majah, Muhammad Ibn Yazid, *Sunan Ibn Maajah*, ed. Muhammad Fu'ad 'Abdu al-Baqi, Beirut: Dar al-Fikr, n.d. Hadith No. 2043; cf. al-Bukhari, *Sahih op. cit.*, Hadith No. 4968.
18. O.A. Al-Saleh, "The Rights of the Individual to Personal Security in Islam", in *The Islamic Criminal Justice System*, ed. M.C. Bassiouni, New York: Oceana Publications, 1982, p. 73.
19. M. Baderin, *International Human Rights, op. cit.*, p. 108; M.M. Salama, "General Principles of Criminal Evidence in Islamic Jurisprudence", in *The Islamic Criminal Justice System, op. cit.*, pp. 119–120.
20. See M.A. Baderin, *op. cit.*
21. International covenant on Civil and Political rights, (ICCPR) Article 14 (3) (g), retrieved from: <http://www2.ohchr.org/English/law/ccpr.htm#art14>, accessed last 5/03/2009
22. P. Mirfield, *op. cit.*, p. 45.
23. *Ibid.*, p. 42, Satnam Choongh, *Policing as Social Discipline*, Oxford: Clarendon Press, 1997, p. 6.
24. White (1741) 17, How. St. Tr. 1079 White was tried for murder in which it appeared that the contents of White's examination before the Mayor of Bristol included confession. The counsel for White sought for the details of the confession whether it was made voluntarily or not. The Recorder of Bristol refused to do so on the ground that White did not make it part of his case. In his case, it was remarked that his confession was extorted by threat or drawn from him by promise. See P. Mirfield, *ibid.*, p. 42.
25. Tawfiq Ibrahim Ladan, trans., Women's Aid Collective, *Safiyatu's Case*, n.p. 2003.
26. See P. Rudolph, "The Re-Islamization of Criminal Law", *op. cit.*, p. 233; O.M. Opeleye, *The Sustainability of Shariah in a pluralistic and democratic Nigeria*, a 5th faculty of Arts Guest Lecture Series, Lagos State University, Nigeria, 24th August 2005, p. 20.
27. Ibn Hajar Ahmad Ibn Ali, al-'Asqalaani, *Bulugh al-Maram* translated, Riyadh Saudi Arabia: Dar us-Salaam Arabia Dar us-Salaam Publications, 1996/1416, Hadith no. 1048.
28. Al-Suyuti, *al-Ashbaa' op. cit.*, p. 52, Ibn Nujaym Zayn al-'Abidin Ibn Ibrahim, *al-Ashbaa' wa la-Naza'ir 'Ala madhhab Abi Hanifah al-Nu'man*, Beirut: Daru al-Kutub al-'Ilmiyyah, 1993/1413 p. 59; C.R. Tyser, et al. (trans) *The Mejelle*, being English Translation of Majallahel-Ahkam-l-Adliya and a complete code on Islamic civil law, Lahore: Punjab Educational Press, 1967, article 8.
29. Al-Bukhari, *Sahih, op. cit.*, Hadith no 6747; Muslim, *Sahih, op. cit.*, Hadith no. 1691.
30. M.A. Baderin, *International Human Rights, op. cit.*, p. 104.
31. *State v. Bunk 4 N.J. 461, 73 A. 2d 249* (1950) quoted in F.E. Inban and J.E. Reid, *Criminal interrogation and Confession, op. cit.*
32. Al-Kasaani, *Badaa'i', op. cit.*, Vol. 7, pp. 216–233.
33. Al-Kasaani, *ibid.*, p. 61, al-Ramali, *Nihaayah*, Beirut: Daar al-Fikr 1984/1404, Vol. 7, p. 431; Ibn Qudamah *al-Mughni, op. cit.*, Vol. 5, p. 288; al-Sarkhasi, *al-Mabsuut*, Beirut: Daar al-Ma'rifah, n.d., Vol. 17, p. 189.
34. M. al-Naysaburi, *al-Mustadrak, op. cit.*, Vol. 4, p. 402, Hadith No. 8077.
35. al-Kasaani, *Badaa'i', op. cit.*, p. 233; al-Shiribiini, *Mughni al-muhtaj, op. cit.*, Vol. 4, p. 150.
36. Al-Nasaai, *Sunan, op. cit.*, Hadith No. 7207.
37. Al-Sarkhasi, *al-Mabsuut, op. cit.*, Vol. 9, p. 49; Mansur Ibn Yunus Al-Bahuti, *Kashshaaf al-Qinaa 'An Matn al-Iqnaa'*, ed. Hilal Muslihi Hilal, Beirut: Daar al-Fikr 1402 A.H., Vol. 6, p. 85; Muhammad Ibn Abdul-Wahid Ibn al-Humam, *Fath al-Qadiir Sharh al-Hidaayah*, Cairo: al-'Amiriyah Press, 1336 A.H., Vol. 5, p. 408.
38. Ibn Abdu al-Barr, *al-Istidhkaar*, ed. Salim M. Ata, Beirut: Daar al-Kutub al-Ilmiyyah, 2000, Vol. 7, p. 503.
39. Ibn Qudamah, *al-Mughni, op. cit.*, Vol. 10, p. 167.
40. Al-Bukhari, *Sahih, op. cit.*, Hadith No. 2190; Muslim *Sahih, op. cit.*, Hadith No. 1697.
41. Al-Sarkhasi, *al-Mabsuut, op. cit.*, Vol. 9, p. 49.
42. Al-Maawaridi, *al-Haawi al-Kabiir* (n.p., n.d), Vol. 13, pp. 210–211.
43. P. Rudolph, "The Re-Islamization", *op. cit.*, pp. 235–237.
44. Ibrahim Ibn Muhammad Ibn Muflih, *al-Mubdi' Sharh al-Muqni'*, Beirut: Daar al-Maktab al-Islami, 1400 A.H., Vol. 10, p. 368; al-Kasaani, *Badaa'i', op. cit.*, Vol. 7, pp. 232–234.

45. Ibn Nujaym, *al-Ashbaa'*, *op. cit.*, p. 255, Al-Sarkhasi *al-Mabsuut*, *op. cit.*, Vol. 4, pp. 225–226; Mustafa Ahmad al-Zarqa, *al-Madkhal al-Fiqh al-'Amm*, Damascus: Matba'at Jami'ah Damascus, 1983/1383, p. 667. Cf. P. Mirfield, *Confession*, *op. cit.*, p. 129.
46. Muhammad Waqar-ul-Haq, *Islamic criminal laws (Hudood laws and Rules with up to date commentary)*, Lahore, Pakistan: Nadeem Law Book House, 1994, p. 152, K. Fred, *The admissibility*, *op. cit.*, p. 321.
47. al-Barnu, *Mawsuu'a*, *op. cit.*, Vol. 1, p. 233.
48. See the report of Safiyyatu's case in WACOL, 2003. cf. *R. v Sigmand* (1968) 1 C.C.C. 92 (B.C.C.A.) and *R. v. Dickson*, quoted in F. Kaufman, *op. cit.*, pp. 321–322.
49. P. Rudolph, "The Re-Islamization", *op. cit.*, p. 226.