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

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## Chapter Three: Islamic Law and Muslim Governance in Northern Nigeria: crimes against life, limb and property in *sharī'a* judicial practice<sup>297</sup>

Abstract: A decade ago, twelve northern Nigerian states introduced Islamic criminal legislation. Many governors of these states supported the move only with reluctance. They were caught between popular demands for the introduction of the *sharī'a* and the exigencies of their office, established by the Nigerian Constitution. Their situation may be compared to that of the colonial period emirs whose legitimacy was closely linked to the implementation of Islamic criminal law, but who were forced to implement British orders containing its application. In this article, I analyse the judicial practice of modern *sharī'a* courts with regard to crimes against life, limb and property, a major concern for northern Nigerian Muslims in the past and at present. I conclude that because both the emirs and the governors have been unable to find lasting solutions to the problem of reconciling the two legal systems, they have opted for delaying tactics.

The introduction of Islamic criminal law in twelve northern states of the Nigerian federation, starting in 1999, coincides with the country's return to democratic elections and civilian rule. This is a remarkable development, particularly in light of the fact that earlier projects to Islamise criminal law were undertaken mainly by totalitarian regimes in an effort to discipline the population.<sup>298</sup> In northern Nigeria, it seems to be the other way round: after the governor of Zamfara State enacted Islamic criminal legislation, the governors of eleven other states ceded to popular pressure and introduced Islamic criminal legislation. Shortly after the introduction of this legislation, *sharī'a* courts in northern Nigeria passed sentences of amputation for theft (*sariqa*) and of death by stoning for illicit sexual intercourse (*zinā*). These sentences raised major con-

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<sup>297</sup> Originally published in *Islamic Law and Society*, 17:3-4 (2010), and reprinted with permission from Brill Academic Publishers.

<sup>298</sup> Peters (1994: 270). In this article, Peters analyses the situation in countries in which Islamic criminal law was introduced by legislation. At the time, these were Libya (1972-1974), Pakistan (1979), Iran (1982) and Sudan (1983, 1991).

cerns relating to human rights as guaranteed by the Nigerian Constitution and international treaties. National and international media paid special attention to the stoning sentences. Indeed, a majority of the criminal trials before *sharī'a* courts that were reported in the media were linked to sexual offences. In the day-to-day administration of justice before *sharī'a* courts in northern Nigeria, however, these trials constitute only a small percentage of offences tried under Islamic criminal law.

Popular pressure on state governors was not merely the result of a wish to sanitise society and restore Muslim values, as the predominance of sex-related trials in the public discourse seems to suggest. Murray Last notes “a pervasive anxiety over insecurity felt on both a physical and a spiritual plane” among northern Nigerian Muslims (Last 2008: 41). This feeling of insecurity is probably at the root of popular support for the introduction of Islamic criminal law. On a spiritual level, it helps to explain the wish to eradicate immoral behaviour in a bid to bring society as a whole in line with the divine injunctions and, thereby, to avert God’s punishment. The question of physical security has always been an issue of concern in what is now northern Nigeria. Today, the feeling of insecurity in northern Nigeria, as elsewhere, is nurtured by rapid demographic growth and the influx of strangers from beyond Hausaland or from the countryside into formerly closed communities (Last 2008: 43). Insecurity in Muslim northern Nigeria is largely perceived to be a consequence of external threats. Thus, it is not surprising that Muslims identify restoring security with isolating the Muslim territories from negative external influences by “closing the border” (Last 2008: 46). Creating a territory in which Islamic criminal law is applied may be understood as a surrogate for the political unity of a Muslim northern Nigeria which is unobtainable at present.

Islamic criminal law is widely held by Muslims in northern Nigeria (and elsewhere) to be a panacea for current problems, including the threat to security. Proponents of Islamisation have always pointed to the benefits of Islamic criminal law, including its deterrent effect, its simple and fast procedure and its perceived instrumentality in bringing about a real Islamic society:

With disapproval, attention is drawn to the slowness of justice under Western law, where trials can drag on for many years. Such statements express a longing that exists with many groups in Muslim societies for a less complicated and orderly society, where good deeds are immediately rewarded and evil deeds punished right away. (Peters 1994: 269)

The deficiencies of the Nigerian judicial system are well known. It suffers from slow procedures and corruption. Linked to the popular de-

mand for Islamisation was certainly the hope that judicial procedures would be simplified and, therefore, less prone to corruption and partiality, and that the performance of the justice system would be greatly enhanced.<sup>299</sup>

In Nigeria, the implementation of Islamic criminal law has taken place within a secular constitutional order of Western inspiration. The question of the constitutionality of Islamic criminal legislation in northern Nigeria has been widely discussed.<sup>300</sup> In this article, I focus especially on the political implications for the state governors, who need to reconcile public demands for the *sharī'a* with the exigencies of their office. Their situation is comparable to that of the emirs of the colonial period, who also faced the challenge of implementing Islamic criminal law under the supervision of a non-Muslim political authority. Therefore, I describe the historical development of the application of Islamic criminal law in northern Nigeria with particular attention to the colonial era, before turning to the political context surrounding the recent introduction of Islamic criminal legislation. Since crimes against life, limb and property pose the greatest threat to the physical security of the population, I analyse a sample of trials before *sharī'a* courts for theft, homicide and bodily harm.<sup>301</sup> In the conclusion, I discuss similarities and differences between the situation of the colonial emirs and the current governors and the solutions which they did or did not find to the problem of reconciling Islamic law and a secular political order.

### ***Historical development of the application of Islamic criminal law***

At the beginning of the nineteenth century, a *jihād*, led by Usman dan Fodio, resulted in the establishment of the Sokoto Caliphate over much of what is nowadays northern Nigeria.<sup>302</sup>

The authority of the caliph and the local emirs was closely identified with the application of Islamic criminal law based on the Mālikī school of *fiqh* or Islamic law (Christelow 2002: 188). Apart from *alkali* (Arabic *al-qādī*) courts, the caliph and the emirs had their own judicial councils, which handled most disputes over land and houses, matters relating to slavery, homicide, theft, public order, administration, and taxation

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<sup>299</sup> See, e.g., Yadudu (2001).

<sup>300</sup> See, e.g., Peters (2003) and Human Rights Watch (2004).

<sup>301</sup> Although armed robbery (*hīrāba*) also qualifies as a crime against limb, life and property, this offence has not been included in the analysis, since I have knowledge of only one case, which was very poorly documented (p. 34).

<sup>302</sup> For the history of the *jihād* and its leaders, see Hiskett (1973). For the history of the Sokoto Caliphate, see Last (1967).

(Christelow 1994: 13). With regard to the judicial authority of the ruler (*siyāsa*) as opposed to that of the *qāḍī*, Mālikī law follows the doctrine of *siyāsa sharʿiyya*, as developed by Ibn Taymiyya (d. 728/1328) and Ibn Qayyim al-Jawziyya (d. 751/1350). According to this doctrine, the ruler's judicial decisions must comply with the *sharīʿa*. However, to increase the efficiency of administration, the law of evidence was widened to allow circumstantial evidence, which is seldom accepted in classical *fiqh* (Johansen 2002). In what are known as “trials of suspicion” (*daʿāwī al-tuham*), Mālikī law allows state authorities to investigate suspects of doubtful reputation who are accused of theft, highway robbery, homicide or illicit sexual intercourse. The authorities may imprison or beat the suspects to obtain confessions (Ibn Farḥūn 1995: 2:129). This means that, in the exercise of their judicial powers, the councils of the caliph and the emirs were to follow the rules of the *sharīʿa*, using their discretionary powers only with regard to matters of evidence. In practice, as shown by Allan Christelow's analysis of early colonial records of the Kano judicial council, the council was prudent in the use of its discretionary powers in cases of theft and violence. Although cases were investigated—which seems to indicate that the council used the possibilities granted by the doctrine of *siyāsa sharʿiyya*—judicial discretion appeared not so much in the making of judgments as in the manipulation of the rules of testimony and oath (Christelow 1994: 11).

Western authors, including Joseph Schacht, have expressed the view that Islamic criminal law, as it relates to *ḥadd*, was hardly applied in practice. Rather, they contend, the ruler exercised his prerogative in administering justice based on *siyāsa* (Umar 2006: 198-9). Based on an analysis of Egyptian court records, Rudolph Peters comes to a different conclusion:

This view is not correct, at least not for nineteenth century Egypt. Examination of Egyptian court records from this period shows rather that the provisions concerning the *ḥudūd* were often fully applied, but that convictions other than to flogging were rare, due to the difficulties [of fulfilling the Islamic standards of proof]. This does not mean that the culprits went scot-free, because they could always be punished on the strength of *taʿzīr*. (Peters 1994: 252)

After the British conquest in 1320-22/1903-04, the political structures in place in northern Nigeria were maintained under British overlordship. Submission to a non-Muslim political authority challenged the emirs' legitimacy, which was closely linked to application of Islamic law.<sup>303</sup> A

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<sup>303</sup> The development of the legal system in Northern Nigeria under colonial rule is described by Ostien and Dekker (2010). Christelow (1994) analyses the judicial practice of

majority of emirs and Muslim judges confirmed or appointed by the British seem to have justified the decision of keeping their positions with the argument that, in the face of British military superiority, it was necessary to preserve the physical and spiritual survival of Muslims.

The British tried to provide the emirs with arguments justifying their acceptance of British interference with Islamic law. Whereas in India the British did not want to impose punishment on the strength of *siyāsa*, on the grounds that it was a form of arbitrary justice (Peters 2009), in Northern Nigeria they invoked this very doctrine. Joseph Schacht, for one, argued that the doctrine of *siyāsa* conferred all judicial powers on the ruler—in the Nigerian context the emirs or the British colonial power. Based on this power, the emirs, acting on behalf of the British authorities, should have been able to suspend the application of certain aspects of Islamic law. However, Schacht also observed that during the colonial period the emirs increasingly renounced the use of *siyāsa* and, “in the absence of any desire on the part of the British administration to interfere with the law applicable to the Muslim populations, pure Islamic law acquired an even higher degree of practical application than before” (Schacht 1964: 87). He explains this preference for strict *sharīʿa* as a response to the interference of British judges with the emirs’ verdicts: adherence to the provisions of the *sharīʿa* was easier to defend vis-à-vis the British judges than the exercise of *siyāsa* (Abun-Nasr 1988: 46).

It is questionable whether the emirs accepted the justifications proffered by the British for their interference in the application of the law (Umar 2006: 198-202). As noted, the Mālikī doctrine of *siyāsa*, based on Ibn Taymiyya’s and Ibn Qayyim al-Jawziyya’s *siyāsa sharʿiyya*, cannot be invoked to justify a political decision—the more so if it was imposed by a non-Muslim overlord—to limit the applicability of Islamic law. Rather, the attitude of most emirs during the colonial period was one of passive resistance, probably inspired by the Islamic doctrine of *taqiyya* (dissimulation), which combines outward cooperation with inward rejection of colonial rule (Umar 2006: 155-6).

One way for the emirs and their legal advisers to justify their compliance with the new political and judicial order seems to have been the reference to the passage of time (*dahr, zamān*), the idea that, following the deaths of the Prophet and his Companions, an unstoppable process of moral and religious decline began (Umar 2006: 177). This concept implies that God, and not the temporal British military and political he-

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the judicial council of Kano in the early colonial period. The conflict between Islamic and English law was studied extensively by J. N. D. Anderson (e.g. 1957). For a Muslim perspective on the transformation of Islamic law during the colonial period, see Yadudu (1991). The perception of colonialism by the Muslim elite and their responses to it are analysed in Umar (2006).

gemony, will prevail. In line with this idea, the judicial council of Emir 'Abbās of Kano classed judgments based on legislation introduced by the British in the judicial archives under the category of *ḥukm zamāninā* (“verdict of this era”) to mark them as not based on the *sharī'a* (Christelow 1994: 12).

Whereas initially substantive Islamic law was allowed to govern civil and criminal matters without hindrance (Yadudu 1991: 27-8), the colonial administration soon started interfering with the local judicial system in cases that were “repugnant to natural justice or morality, or inconsistent with any provisions of any Ordinance.”<sup>304</sup> In effect, the British retained firm control over, and contained aspects of, Islamic law through the instruments of judicial review and transfer of cases (Umar 2006: 45). The colonial administration could transfer a case from native courts, i.e. the *alkali* courts and the judicial council, to English courts, which applied the Nigerian Criminal Code (Anderson 1957: 87). Certain categories of penal sentences, including capital sentences, had to be approved by the governor-general after review by the resident (Peters 2009). However, where a case was disposed of at first instance by a native court, it was only by the governor’s exercise of the prerogative of mercy that discrepancies between the two systems of law could be rectified (Anderson 1957: 88).

The British introduced appellate instances in the Islamic judicial system. In particular, they conferred appellate jurisdiction on the emirs’ judicial councils over decisions taken by *sharī'a* courts. The British rationale was that emirs, as political figures, were more easily susceptible to political pressure and, therefore, through them the colonial authorities could retain control over the application of Islamic law, in particular in politically sensitive cases (Umar 2006: 189-90).<sup>305</sup>

The relation between Islamic and English law changed in 1947, after conflicts arose over homicide law. During his tenure, Governor-General Lugard (1914-19) fought to keep appeals of homicide judgments, which he considered politically sensitive, in the hands of his administration (Umar 2006: 16). Now, the British colonial judiciary apparently wanted to impose the rules of English law with regard to the awarding of punishment in homicide cases. It is plausible that this was partly motivated by the symbolic value of capital justice as a sign of sovereignty (Peters 2009). The West African Court of Appeal overturned the death sentence of Tsofo Gubba, who had been convicted of culpable homicide by the

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<sup>304</sup> Native Court Ordinance, 1933, section 10, quoted in Anderson (1957: 88).

<sup>305</sup> The use of these appellate instances as a means to control and contain the application of Islamic law was the reason why as early as 1950 the traditional rulers of northern Nigeria identified the preservation of Muslim identity with the creation of Islamic appellate courts (Abun-Nasr 1988: 40).

emir of Gwandu's judicial council for having killed his wife's lover.<sup>306</sup> The court of appeal reversed the decision on the grounds that provocation is a mitigating circumstance, a concept not recognised under Islamic law. It concluded that native courts could not exercise their jurisdiction in a manner inconsistent with the provisions of the secular Nigerian Criminal Code. For acts which constituted an offence against the Criminal Code, native courts could not impose punishments in excess of the maximum punishment permitted by the Criminal Code. Thus, if a death sentence was passed in accordance with Islamic procedure, but the evidence was deemed insufficient under English law, it would be quashed. This decision undermined the emirs' legitimacy, since they now had to enforce rules that had no base in the *shari'a*. Negotiations between the traditional rulers and the colonial administration in this matter seem to have broken down: in an unusual step, the Sultan of Sokoto, Siddiq Abubakar III, voiced his criticism publicly in a speech before the House of Chiefs of the Northern Region (Boyd and Maishanu 1991: 28). Against this background, it is not surprising that after this reform the emirs told British officials that they would prefer the British to take over the jurisdiction of criminal law instead of constantly revising their decisions (Abun-Nasr 1988: 46).

With the independence of Nigeria on 1 October 1960, the legal order in what had now become the Northern Region changed radically.<sup>307</sup> The application of Islamic criminal law was abolished; henceforth, criminal matters were tried under the 1959 Penal Code, an essentially English code that contained a number of special provisions based on Islamic criminal law (Peters 2003: 12). The 1959 Penal Code has been inherited by the successor states of the Northern Region, which to date number nineteen.<sup>308</sup> After the adoption of the 1959 Penal Code, Islamic law continued to be applied in uncodified form only in civil cases.

As a result of the breakup of the regions and the reorganisation of the judicial system by the military government in 1967, the status of Islamic law within the Nigerian legal system increasingly acquired religious and political importance for Muslims in the north, and Islamic law gradually became the basic element of the political identity of Muslims in northern Nigeria (Abun-Nasr 1993b: 201-2). When some northern Nigerian states moved to re-introduce Islamic criminal law after 1999, the emirs, having lost their political and judicial powers, played no active role in

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<sup>306</sup> On this case and its implications, see, e.g., Anderson (1957: 88-9); Umar (2006: 53-5) and Peters (2009).

<sup>307</sup> For the debate on the status of Islamic law in Nigeria after independence, see Abun-Nasr (1988, 1993b) and Ostien (2006).

<sup>308</sup> The laws of the original regions or states continued to apply in, and became the laws of, the new states carved out of them (Ostien 2006: 234).



the process. Nevertheless, they have gone along with it, and probably could not have done otherwise, if they were to retain spiritual authority over their constituencies (Blench et al. 2006: 73-4).

### ***The re-introduction of Islamic criminal law***

Since Nigeria's return to civilian rule in 1999, political power in the states is held by elected state governments and the state Houses of Assembly. Their offices are established by the 1999 Constitution of the Federal Republic of Nigeria and their legitimacy is linked, on the national level, to the conformity of their policies with the provisions of this constitution. At the same time, notwithstanding frequent accusations of electoral fraud, the gubernatorial elections of 1999, 2003 and—to a lesser extent—2007 have shown that, under the new dispensation, electoral victory on the state level depends, at least to a certain extent, on winning popular support.<sup>309</sup>

As in all civilian political systems, the governors need to reconcile constitutional constraints and the demands of their particular mix of constituents. In Muslim-majority states of northern Nigeria, they—like the colonial period emirs—had to balance their subordination to a secular political system and their constituents' demands for an assertion of the Islamic character of their governance. Nevertheless, there are important differences between the colonial period emirs and the present-day governors. The roles have been reversed: while emirs had to integrate demands imposed on them by the colonial authorities into their traditional system of governance, present-day governors must manage their secular offices in a way that resembles an Islamic model to the greatest (constitutionally) possible extent.

Under the 1999 Constitution, the states do have considerable liberty in shaping the administration of justice in their territory. They are empowered to introduce legislation on criminal matters. The constitution

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<sup>309</sup> According to the EU Election Observer Mission Nigeria 2003 (EU EOM), in many Nigerian states, the 19 April 2003 gubernatorial elections were “marred by serious irregularities and fraud – in a certain number of States, minimum standards for democratic elections were not met.” Widespread election fraud was noted, among the *shari'a* states, in Kaduna and, to a lesser extent, in Katsina. In Gombe and Kebbi, the EU EOM was not present on election day. As a result of the elections, a number of unpopular governors lost their posts: in Borno State, Mala Kachalla was succeeded by Ali Modu Sheriff; in Gombe State, Abubakar Habu Hashidu was replaced by Mohammed Danjuma Goje; in Kano State, Ibrahim Shekarau defeated Rabiu Musa Kwankwaso. Shekarau won the election primarily for his stated commitment to the implementation of the *shari'a*. In the 2007 gubernatorial elections, governors elected to office in 1999 could not stand for elections again, as the constitution limits the mandate of the governors to a maximum of two four-year terms. The governor of Kano State, Ibrahim Shekarau, was re-elected. On the role of *shari'a* in the 2003 elections, see Kogelmann (2006).

explicitly establishes an Islamic judiciary. Section 275 provides that “any State that requires it” shall have a *sharī'a* court of appeal. This court exercises appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law, in particular as regards marriage, inheritance and maintenance, “in addition to such other jurisdiction as may be conferred upon it by the law of the State” (Section 277 (1)). This highly contentious passage has been called the “delegation clause” by Philip Ostien because it plausibly may be read, and has been read, as delegating to the states the power to give their *sharī'a* courts of appeal any jurisdiction they please, including Islamic criminal law.<sup>310</sup>

States which introduced Islamic criminal law replaced their area courts, which hitherto applied uncodified Islamic law in civil cases and the Penal Code in criminal cases, by *sharī'a* courts, placed under the administrative responsibility of the *sharī'a* court of appeal. These courts apply uncodified Islamic law in civil cases, but handle criminal cases in accordance with the newly introduced *sharī'a* penal codes. This involved little change of personnel, most area court judges simply becoming *sharī'a* court judges. In addition, the jurisdiction of the state *sharī'a* courts of appeal, formerly restricted to matters of Islamic personal law, has been expanded to all civil and criminal matters, so that all appeals from inferior *sharī'a* courts can be directed to them (Ostien 2006: 252).

However, the situation is not as clear as it may seem from Section 277 (1). In all other sections referring to the states' *sharī'a* courts of appeal, the 1999 Constitution relentlessly uses the phrase “Islamic personal law.” There is no doubt that the drafters of the constitution intended to limit *sharī'a* court of appeal jurisdiction to questions of Islamic personal law. In particular, appeals from the *sharī'a* courts of appeal of the states to the federal Court of Appeal are restricted to “civil proceedings before the Sharia Court of Appeal with respect to any question of Islamic personal law which the Sharia Court of Appeal is competent to decide” (Section 244 (1)) (Ostien and Dekker 2010: 581). However, it cannot be the intention that sentences by the state *sharī'a* courts of appeal in criminal matters be left unappealable. Since the introduction of Islamic criminal law, the High Courts of Borno and Niger States have declared the expansion of state *sharī'a* court of appeal jurisdiction beyond questions of Islamic personal law as unconstitutional. As a consequence, in these states, appeals from the *sharī'a* courts in Islamic criminal law go to the high courts (*ibid.*). In other states, the *sharī'a* courts of appeal have received and decided appeals involving Islamic criminal law from lower

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<sup>310</sup> Ostien (2006: 248-52). He believes that the “delegation clause” is a drafting error which somehow slipped into the draft of the 1979 Constitution and has not been deleted in the 1999 Constitution.

*sharī'a* courts. To present, the federal courts have not decided an appeal of a sentence in Islamic criminal law brought before them from one of the *sharī'a* states. Thus, the question of the constitutionality of the Islamic criminal legislation has remained unanswered.

In criminal matters—unlike personal and civil matters—the *sharī'a* courts cannot apply Islamic law in the traditional manner of a jurists' law due to the constitutional requirement that criminal offences and their punishments be specified in a written law enacted by the federal or state parliament (Section 36 (12), 1999 Constitution). As a consequence, the only practicable way for the governors to introduce Islamic criminal law was by way of state legislation. To be applicable within the legal framework set by the Nigerian Constitution, Islamic criminal law had to be codified.<sup>311</sup> Codification of Islamic law means that the state takes control and decides what God's law is or, at least, how and to what degree society should conform to God's will.<sup>312</sup> In the codification of Islamic law, choices have to be made between various, often conflicting opinions on a given issue as contained in the classical *fiqh* works. To make these choices, the cooperation of experts in Islamic law is essential. They are needed both for their expertise and in order to legitimise state-enacted *sharī'a* codes. The necessary participation of these experts limits the freedom of the state in codifying Islamic law, while it enables them to exert pressure on the government by threatening to withdraw their support.

After his election in 1999 as governor of Zamfara State, Ahmad Sani, who holds the traditional title of the Yarima of Bakura, quickly started to act on his campaign promise to “restore” the full *sharī'a*: on 8 October 1999, he assented to a law establishing *sharī'a* courts for Zamfara State, subordinated to the state *sharī'a* court of appeal, with the power to determine both civil and criminal proceedings “in Islamic law.” The law also created a Council of ‘Ulamā for the State, with the power to “codify all the Islamic penal laws and their corresponding punishments, and the rules of criminal procedure and evidence as prescribed by the Qur’an, Hadith and Sunna of the Prophet (SAW), *Ijmah*, *Qiyas* and other sources of Islamic Law.”<sup>313</sup> A draft for a *sharī'a* penal code was made by the Zamfara State Ministry of Justice in collaboration with the newly established

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<sup>311</sup> In the early stages of *sharī'a* implementation, in some states, such as Katsina and Kano, cases were tried according to uncodified *sharī'a*. However, the sentence of Safiyya Hus-saini, e.g., was quashed, among other reasons, on the ground that the *sharī'a* penal code was not in place at the time of the offence. Therefore, it appears that a continued application of uncodified *sharī'a* in criminal matters would have been contested on constitutional grounds. See Chapter One and Sada (2007: 23-4).

<sup>312</sup> On the effects of codification of Islamic law see Peters (2002a) and Layish (2004).

<sup>313</sup> Quoted in Sada (2007: 23).

Council of ‘Ulama. It was revised by a group of seven lecturers in law from the Centre for Islamic Legal Studies (CILS) and the Faculty of Law at Ahmadu Bello University in Zaria (Kaduna State). Their final draft, which was prepared under time pressure, was enacted by the state House of Assembly and signed into law by Governor Sani on 21 Shawwāl 1420/27 January 2000. The code came into force on that day (Sada 2007: 24). Although the code is a codification of Islamic criminal law, it leaves room for the application of uncodified Islamic criminal law for offences not specified in the code.<sup>314</sup> This provision clearly contravenes the constitutional principle that criminal offences and their punishments be specified in a written law.

Following the lead of the Zamfara State government, governors in eleven other Muslim-majority northern states were forced to profess, at least verbally, their commitment to implementation of the *sharī‘a*, which in public discourse was often reduced to Islamic criminal law.<sup>315</sup> Few of the governors were enthusiastic about this measure. In Borno, Gombe and Yobe, where Islamic criminal law was introduced under pressure from the public, the law has largely remained a dead letter. The then governor of Katsina State, Umaru Yar’Adua, was accused of impeding the implementation of Islamic criminal law (Chapter One, p. 29). In Jigawa State, the “gradual approach” of the state government was met by accusations of lack of resolve (p. 37). In Kano State, the then governor, Rabiu Musa Kwankwaso, was reluctant to introduce a *sharī‘a* penal code. Muslim scholars tried to mobilise the public and, in February 2000, called on the governor, urging him to take action. The scholars already had prepared a *sharī‘a* penal code bill of their own, which they planned to submit to the state House of Assembly if the governor’s response was not encouraging. The state government ceded to the pressure and introduced legislation establishing *sharī‘a* courts that were to apply Islamic criminal law as found in the classical sources. This law remained a dead letter. To put more pressure on the government, the *sharī‘a* penal code bill prepared by the scholars was introduced in the state House of As-

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<sup>314</sup> Section 92 (General Offences) of the 2000 Zamfara State *Sharī‘a* Penal Code: “Any act or omission which is not specifically mentioned in this Sharia Penal Code but is otherwise declared to be an offence under the Qur’an, Sunnah, and *ijtihād* of the Malikī school of Islamic thought, shall be an offence under this code and such act or omission shall be punishable: (a) with imprisonment for a term which may extend to five years, or (b) with caning which may extend to 50 lashes, or (c) with a fine which may extend to ₦5,000.00, or with any two of the above punishments.” This or a similar provision is also found in the *sharī‘a* penal codes of Bauchi, Gombe, Jigawa, Kebbi, Sokoto, and Yobe (Ostien 2007: 4:60).

<sup>315</sup> In addition to the introduction of Islamic criminal law, several states have introduced other measures, such as the segregation of men and women in public transport. See Ostien (2007, vol. 3).

sembly as a private bill. This, finally, prompted the governor to take proactive steps: two committees were set up, a Technical Committee headed by Prof. Auwalu Hamisu Yadudu, and a Sharia Implementation Advisory Committee (SIAC) under the chairmanship of Sheikh Isa Waziri. The Yadudu committee recommended that the private bill be withdrawn and a separate *sharī'a* penal code be prepared and submitted as an executive bill to the House of Assembly. This code was drafted in Hausa by a subcommittee of the SIAC, headed by the lawyer Muzammil S. Hanga, and subsequently translated into English by the Kano State Ministry of Justice. However, Governor Kwankwaso, upon receipt of the draft, saw a need to set up another ten-member committee under the chairmanship of Dr. Ibrahim Na'iyā Sada, the CILS director, which was given one week to review the draft, in a bid to have the legislation in place by 1 Ramaḍān 1421/26 November 2000, as promised by Governor Kwankwaso. The review committee observed that certain provisions tended to conflict with the Nigerian Constitution or existing federal laws. These were amended or deleted by the committee, including the provision which allows for the application of uncodified Islamic criminal law for offences not specified in the code. The resulting draft was introduced to the state House of Assembly and adopted, with modifications (Sada 2007: 25-30).

Soon after the introduction of Islamic criminal legislation, the governors embarked on reforming it. The twelve *sharī'a*-implementing states commissioned and funded the CILS to draft a “harmonised *sharī'a* penal code” that would be enacted by all twelve states to replace the diverse *sharī'a* penal codes in place. This provided the chance not only to remove divergences between the different codes, but also to improve their often poor legislative quality (Ostien 2007: 4:20-1). At present, only Zamfara State appears to have adopted the “harmonised *sharī'a* penal code”—in a photocopied version still bearing the header of the CILS—in November 2005 (Ostien 2007: 4:34).

The result of this legislative process was that Islamic criminal legislation in the different states differs in form and substance. Most codes are based on the Zamfara *sharī'a* penal code. Kano State has produced its own code, while Niger State has amended the existing Penal Code to include provisions on Islamic criminal law. A similar situation applies to the *sharī'a* criminal procedure codes: eight states introduced an independent *sharī'a* criminal procedure code; Katsina and Yobe State still use the 1959 Criminal Procedure Code, while Kano and Borno State added to it a new chapter on trials by *sharī'a* courts.

## ***Provisions of the sharīʿa penal codes***

In general the individual *sharīʿa* penal codes provide for offences and punishments to be imposed and applicable to all Muslims and those non-Muslims who voluntarily consent to being tried by a *sharīʿa* court. This implies that non-Muslims who do not consent continue to be tried under the Penal Code (Ostien 2007: 4:45). The *sharīʿa* penal codes maintain most of the provisions of the 1959 Penal Code under the heading of *taʿzīr*, or discretionary punishments, to which are added chapters defining the *ḥadd* offences and the Islamic law of homicide and bodily harm (Peters 2006: 223). The *sharīʿa* penal codes were drafted in great haste, which “explains the poor legislative quality of the codes with lapses such as faulty, sometimes even incomprehensible wording, incorrect cross references, omissions and contradictions.”<sup>316</sup> In the following sections, I discuss the provisions of the *sharīʿa* penal codes with regard to theft, homicide and wounding and contrast them with the classical doctrine of Mālikī *fiqh*.

### ***Sharīʿa penal codes on homicide and bodily harm***

The provisions of the *sharīʿa* penal codes in northern Nigeria<sup>317</sup> concerning the Islamic law of homicide follow the classical Mālikī model, albeit with modifications.<sup>318</sup> In the classical doctrine, the prosecution, the continuation of the trial and the execution of the sentence are conditional upon the will of the victim or, in cases of homicide, the victim’s next of kin (*awliyaʾ al-dam*, sing. *walī al-dam*). In Mālikī law, these are the closest adult male agnates. Under the *sharīʿa* penal codes, it is the state prosecutor who brings the accused to trial, not the victim’s next of kin.

In the classical doctrine, the legal effects of homicide or bodily harm depend very much upon the perpetrator’s intent. The basic distinction is between intentional (*ʿamd*) and accidental (*khataʾ*) homicide or wounding. Intent is established by examining the weapon or means employed in the offence. If this is such that it would normally produce death or the injury suffered by the victim, the act is assumed to have been intentional. If death or injury were caused by an instrument or an act that normally would not have this effect, classical Mālikī law tries to establish whether or not the intention to kill or wound exists by looking at other factors, such as anger or hatred on the part of the perpetrator. If

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<sup>316</sup> Peters (2003: 14). See also Sada (2007: 25).

<sup>317</sup> For the *sharīʿa* penal codes, I rely on Philip Ostien’s edition of the harmonised *sharīʿa* penal code and harmonised *sharīʿa* criminal procedure code produced by the CILS, which shows variations between the harmonised versions and the codes in place as well as the old Penal Code (Ostien 2007: 4:36-139 and 4:221-317).

<sup>318</sup> For a summary of the classical doctrine, see Peters (2005: 12-19 and 38-53).

the killing or wounding was intentional, the victim or the next of kin, respectively, can demand retaliation (*qiṣāṣ*). In the classical doctrine, *qiṣāṣ* is performed by the victim or the next of kin in a manner similar to that which the perpetrator used to wound or kill his victim.

In the *sharī'a* penal codes, the basic principle of retaliation (*qiṣāṣ*) is respected. This means that if the victim's next of kin demand it, intentional homicide is punished with death "in the like manner he [the perpetrator] caused the death of his victim" (Ostien 2007: 4:292). However, whereas the classical doctrine allows retaliation for wilful wounding or homicide to take place only if there is equivalence in value between the attacker and the victim, i.e. if the attacker's *diyya* (see below) is not higher than the victim's (except in the case of a woman killed by a man), the codes are silent about this requirement (Peters 2003: 172).

Many *sharī'a* penal codes include in the definition of intentional homicide deaths resulting from causes "not intrinsically likely or probable to cause death," with some codes specifying that this refers to the object used, e.g. a light stick or a whip. The Kaduna code states that causing death with one of the aforementioned objects "in a state of anger" constitutes intentional homicide (Ostien 2007: 4:84-5). This definition of intentional homicide is close to the classical doctrine. All instances in which the Penal Code accepts the plea of provocation in cases of homicide and hurt have been omitted in the *sharī'a* penal codes (ibid.: 4:11-2).

If the victim or the next of kin remit retaliation, they are entitled to receive financial compensation (*diyya*) which accrues to the victim's estate, or they can pardon the perpetrator. Also according to the *sharī'a* penal codes, in most cases of wilful homicide and grievous hurt, the plaintiff has the option of remitting the *qiṣāṣ* punishment and accepting monetary compensation (*diyya*).<sup>319</sup>

According to Rudolph Peters, the classical doctrine treats *diyya* as a remedy for a civil tort (Peters 2005: 7). Payment of *diyya* does not imply fault, as evidenced by the fact that as a rule it is not paid by the perpetrator but by his solidarity group (*āqila*). A liability for paying *diyya* is also created in cases in which killing or wounding is accidental (*khata'*). Negligence on the part of the defendant is not required. The *sharī'a* penal codes define unintentional, i.e. accidental, homicide as causing another person's death by mistake or accident. Most codes state that it is "punished" with the payment of *diyya* (Ostien 2007: 4:85). The description of *diyya* as punishment is contrary not only to the classical doctrine but also to the provision of the *sharī'a* penal codes that there is no criminal re-

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<sup>319</sup> See Ostien (2007: 4:85) for homicide and (2007: 4:90) for hurt.

sponsibility unless for acts committed intentionally or negligently (Peters 2003: 27-8).

In classical Mālikī law, the full amount of *diyya* is defined as 100 camels, 1,000 dinars or 12,000 dirhams. This full amount of *diyya* is payable in the case of homicide of a free Muslim man. The bloodprice for women, non-Muslims and slaves is calculated as a fraction of the full *diyya*. In cases of wounding, the financial compensation for the loss of members or faculties or for certain wounds is also calculated as a fraction of the full *diyya*. Most of the *sharī'a* penal codes, while specifying the fractions of *diyya* to be paid for particular wounds or damages (Ostien 2007: 4:137-9), fail to define the equivalent of the *diyya* in modern currency and simply cite the classical definition (ibid.: 4:54; Peters 2003: 27-8). Only Niger State, in its 2000 amendment to the Penal Code, defines the full amount of *diyya* as 4 million Naira (35,000 US\$) (Ostien 2007: 4:141; Peters 2003: 27). As in the classical doctrine, *diyya* is paid to the victim or the *awliyā' al-dam*, respectively, by the *'āqila*, which most codes define as the agnatic relatives of the killer.<sup>320</sup> The *sharī'a* criminal procedure codes of Kano and Bauchi State go a step further and stipulate that *diyya* is to be paid by "close relations of the convict." In cases in which these relatives are not available or are not financially capable of making such payment, the convict is ordered to pay the full amount. If neither the convict nor his relatives are capable of paying, the state government assumes responsibility for effecting the payment of *diyya* (Ostien 2007: 4: 323).

All *sharī'a* penal codes except that of Bauchi State distinguish between "hurt" and "grievous hurt" (Ostien 2007: 4:89-90).<sup>321</sup> Instances of grievous hurt are specified in a list that enumerates permanent partial disablements, such as emasculation, permanent deprivation of a sense or the power of speech, deprivation of any member or joint or disfiguration of the head or face (Ostien 2007: 4:89). In cases of grievous hurt, the victim can demand retaliation "in the like manner the offender inflicted such injury on the victim" (ibid.: 4:293). Other cases of hurt are punished with a maximum of six months' imprisonment or twenty lashes and payment of damages.

In the classical doctrine, in addition to retaliation or financial compensation, the state authorities or the court may inflict punishment on the strength of *ta'zīr* or discretionary punishment. In Mālikī law the *ta'zīr* penalty is fixed: a person who commits wilful homicide but who, for procedural reasons, cannot be sentenced to retaliation, must be sen-

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<sup>320</sup> There are no specific provisions on who receives the *diyya* in the rules on homicide and hurt, but the terms *diyya* and *'āqila* are defined accordingly (Ostien 2007: 4:53 (*'āqila*) and 4:54 (*diyya*)).

<sup>321</sup> A similar distinction is found in the 1991 Sudanese Penal Code, S. 138 Grievous Hurt (*jirāh*) and S. 142 Hurt (*adhan*). I thank Olaf Köndgen for this information.



tenced to one year's imprisonment and 100 lashes. While most *sharī'a* penal codes follow classical Mālikī *fiqh* in this respect, the Kano and Katsina codes provide for up to ten years' imprisonment (Ostien 2007: 4:85; Peters 2003: 27).

Under Islamic law, an accusation of homicide or bodily harm is proven either by confession of the accused or concurring testimonies of two male adult Muslim witnesses of good reputation in the presence of a judge. In principle, oaths do not count as evidence in the law of *qisās*, but there is one exception: the *qasāma* procedure.<sup>322</sup> It is a means to compensate for insufficient evidence in homicide cases in which the body is found bearing marks of violence. The victim's *awliyā' al-dam* must prove that there is strong suspicion (*lawth*) as to the identity of the murderer. Based on this, the court can decide to allow the *qasāma* procedure to take place. In Mālikī law, the next of kin swear fifty oaths in order to substantiate their claim. The *qasāma* procedure establishes liability for the *diya*, and may result in a death sentence for the defendant, if the plaintiff swears that the killing was intentional. The validity of the *qasāma* procedure has been contested by some Muslim jurists, but it has been used in northern Nigeria both in the past and, as we will see, in recent times.

### ***Sharī'a* penal codes on theft**

Under classical Islamic law unlawfully seizing property (*ghaṣb*) is essentially a tort with civil remedies: return of the stolen object or damages.<sup>323</sup> In addition, the thief may be sentenced to a discretionary punishment (*ta'zīr*). Under special circumstances, however, he may be sentenced to the *ḥadd* punishment for theft (*sariqa*), which—for first offenders—is amputation of the right hand.<sup>324</sup> The jurists define the *ḥadd* crime of theft narrowly: theft is the surreptitious seizure of (movable) property with a certain minimum value (*niṣāb*) from a place which is locked or under guard (*ḥirz*). Classical Mālikī doctrine defines the *niṣāb* as three silver dirhams or one-quarter of a gold dinar. A further requirement for the fixed punishment to apply is that the thief must not have the goods legally at his disposal or be a co-owner. For example, a shop assistant who takes away goods or money from the shop he attends to, or a person who steals state property, cannot be punished with amputation.

In the *sharī'a* penal codes, *sariqa* or theft is punishable by amputation of the right hand from the wrist for first offenders. The modern defini-

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<sup>322</sup> On the origins and the doctrine of the *qasāma* procedure in Islamic law, see Peters (2002b).

<sup>323</sup> For the classical doctrine on theft, see Peters (2005: 55-7).

<sup>324</sup> This *ḥadd* penalty is based on Qur'ān 5:38: "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, and exemplary punishment from God." See Peters (2005: 56).

tion of *sariqa* respects many of the classical restrictions for the application of the *ḥadd* punishment (Ostien 2007: 4:73). These include that the value of the stolen goods must exceed a minimum value (*niṣāb*). However, the codes fail to define the exact monetary value of the *niṣāb*. The stolen property must have been kept in a safe place or *ḥirz*, defined as any location or place “customarily understood to represent safe keeping or custody or protection” (Ostien 2007: 4:52). Presumed or real co-ownership of, or entitlement to, the stolen goods is accepted as a defence that precludes the imposition of the *ḥadd* punishment (ibid.: 4:74).

Uniquely, the Kano code treats as *sariqa* embezzlement of public funds or of funds of a bank or company by officials and employees and makes it punishable with amputation and “not less than five years’ imprisonment.” Section 134B reads—in its original English wording:

Whoever is a public servant or a staff of a private sector including bank or company connives with somebody or some other people or himself and stole public funds or property under his care or somebody under his jurisdiction, he shall be punished with amputation of his right hand wrist and sentence of imprisonment of not less than five years and stolen wealth shall be confiscated. If the money or properties stolen are mixed with another different wealth it will all be confiscated until all monies and other properties belonging to the public are recovered. If the confiscated amount and stolen properties are not up to the amount, the whole wealth shall be confiscated and he would be left with some amount to sustain himself.<sup>325</sup>

This provision in the Kano code has its own history. It was first included in the draft produced by the Hanga subcommittee. The review committee, headed by Ibrahim N. Sada, after discussion, decided to re-designate it as an offence attracting *taʿzīr* punishment. However, the Kano State House of Assembly, in the bill it finally enacted, based on the advice of prominent Kano-based Muslim scholars, restored it to the original draft position (Sada 2007: 30-1).

From the perspective of Islamic law, there is some support from less authoritative Mālikī jurists, who regard amputation as a lawful punishment for these offences, albeit not as a *ḥadd* punishment but by way of *taʿzīr* (Peters 2005: 172). There seems to be an element of populism in the decision to assimilate embezzlement of public funds to the *ḥadd* crime of theft. The possibility to call a corrupt politician a thief may appeal to the

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<sup>325</sup> Ostien (2007: 4:74). The other *sharīʿa* penal codes, with the exception of Katsina, define similar offences under the heading “Criminal Breach of Trust” (Kaduna under *taʿzīr*) and make them punishable with between five (Kebbi) and fifteen (Zamfara) years’ imprisonment, fine and a maximum of sixty lashes (ibid.: 4:79).

population of a country ranked among the most corrupt in the world. However, to the present time, there is no evidence that this section has been applied in practice.

In the classical doctrine, unlike homicide or bodily harm, the prosecution of theft is not a private matter. Once the case has been reported to the government and the victim has demanded the application of the *ḥadd* punishment, he cannot pardon the defendant. The return of the stolen goods by the thief before the judgment, however, prevents amputation. If the stolen object still exists, it must be given back to its rightful owner. If it has been destroyed, according to Mālikī jurists, the victim may demand damages in addition to the penalty if the thief is rich, but otherwise only the penalty (Ibn Farḥūn 1995: 2:193).

The classical rules of evidence with regard to *ḥadd* offences, including *sariqa*, are formalistic (Peters 2005: 12-4). In principle, convictions may be based either on confession of the defendant or the testimony of two male, or one male and two female, adult Muslim witnesses of good reputation who give concurring testimonies in the presence of the *qāḍī* with regard to what they have seen themselves. Only confessions made in court are valid. In a court presided over by a *qāḍī*, statements obtained under coercion and torture are not accepted. With regard to *ḥadd* punishments, such as theft, the assertion of having confessed under torture is tantamount to withdrawal of confession.

If the evidence is insufficient for the *ḥadd* punishments, under classical doctrine, the judge is relatively free to impose a discretionary punishment if he is convinced that the accused is guilty. According to most *sharī'a* penal codes, with the exception of those in Katsina and Kano, if the requirements of *ḥirz* and *niṣāb* are not met, the court can sentence the accused for committing the offence of “theft not punishable with *ḥadd*.” The maximum punishment in those cases is one year in prison and fifty lashes (Ostien 2007: 4:74-5).

### ***Role of the governors in implementing Islamic criminal law***

The governors had only limited influence on the formulation of the new legislation. The codification of Islamic criminal law was mainly the work of a younger generation of university-trained lawyers or scholars of Islamic law. The driving force in the process is said to have been “mainly young and educated Muslims associated with Muslim activism and supported by Islamic scholars, particularly graduates of Arab universities” (Sanusi 2007: 177). Participation in the “*sharī'a* project” was seen as an opportunity for social mobility and personal advancement (ibid.: 184). The need to introduce Islamic criminal law by way of state legislation has created an opportunity for some to distinguish themselves and to

acquire social recognition. Possibly, economic reward was also a motivation: numerous commissions needed to be staffed and positions filled. The introduction of the *sharī'a* brought about an institutionalisation of the religious sphere, the effects of which will become apparent only in the long term.

The ideas and measures promoted by the pro-*sharī'a* lobbies did not necessarily match the intentions of the governors, who must take into consideration the wider interests of their states within the Nigerian federation and internationally. Moreover, the political office holders also had personal interests to consider: implementing harsh sentences in a bid to please their mostly Muslim constituencies would have ruined the governors' hopes of continuing their career on a national level.<sup>326</sup> Thus, they may have felt the need to control the application of the *sharī'a*, in particular Islamic criminal law, and if necessary contain certain aspects thereof.

At the same time, the governors have reasons to be apprehensive of appeals of cases involving Islamic criminal law reaching the level of the federal courts. In view of several potential conflicts between the Nigerian Constitution and the Islamic criminal legislation, the federal courts are likely to rule that the *sharī'a* penal codes in place in northern Nigeria are unconstitutional. The annulment of Islamic criminal law by the federal level would severely damage the governors' credentials as Muslim leaders. The governors could not be expected to actively seek clarification of the constitutional issues on the federal level.

The ability of governors to control the application of Islamic criminal law is restricted by the limitations of the powers conferred to them by the Nigerian Constitution. Their lack of judicial powers means that the administration of justice has become the exclusive remit of the state judiciary, which—at least theoretically—is independent of the state government. In addition, the governors have only limited control over law enforcement in their respective states,<sup>327</sup> and do not have the authority to establish their own law enforcement agencies. The only official law enforcement authority, even in states that have introduced Islamic criminal law, is the secular nation-wide Nigeria Police Force (NPF). NPF officers are not stationed in their home areas, which compromises their immediate effectiveness in the community (Last 2008: 55). It may also

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<sup>326</sup> Many governors of *sharī'a* states showed interest in being nominated as candidates for the office of the President of Nigeria in the 2007 elections. One of them, former governor of Katsina State Umaru Yar'Adua was eventually elected. See Ostien (2007: 4:203) and Chapter One.

<sup>327</sup> According to Section 215 (4) of the 1999 Constitution, the state governor has the right to issue directives to the commissioner of police, but the commissioner has the right to refer the matter to the federal government.

affect their commitment to the implementation of Islamic criminal law. In several states, *sharī'a* enforcement, or *hisba*, groups were established, partly with statutory backing of the state government.<sup>328</sup> In other states, such as Kano and Katsina, independent *hisba* groups emerged in opposition to what was perceived as a lack of resolve on the part of the state government in implementing *sharī'a* (Chapter One, p. 39).<sup>329</sup> In response, the Katsina State government issued a directive to the *sharī'a* courts not to accept any more cases brought before them by independent, i.e. not state-controlled, *hisba* groups.<sup>330</sup> In the past, there have been clashes between the NPF and *hisba* groups. This notwithstanding, Murray Last (2008: 51) concludes that, due to the limitations of their mandate, the *hisba* are acting as concerned citizens, not as a police force. Even in the field of law enforcement, state governors are torn between constitutional restrictions on their powers and pressure exerted by non-state agents.

Nevertheless, the state governments retain a certain influence on the judiciary. Whereas they have limited powers to interfere with the progress of trials in *sharī'a* courts, they do have means to control and contain the application of Islamic criminal law in other ways. For example, they can decide to assign specific cases to specific courts. Besides the newly established *sharī'a* courts applying the *sharī'a* penal codes and the *sharī'a* criminal procedure codes, magistrate and high courts in the “*sharī'a* states” continue to apply the old Penal Code and the Criminal Procedure Code. Homicide, wounding and theft are offences under both types of law and, therefore, can be tried by either the magistrate courts or the *sharī'a* courts. Cases in which all parties are Muslims normally should be brought before *sharī'a* courts. Ultimately, it is in the discretion of the state attorneys-general to decide which type of court should hear a case. Only the more serious cases, however, reach their offices. Those that do are almost all assigned to the magistrate or the high courts.<sup>331</sup> Transferring cases to non-Muslim courts, it will be recalled, was an important instrument with which the colonial administrators contained the application of Islamic law. Apparently, present-day governors use this method to avoid verdicts that might bring them into conflict with the constitution and the federal government. Some governors have lost this option. In Zamfara State, in October 2002, a separate law was passed

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<sup>328</sup> See Chapter One for Zamfara (p. 26), for Jigawa (p. 36), for Bauchi (p. 45).

<sup>329</sup> In response, Kano State enacted a law establishing a state-controlled *hisba* board. For a comparison of the independent and the state-controlled *hisba* groups, see Gwarzo (2003: 305-8).

<sup>330</sup> “Sharia implementation in Katsina, the journey so far,” *Weekly Trust*, 26/07-01/08/2003, 8.

<sup>331</sup> Philip Ostien, personal communication, June 2009.

removing the criminal jurisdiction of magistrate courts to try offences committed by Muslims. As a result of this law, all cases involving Muslims have been transferred from the magistrate courts to the *sharī'a* courts in Zamfara State (Human Rights Watch 2004: 21).

As in the colonial period, if a case has been decided by a *sharī'a* court, the governors can avoid a potential conflict of laws only by invoking their constitutional prerogative of mercy. Section 212 of the 1999 Constitution allows state governors, among other options, to grant a pardon to the defendant, to substitute a less severe form of punishment for any punishment imposed or to remit the whole or any part of any punishment. According to the *sharī'a* criminal procedure codes, severe punishments, such as death penalties, amputation for theft or retaliation, cannot be executed without prior confirmation of the state governor. Some *sharī'a* criminal procedure codes apparently attempt to exempt *ḥadd* and *qīṣāṣ* punishments from the requirement for the governor's approval, but these provisions will surely be held ineffective if ever challenged in higher courts.<sup>332</sup>

### ***Judicial practice***

In general, it appears that the largely oral character of early colonial judicial procedure, identified by Allan Christelow (2006: 301), has been maintained. Confession, witness testimony and oaths seem to be the main means to produce evidence during trial.<sup>333</sup> In this respect, the local tradition lives on.

Legal pluralism accords the governor the possibility to influence the administration of justice by assigning particular cases to particular courts. The same applies to other parties involved. Plaintiffs and defendants have tried to use the possibilities opened by the competition of legal systems to their personal advantage.

Apparently arbitrary decisions have been made as to which courts should handle which cases (Human Rights Watch 2004: 19-21). There are allegations that police and judicial officials were bribed or otherwise pressured to take cases before *sharī'a* courts instead of magistrate courts. For example, in 2001 Altine Mohammed was initially taken to a magistrate court in Kebbi State. However, at the request of the grand *qādī*, who owned the items he was accused of stealing, the case was transferred to the upper *sharī'a* court in Birnin Kebbi, where Mohammed was sentenced to amputation (ibid.: 20). There also have been reports of de-

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<sup>332</sup> For a discussion of the sections in the *sharī'a* criminal procedure codes with regard to the consent of the governor, see Ostien (2007: 4:201-3).

<sup>333</sup> See, e.g., the lively description of proceedings in a northern Nigerian *sharī'a* court by Wiedemann (2006).

fendants bribing the police to take them to the magistrate court rather than the *sharī'a* court.<sup>334</sup>

The prospect of receiving compensation has also been a motivation for asking for a case to be transferred from a magistrate court to a *sharī'a* court. Isa Bello, Jamilu Nasiru and Yawale Muhammadu, accused of having forcefully removed the eyes of seven-year-old Umar Mamman, were tried by a magistrate court in Sokoto, where they were convicted of conspiracy and causing grievous hurt and sentenced, on 4 June 2007, to five years' imprisonment. Not satisfied with this, Umar Mamman raised the case to a lower *sharī'a* court in Wamakko asking for *diya*.<sup>335</sup>

Even non-Muslims have opted for a trial before a *sharī'a* court. In July 2001, two Christians, Emmanuel Oye and Femi Lasisi, insisted that they be tried before a *sharī'a* court in Sokoto State. They had been charged with "idleness" and "belonging to a group of thieves." Possibly, they reckoned that the punishment awaiting them under Islamic criminal law would be less severe than under the secular Penal Code.

The unsatisfactory quality of many sentences passed by *sharī'a* courts has frequently been criticised. Two major factors have led to perfunctory verdicts. One is the badly drafted and often incomplete legislation, in particular the absence, in some states, of *sharī'a* criminal procedure codes. The second factor is insufficient knowledge of Islamic criminal law on the part of the judges. Most *sharī'a* judges previously exercised their profession as *alkalai* in the former area courts, where they administered uncodified *sharī'a* in civil matters and applied the Penal Code in criminal matters. Preparation or training for implementing the new codes was lacking.

The following analysis of judicial practice in northern Nigerian *sharī'a* courts after the introduction of Islamic criminal law is based on two samples of trials, first for homicide and bodily harm and second for theft. This choice reflects the importance of crimes against life, limb and property for the physical security of the population and, therefore, for governance. By contrast, national and international public opinion largely concentrated on trials of sexual offences, in particular illicit sexual intercourse (*zinā*).<sup>336</sup>

### **Judicial practice in cases of homicide and bodily harm**

Only a small number of trials for intentional homicide and bodily harm have come to my notice, despite the fact that such trials should attract the attention of the local media, since they address the issue of personal

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<sup>334</sup> Philip Ostien, personal communication, June 2009.

<sup>335</sup> "Nigeria: Group Seeks Justice for Boy, 7," *This Day*, 16/05/2008.

<sup>336</sup> For an analysis of judicial practice in *zinā* cases, see Chapter Two.

safety and physical integrity. With regard to homicide, I am aware of only one trial.<sup>337</sup>

In the pre-colonial era, in most homicide cases, the result was payment of compensation to the victim's family by the killer, who was lashed and imprisoned for one year (Christelow 2002: 193). By contrast, the murder case of Sani Yakubu Rodi of Katsina State ended in a capital punishment. Rodi was convicted of intentional homicide and, upon the request of the victims' *awliyā' al-dam*, on 5 November 2001 he was sentenced to death. The death sentence was carried out on 3 January 2002 after the then governor of Katsina State, Umaru Yar'Adua, had confirmed the verdict (Human Rights Watch 2004: 32).

Rodi was accused of a brutal murder. On 8 June 2001, the wife of the Katsina State Director of Security and their two children, aged four years and three months, respectively, were stabbed to death at their residence. Reportedly, Rodi was caught on the premises on the same day, wearing blood-stained clothes and having in his possession a double-edged knife.<sup>338</sup> Rodi is reported to have repeatedly denied the charge.<sup>339</sup> However, neither he nor his family appealed the verdict. Rodi's family accepted the sentence, as they were convinced that he was guilty.<sup>340</sup>

The indictment was based on the circumstances of Rodi's arrest. Considering that these constituted *lawth*, the court allowed the *qasāma* procedure to take place. The husband of the murdered woman and his younger brother, acting as the victims' *awliyā' al-dam*, each swore twenty-five times on the Qur'ān.<sup>341</sup> This is in line with Mālikī criminal procedure, which stipulates that in cases of intentional homicide, if there are two or more *awliyā' al-dam*, the fifty oaths are shared equally among them (Ibn Farḥūn 1995: 1:274). Initially, the court ruled that Rodi

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<sup>337</sup> However, Human Rights Watch (2004: 21) speaks of a number of murder cases involving Muslim defendants which have been brought before *sharī'a* courts.

<sup>338</sup> "Sharia court sentences man to death by knifing," *The Guardian* (Nigeria), 15/11/2001, print edition.

<sup>339</sup> Human Rights Watch (2004: 32) reports that Rodi pleaded guilty in one of the hearings. However, a confession would be sufficient evidence for conviction and, thus, the *qasāma* procedure would have been unnecessary. Possibly, Rodi confessed after the procedure had taken place and it had become clear that the evidence was sufficient for him to be convicted.

<sup>340</sup> "Family will not appeal death sentence against Nigerian man," AFP, 22/11/2001. The family of the defendant is not a party to the case. However, in some trials of illicit sexual intercourse (*zinā*), stoning-to-death sentences were appealed by family members, pleading insanity of the defendant. For an example, see Chapter Two (p. 68).

<sup>341</sup> "Sharia court sentences man to death by knifing," *The Guardian* (Nigeria), 15/11/2001, print edition.



was to be executed by stabbing with the same knife with which he murdered his victims.<sup>342</sup>

The mode of execution subsequently was changed to hanging by the state government. According to some reports, this was done with a view to avert riots.<sup>343</sup> Another reason may have been that the execution of the sentence might have been contested on constitutional grounds. Stabbing to death may have qualified as a form of cruel, degrading or inhuman punishment, which is prohibited by the 1999 Constitution (Section 34). From a historic perspective, the change of execution method reproduces the colonial rule, introduced by the British through a legislative enactment stipulating that death penalties under Islamic law must be carried out by hanging (Anderson 1957: 87n3). The leader of the ‘Yan Izala movement<sup>344</sup> in Katsina State, Sheikh Habibu Kaura, who witnessed the execution of Rodi, protested against the decision not to allow retaliation.<sup>345</sup>

The state government, on its part, attempted to find justification in Islamic legal doctrine. In a press interview, Aminu Ibrahim, Katsina State Grand Qāḍī and chairman of the state’s *sharī’a* commission, explained that, in the absence of eyewitnesses to the crime and due to Rodi’s refusal to confess, the indictment was based on circumstantial evidence: the knife found in his hands, and the blood found on him and the knife. This is why the *qasāma* procedure was invoked to complement the evidence. According to Ibrahim, by passing the sentence in its initial form, the court forgot to take this fact into account.<sup>346</sup> The grand *qāḍī*’s argument for changing the mode of execution, explicitly mentioned in the verdict, appears to be that the *qasāma* procedure may lead to a death sentence, but not to retaliation. There seems to be support for this interpretation in classical Mālikī rules of procedure. In his *Tabṣīrat al-ḥukkām*, Ibn Farḥūn (d. 799/1396) states that in cases of intentional homicide, the *qasāma* oaths must be sworn by those who normally would be entitled to *qiṣās*, i.e. the closest male agnates. However, he is vague about the effects of the *qasāma* procedure: the *awliyā’ al-dam* are entitled to the murderer’s life (*yastaḥiqqūna al-dam*); if they wish, they kill him (or have him killed) or they pardon him. He does not use the word *qiṣās*

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<sup>342</sup> “Sharia court sentences man to death by knifing,” *The Guardian* (Nigeria), 15/11/2001, print edition.

<sup>343</sup> E.g. “Nigeria’s first Sharia execution,” BBC News, 04/01/2002.

<sup>344</sup> *Jamā’at izālat al-bid’a wa iqāmat al-sunna* (Society for the removal of innovation and reinstatement of tradition) or ‘Yan Izala is a Muslim reform movement which is equally opposed to the *ṣūfī* brotherhoods and Western influence. See Loimeier (1997) and Kane (2003).

<sup>345</sup> “Sharia: Katsina executes murder convict,” *Vanguard*, 04/01/2002.

<sup>346</sup> “Controversy over Sani Rodi’s hanging,” *New Nigerian Newspaper*, 16/01/2002, 14.

in this context (Ibn Farḥūn 1995: 1:273-4). Thus, even if the state government prevented the retaliation sentence for political motives, it sought justification for this containment of Islamic criminal law in Islamic legal doctrine.

In pre-colonial and colonial times, the judicial councils used the *qasāma* procedure as an instrument to establish liability in murder cases. It was one of the instances in which the judicial council was able to use its discretion, as illustrated by the following examples from Kano emirate. In a time of famine, a man was caught stealing food from a granary. He was followed, beaten and castrated, sustaining injuries so severe that he died after nineteen days. The perpetrators were not found, so the council invoked the *qasāma* procedure against the owner of the granary, even though there was no evidence that he took part in beating the food thief. This was no doubt a popular measure in a time of drought (Christelow 2006: 316-7). By contrast, the council did not invoke the *qasāma* procedure against a member of the traditional aristocracy accused of killing his wife (Christelow 1994: 167). In the case of Sani Rodi, it may be significant that the next of kin who demanded retaliation was a high-ranking state government official in charge of security matters. This leaves room for speculation regarding the extent to which the *qasāma* procedure retains a subjective element and, thereby, exposes the court to political pressure. The court's decision whether or not to invoke the *qasāma* procedure may well have been influenced by the social prestige of the complainant.

The trial of Sani Rodi shares a number of features with the judicial practice of the emirs' judicial councils in the colonial period, i.e. the use of discretion in the application of Islamic rules of evidence based on political expediency and the containment of certain aspects of Islamic criminal law in order to avoid conflict with a supreme non-Islamic political authority.

In three of the seven trials for grievous hurt punishable by retaliation of which I am aware, the conviction of the defendant was based on a confession. In January 2003, Adamu Musa Hussaini Maidoya of Bauchi State was convicted of cutting his wife's right leg with a cutlass in a rage of jealousy, on the strength of his confession. The sentence was upheld by the state's *sharī'a* court of appeal in August 2006, more than three years after the trial of first instance, on the grounds that Maidoya had not withdrawn his confession.<sup>347</sup> In early 2008, the sentence was yet to be executed, pending the signature of the governor of Bauchi State.<sup>348</sup> In March 2004, Sabo Sarki of Bauchi State was convicted, on the strength of

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<sup>347</sup> "Sharia Court of Appeal affirms first amputation in Bauchi," *Daily Trust*, 21/08/2006.

<sup>348</sup> "Six sharia convicts await stoning death in Nigeria," Reuters, 15/02/2008

his confession, of having forcefully removed the eyes of a fourteen-year-old boy in order to sell them to a man who intended to use them in a ritual. Sarki reportedly was arrested together with two accomplices,<sup>349</sup> but for reasons that are unclear these were not convicted. Possibly they did not confess and, therefore, the evidence against them was insufficient. In Zamfara State, Dantanim Tsafe pleaded guilty in court, in February 2000, of knocking out his wife's teeth. By contrast, Ahmadu Tijjani of Katsina State was convicted, in May 2001, of partially blinding the plaintiff in a quarrel based on the testimonies of seven eyewitnesses to the fight.<sup>350</sup> In marked difference to judicial practice in pre-colonial and colonial times, I am not aware of any trial for homicide or bodily harm in which the defendant was sentenced to a *ta'zīr* punishment on the grounds that the available evidence was insufficient for retaliation.

It appears that the courts encourage plaintiffs to forego retaliation and accept *diya*. In the trial of Ado Bako of Kano State, who was convicted, in September 2001, of causing permanent damage to one of the plaintiff's eyes, the question of retaliation does not seem to have played any role, the defendant being sentenced to paying *diya*. If he was unable to pay, he would have to spend six years in prison.<sup>351</sup> Sabo Sarki was sentenced to pay *diya*. However, the plaintiff insisted on retaliation. The court asked Islamic scholars and Sarki's family for assistance to persuade the boy to accept compensation.<sup>352</sup> Other plaintiffs, as in the cases of Ahmed Tijjani<sup>353</sup> and Adamu Maidoya,<sup>354</sup> insisted on retaliation. Nevertheless, the state governors are reluctant to assent to demands of *qisās*. I am not aware of any retaliation sentence for grievous injury that has been executed to date in northern Nigeria.

If *diya* is to be paid, it must be calculated in modern local currency. To illustrate the difficulty of finding a modern equivalent of the full amount of *diya*, I compare trials in which the plaintiffs sought justice after having been blinded totally or in only one eye. According to the *sharī'a* penal codes, depriving a person of his sight warrants the full amount of *diya*. If one organ out of a pair is damaged, the financial compensation is half of the full amount of *diya* (Ostien 2007: 4:138). In May 2001, half the amount of *diya* to be paid by Ahmad Tijjani was calculated to be 1.5 million Naira (13,400 US\$).<sup>355</sup> In September 2001, half the

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<sup>349</sup> "Shariah court convicts man over ritual," *Daily Trust*, 30/03/2004, 5.

<sup>350</sup> "In Katsina, it's an eye for an eye," *The Guardian* (Nigeria), 26/05/2001, 1-2.

<sup>351</sup> "Kano Govt Compensates Man for Losing Eye," *Leadership*, 11/04/2008.

<sup>352</sup> "Boy turns down N6m compensation for eyes," *Daily Trust*, 13/05/2004.

<sup>353</sup> "In Katsina, it's an eye for an eye," *The Guardian* (Nigeria), 26/05/2001, 1-2.

<sup>354</sup> "The Justice She Wants," *Newswatch*, 18/11/2002, 48-49.

<sup>355</sup> "In Katsina, it's an eye for an eye," *The Guardian* (Nigeria), 26/05/2001, 1-2; and "Nigerian court orders 'eye-for-an-eye' ... literally," AFP, 06/06/2001.

amount of *diya* was set at 2,070,000 Naira (18,500 US\$) in the case of Ado Bako.<sup>356</sup> In March 2004, in the case of Sabo Sarki, the full amount of *diya* was said to be equivalent to 5.5 million Naira (37,000 US\$).<sup>357</sup> In 2007, the Wamakko *sharī'a* court in Sokoto State, to which Umar Mamman had turned asking for *diya* from Isa Bello, Jamilu Nasiru and Yawale Muhammadu for blinding him, set the full amount of *diya* at 11,160,000 Naira (75,000 US\$).<sup>358</sup> This series shows that the full amount of *diya*, which serves as a basis for calculating the lesser amounts, has varied between 3 million and over 11 million Naira, or approx. 26,700 US\$ and 75,000 US\$. It may be argued that fixing an equivalent of the *diya* in local currency subjects the actual amount of compensation to the perils of inflation. From this perspective, the calculation of *diya* for each individual case on the basis of the classical definition makes sense. But failure to define a modern equivalent of the *diya* creates legal uncertainty, as illustrated by the considerable difference between the two first cases, which were decided within a period of a few months.

The fact that the *sharī'a* penal codes regard *diya* as a punishment, not as compensation for a civil liability, may have contributed to considerable confusion. In February 2000, a *sharī'a* court in Zamfara State ordered Dantanim Tsafe to pay 157,933.70 Naira (1,500 US\$) for knocking out his wife's front teeth in a quarrel. Tsafe's wife is reported to have pleaded for the "fine" to be set aside, as her husband was unable to pay. The judge reduced the "fine" to 50,000 Naira (470 US\$), adding that, if he failed to pay, Tsafe would have to "submit his teeth for forceful removal."<sup>359</sup> The confusion over the nature of *diya* may be at the root of the wife's plea to set aside the compensation to which she was entitled.

In Bauchi and Kano, in accordance with their *sharī'a* criminal procedure codes, the state governments pay compensation when the defendants, and presumably their *‘āqila*, are unable to pay the *diya*. In the trial of Sabo Sarki, the court ruled that if the defendant was unable to pay the *diya*, the Bauchi State government must pay compensation to the plaintiff.<sup>360</sup> Since Ado Bako was unable to pay the *diya* after his sentencing in September 2001, the Kano State government paid, in April 2008, i.e. possibly after the end of his six years' prison term, 500,000 Naira (4000 US\$) as compensation to the victim.<sup>361</sup>

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<sup>356</sup> "Kano Govt Compensates Man for Losing Eye," *Leadership*, 11/04/2008.

<sup>357</sup> "Shariah court convicts man over ritual," *Daily Trust*, 30/03/2004, 5.

<sup>358</sup> "Group Seeks Justice for Boy, 7," *This Day*, 16/05/2008.

<sup>359</sup> "Zamfara amputation: Raising the stakes of Sharia implementation," *The Guardian* (Nigeria), 29/02/2000, 8. See also "Sharia: Farmer fined N158,000 for beating wife," *The Comet*, 15/02/2000, print edition.

<sup>360</sup> "Shariah court convicts man over ritual," *Daily Trust*, 30/03/2004, 5.

<sup>361</sup> "Kano Govt Compensates Man for Losing Eye," *Leadership*, 11/04/2008.

In one trial for injury not punishable with retaliation in April 2002, Luba Mainasara of Zamfara State was convicted on the strength of her confession of beating her fellow wife with a pestle and was sentenced to 20 lashes and a fine of 3,000 Naira (22 US\$). In addition, she had to pay 50,000 Naira (370 US\$) as compensation to her fellow wife.<sup>362</sup>

### **Judicial practice in theft cases**

The trials for theft reported in the media or by non-governmental organisations (NGOs) are only a part of the total number.<sup>363</sup> Already in September 2004, Human Rights Watch reported:

According to the information available to Human Rights Watch, there have been more than sixty amputation cases since 2000. However, as with other types of sentences passed by Shari'a courts, accurate statistics are unavailable, and cases are often unreported, so the real figure might be higher. It has also been difficult to confirm the details and progress of each case. There is no central record of cases and no concerted attempt to record and maintain an overview of cases, either within state governments' ministries of justice or even among nongovernmental organizations. (Human Rights Watch 2004: 36)

The present study is based on a sample of fifty-one trials for theft initiated before *shari'a* courts in northern Nigeria between February 2000 and December 2003.<sup>364</sup> This set of trials involves 64 defendants, at least 52 of whom were sentenced to amputation of the right hand. The cases recorded, however, are not evenly distributed over the aforementioned period as a considerable part of the data originates from surveys carried out in specific areas over limited periods of time. In December 2003, Human Rights Watch (2004: 40) interviewed twenty-six prisoners in Zamfara, Kano and Kebbi States who had been sentenced to amputation between 2001 and 2003 but whose sentences had not yet been carried out. Twelve of these trials were reported exclusively by Human Rights Watch, whereas seven were also reported by the media. Another report mentioning individual cases was published by the Nigerian non-

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<sup>362</sup> "Sharia Court Orders Housewife to Pay Mate N50,000," *Daily Trust*, 03/04/2002, print edition.

<sup>363</sup> For occasional press reporting on numbers of cases in individual states, see Chapter One.

<sup>364</sup> The exact number of trials remains unclear since, as in the case of the "Zaria 6," media sources sometimes mention several people sentenced to amputation without specifying the circumstances in which they were tried. The appendix lists 44 cases of theft. The number of 51 is achieved by treating the "Zaria 6" as six and the trials of Haruna Musa, Aminu Ahmed and Ali Liman as three separate cases.

governmental organisation BAOBAB for Women's Human Rights (2003). It mentions the names of ten defendants supported by the group in eight trials taking place in Sokoto State in 2002. Two of the cases mentioned were also reported in the media. Naturally, these two sources take the perspective of the accused and focus on the alleged violations of their rights by police and the courts, e.g., confessions extracted under police torture. In addition to these sources, I have identified seventeen cases of theft reported only in the media. These are more or less evenly distributed over the period from 2000 to 2003. The relatively small overlap between the NGO reports and the available media reporting may be indicative of the scale of trials for theft. The small number of cases mentioned by more than one source suggests that an even greater number remains unreported.<sup>365</sup> The sentences of amputation of hands for theft in northern Nigeria probably number several hundred (Ostien and Dekker 2010: 592).

The identified trials took place in the states of Sokoto (13), Zamfara (12), Kano (8), Kebbi (6), Kaduna (6), Katsina (4), Jigawa (1), and Bauchi (1). The first decision of the respective trials, or the first known hearing, was reported in 2000 (4), 2001 (14), 2002 (20), and 2003 (13).

In pre-colonial times, the infliction of mutilating punishments seems to have been extremely rare (Umar 2006: 45). A great many, perhaps most, theft cases were probably resolved by returning the lost property or would not have met the minimum value required for amputation (Christelow 2002: 190). Presumably, thieves were also punished on the strength of *ta'zīr*. Now, the *ḥadd* punishment has become the rule. As mentioned, I am aware of fifty-two amputation sentences for theft. Three of these were carried out. In Zamfara State, the right hand of Buba Bello Jangebe, who was sentenced in February 2000, was amputated on 20 March 2000 and that of Lawali "Inchi Tara" Isah, sentenced in December 2000, on 3 May 2001. In Sokoto State, Umaru Aliyu was sentenced in April 2001 and his right hand amputated on 5 July 2001. No execution of an amputation sentence has been reported after that date.

The items stolen include livestock, bicycles, motorbikes and car spare parts, textiles and clothing, food staples, but also cash, electric appliances and electronic equipment. The value of the items ranges from 400 Naira (3 US\$) for a shirt to 50,000 Naira (385 US\$) for eighteen sheep. The highest value was reported in connection with Aminu Bello: he was convicted, in December 2001, of stealing property worth 65,000 Naira

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<sup>365</sup> According to media reports, the people awaiting amputation in Bauchi state rose from twelve in June 2003 to twenty-eight in November 2004. For the same period, I have identified only one individual case in the state (Chapter One, p. 48).

(580 US\$) from a Christian woman who appeared as the plaintiff in a Sokoto State *sharī'a* court.<sup>366</sup>

Of the fifty-two people sentenced to amputation, at least twenty-one were convicted on the basis of a confession in court. Some defendants reportedly were advised to do so by the police or the prosecution under the promise that they would receive a more lenient sentence if they did.<sup>367</sup> Seven defendants are said to have admitted the allegations against them in court after being tortured in police custody.<sup>368</sup> In addition to these, at least six others were sentenced to amputation, although they told the judge that they had confessed to police under torture.<sup>369</sup> Some amputation sentences relied, to some extent, on partial admissions by the defendant. For instance, Abubakar Mohammed admitted taking the television but not the video recorder he was accused of stealing (Human Rights Watch 2004: 48). Fifteen-year-old Abubakar Aliyu was reportedly convicted of theft after he admitted having opened the door of the apartment from which he was accused of stealing money.<sup>370</sup> Sirajo Idris, accused of stealing a television set and a suitcase, admitted entering the house which he said was his uncle's (BAOBAB 2003: 19).

Under strict Islamic law, confession under torture is not accepted in the *qāḍī's* court.<sup>371</sup> Also in practice, judicial systems based on Islamic law have been shown not to be more likely to tolerate torture than secular ones: Islamic law neither encourages nor prevents investigative torture in practice (Reza 2007). An explanation must be sought elsewhere: the frequent disregard for Islamic rules of evidence in northern Nigerian *sharī'a* courts is probably due to a combination of a lack of knowledge of the Islamic rules of procedure on the part of the judges and activities of pressure groups which attend the court hearings "to see whether Sharia

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<sup>366</sup> "Another thief sentenced to hand amputation in Nigeria," AFP, 27/12/2001.

<sup>367</sup> Allassan Ibrahim and Hamza Abdullahi (Kano State, June 2003; HRW 2004: 52); Danladi Dahiru (Kano, August 2001; *ibid.*: 54); Abubakar Abdullahi (Zamfara, February 2002; *ibid.*: 56); and Haruna Bayero (Kano, April 2002; *ibid.*: 53).

<sup>368</sup> Yahaya Kakale (Kebbi, December 2001); Aminu Bello; Mohammed Bala and Abubakar Mohammed (Kano, January 2002; *ibid.*: 55-6); Sirajo Mohammed (Zamfara, April 2003; *ibid.*: 47-8); Bawa Magaji and Altine Hassan (Sokoto, 2002; BAOBAB 2003: 18-9).

<sup>369</sup> Abubakar Lawali and Lawali Na Umma (Zamfara, May 2003; HRW 2004: 46-7), Altine Mohammed (Kebbi, July 2001; *ibid.*: 46), Abubakar Yusuf (Zamfara, April 2003; *ibid.*: 51), Abubakar Hamid (Kebbi, October 2002; *ibid.*: 45-6), Umaru Guda (Sokoto, 2002; BAOBAB 2003: 19).

<sup>370</sup> "Sharia court orders amputation of 15-year-old boy," *The Guardian* (Nigeria), 15/07/2001, last page.

<sup>371</sup> In the classical theory, the *qāḍī* does not have the right to investigate. He acts as an arbitrator between the litigants and makes his decision on the basis of their testimonies and oaths (Johansen 2002: 177).

law would be enforced.”<sup>372</sup> Moreover, in Nigeria the acceptance in court of confessions extracted under torture is not limited to *sharī'a* courts. The NPF is notorious for routinely torturing suspects to extract confessions. According to Amnesty International and the Nigerian non-governmental organisation Legal Defence and Assistance Project (LEDAP) (2008: 3 and 10), more than half of all prisoners awaiting the execution of a death sentence in Nigeria’s prisons were sentenced to death on the basis of a confession. Thus, the figures mentioned above seem to mirror the national situation.

Some amputation sentences for theft were based on witness statements. In 2002, a certain Malam Aliyu of Sokoto State was convicted of theft on the strength of the testimony of two witnesses who alleged that he had stolen the items presented as exhibits and kept them in the place in which they were found (BAOBAB 2003: 20). Also in Sokoto State, in July 2001, thirteen witnesses are said to have testified against Lawali Garba.<sup>373</sup>

As mentioned earlier, in addition to sufficient evidence, the imposition of the *ḥadd* punishment of amputation is conditional on the fulfilment of a number of factors. For one, the value of the stolen item must exceed the minimum stipulated value (*niṣāb*). In the absence of a modern monetary equivalent, the *niṣāb* has been set at different values by different judges. Referring to the case of Umaru Aliyu who, in April 2001, was convicted of stealing one sheep worth 3,000 Naira, an upper *sharī'a* court judge in Sokoto, Bawa Sahabi Tambuwal, fixed the *niṣāb* at 869 Naira (8 US\$). The judge had invited two Islamic scholars to explain to the people sitting in the court room the Naira equivalent of *rub' dīnār* (one-quarter of a dinar).<sup>374</sup> Since the value of the sheep was higher than this, the punishment was amputation. In line with this definition, the same judge did not sentence Mohammed Ali to amputation in December 2001 because the value of the kitchen goods he was convicted of stealing was “less than \$8.”<sup>375</sup> However, in the same state of Sokoto, also in April 2001, a lower *sharī'a* court judge, Umaru Sifawa, set the *niṣāb* at 15,000 Naira (130 US\$) and, consequently, did not sentence Lawali Bello and Sani Mohammed to amputation for stealing two goats valued at 2,600 Naira (23 US\$).<sup>376</sup> According to Tambuwal’s definition of the *niṣāb*, they might have been sentenced to amputation. In September 2000, Kabiru Salisu was

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<sup>372</sup> Yawuri (2007: 133-4). He refers to the 19 August 2002 hearing in which Amina Lawal’s stoning sentence was confirmed.

<sup>373</sup> “Sharia Claims Another Victim in Sokoto,” *This Day*, 13/07/2001.

<sup>374</sup> Peters (2003: 22) and “Sharia: Man to Lose Hand for Stealing Sheep,” *This Day*, 14/04/2001, 3.

<sup>375</sup> “Nigerian ‘Christian’ in Sharia court,” BBC News, 11/12/2001.

<sup>376</sup> “Two Kids Share 40 Lashes for Goat Theft,” *This Day*, 25/04/2001.



sentenced in Zamfara State to imprisonment and lashing, instead of amputation. The shirt that he was convicted of stealing was valued at 400 Naira (3 US\$).<sup>377</sup> Musa Shuaibu's amputation sentence, which was handed down in August 2002, was quashed, in September 2002, on appeal before the Zamfara State Shari'a Court of Appeal on the grounds that the court of first instance failed to establish the monetary value of the alleged stolen goods which, in the view of the appellate court, did not exceed the *niṣāb*.<sup>378</sup> Another condition for the imposition of the *ḥadd* punishment is that the property was stolen from a safe place (*ḥirz*). Abdul Jolly Hassan of Bauchi State was not sentenced to amputation in June 2002 because the goats he stole were not properly caged.<sup>379</sup>

Some defendants were sentenced to amputation despite their claim that the stolen goods were compensation for unpaid debts. Human Rights Watch (2004: 41) reports that two co-defendants said they had stolen two pieces of clothing and seeds from their employer—totalling 5,000 Naira (35 US\$)—because he had not paid them for their work.<sup>380</sup> In another case, also reported by Human Rights Watch (2004: 51), Abubakar Yusuf was sentenced to amputation of the right hand in April 2003 in Zamfara State, reportedly after taking a video camera, a photo camera and a generator from a friend who owed him money. To be in conformity with the letter of the codes, the value of the stolen goods minus the owed amount would have to exceed the *niṣāb* (Ostien 2007: 4:74).

Some of the defendants sentenced to amputation said they would not appeal the sentence. Among them were Buba Bello Jangebe, Lawali "Inchi Tara" Isah and Umaru Aliyu, whose hands were subsequently amputated. Their decision may have been influenced by promises of rehabilitation. After his amputation, Buba Bello Jangebe was given the post of a janitor in a secondary school owned by the Zamfara State government.<sup>381</sup> Umaru Aliyu was granted 50,000 Naira by the Sokoto State government.<sup>382</sup>

At least twenty-five of the fifty-two known amputation sentences were appealed. This high percentage is probably not representative but a result of the fact that the NGOs give support to the defendants on whom they report. It must be assumed that the majority of cases remain unreported and unappealed. Some appeals were granted on the grounds that the defendants were minors. In 2001 the amputation sentence of Abubakar Aliyu of Kebbi State, aged between 14 and 17, was converted

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<sup>377</sup> "Two men flogged publicly in Nigeria for drinking, stealing," AFP, 25/09/2000.

<sup>378</sup> "Safiyat becomes honorary citizen of Rome," *The Guardian* (Nigeria), 06/09/2002, 56.

<sup>379</sup> "Man Escapes Amputation over Theft of 18 Sheep," *This Day*, 24/06/2002.

<sup>380</sup> The state in which this trial took place is not mentioned.

<sup>381</sup> "Zamfara amputes bicycle thief," *Punch*, 05/05/2001, 1-3.

<sup>382</sup> "Amputee Gets N50,000 Govt Gift," *This Day*, 31/07/2001.

into flogging and one year in a children's remand home (Human Rights Watch 2004: 57). In Sokoto State, Lawal Garba and Bashir Alkali, two teenage boys who were accused of theft and sentenced to amputation, were acquitted on appeal in March 2002 (BAOBAB 2003: 17). As mentioned above, Musa Shuaibu was acquitted on appeal on the grounds that the value of the stolen items did not exceed the *niṣāb*. In other cases, the appellate courts ordered retrials. In December 2002, the Kano State Shari'a Court of Appeal ordered the case of Mohammed Bala, but not that of his accomplice Abubakar Mohammed, to be retried by the court of first instance. Mohammed Bala was released on bail pending the decision (Human Rights Watch 2004: 55). In April 2004, an upper *shari'a* court in Kano State granted the appeal of Haruna Bayero and quashed the amputation sentence on the grounds that the court had not explained the effect of the confession to the defendant. The court ordered a retrial (ibid.: 56). In at least one case, the appeal was not granted. In 2002, the Kebbi State Shari'a Court of Appeal did not accept the withdrawal of Yahaya Kakale's confession and upheld the amputation sentence of the trial of first instance. According to Nigeria's National Human Rights Commission, a further appeal has been filed on his behalf to the Federal Court of Appeal in Kaduna. This would be the first case of Islamic criminal law to reach the federal courts (ibid.: 44). However, there are reasons to believe that this is not in the interest of state governors.

Those whose amputation sentences have not been appealed and who have not been released on bail remain remanded in prison pending confirmation of their sentence by the state governor. After the three initial amputations, however, the governors have not assented to any of the numerous amputation sentences that were subsequently pronounced. As a result, the convicts have remained in prison, frequently for several years. The reluctance of the state governments to confirm the judgments is due to their difficult position between the conflicting political imperatives of demonstrating their personal commitment to *shari'a* implementation and avoiding the implementation of harsh punishments, forbidden by the Nigerian Constitution. Already in 2003, Governor Ahmad Sani of Zamfara State acknowledged that he felt that the present situation was not "conducive for amputations" but denied that the convicts should be released, as "it will create chaos" (Human Rights Watch 2004: 39). At the same time, however, the governors feel pressure from different quarters. In Bauchi State, for one, against the background of twenty-eight people in the state's prisons in 2004 awaiting the amputation of a hand for theft, legal rights groups urged the state governor to set aside their sentences, while Muslim groups appealed to him to implement them (Chapter One, p. 49).

While a satisfactory solution on the political level is not in sight, pragmatic solutions are sought in individual cases. Haruna Musa, Aminu Ahmed, and Ali Liman, sentenced to amputation in Kano State in January and February 2002, were released on bail by an upper *sharī'a* court in May and June 2003 (Human Rights Watch 2004: 40). In May 2005, the amputation sentences of six men, the “Zaria 6,” who were convicted of theft by an upper *sharī'a* court in Zaria (Kaduna State) between August and September 2003, were set aside on appeal on the grounds that the two years that they had already spent in prison were sufficient punishment (Chapter One, p. 44). In 2005 twenty-one persons sentenced to amputation of the right hand for theft were set free by the governor of Sokoto State, using his constitutional prerogative of mercy (Ostien and Dekker 2010: 604). This latter case may indicate a change in attitude of a state governor.

## **Conclusion**

After the return to civilian rule in 1999 under what has become known as the Fourth Republic, the governors of the northern states, newly elected in accordance with the 1999 Constitution of the Federal Republic of Nigeria, were exposed to immense popular pressure. They had to prove that they were representatives of the local population and not subject to external control, as had been the case under military rule, when the governors were appointed by the central government. They also had to address the security concerns of the population.

In the prevailing opinion of northern Nigerian Muslims, both issues had, over the years, become linked to the implementation of Islamic criminal law. Governors who did win the elections with the promise of implementing the *sharī'a* were forced to introduce Islamic criminal law. Governors who pleaded for a “gradual introduction” of the *sharī'a* feared popular anger and, possibly, defeat in the next elections. At the same time, the governors had to try to maintain their position within the secular political system of the Nigerian state. Implementing harsh sentences in a bid to please their mostly Muslim constituencies would have ruined the governors’ hopes of continuing their career on a national level.

This situation is comparable to that of the emirs of the colonial period, who traditionally built their legitimacy on the application, in their judicial councils, of Islamic law, including criminal offences like homicide, wounding and theft, but were forced by the British to contain its application and even implement rules that had no base in the *sharī'a*. Whereas the emirs sought to maintain an existing system seen as the safeguard of Islam and Muslim culture, the governors face popular ex-

pectations that the introduction of Islamic criminal law will bring rapid relief for the rampant feeling of physical and spiritual insecurity in northern Nigeria. They have been under immense pressure not only to promulgate Islamic criminal law by way of state legislation but also to enforce it.

The governors have only limited control of the legislative procedures in their states. In addition, the codification of Islamic criminal law requires the involvement of experts in Islamic law. Thus, there is room for intervention by other groups, such as Islamic scholars, Muslim legal experts, Islamic activists, and even state Houses of Assembly—which in northern Nigeria are not known for their opposition to the state government. Not a few saw in the project a means to enhance their position in society; for some this may have been a correct perception.

The result of populist politics and Muslim activism was a steadily increasing number of sentences that had to be approved by the governors but were politically inopportune and detrimental to the governors' position within the secular federal system. The ways in which the state governments can control, and if necessary contain, the administration of Islamic criminal law in northern Nigeria resemble to a large extent the methods used by the British colonial authorities prior to 1947: they can transfer cases to non-Islamic courts or exercise their prerogative of mercy. At least in the early years of *sharī'a* implementation, however, using this prerogative would not have been a politically viable option for governors who wished to retain public support. Even today, Islamic criminal law must be maintained for political reasons. This is apparent in the fact that, like colonial officers, such as Lord Lugard, today's governors try to prevent the issue of Islamic criminal law from reaching the federal courts for fear of creating a precedent which, like that of Tsofo Gubba, might lead to an annulment of Islamic criminal legislation altogether.<sup>383</sup> Such an outcome would expose the governors to the accusation of representing an un-Islamic political system.

How can this dilemma be solved? Sentences to death by stoning for illicit sexual intercourse were appealed and ultimately quashed on the basis of procedural flaws in the first instance trials (Chapter Two). In spite of the apparent shortcomings of many of the trials described above, this seems to be more difficult in cases of bodily harm and theft,

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<sup>383</sup> In his discussion of the reasons for the *sharī'a* court of appeal's quashing of Safiyyatu Hussaini's stoning sentence, Peters (2006: 240-1) suggests that the court may have chosen to quash the sentence in order to prevent it from being appealed in a federal court, which might test the constitutionality of the *sharī'a* penal codes. Ostien and Dekker (2010: 604-6) suggest that it is likely that Islamic criminal law will be challenged in the federal courts by non-Muslims because for certain offences the Penal Code prescribes harsher punishments than the *sharī'a* penal codes.

possibly because in northern Nigeria the threat to physical security is felt more intensely than that to spiritual security. The only politically viable option for the governors has been to delay approval, and therefore execution, of the unwanted sentences.

The comparison between the emirs and the governors shows that neither group has been able to find a lasting solution to reconcile the application of Islamic criminal law with the exigencies of a non-Muslim political system. The emirs sought refuge in the idea that one day the non-Muslim occupation would end and Islam would prevail. Similarly, the governors apparently have no choice but to delay and wait for the situation to evolve in a way that will open the possibility of finding an accommodation in the future.