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### Islamic criminal law in northern Nigeria: politics, religion, judicial practice

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## Chapter Two: Divine Law and Local Custom in Northern Nigerian *Zinā* Trials<sup>201</sup>

Abstract: The introduction of Islamic criminal law in twelve northern states of the Nigerian federation after 1999 was widely perceived as an attempt to Islamise the Nigerian state. In this article it is argued that the “*sharīʿa* project” started as a pre-election promise, but was immediately supported by Muslim reform groups whose aim was not the establishment of an Islamic state but rather the imposition of *sharīʿa*-compliant behaviour on Muslims. Particular emphasis was put on illicit sexual relations (*zinā*). However, Muslim societies of northern Nigeria have a notion of *zinā* which differs in important aspects from the classical doctrine, and certain forms of socially accepted extramarital sexuality still exist. Based on an analysis of a sample of *sharīʿa* court trials for rape, sodomy, incest and *zinā*, it is shown that the judicial practice in *sharīʿa* courts has helped to mitigate the effects of Islamic criminal law on the traditional societies in northern Nigeria. In particular, accusations based on suspicion and pregnancy out of wedlock as proof of *zinā* have been rejected by the courts, thereby confirming the privacy of the family compound and traditional conflict resolution through mediation. At the same time, male control over female sexuality has been strengthened.

Between October 1999 and December 2001, twelve northern states of the Nigerian federation implemented legislation codifying Islamic criminal law and introducing Islamic codes of behaviour, such as the prohibition of alcohol and the segregation of sexes in public transport. These measures were promoted under the slogan of the “restoration of the *sharīʿa*.”<sup>202</sup> Two *sharīʿa* court rulings, the stoning-to-death sentences of the unmarried mothers Safiyya Hussaini and Amina Lawal, caused particularly vehement national and international reactions.<sup>203</sup> Both sen-

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<sup>201</sup> Originally published in *Die Welt des Islams*, 49:3-4 (2009), 429-65, and reprinted with permission from Brill Academic Publishers.

<sup>202</sup> On the introduction of Islamic criminal law in Nigeria, see Peters (2003).

<sup>203</sup> The records of proceedings and judgments in the two cases, translated into English, along with other information and analysis, are given in Ostien (2007, vol. 5). An analysis

tences were quashed on appeal. To date no stoning-to-death sentence has been executed in Nigeria.<sup>204</sup>

The predominantly Christian south of Nigeria—and the international community—considered the introduction of the *sharī'a* as a preliminary stage to the proclamation of an Islamic state and, after the first sentences of stoning to death had become publicised, an acute threat to the fundamental rights as stipulated in the 1999 Constitution of the Federal Republic of Nigeria and the international human rights instruments to which Nigeria is a state party.<sup>205</sup> In contrast, many northern Nigerian Muslims expected that the introduction of the *sharī'a* would improve their security situation and living conditions.<sup>206</sup> Beside material benefits, however, the religious aspect of salvation through a return to a divine code of behaviour in society should not be underestimated. In particular, the issue of strict sexual morals has been perceived—by supporters and critics alike—as a crucial element of the societal changes intended by the introduction of the *sharī'a* in northern Nigeria. The prominence accorded to sexuality in the Muslim discourse on Islamic law in northern Nigeria can only be explained as an attempt to restore lost virtues in society and to put it back on the straight and narrow.

The question of how and to what extent Islamic law should be applied in the independent Nigerian state has been a recurrent issue in the Nigerian political discourse.<sup>207</sup> Since the introduction of the 1959 Penal Code of the Northern Region, which put an end to the application of uncoded Islamic criminal law, Islamic law gradually became the basic element of the political identity of Muslims in northern Nigeria. It has been propagated as a panacea for all problems of the Nigerian polity, which led to the wide-spread belief that corruption and decadence are the result of a loss of Muslim values caused by external influence or a lack of Islamic education. This perception seems to be shared by a majority of northern Nigerian Muslims, irrespective of the diverging positions they

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of the case of Safiyya Hussaini is provided in Peters (2006). For accounts of the two cases by one of the lead defence lawyers, see Yawuri (2004).

<sup>204</sup> Thousands of Nigerians lost their lives in outbreaks of inter-confessional or inter-ethnic violence directly or indirectly connected to the introduction of the *sharī'a*. These seem to have attracted the attention of international and national human-rights organisations to a much lesser extent than the two prominent trials for illicit sexual intercourse (Kogelmann 2006: 257).

<sup>205</sup> A closer look on the reactions of both Muslims and Christians to the introduction of *sharī'a*, however, reveals that the frontlines especially on the local level were not as clear-cut as it may seem from the outside (Ludwig 2008).

<sup>206</sup> This aspect is discussed in more details in Chapter Three.

<sup>207</sup> For a discussion of the status of Islamic law in Nigeria before 1999, see Abun-Nasr (1988, 1993b).

take with regard to the multi-religious Nigerian state and its secular constitution.<sup>208</sup>

The issue of the application of Islamic law returned to the scene on the advent of civilian rule in 1999 after decades of military dictatorship. Reintroducing the *sharī'a* was the main campaign promise of the gubernatorial candidate of Zamfara State, Ahmad Sani Yerima. After his victory, he immediately started to act on his pre-election pledge, creating *sharī'a* courts and introducing Islamic criminal legislation in Zamfara.<sup>209</sup> Governors of eleven other northern Nigerian states followed suit, partly under enormous popular pressure (see Chapter Three).

Notwithstanding the political nature of the initiative, religious movements—in particular the local reform movement, whose main representative is the *Jamā'at izālat al-bid'a wa-iqāmat al-sunna* (Society for the removal of innovation and reinstatement of tradition), or 'Yan Izala in short—were quick to espouse the project on the basis of common interests. The 'Yan Izala emerged in the late 1970s in strong opposition to the traditional forms of Islam of the *ṣūfī* orders.<sup>210</sup> Their ideological background has mainly been provided by *salafī* thought and Wahhābī theology.<sup>211</sup> Notwithstanding the conservatism of these sources, the reform movement has been characterised as representing Muslim modernity in the sense that it mediates social change in northern Nigeria (Umar 2001; Kane 2003). This is partly due to the fact that its members have advocated the education of women and challenged the respect which children traditionally owe to their parents in Hausa society. Another central element of the modernist doctrine is that it emphasises the centrality of the *sharī'a* in Islamic beliefs and practices. This trait is comparable to the emphasis put on legal positivism in modernity in a Western sense (Umar 2001: 132-4).

Members of the reform movement saw the legal reforms as an opportunity to achieve a strict application of Islamic law and to transform Muslim society through the elimination of Western cultural influences and features of the traditional forms of Islam, both of which they considered unlawful innovations (*bida'*) (Sanusi 2004: 81-2). The reasons that led them to support the political initiative of the introduction of Islamic

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<sup>208</sup> For a discussion of the major trends in northern Nigerian Islam and the relations between them, see Umar (2001).

<sup>209</sup> On the implementation of Islamic criminal law in Zamfara and subsequent developments, see Ostien (2007, 1:vii-xi) and Sada (2007).

<sup>210</sup> The emergence and ideological orientation of the 'Yan Izala has been studied by Lomeier (1997) and Kane (2003).

<sup>211</sup> For the sources referred to by the movement's spiritual mentor Abubakar Gumi in his Hausa translation of the Qur'ān, see Brigaglia (2005: 429). Kane (2003: 123-7) discusses books, mainly authored by Wahhābī scholars, which are used by the 'Yan Izala in proselytising.

criminal law were not primarily linked to Islamising the state, as alleged by many non-Muslim critics. Rather, the reformers saw the introduction of Islamic criminal law as a chance to impose what they perceived as an Islamic way of life by enforcing their interpretation of the *sharī'a* through the judicial system and thereby deterring Muslims from un-Islamic behaviour.

However, Muslim societies in northern Nigeria have evolved under the influence of Islam for centuries, and local customs have been shaped in interaction with the injunctions of Islamic law. The modernist project challenges behaviour that a majority of the population perceives, if not as Islamic, then at least as acceptable in a Muslim society. Infractions of the newly introduced Islamic criminal legislation are most likely to occur in areas in which the local custom differs from the variant of the divine law codified in the *sharī'a* penal codes. From the reformers' perspective, the success of the introduction of Islamic criminal law depends on whether judicial practice in cases involving charges of illicit sexual intercourse contradicts or reproduces prevailing sexual habits.

This article contrasts traditional notions of illicit sexual intercourse among the Muslim Hausa with the canonical Islamic law of *zinā* and analyses the effects caused by the conflict of traditional Muslim behaviour in north-western Nigeria and the modernist religious doctrine. The analysis is based on a sample of trials for illicit sexual relations in northern Nigerian *sharī'a* courts.

### ***The northern Nigerian cultural context***

North-western Nigeria has a long history of Islamisation. A *jihād*, waged by the reform movement of Usman ḍan Fodio against the Hausa city states between 1804 and 1812, resulted in the establishment of the Sokoto Caliphate.<sup>212</sup> The Caliphate was divided in largely autonomous emirates, approximately thirty of them by the mid-nineteenth century. John N. Paden points out that the political system of the emirates shaped the societies under their control to an extent that central tendencies of what he calls the emirate civic cultures become identifiable, in particular as regards their orientation to time and destiny, community, authority, civic space, and conflict resolution (Paden 2005: 70–98).<sup>213</sup> Of the currently thirty-six states of the Nigerian federation, fourteen had direct

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<sup>212</sup> For the history of the *jihād* and its leaders, see Hiskett (1973). For the history of the Sokoto Caliphate, see Last (1967).

<sup>213</sup> Sanusi (2007: 179) goes as far as to talk about “a near-monolithic society in most of northern Nigeria.”

experience with the emirate system.<sup>214</sup> The trials of illicit intercourse analysed in this study have taken place in seven of these states.<sup>215</sup>

The culturally dominant group in the region formerly covered by the Sokoto Caliphate are the Hausa.<sup>216</sup> Whereas these are not a homogeneous ethnic group (Barkow 1972: 317-8), certain cultural features seem to have been communally adopted by a majority of the Muslim Hausa.

The Hausa cultures traditionally see legal action before a court of justice as the last resort. On the local level, conflicts usually are resolved informally through mediation by the elders of the community (Paden 2005: 93-4). Only if this mediation fails, the case may eventually be raised to a court. It can be assumed that this applies in particular in cases of extramarital sexual intercourse, which causes considerable embarrassment to the families involved if discussed publicly in court.

In the words of Nigerian-based feminist writer Charmaine Pereira (2005), the introduction and enforcement of Islamic criminal law constitute a radical break with the prevailing heterosexual culture of northern Nigeria. To shed light on the notion of illicit sexual intercourse among the Hausa, it is useful to outline briefly certain aspects of gender relations in the (Muslim) Hausa cultures in general.

In the Hausa-speaking areas of northern Nigeria, gender segregation has taken the form of seclusion, often referred to as *purdah* (or *kulle* in Hausa).<sup>217</sup> The Hausa consider wife seclusion as typically Islamic, in particular because it is not found among the *maguzawa* or Hausa who still adhere to pre-Islamic traditional beliefs (Kleiner-Bossaller 1993: 86). There is a feeling that seclusion is a means to maintain social order in line with Islamic rules, a view expressed in the following quote from northern Nigerian sociologist Yakubu Zakaria (2001: 110):

With the seclusion of adult women in Hausa society, intrusion into privacy, unwanted pregnancies among adult females and other social vices have been reduced to the barest minimum. For the Muslim Hausa woman the keeping of the rules of *purdah* and wearing the veil have become symbols of Islamic identity, a sign of

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<sup>214</sup> The states which were at least partly incorporated in the Sokoto Caliphate are the Hausa-Fulani-dominated states of Sokoto, Kebbi, Zamfara, Katsina, Kano, Jigawa, Bauchi, and Gombe, but also other states such as Niger, Kaduna, Kwara, Kogi, Adamawa and Taraba, which are dominated by other ethnic groups or are composed of a ethnically mixed population (Paden 2005: 63 and 150-1).

<sup>215</sup> Court trials for illicit sexual intercourse have been reported from Bauchi, Jigawa, Kano, Katsina, Niger, Sokoto, and Zamfara (see Chapter One).

<sup>216</sup> Politically, the Sokoto Caliphate was dominated by ethnic Fulani, who by the time of the *jihād* had adopted many aspects of the Hausa culture (Hiskett 1973: 5 and 19).

<sup>217</sup> On the situation of women in the Hausa society, see Kleiner-Bossaller (1993), Werthmann (2000) and Nasir (2007).

protection and respect rather than of oppression. In Hausa society female seclusion and the wearing of the veil are proofs of the acceptance and practice of Islamic norms and values. Often, they are distinguishing symbols between the Muslim and non-Muslim women.

However, wife seclusion as a predominant practice in Muslim Hausa societies is a rather recent phenomenon.<sup>218</sup> Seclusion became a general practice only after the Second World War. In the 1980s, ninety-five per cent of married women in Kano city were living in seclusion (Callaway 1984: 431). Even in rural areas, seclusion appears today to be largely universal among married women regardless of their husband's occupation, status, or wealth of the household (Robson 2000: 185).<sup>219</sup> However, in the rural ambit the rules of seclusion may be handled in a more flexible way, a system called *kullen tsari* (arranged seclusion), due to the necessity for women to work on the fields and perform other tasks outside the house (Imam 1991). In an urban environment, on the other hand, businessmen, executives and academics with Western education nowadays encourage their women and daughters to take up activities outside the house.

Women are not secluded during their entire life. Jerome Barkow (1971: 59) has identified six stages of a Hausa woman's life: *yarinya* or young girl; *bera* or pre-nubile girl; *buduruwa* or girl whose breasts have begun to grow but who is not yet married; *matan aure* or married woman; *bazawara* or woman between marriages; and *tsofuwa* or old (post-menopausal) woman. Only a married woman is expected to observe seclusion fully. Before marriage, girls enjoy great freedom of movement in traditional Hausa society. They serve as their secluded mothers' communication links to the outside world and carry out their commissions. In addition, they usually are in charge of selling their mothers' products on the street (*talla* or hawking). In an urban, more anonymous, environment, hawking can pose a threat to underage girls, e.g. of becoming victims of rape (Kleiner-Bossaller 1993: 85). Northern Nigerian governments have tried in the past to control hawking by young girls, but the practice still persists (Nasir 2007: 81).

In the 1960s, a number of authors still described a form of premarital sexual practice, known in Hausa as *tsarance*, during which several couples consisting of a *buduruwa* and a young man, who might or not be married, spend the night together teasing and petting, usually without

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<sup>218</sup> On the development of female seclusion among the Hausa, see Callaway (1984), Imam (1991), Werthmann (1995) and Robson (2000).

<sup>219</sup> Robson conducted her field research in Zarewa village, located in Kano State, north of Zaria, between 1991 and 1993.

actual intromission.<sup>220</sup> By now, *tsarance* seems to have been almost completely abandoned (Pereira 2005). Already in the early 1970s, it had been largely replaced by more individual forms of premarital intimacy (Barkow 1971: 60; and 1972: 319). Already then, for Muslim adolescents, sex-play had to take place surreptitiously, the participants always worried that an adult may come upon them (Barkow 1973: 73). The acceptance of premarital forms of sexuality has certainly decreased in the last thirty years. The number of charges for premarital sex brought before *shari'a* courts in northern Nigeria, however, indicates that sexual relations before marriage continue to exist.

Another traditional occasion for young men and women to meet and possibly acquire sexual experience was to attend marriage celebrations out of town which could last several days. This tradition currently seems to be practiced only in remote villages (Pereira 2005). But it may still exist. In December 2004, eight persons, including a newly wed couple, were convicted of “immoral activities” by a *shari'a* court in Zamfara State and sentenced to 25 strokes of the cane and a fine of 5,000 Naira (38 US\$) each. They had organised a wedding picnic. The judge admonished the people not to indulge in “similar activities” when getting married,<sup>221</sup> possibly a reference to the described traditional practice.

In Hausa society, for both sexes, the first marriage is a *rite de passage* into adulthood. Namely for the woman, in most cases, it means the passage from the freedom of a *buduruwa* to the secluded life of a *matan aure*. Practically all women and men have contracted marriage at least once in their life (Kleiner-Bossaller 1993: 97-8). The age at which the first marriage is contracted, however, is significantly lower for girls than for boys. Early marriage—at the age of eleven to fifteen years—is the rule for women, the exception being girls who have received a formal school education (*ibid.*).<sup>222</sup> In 2004 the Nigerian federal government reported to the UN Committee on the Rights of the Child that in north-west and north-central Nigeria, i.e. Hausaland, fourteen years is the age of marriage (United Nations 2004). The Nigerian 2003 Child Rights Act (CRA), the domesticated version of the UN Convention on the Rights of the Child (CRC), sets the statutory minimum age of marriage for the whole of Nigeria at eighteen years. This provision is one of the principal reasons for the reluctance of certain state Houses of Assembly, especially in the north, to ratify the CRA (Nasir 2007: 86). By late 2008, the only predominantly Muslim northern state to have passed a law to enforce the CRA was Jigawa. But even this law, adopted in 2007, does not specify an age

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<sup>220</sup> See Barkow (1971: 60fn4) for bibliographic references.

<sup>221</sup> “Wedding picnic: Sharia court sentences couples to 25 lashes,” *Daily Trust*, 29/12/2004.

<sup>222</sup> For the negative medical consequences of early marriage, see Wall (1998).

limit for marriage, referring only to “puberty” and letting the judge decide. This, according to the state government, was done in a bid to make the law acceptable to the local population. In addition, it will be enforced only once the population has been fully sensitised on its existence.<sup>223</sup>

Most marriages are concluded under Islamic law; no records are kept of such marriages in any government office (Nasir 2007: 84). Polygyny is widespread (ibid.: 86-7). First marriages for girls are typically arranged by their fathers, in some cases without the girl’s explicit consent or even against her will. An age difference of twenty or more years between spouses is not uncommon (Kleiner-Bossaller 1993: 99). This may be one reason for the high frequency of divorce in Hausaland. A man can divorce his wife, in line with Islamic law, by simply repudiating her without necessity to give reasons. No official records are kept of such divorces (Nasir 2007: 87). A woman may be married three or more times in the course of her life. For instance, when 30-year-old Amina Lawal was indicted for *zinā*, she already had been divorced twice and had given birth to two children in wedlock, after first marrying at the age of 14. Safiyya Hussaini, who was aged 35 at the time of her trial, had been married three times.

Between two marriages, i.e. in the stage of the *bazawara*, and as a *tsofuwa* after the menopause, a woman may not necessarily live in seclusion. In the early 1980s, Barbara J. Callaway estimated that, in the city of Kano, 10 to 11 percent of adult women are divorced and not married at any given time. However, an individual woman usually will not be out of marriage for more than a few months to a year (Callaway 1984: 443). Most divorced women stay with male relatives. In the 1970s, Jerome Barkow observed that a divorced woman might take lovers discretely, accepting their usually cash gifts and eventually marrying one of them (Barkow 1972: 320). The high number of divorced women tried for illicit sexual intercourse in northern Nigerian *sharīa* courts suggests that a whole range of individual practices subsist.

A traditional alternative to remarrying is courtesanship (*karuwanci*). A courtesan (*karuwa*, pl. *karuwai*) is a previously married woman in her reproductive age that lives with other *karuwai* in a *gidan mata* or women’s house (Barkow 1971: 65). *Karuwai* can have relations with one or more men, but unlike prostitutes they choose their partners by themselves and relationships often are long-lasting (Kleiner-Bossaller 1993: 91-2). *Karuwanci* is usually only a temporary stage in the life of a woman, since she will probably marry after some time. Some women go back to *karuwanci* after each of their several marriages (Barkow 1971: 70).

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<sup>223</sup> “NIGERIA: Early marriage adds to socioeconomic woes, NGOs say,” IRIN, 26/11/2008.

After the introduction of the *sharī'a*, in general, the local *gidan mata*, both in towns and villages, has been closed following pressure exercised by *sharī'a* enforcement groups, known as *hisba*, while *karuwai* continue to exercise their trade in private houses (Last 2008: 52fn). In May 2007, the chairman of the Bauchi State *sharī'a* commission declared that during the past six years the commission closed down 200 brothels and beer parlours; more than 1,000 “prostitutes” were rehabilitated.<sup>224</sup> An indication that *karuwanci* has not disappeared completely may be the case of a college teacher in Jigawa State who was sentenced—together with his “girl friend”—to 80 lashes each by a *sharī'a* court in September 2002 for intoxication.<sup>225</sup>

*Karuwanci* could become an accepted part of popular Hausa culture because, traditionally, faithfulness is not expected on the part of the husband. A husband’s unfaithfulness is not considered adultery unless it involves a married woman (Barkow 1972: 323-4). Extramarital sexual relations continue to be tolerated by the population in northern Nigeria, certainly in the case of men, but also—provided they take place discretely—for women.

The Hausa have a notion of illicit sexual intercourse, which they call *zinā*. However, the understanding of *zinā* among the Hausa differs from the Islamic legal doctrine. Northern Nigerian Muslims perceive *zinā* as a criminal offence—in the sense that the community, if not the state, takes an interest in prosecuting it—only in cases where an extralegal settlement of the civil aspects between the affected families fails and the conflict becomes a public affair.<sup>226</sup> Adultery might become a criminal case, for example, if the husband of the adulteress threatened to kill or harm the adulterer, or if the family or ward made a big issue of the matter (Paden 2005: 95). Even the offence of rape is seen foremost as a civil issue. It can become a criminal case when the parents of the girl do not accept a settlement, which may include that the rapist is forced to marry the victim (*ibid.*).

Conflicts arising from sexual relations which exceed the socially accepted norm probably are resolved, first and foremost, through mediation between the parties involved. For a case of illicit intercourse to reach a *sharī'a* court, it must have escalated in the sense that the families involved were unable to reach an agreement or that it became public for some other reason.

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<sup>224</sup> “Shari’a commission rehabilitates 1,000 prostitutes in Bauchi,” *Daily Trust*, 08/05/2007.

<sup>225</sup> “Village Head, Tutor, Girlfriend Caned 240 Lashes,” *This Day*, 25/09/2002. This is the only trial of a woman for intoxication which has come to my knowledge.

<sup>226</sup> Charmaine Pereira (2005) has collected an insightful sample of answers from the grassroots to the question of what constitutes *zinā*.

Since married women live almost invariably in seclusion, they are unlikely to be charged with adultery before a court. Illicit intercourse is more likely to become public knowledge in settings in which unmarried girls or women meet men, be they married or not, outside the close mutual supervision of the family compound. Groups likely to be involved in trials of illicit sexual intercourse, consequently, are girls who move freely without being surveyed by their secluded mothers; young people practicing premarital sex; divorced women who do not conform to a secluded lifestyle; and *karuwai*. Since promiscuity of men is widely accepted, they are less likely to face accusations of *zinā* or may be discharged more easily by judges in male connivance.

### ***Unlawful sexual intercourse in Mālikī doctrine***

The popular understanding of *zinā* among northern Nigerian Muslims differs in important aspects from the Islamic legal doctrine.<sup>227</sup> Under the *sharī'a*, sexual intercourse is only permitted within marriage or between a slave woman and her master. As slavery has been abolished, in practice, unlawful intercourse nowadays is limited to extramarital sexual relations. There are three different aspects to the offence: firstly, it is an offence punishable at the discretion (*ta'zīr*) of the *qāḍī* in view of its negative impact on society, which is expressed in Qur'ān 17:32: "Do not come near *zinā*, for it is a shameful (deed) and an evil, opening the road (to other evils)" (see Ostien and Umaru 2007: 44). Based on this verse, not only unlawful intercourse itself but also acts which might lead to it, as e.g. private meetings between men and women who are not closely related, may be punished by way of *ta'zīr* (*ibid.*).

Secondly, a man who engages in unlawful sexual intercourse commits a civil tort against the woman, regardless of whether or not the woman consented. If the woman is not married, the man is liable for the proper brideprice (*mahr al-mithl*, i.e. the average brideprice that a woman of the same age and social status would receive upon marriage in that region), for having enjoyed her sexual services.

Finally, if the strict evidentiary requirements are fulfilled, persons who have had illegal sex can be punished with a *ḥadd* penalty. The *ḥadd* punishment for *zinā*, according to the Mālikī school which is followed in West Africa, is one hundred lashes and, only for male convicts, banishment for one year. For a specific group of people, called *muḥṣan*, capital punishment by stoning applies. A *muḥṣan* is a person who is adult, free, Muslim and has previously enjoyed legitimate sexual relations in a matrimony, regardless of whether the marriage still continues. Adulthood is

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<sup>227</sup> For the classical doctrine of *zinā*, see Peters (2005: 14-5 and 59-62).

reached with (physical) puberty. According to the Mālikīs, boys and girls cannot be considered adults under the age of nine; and they cannot be considered minors after the age of eighteen.

In the classical Islamic doctrine, the requirements for proving the *ḥadd* offence of *zinā* are the strictest among the rules of evidence for *ḥadd* offences: a confession by the accused or concurring testimonies of four male eyewitnesses are required. The witnesses must have seen the act in the most intimate details, i.e. the penetration. If the testimonies do not satisfy the requirements, the witnesses can be sentenced to eighty lashes for *qadhf* or false accusation of *zinā*. As the only one of the four canonical schools of Islamic law, however, the Mālikīs allow circumstantial evidence in *zinā* trials: they regard childbirth in the case of an unmarried, or legally divorced, woman as a proof of unlawful sexual intercourse. If in such a case she pleads that she was a victim of rape, she must, in order to corroborate her plea, produce circumstantial evidence. In these cases, the burden of proving her innocence is put on her. According to the other schools, already her claim that she was raped produces *shubha* or uncertainty which should normally prevent the *ḥadd* punishment for *zinā* from being pronounced.

A plea accepted by the Mālikīs that produces *shubha* is the attribution of the pregnancy to a former husband (Peters 2006: 237). According to Mālikī authorities, a pregnancy may last five or even seven years. Therefore, if the child is born within five or seven years after the dissolution of her marriage, it is considered possible that conception occurred during the woman's former marriage. In this case, pregnancy alone cannot be considered sufficient proof of *zinā*.

According to Ibrahim Na'iyā Sada, former director of the Centre for Islamic Legal Studies at the Ahmadu Bello University in Zaria, which was tasked to revise the initial draft of the Zamfara Shari'a Penal Code, the main aim of the *ḥadd* punishment for *zinā* is the preservation of *nasab* or lineage, one of the purposes of marriage being "to procreate in an organised manner" (2002).<sup>228</sup> Indeed, married women are protected by Islamic law after the sixth month of their marriage. If the husband wants to deny the paternity of a child of whom his wife is pregnant or to whom his wife has given birth, he can resort to the procedure of *li'ān*, which results in the rejection of his paternity and in a divorce, but not in criminal proceedings against the wife (Peters 2005: 193). Thus, while unmarried women—if they are to avoid charges of *zinā*—need to prove that the alleged illicit intercourse took place against their will, the burden of proving that the pregnancy of a married woman is the result of illicit intercourse is placed on the husband.

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<sup>228</sup> See also Bambale (2003: 38-9).

## *Unlawful sexual intercourse in the sharī'a penal codes*

In the *sharī'a* penal codes of northern Nigeria,<sup>229</sup> *zinā* is to be punished by death by stoning if the offender is married.<sup>230</sup> In other cases the penalty is one hundred lashes. Men are punished, in addition, by imprisonment for one year. The same punishments are prescribed for the offences of rape,<sup>231</sup> sodomy and, in most codes, incest.<sup>232</sup> Most codes punish lesbianism (*siḥāq*) with 50 lashes and a maximum of six months' imprisonment. In Bauchi, the prison term may extend to up to five years; Kano and Katsina prescribe death by stoning (Ostien 2007: 4:71). Only in cases of rape, the male offender is, in addition, required to pay the victim the proper brideprice (*ṣadāq al-mithl*) (ibid.: 4:69).<sup>233</sup>

Sexual intercourse by a man with his own wife is not regarded to be rape (Ostien 2007: 4:69). Any sexual intercourse, with or without consent, with a girl under fifteen years of age—under the age of maturity (*taklīf*) in Bauchi and Kaduna—or a woman of unsound mind is considered rape (ibid.). The age limit may protect girls under the age of fifteen from being prosecuted for *zinā*, e.g. in cases of rape. However, it does not apply to sexual intercourse within a marriage, which under no circumstances is regarded as rape. In contrast, under the 1959 Penal Code for the Northern Region, which was replaced by the *sharī'a* penal codes for Muslims but continues to apply to non-Muslims in the *sharī'a* states, intercourse with wives who have not attained puberty was considered rape (ibid.).

Many codes fail to specify the evidentiary value of pregnancy. Only the Kebbi code mentions pregnancy specifically as proof of *zinā* (Ostien 2007: 4:68). Kano and Niger accept only confession or statements by four male witnesses as proof for *zinā*, thereby precluding the acceptance of pregnancy or childbirth out of wedlock as circumstantial evidence (Peters 2003: 20). Failure to specify the rules of evidence in the northern Nigerian *sharī'a* penal codes and the *sharī'a* codes of criminal procedure opens the door for the application of uncodified Mālikī rules of evidence (Peters 2006: 240). In practice, the *sharī'a* courts have applied Mālikī law

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<sup>229</sup> Eleven states enacted separate *sharī'a* penal codes. Most states followed the model of Zamfara. Niger introduced corresponding amendments to the existing Penal Code. I rely on the comparative edition of the different *sharī'a* penal codes prepared by Ostien (2007: 4:33-139).

<sup>230</sup> The word “married” used in the codes is an apparently incorrect translation of *muḥṣan*, as already remarked by Peters (2006: 226 fn 15), for the case of Safiyya Hussaini. Judicial practice shows that the courts consistently construe “married” as *muḥṣan*.

<sup>231</sup> Bauchi extends the term of maximum imprisonment to 14 years, Kano and Katsina to life (Ostien 2007: 4:69).

<sup>232</sup> Kano and Katsina omit the offence of incest (ibid., 4:70).

<sup>233</sup> *Ṣadāq al-mithl* is synonymous to *mahr al-mithl*.

of evidence, including the acceptance of pregnancy out of wedlock as circumstantial evidence of *zinā*.<sup>234</sup> As a result, at least in the initial phase, pregnancy or childbirth out of wedlock were the most frequent grounds of indictment for unlawful sexual intercourse, in many cases followed by the woman's confession in court. In such trials, the woman was charged, while the man often were discharged for lack of evidence. In most cases, the circumstantial evidence was rejected by the appellate instances.

### ***Judicial practice in zinā trials***

Judicial practice in cases involving illicit sexual intercourse is analysed on the basis of a sample of *zinā* trials reported from northern Nigeria between 2000 and 2004<sup>235</sup> and an additional rape case of May 2007. The trials involved charges of rape, sodomy, incest and consensual unlawful intercourse, for which the codes use the term *zinā*.

Many verdicts handed down by lower instances were deficient. All too often the judges administering justice in the *sharī'a* courts have not been qualified to apply Islamic criminal law and the new legislation codifying it. In addition, they have been exposed to the activities of Muslim pressure groups, a fact which seems to have encouraged disrespect of procedural guarantees.<sup>236</sup>

### **Rape**

Nine cases of rape with a total of fourteen defendants were identified between 2000 and 2004. An additional trial for rape came to light in May 2007 (see the appendix, p. 173f). Most cases of rape were reported to the courts by members of the community,<sup>237</sup> family members of the victim,<sup>238</sup>

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<sup>234</sup> On the applicability of uncodified Islamic procedural rules in northern Nigerian *sharī'a* courts, see Ostien (2007: 4:188-91).

<sup>235</sup> For an overview of the trials identified for the period 2000-2004, see Chapter One.

<sup>236</sup> For example, the 19 August 2002 hearing which saw Amina Lawal's death sentence confirmed was attended by a "group of Muslim radicals numbering about fifty [who] were present to see whether Sharia law would be enforced. [... W]henver the judge made a finding or a ruling which went against Amina Lawal, the group of radicals would chant the *takbir* (*Allahu akbar!* – Allah is the Greatest!). After the judgment the group broke into jubilation, chanting that Islam had overcome *kufr* (unbelief)" (Yawuri 2007: 133-4). Aliyu Musa Yawuri, Amina Lawal's lead lawyer, was accused of betraying his religion (2007: 139).

<sup>237</sup> Ado Baranda was surprised by neighbours in his house, trying to stop the girl from crying after raping her ("All Set for Sarimu's Public Stoning in Jigawa," *This Day*, 02/09/2002). Aminu Ruwa was reported to the police by "one Mohamed Alhaji of Tutjiba area" ("Man gets 100 strokes for indecency," *The Guardian* (Nigeria), 20/11/2002, 16). Mohammed Ibrahim's offence was allegedly reported to the police by a certain Shuaibu Sani ("Two Charged with Raping Minors," *This Day*, 27/01/2003). Tukur Aliyu was handed over to a *hisba* group by his neighbours ("Man, 45, gets 40 lashes for raping four-year-old girl", *Daily Independent*, 20/10/2003).

or school authorities.<sup>239</sup> Abubakar Aliyu was caught in the act by police.<sup>240</sup> Only in the trial of Adamu Jugga, it was the victim who brought the case to court. The 35-year-old married woman alleged that 50-year-old Jugga entered her matrimonial home and assaulted her.<sup>241</sup>

At least in five of the ten trials, involving eleven of the fourteen defendants, the victims were eleven years of age or younger, a fact which illustrates the risk incurred by young girls who leave the parental compound without the supervision of their mothers living in seclusion.

The convictions (of first instance) of Ado Baranda, Aminu Ruwa, Hamisu Suleiman, Ibrahim Ayuba and Mohammed Ibrahim, i.e. in more than one third of the known rape trials, were based on confession.<sup>242</sup> Whether Abubakar Aliyu, the only man reported to have been caught in the act, was convicted on the strength of testimonies by the police officers who surprised him remains unclear. There are no reports that men charged with rape were convicted on the grounds of a pregnancy of the victim. In other words, in none of the known *zinā* indictments based on pregnancy out of wedlock the courts received and allowed a claim of forceful intercourse.

Three rapists were sentenced to death by stoning;<sup>243</sup> while not much is known about the circumstances of the trials of Selah Debo and Ade Debo, Ado Baranda of Jigawa State was convicted in May 2002 of raping a four-year-old girl and sentenced to death by stoning, one hundred strokes of the cane and payment of 10,000 Naira (83 US\$) brideprice.<sup>244</sup> The trial attracted some media attention, not least because of a public comment by then Jigawa State Governor Ibrahim Turaki. In a reference to Baranda's death penalty, he stated at a 'Yan Izala convention that as a governor he could not stop a divine law from being carried out, in particular in the light of the fact that the convict had pleaded guilty.<sup>245</sup> Initially, Baranda seemed to have accepted the judgment. Nevertheless, an

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<sup>238</sup> Ibrahim Ayuba was reported to the police by the victim's father, after "it was discovered that one Ibrahim Ayuba was the culprit" ("Two Charged with Raping Minors," *This Day*, 27/01/2003).

<sup>239</sup> The five rapists in Jigawa State were reported to the police by the authorities of the girl's school after she had told her teachers that she had been raped on her way to school ("For rape, sharia court passes death, fines others," *The Guardian* (Nigeria), 03/09/2002, 7). How the courts were informed about the accusations of rape against Hamisu Sulaiman, Selah Debo and Ade Debo has not been reported.

<sup>240</sup> "Man Sentenced for Committing Adultery with Lunatic," *This Day*, 14/07/2001.

<sup>241</sup> "Alleged rape victim, 35, offers to swear by Qur'an," *Weekly Trust*, 04-10/10/2003, 17.

<sup>242</sup> The grounds of conviction of Selah Dabo, Tukur Aliyu, the five rapists of Jigawa State, and Ade Debo were not reported.

<sup>243</sup> No sentence has been reported in the cases of Ibrahim Ayuba, Mohammed Ibrahim and Adamu Jugga.

<sup>244</sup> "Sharia: Man to Die for Raping 9-year Girl," *This Day*, 10/05/2002.

<sup>245</sup> "Sharia: Male convict to die by stoning," *Daily Champion*, 27/08/2002, 1-2.

appeal filed on his behalf by his family—after the thirty-day period for appeal had already elapsed—was admitted by the Jigawa Shari‘a Court of Appeal. On appeal, Baranda withdrew his confession and was acquitted of the charge in August 2003 on the grounds of insanity and remanded in a psychiatric asylum.

As regards the punishment for defendants who were not and had not been married previously, only in two of the analysed cases, the rapist received a punishment which matched at least partly the punishment prescribed in the respective *shari‘a* penal code. In July 2001, Abubakar Aliyu was brought before a *shari‘a* court for committing “adultery” with a mentally deranged woman. He was sentenced to 100 strokes of the cane in addition to one year’s imprisonment.<sup>246</sup> Aminu Ruwa, who confessed to raping a six-year-old girl, was sentenced to 100 strokes of the cane. He, in addition, was sentenced to paying the medical bill of his victim, estimated at 3,500 Naira (27 US\$).<sup>247</sup> No prison term was mentioned.

Presumably, in the three remaining cases (the five Jigawa rapists, Hamisu Suleiman and Tukur Aliyu) the courts viewed the evidence as insufficient for pronouncing the *hadd* punishment. However, at least in the case of Hamisu Suleiman, the defendant is reported to have confessed to the charge, which is regarded sufficient evidence for conviction and the application of the *hadd* punishment. The judge stated that the court was lenient with Suleiman because he was a first offender and sentenced him to eighteen months in prison and a 15,000 Naira fine (110 US\$).<sup>248</sup> The five Jigawa rapists received prison sentences of five months with an option of 5,500 Naira (42 US\$) fine each.

The last case defies easy categorisation. Tukur Aliyu was sentenced to forty strokes of the cane and a fine of 10,000 Naira (71 US\$). Described as a traditional Islamic teacher (*malam* in Hausa) in charge of teaching the Qur‘ān to young children known as *almajirai*, Aliyu is said to have sexually abused a four-year-old girl who was under his supervision. He was caught when the little girl escaped from his house and was found by neighbours walking in the street with bloodstained clothes. The girl told them what had happened to her.<sup>249</sup> The circumstances of his arrest and the punishment he received present striking similarities with the case of Saminu Abbas of Kano State, who was charged before a *shari‘a* court in May 2003 after raping a four-year-old girl. In this case, the girl returned

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<sup>246</sup> “Man Sentenced for Committing Adultery with Lunatic,” *This Day*, 14/07/2001. Although the report speaks of adultery, sexual intercourse with a woman of unsound mind is always considered rape.

<sup>247</sup> “Man gets 100 strokes for indecency,” *The Guardian* (Nigeria), 20/11/2002, 16.

<sup>248</sup> “Rape suspect bags 18 months jail term,” *Daily Trust*, 21/08/2003, 23.

<sup>249</sup> “Man, 45, gets 40 lashes for raping four-year-old girl,” *Daily Independent*, 20/10/2003.

home crying. On indication by a group of children, who told her mother that Abbas had taken her daughter to his home, the mother examined the girl and found stains of blood on her underwear.<sup>250</sup> No sentence was reported in this case, but the press report mentions that Abbas was indicted on the basis of Section 187, Kano State *Sharī'a* Penal Code. This section defines the offence of gross indecency, including acts such as “kissing in public, exposure of nakedness in public and other related acts of similar nature in order to corrupt public morals.” It is made punishable with forty lashes, one year in prison and a fine of 10,000 Naira. The same offence is defined by the Zamfara code (Section 138). Thus, Tukur Aliyu may not have been convicted of rape but of gross indecency. Whereas the press reports describe the offences as rape or attempted rape, respectively, the grounds of conviction remain unclear. Possibly, in the absence of confessions or testimonies of four male eye-witnesses, the judges sought to punish the culprits by way of *ta'zīr*, and “gross indecency” was the *ta'zīr* offence provided for in the *sharī'a* penal codes which they thought matched best the offence committed.<sup>251</sup>

In addition to these trials for rape or gross indecency, Yanusa Yargaba of Jigawa State was convicted of attempted rape of a blind woman in August 2001.<sup>252</sup> Yargaba allegedly entered a blind couple's home illegally at night and tried to rape the woman. His conviction was founded on a confession made in court and the statements of three witnesses. The judge sentenced him to hundred strokes of the cane. Although attempted rape is not defined in the *sharī'a* penal codes,<sup>253</sup> and for the accusation of *zinā* penetration needs to take place, this sentence is remarkably close to the *ḥadd* punishment for *zinā*.

In conclusion, it seems that in cases of rape, *sharī'a* judges tended to seek ways of avoiding the imposition of *ḥadd* punishments on the accused who were mainly brought before them by members of the public. In addition, while several defendants were ordered to pay fines, the only rapist ordered to pay *ṣadāq al-mithl* was Ado Baranda. The high proportion of underaged victims shows that forceful sexual intercourse which takes place within family compounds is either not considered an offence or dealt with between the affected parties. In addition, adult women are reluctant to report rape cases to the police for fear of being accused of *zinā*. As a result, most of the rape trials in *sharī'a* courts treat cases of paedophilia.

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<sup>250</sup> “Man in *Sharia* court for raping 4-year-old girl,” *Daily Trust*, 26/05/2003, 23.

<sup>251</sup> The Zamfara code groups “gross indecency” under *ḥadd* offences. However, in the classical doctrine, it must be considered *ta'zīr*, as in Kano.

<sup>252</sup> “Man to Get 100 Lashes for Attempted Rape,” *This Day*, 27/08/2001.

<sup>253</sup> There is only a provision for “attempts to commit an offence punishable by imprisonment,” which cannot apply to attempted rape (Ostien 2007: 4:66).

## Sodomy

A similar impression is gained from the three known cases of sodomy (see the appendix, p. 174). Penalising sodomy aims at deterring people from homosexuality. This assumption is substantiated by the fact that the *sharī'a* penal codes also prohibit lesbianism (Imam 2004: 134fn5). In contrast, the 1959 Penal Code for the Northern Region made “carnal intercourse against the order of nature with any man, woman or animal,” which included sodomy, punishable with imprisonment (Ostien and Umaru 2007: 49), but did not mention lesbianism explicitly. In practice, however, at least in two of the three sodomy cases the victims were little boys. Thus, these acts are better described as paedophilia than as homosexuality.

Jibrin Babaji was arrested by a *hisba* or *sharī'a* enforcement group on indication of two citizens and handed over to police.<sup>254</sup> Attahiru Umar was reportedly apprehended by fellows of the *almajiri* he raped.<sup>255</sup> The convictions of Babaji and Umar were based on confession in court. Babaji is also reported to have answered in the affirmative when asked by the judge if he was a Muslim.<sup>256</sup> Umar reportedly confessed to the offence after having been identified by two witnesses.<sup>257</sup>

Attahiru Umar and Jibrin Babaji were sentenced to death by stoning. Similar to Ado Baranda, Jibrin Babaji was acquitted on appeal after he pleaded to being insane. The three boys, who allegedly accepted money from Babaji in return for allowing him to have sex with them, were given six strokes of the cane after the trial of first instance, but were later rehabilitated by the court that granted the appeal of Babaji. The judge who had sentenced them in the first instance was ordered to pay them compensation.<sup>258</sup> No information has come to light regarding a possible appeal against Umar’s death sentence. Like the abovementioned rapist Selah Debo, it is not unlikely that Attahiru Umar has remained in jail awaiting the execution of the death sentence.<sup>259</sup> For being unmar-

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<sup>254</sup> “Sodomy: Sharia court sentences man to death by stoning,” *Daily Trust*, 25/09/2003.

<sup>255</sup> “Sharia Court Sentences Man to Death by Stoning,” *This Day*, 14/09/2001. How Barkeji were brought to the court’s attention was not reported.

<sup>256</sup> “Sodomy: Sharia court sentences man to death by stoning,” *Daily Trust*, 25/09/2003.

<sup>257</sup> “Nigerian sentenced to stoning,” *BBC News*, 14/09/2001. The grounds of Barkeji’s conviction were not reported.

<sup>258</sup> “Sodomy: Judge to pay N3000 for wrongful conviction,” *Daily Trust*, 23/03/2004, 5.

<sup>259</sup> Both cases were cited in the media as examples for stoning cases after the period for appeal had elapsed. Attahiru Umar’s cases was last mentioned in “Niger sharia court sentences two to death by stoning,” *The Guardian* (Nigeria), 29/08/2002, 1-2, that is almost a year after the judgment. The case of Selah Dabo was signalled in November 2004 by the Legal Aid Council, a federal agency which provides legal representation for indigent accuseds in serious cases, two months after the judgment (“Sharia: Legal Aid Council to appeal against 30 convictions,” *Vanguard*, 17/11/2004).

ried—“even though he had sexual knowledge of another man,” as the judge pointed out—Abdullahi Barkeji received the *ḥadd* punishment for non-*muḥṣan* defendants: one hundred strokes of the cane and one year’s imprisonment.<sup>260</sup>

These trials—few though they are—demonstrate that in cases of sodomy the courts were less reluctant to impose the *ḥadd* punishments for *zinā* than in rape cases. It appears that, in a region in which child marriage is common, sexual intercourse with immature girls is more acceptable to fellow men (and judges) than with little boys.

## Incest

The more prominent of the two reported incest cases involved Umaru and Altine Tori of Bauchi State. Fifteen-year-old Altine was forced by her stepfather Umaru Tori to have sexual intercourse with him on several occasions while they were alone on the family’s farm land. The crime was reported to the police by an uncle of Altine’s after noticing that she was pregnant. In court, Umaru Tori confessed to having raped his stepdaughter four times and was sentenced to death by stoning in December 2003. Later, he reportedly denied responsibility for Altine’s pregnancy and filed an appeal, which was upheld, on 24 May 2005, by the state’s *sharī’a* court of appeal.<sup>261</sup> The appellate court ordered the case to be retried by the upper *sharī’a* court.<sup>262</sup>

As for Altine, in the initial trial, the prosecuting police officer reportedly testified in court that at the time of the offence the girl called for help and tried to escape from her stepfather.<sup>263</sup> This statement might have been considered sufficient to cause *shubha* and prevent the *ḥadd* punishment for *zinā* from being applied to Altine. In spite of this, Altine, who only admitted two forceful sexual contacts, was apparently convicted of incest like her step-father on the basis of her pregnancy out of wedlock and sentenced to 100 strokes of the cane to be administered after the delivery of her baby.<sup>264</sup> The court seems to have taken the position that she had given herself voluntarily to her stepfather. In an appeal filed in her name, her defence counsel argued that, among other

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<sup>260</sup> “Man Gets 100 Strokes, One-Year Jail for Sodomy,” *This Day*, 28/02/2002, 5.

<sup>261</sup> “Shariah Court Entertains 11-Month-Old Appeal,” *Weekly Trust*, 30/11/2004.

<sup>262</sup> Amnesty International Annual Report Nigeria 2006.

<sup>263</sup> “Incest: Sharia Court sentences man to death by stoning,” *Daily Trust*, 06/01/2004, 1-2.

<sup>264</sup> “Sharia: Man to die by stoning for impregnating step-daughter in Bauchi,” *The Guardian* (Nigeria), 06/01/2004. The Bauchi State *Sharī’a* Penal Code makes incest punishable with one hundred lashes and imprisonment for a term up to seven years for unmarried defendants (Section 136(a)). In Altine’s case there was no mention of a prison term.

grounds, there was no definitive proof of the offence as required by Islamic law.<sup>265</sup>

In the second known trial for incest, it appears that only the man was indicted. Umar Isa Zurena of Jigawa State was charged with incest in November 2003 after his niece, pressed by her family, disclosed that her pregnancy was caused by him. He was taken to court by the young woman's father. There, she is reported to have testified that her uncle raped her on two occasions, offering her money and threatening to beat her if she disclosed what had happened.<sup>266</sup> No judgment has been reported for this case.

These cases show that the offence of incest can be a means of prosecuting sexual abuse within the extended family, in particular those family members who are in charge of children outside the compounds and those who have access to the women's quarters. However, it is in the discretion of the court whether or not to consider the girl or woman affected a victim or an accessory in the offence.

### **Consensual unlawful sexual intercourse (*zinā*)**

In general, the described cases of rape, sodomy and incest convey the impression that *sharī'a* court judges of lower instances have tended to avoid inflicting *ḥadd* punishments on male defendants to the greatest extent possible. Only for crimes which in the patriarchal societies of northern Nigeria may be considered repulsive for violating the feeling of manhood (sodomy) or the family honour (incest), this indulgence is absent. However, it is equally absent in trials of consensual unlawful sexual intercourse, in which the majority of the defendants are women.

Since the *sharī'a* penal codes of the various states expressly define the offence of rape as intercourse against the will or without the consent of the woman, the offence of *zinā*, as defined in the codes, refers to consensual sexual intercourse between a legally responsible man and a legally responsible woman who are not married to one another. While this assumption seems to hold true in most cases, it is not always possible to assert that the women's consent was free from coercion. For instance, Bariya Ibrahim is reported to have named three middle-aged men as being the possible father of her pregnancy. She stated that all three had paid her to have sex with her, adding that it had been against her wishes.<sup>267</sup> Since she could not prove her allegations, she risked being

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<sup>265</sup> "Shariah Court Entertains 11-Month-Old Appeal," *Weekly Trust*, 30/11/2004. The final hearing was slated for 7 December 2004. However, the outcome of the appeal could not be established. It is not clear whether Altine and Umaru Tori filed their appeals together.

<sup>266</sup> "Man, 20, in court for impregnating niece," *Weekly Trust*, 22/11/2003.

<sup>267</sup> "Nigerian girl gives birth and faces 180 lashes," AFP, 29/12/2000.

convicted, in addition to *zinā*, of *qadhf* or false accusation of *zinā*. In another case, involving Hafsatu Idris and Ahmadu Haruna, the female defendant claimed that she had been raped. Nevertheless, she was indicted for *zinā*, alongside the alleged rapist.<sup>268</sup> These examples show that women do have cause to be apprehensive about addressing the courts over sex-related offences, as failure to prove their allegations exposes them to the risk of being charged with consensual sexual intercourse.

Cases of consensual intercourse came to the attention of the courts principally in two ways. A number of unmarried women who were found pregnant or had a baby out of wedlock were reported to police or the *sharī'a* courts by neighbours or *hisba* groups.<sup>269</sup> After it became known that she had a baby without being married, Amina Lawal was taken to the village head and later handed over to police (Ostien 2007: 5:52-3). Hafsatu Abubakar was reported to the police by a *sharī'a* implementation committee for having a baby out of wedlock.<sup>270</sup> Bariya Ibrahim was first brought by her uncles to the village's district head, who summoned the three men named by the girl as possibly responsible for her pregnancy and questioned them extensively. At this stage, members of a *hisba* group heard about the case and reported it to the police (BAOBAB 2003: 10). It appears that in this case the intervention of the *hisba* group aborted the traditional conflict resolution mechanism. Another case which shows the effects of a thwarted mediation is the trial of Hafsatu Idris: her newly wedded husband divorced her after noticing that she was pregnant at the time of the wedding. She claimed having been raped by Ahmadu Haruna. The three families involved were seeking an out-of-court settlement of the affair, when Ahmadu Haruna dragged Hafsatu's uncle to court for denting his image in the town. The case was first taken to a lower *sharī'a* court which ordered further police investigations. The second police report contained the charge of *zinā* and the case was transferred to an upper *sharī'a* court where Hafsatu Idris and Ahmadu Haruna were jointly indicted.<sup>271</sup>

The second way in which courts became aware of cases of consensual unlawful intercourse is that, unaware of the changes in the legislation, the family of a woman sought civil redress in a *sharī'a* court after the alleged father refused to accept the paternity of the child or did not fulfil his obligations incurred during traditional mediation. Ahmadu Ibrahim was dragged to court by the father of Fatima Usman, who demanded that Ahmadu live up to his promise made before the village council of

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<sup>268</sup> "Rape victim's father accuses police of changing FIR," *Daily Trust*, 24/03/2004, 29.

<sup>269</sup> On the role of *hisba* groups, see, for example, Peters (2003: 29-30) and Last (2008: 50-5).

<sup>270</sup> "Mother of 2-week Baby on Capital Offence Charge," *This Day*, 11/01/2002.

<sup>271</sup> "Rape victim's father accuses police of changing FIR," *Daily Trust*, 24/03/2004, 29.

elders that he would sustain his illegitimate child (Ibrahim and Lyman 2004: 20). The family of Safiyya Hussaini went to a *sharī'a* court to compel Yakubu Abubakar to accept responsibility for a pregnancy for which she said he was responsible.<sup>272</sup> Adama Yunusa dragged her fiancé to court to force him to assume his responsibilities as father of her unborn child. As a result, she was indicted for *zinā*.<sup>273</sup> The case of Attine Tanko and Lawal Sada came to the attention of the court after Attine confessed to her father that she was pregnant and that Lawal was the father of the child.<sup>274</sup> Also in this case, it appears likely that the father wanted to force Sada to assume his responsibilities.

Eighteen trials for the offence of *zinā* have been identified (see the appendix, p. 175f).<sup>275</sup> In all identified cases, women were indicted, while only twelve male defendants appeared in court. Four of the men were immediately discharged and acquitted due to lack of evidence against them.<sup>276</sup> Some of the eight women, who stood trial for *zinā* without a male counterpart, failed to prove their allegations of who was responsible for their pregnancy and were threatened, in addition to the punishment for *zinā*, with being convicted of *qadhf* or false accusation of *zinā*.<sup>277</sup>

Only in one case, the woman was acquitted and the man convicted: Yunusa Rafin Chiyawa was accused of illegal intercourse with the wife of one of his neighbours. The woman swore on the Qur'ān that she had been hypnotised by Chiyawa.<sup>278</sup> As a result, she was considered not to be criminally responsible at the time of the offence. Two other women, Maryam Abubakar and Hafsatu Abubakar, were acquitted in the trial of first instance, both after attributing their pregnancies to their former husbands. Both had been charged without a male counterpart.

Pregnancy of an unmarried or divorced woman is clearly the main indicator that has led to charges of *zinā*. At least fourteen of the nineteen female defendants were pregnant or had given birth out of wedlock at the time of trial. The only woman who was married at the time of trial was the co-defendant of Yunusa Rafin Chiyawa. In all fourteen cases of

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<sup>272</sup> "The travails of convict Safiyatu," *The Comet*, 24/11/2001, 8-9.

<sup>273</sup> "Sharia: Woman Gets 100 Strokes over Pregnancy," *This Day*, 06/05/2002.

<sup>274</sup> "Second teen mum in Nigeria awaits flogging for pre-marital sex," AFP, 11/01/2001.

<sup>275</sup> In the previously published version of this article (Weimann 2009: 456), an unnecessary counting error occurred. There, nineteen trials for illicit consensual sexual intercourse were mentioned, whereas footnote 127 only lists eighteen. This error was a corollary of another error in a footnote (Weimann 2009: 458 fn 131), which mentions Hafsatu Idris twice, thus seemingly elevating the number of indicted women to nineteen. The first mention of Hafsatu Idris is correct.

<sup>276</sup> These men are Yakubu Abubakar (Safiyya Hussaini); Yahaya Mohammed (Amina Lawal); Umaru Shehu (Hafsatu Abubakar) and Dauda Sani (Hajara Ibrahim).

<sup>277</sup> These were Bariya Ibrahim Maguza, Hajo Poki, possibly Hajara Ibrahim.

<sup>278</sup> "Nigerian man faces death for adultery," BBC News, 27/06/2002.

unmarried (expecting) mothers indicted for *zinā*, the pregnancy was considered circumstantial evidence.<sup>279</sup> In the trial of first instance, many of the women were convicted on the basis of their confession.<sup>280</sup> It is reasonable to assume that these women were ignorant of the relevant provisions of Islamic law when they confessed in court. Faced with accusations of illicit pregnancy or childbirth, these women admitted sexual relations and pointed to the man responsible for it, probably motivated by the wish that the father assume responsibility for his child. The men, however, have no incentive to acknowledge the charges.<sup>281</sup> In none of the reported cases are eye-witnesses reported to have testified to the offence.

At least in twelve of the eighteen *zinā* trials with female defendants, the accused women were convicted of the charge in the first instance.<sup>282</sup> All women seem to have received the respective *ḥadd* punishment for *zinā*: five were sentenced to death by stoning; seven to 100 lashes. Some verdicts do not stop there: in addition to 100 lashes, Aisha Musa received one year's imprisonment (BAOBAB 2003: 12); and Adama Yunusa was banned from the area in which she lived.<sup>283</sup> Both additional punishments are traditionally reserved for men. In the trial of first instance, Hajara Ibrahim was even sentenced to death by stoning and 100 lashes.<sup>284</sup>

At the same time, only three men were convicted of the offence of *zinā* proper together with their female partners: Sani Mamman, the co-defendant of Zuweira Aliyu, and Lawal Sada, the co-defendant of Attine Tanko, were convicted and sentenced to 100 lashes and one year's imprisonment; only Fatima Usman and Ahmadu Ibrahim were jointly sentenced to death by stoning.

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<sup>279</sup> Hajara Ibrahim, Attine Tanko, and Bariya Ibrahim were pregnant at the time of trial. Fatima Usman, Hawa'u Garba, Hafsatu Abubakar, Safiyya Hussaini, Daso Adamu, Hajo Poki, Maryam Abubakar Bodinga, and Aisha Musa were indicted after giving birth to a child out of wedlock. Amina Lawal and Hafsatu Idris were found pregnant, but gave birth before the start of their trials. Adama Yunusa sued her fiancé four months into her pregnancy. No pregnancy or illegitimate childbirth has been reported for Amina Abdullahi, Zuweira Aliyu, Zuwayra Shinkafi and the co-defendant of Yunusa Chiyawa.

<sup>280</sup> This has been reported for Safiyya Hussaini, Amina Lawal, Hajara Ibrahim, Bariya Ibrahim, Hafsatu Abubakar, Hawa'u Garba, and Adama Yunusa.

<sup>281</sup> An exception is Hussaini Mamman, who admitted in court that he had a child with Hawa'u Garba, saying he wanted to marry her, but her parents refused. "Nigerian couple arraigned in Islamic court on adultery charge," AFP, 18/06/2001.

<sup>282</sup> No sentences have been reported for the trials of Hawa'u Garba and Hussaini Mamman, and Hafsatu Idris and Ahmadu Haruna, respectively. It remains unclear on which provisions of the Zamfara State Shari'a Penal Code the sentences of Zuwayra Shinkafi (thirty lashes) and Sani Yahaya (eighty lashes and ten months' imprisonment) were based.

<sup>283</sup> "Sharia: Woman Gets 100 Strokes over Pregnancy," *This Day*, 06/05/2002.

<sup>284</sup> "Sharia court sentences woman to death by stoning," *Daily Trust*, 13/10/2004.

At least in eight of the sixteen *zinā* trials of first instance in which the defendants were found guilty, appeals were filed to a higher court.<sup>285</sup> Some women who had been sentenced on the basis of their confession now revoked.<sup>286</sup> Among the sentences appealed were the six stoning-to-death verdicts. Five of these death sentences were reversed and the defendants discharged and acquitted, although partly after protracted proceedings: in case of Amina Lawal's trial, e.g., one year and a half passed between the sentence of first instance and her acquittal in the second appeal. In the sixth trial, a final verdict has never been reached: Fatima Usman and Ahmadu Ibrahim were sentenced to death by stoning in Niger State in August 2002. They appealed to the state's *sharī'a* court of appeal. Pending the outcome, they were admitted to bail. While the appeal was pending, the state's High Court called into question the jurisdiction of the *sharī'a* court of appeal to decide the case. The appeal, therefore, has never been decided by the *sharī'a* court of appeal but has also never been transferred to the High Court; the couple are still on bail, and they are unlikely ever to hear from the authorities about this matter again (Ostien and Dekker 2010: 604). In none of the cases in which a *ḥadd* sentence of first instance was overturned was it replaced by a *ta'zīr* punishment; the appellants were discharged and acquitted.

With regard to more recent stoning-to-death sentences, such as those against Hajara Ibrahim or Daso Adamu, the appeal was granted within less than three months after the verdict of first instance. Thus, it seems that after an initial period of uncertainty about how to deal with this kind of sentences, the acquittals of Safiyya Hussaini, Amina Lawal and others now serve as precedents for appellate courts to reject pregnancy as proof of *zinā* in *muḥṣan* women. Appeal judges accepted the argument of the delayed pregnancy. In many of the acquittals of female

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<sup>285</sup> Safiyya Hussaini was acquitted in March 2002 by a *sharī'a* court of appeal. Adama Yunusa's sentence of 100 lashes was upheld but the banishment revoked in May 2002 by a *sharī'a* court of appeal. Maryam Abubakar Bodinga was acquitted in October 2002 by an upper *sharī'a* court. Amina Lawal, after her sentence was upheld in a first appeal by an upper *sharī'a* court in August 2002, was acquitted in September 2003 by a *sharī'a* court of appeal. Yunusa Rafin Chiyawa was acquitted in November 2003 by an upper *sharī'a* court. Hajara Ibrahim was acquitted in November 2004 by an upper *sharī'a* court. Daso Adamu was acquitted in December 2004 by an upper *sharī'a* court. The final outcome of the trial of Fatima Usman and Ahmadu Ibrahim has not been established (last reported hearing before a *sharī'a* court of appeal in April 2004).

<sup>286</sup> The revocation of the confession is explicitly reported for Safiyya Hussaini and Amina Lawal. The confession of Hajara Ibrahim was annulled by the appeal judge on the grounds that it was not made four times. "Islamic court overturns stoning sentence," *Independent Online* (South Africa), 10/11/2004.

defendants or appellants, this argument was used as one of the main grounds on which the judges based their decision.<sup>287</sup>

Another development is of importance: the attitude of the higher courts to accusations of *zinā* brought before them by members of the public or *hisba* groups has been more cautious than that of the lower courts. In the case of Daso Adamu, the appeal judge stated that the first instance trial was improper because Daso Adamu “didn’t present herself to court but was dragged and tried against her wish.”<sup>288</sup> Similarly, the appeals court that annulled the stoning sentence against Safiyya Hussaini emphasised that the investigation of *zinā* cases on the basis of mere suspicion, such as an unmarried woman found pregnant, is unlawful (Peters 2006: 241). The court stated the following:

We agree with the appellant’s counsel that based on this verse [Qur’ān 49:12], it is *haram* to initiate an action against a person for *zina* based on other people’s reports. Imam Shafi’i said that a leader does not even have the right to summon a person accused of *zina* for the purpose of investigating the accusation [...] It is not permissible for a leader to order somebody’s arrest, in order to investigate him for allegedly committing *zina*, based simply on what other people report. The way the police went to Safiyatu’s house just because they heard that she had committed *zina* is contrary to Islamic law.<sup>289</sup>

The appellate courts may have chosen to quash sentences such as death by stoning in order to prevent the cases from being appealed in a federal court, which might test the constitutionality of the *sharī’a* penal codes (Peters 2006: 240-1). This analysis explains why in no case the *ḥadd* punishment was replaced by a *ta’zīr* punishment. But the annulment of the stoning sentences is also the result of the influence of informed Muslim defence teams at the appeal trials. In the climate of the heated debate about the introduction of the *sharī’a* after 1999, Muslim critics of the way in which Islamic criminal law was introduced had a difficult standing in the public discourse.<sup>290</sup> Instead, the defence of people indicted before *sharī’a* courts, in particular women accused of *zinā* on the strength of pregnancy out of wedlock, became an important arena for critics of the new legislation and its implementation. Muslim human rights activists,

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<sup>287</sup> This applies at least to the cases of Daso Adamu, Amina Lawal, Maryam Abubakar, Hafsatu Abubakar and Safiyya Hussaini.

<sup>288</sup> “Sharia Court Nullifies Death Penalty On Woman,” *Vanguard*, 11/12/2004.

<sup>289</sup> Quoted from the judgment of the Sokoto State Sharī’a Court of Appeal of 25 March 2002, published in English translation in Ostien (2007: 5:48).

<sup>290</sup> One example is the public debate surrounding the so-called Miss World Riots in Nigeria 2002. See Chapter Five and Weimann (forthcoming).

lawyers and scholars formed defence teams to rectify the procedural and substantial shortcomings of the trials of first instance, thereby creating the precedents which by now have made it unlikely that more accusations which do not respect the procedural safeguards of Islamic criminal law will be allowed in court.<sup>291</sup> The international protests, by contrast, often enough had detrimental effects for the accused, as they contributed to further aggravating the antagonism within the Muslim community.<sup>292</sup>

## Conclusion

Initially a political project by some gubernatorial candidates, the “restoration” of Islamic criminal law in northern Nigeria was quickly appropriated by Muslim reformers because it overlapped with the centrality of legal positivism in their doctrine. Their aim was not to Islamise the state but to enforce a legalist interpretation of the *sharīa*. With regard to illicit sexual intercourse, the aim clearly was to discourage all forms of extramarital sexuality. The Hausa cultures’ tolerance of certain forms of extramarital sexuality was deliberately ignored. The “modernist project” aimed at changing the behaviour of the Muslim population by way of creating deterring precedents in court. Procedural guarantees and individual circumstances seem to have been secondary. But the urgency with which the project was pushed forward may have backfired. The improper application of the law not only provoked international protests—which more often than not strengthen the radicals—but, more importantly, also offended the feelings of both Westernised and traditional Muslims.

At the higher levels of the judiciary, Islamic procedural guarantees regarding evidence have been emphasised, and practically all judgments by lower courts which did not respect these guarantees have been revoked. The long awaited acquittal of Amina Lawal in September 2003 was celebrated by Muslim organisations of all affiliations as a “victory of the *sharīa*.” The two most important developments in the judicial practice with regard to the offence of illicit sexual intercourse certainly are that the courts accepted the doctrine of the delayed pregnancy and rejected accusations based on suspicion.

The doctrine of the delayed pregnancy provides an effective defence for divorced women charged before a *sharīa* court on the basis of a preg-

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<sup>291</sup> That this cooperation was not without friction can be seen from the account of the lead defence lawyer of Amina Lawal, Aliyu Musa Yawuri (2007).

<sup>292</sup> In an open letter to its supporters, BAOBAB for Women’s Human Rights, in May 2003, discussed the problematic effects of international protests on *sharīa* trials in Nigeria. The text of the letter is available at <<http://www.counterpunch.org/iman05152003.html>>.

nancy out of wedlock. Since among the Hausa only few divorced women in their reproductive age remain unmarried for more than five years, in most cases pregnancy will no longer be accepted as sufficient proof of *zinā*. Although the Hausa cultures know the concept of a “sleeping pregnancy” (*kwantacce*),<sup>293</sup> its use for legitimising children and, thereby, avoiding conviction of *zinā* in court is probably a recent phenomenon in the country. People not familiar with the concepts of Islamic criminal law must get the impression that they are denying the obvious.<sup>294</sup> Islamic legal concepts, especially the legal consequences of a confession, were rarely explained to the defendants. Due to the ignorance of this doctrine, many women confessed, not knowing that in doing so they created the evidence against them. As a consequence, the doctrine of the delayed pregnancy was used mainly on appeal.

The rejection of accusations based on suspicion prevents charges levelled by a party not directly affected by the case from being admitted in court. After an initial period, in which *ḥisba* groups dragged suspects to *sharīʿa* courts without respecting the Islamic rules of evidence, it seems now that the privacy of the family compound has been confirmed. This limits the possibilities of the *sharīʿa* implementation groups to survey life and potential conflicts arising from extramarital intercourse in the private space of the family compounds. Potentially immoral behaviour in this realm has effectively been withdrawn from the jurisdiction of the *sharīʿa* courts, while the consequence of such acts, i.e. pregnancy out of wedlock, is no longer accepted as proof of *zinā*.

These developments exclude actors that are not parties in the dispute from interfering and, thereby, create opportunities for informal mediation between the affected parties. They are an implicit recognition of the traditional conflict resolution mechanisms. The confirmation of these mechanisms, however, constitutes a major impediment for the attempt to change social behaviour through deterrence from court rulings. Thus, certain aspects of judicial practice in Islamic criminal law in northern Nigeria help to recreate local customs rather than to reform society.

Local customs which have been confirmed by judicial practice include those regarding the prevailing patriarchal gender relations. The different attitudes with which *sharīʿa* court judges particularly in the lower instances treated male and female defendants is a clear indication. Traditionally, for Hausa men, control of female sexuality is a constant

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<sup>293</sup> On the meaning and the social function of *kwantacce*, see Bossaller (1994). For further reading on the issue of prolonged pregnancy refer to Bossaller (2004) and Nils Fischer’s review of this book in *Die Welt des Islams*, 48:2 (2008).

<sup>294</sup> This may be one reason why the first appeal of Amina Lawal failed, and why in the trial of Hafsatu Abubakar the judge did not force the former husband to take responsibility for the child.

concern. Hausa folklore shows that men regard female sexuality as dangerous and disruptive, and women are viewed as inherently licentious and potentially troublesome (Wall 1998: 348). The judicial practice in *sharī'a* courts, especially at the lower levels, has reaffirmed the control of men over women. In view of this, it is not astonishing that adult victims of rape are reluctant to seek redress in courts by themselves.

Due to the lenience with which the lower *sharī'a* court judges have treated male sex offenders, the effects of the *sharī'a* penal codes on male misbehaviour have remained minimal. The introduction of the offence of illicit intercourse has to all appearances not affected the high incidence of child rape in northern Nigeria. To the contrary, in Kano metropolis cases of rape of young girls, mainly between three and eleven years of age, have increased significantly in recent years. Here again, the victims are mainly girls hawking the products of their mothers.<sup>295</sup>

Whereas judicial practice confirms male dominance, the introduction of the offence of *zinā* limits the legal options of women. The risk of being charged with *zinā* when confessing publicly to extramarital sexual relations puts them in a disadvantageous position compared to their male counterparts. Unmarried mothers are unable to sue the fathers of illegitimate children in order to make them assume their responsibilities. They remain economically disadvantaged and are a burden for their kin, which further weakens their social position. As disputes involving extramarital sexual relations must be dealt with in secrecy, the courts are no longer the last resort for settling disputes for which the parties involved cannot find a solution.

Overall, however, judicial practice in cases of illicit sexual intercourse has helped to mitigate the effects of the introduction of the Islamic criminal legislation on the traditional Muslim societies in northern Nigeria. The reformers have reacted to these developments. Since late 2004 no new indictments for *zinā* based on pregnancy out of wedlock have been reported. Instead, the reformers seem to have concentrated on issues such as rape and homosexuality,<sup>296</sup> which are topics unanimously rejected by a majority of Nigerians, be they Muslim or not. The *sharī'a* penal codes continue in place; the impact—positive or negative—which they could have had on Muslim societies in northern Nigeria has been limited to a minimum.

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<sup>295</sup> "NIGERIA: Child rape in Kano on the increase," IRIN, 03/01/2008.

<sup>296</sup> Recent cases involving homosexuals and transvestites are referred to in Ostien (2007: 3:54).