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Otto, Jan Michiel

Published by Leiden University Press

Otto, Jan Michiel.

Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present.

first ed. Leiden University Press, 0.

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# 13 Sharia and national law in Nigeria

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## **Abstract**

The relations between sharia and national law in Nigeria have varied widely from time to time and from place to place within the country – which after all was first brought under a single administration only in 1914. In sections 1-4 of this paper the complex history of our subject is sketched, culminating in the programmes of ‘sharia implementation’ that began in 1999 in twelve of Nigeria’s northern states. Sections 5-9 concentrate thematically upon the present day. Many details of the incorporation of sharia in the laws of Nigeria are discussed, including the Sharia Courts and the Sharia Penal and Criminal Procedure Codes now in place in the sharia states, the continuing application of uncodified Islamic personal law and other Islamic civil law throughout the north, the effects of sharia implementation on women and non-Muslims, and the constitutional questions the sharia implementation programmes raise. The conclusion, section 10, discusses the likely fate of Islamic criminal law in the sharia states, and gives some reason to think that sharia implementation has on the whole been a positive development for Nigeria.

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*The borders of present-day Nigeria were defined during the late nineteenth and early twentieth centuries, in the course of imperialist competition among Britain, France, and Germany for colonies in West Africa. Nigeria, a British colony, emerged as such in 1900, except that its eastern territories were augmented after World War I by accessions from the ex-German Cameroons. Nigeria was governed by the British until 1960, when it became an independent nation. It was then organised as a federation of its Northern, Eastern and Western Regions. It has since been divided into 36 states plus the Federal Capital Territory of Abuja. Its population in 2006, according to the census then taken, was about 140 million, the largest in Africa by far. Its ethnic diversity is extreme: the World Factbook conservatively says there are 'more than 250 ethnic groups'; the linguists list over five hundred living languages.<sup>2</sup> There are however three regional *linguae francae*, corresponding to the three largest ethnic groups: Hausa in the North, Igbo in the East, and Yoruba in the West. Moreover there has been a substantial dispersion of people of all ethnic and linguistic backgrounds throughout the country, and English, Nigeria's official language, is also widely spoken. According to the World Factbook, about 50 per cent of Nigeria's population is Muslim, 40 per cent Christian, and 10 per cent followers of African traditional religions. But these numbers are estimates only, as no accepted census since 1958 has gathered data on religious affiliation. Muslims predominate in the North, Christians in the East and West, although again there has been a substantial dispersion of people of all religious persuasions throughout the country.*

(Source: Bartleby 2010, Lewis 2009)

### 13.1 The period until 1920

#### Partial Islamisation, partial Christianisation, and colonisation by the British

In the early years of the nineteenth century, the territory which became Nigeria was occupied by a heterogeneous assortment of peoples at many different stages of cultural and political development. Some – for instance the Yoruba and Benin kingdoms in the southwest and the Muslim emirates in the north – had strong central authorities whose writs ran far; most others were much more loosely and locally organised. Trade flourished along camel, donkey and headload routes criss-crossing West Africa and extending northwards across the Sahara and eastwards across the Sahel to the Nile. Trade along these routes involved some peoples but passed many others by. Warfare and slave-raiding were common. Slaves were traded within the country, and also exported, from the north to other parts of West Africa and across the

desert to North Africa, and from the south to European slave traders at the Atlantic coast. From the end of the fifteenth century, Portuguese and later Dutch, French, and British merchants had established trading posts on the coast, where for three centuries the Atlantic slave trade thrived. But until the mid-nineteenth century European penetration northward into or beyond the mangrove swamps and rain forests of the coastal region was virtually nil, inhibited by disease. As the saying went: 'The Bight of Benin, oh the Bight of Benin, where few come out though many go in!'

Islam had reached the Borno region, in what is now north-eastern Nigeria, beginning as early as the eleventh century, from north and east across Sahara and Sahel. It came to Hausaland somewhat later, not only from north and east but from the west, from the empires of Mali and Songhay, where for several centuries Timbuktu was West Africa's most famous centre of Islamic learning. By the fifteenth century, Islam was established in the Hausa city-states – Kano and Katsina perhaps most famous among them. By 1750 it was the nominal, if only loosely observed, religion of the ruling and merchant classes in all those parts of the country (Hiskett 1984).

Islam received a new impulse in the north in the last quarter of the eighteenth century, through the activities of the Fulani revivalist and reformer Shehu Uthman dan Fodio. In twenty-five years of preaching and teaching the Shehu gained a large following, his 'Community', to the increasing alarm of the Hausa rulers whose corrupt and oppressive practices he condemned. Measures of repression only exacerbated the situation, finally triggering off the Fulani-led wars of *jihad*<sup>3</sup> (1804 to c. 1810 in Hausaland, and continuing elsewhere for many years thereafter) which established the 'Sokoto Caliphate' (Johnston 1967; Last 1967). Covering much of what subsequently became Nigeria's Northern Region, the Sokoto Caliphate was a loose confederation of emirates, all owing suzerainty to the Sultan of Sokoto. At least under its first leaders the Caliphate was inspired by religious zeal: by the desire to purify society of un-Islamic practices and to live solely according to the sharia. In particular, the Fulani 'made it their aim, in the states which they set up, to enforce Islamic law exclusively [...] and to outlaw customary and administrative law' (Schacht 1964: 86). There were some thirty emirates in all. The people under their rule were most of the many tribes of Northern Nigeria, some more or less Muslim and some not. The ruling houses were all Muslim and mostly Fulani. The Fulani failed in their war against Borno in the northeast, itself a Muslim empire of ancient vintage. When the British arrived, the only parts of the Northern Region not under the sway of one or the other of these two Muslim empires of Sokoto and Borno were the Igala, Idoma, Tiv, and Jukun areas

in the south, the high plateau in the centre which now has Jos as its capital, and scattered pockets of peoples elsewhere. With these exceptions, throughout the North

Islamic law [...] was still near its highest degree of practical application. Custom, if not entirely eradicated, had been pushed into the background, and the only existing tribunals were those of the *qadis* [Hausa: *alkalis*<sup>4</sup>] who were competent in all matters, including penal law. Only the customary land law remained valid and was enforced by the councils of the sultan and of the emirs (ibid).

British penetration of the Nigerian interior began with the second journey of Mungo Park across West Africa from Senegambia (1805-1806). Park passed through a slice of Nigeria on his way down the Niger River in 1806, but he died at Bussa before reaching the sea. It was only with the visits of Hugh Clapperton and his colleagues, first southward across the desert from Tripoli to Borno, Kano, Sokoto and back (1822-1825), and then from Badagry on the coast northward to Kano and Sokoto again (1825-1827), that real knowledge of the country began to be gained. British explorers then quickly confirmed the course of the Niger from Bussa to the sea, and its relation to the lower parts of the River Benue (1830-1831). But repeated attempts to sail or steam up the Niger/Benue system were frustrated by extremely high death rates from malaria. Finally, in 1854, William Baikie led an expedition up the Niger with no loss of life, protecting his men by administering quinine; this pioneering prophylactic use of quinine against malaria was a turning point in the European penetration of Nigeria and indeed of Africa. At the time of Baikie's expedition, another of the great European explorers of Africa – Heinrich Barth, in the service of the British Foreign Office – was nearing the end of his extended visit to the northern parts of the country. Like Clapperton on his first visit, Barth came south across the desert from Tripoli, spending five years (1850-1855) travelling in the region from Borno and Adamawa in the east to Kano, Katsina, Sokoto, Gwandu and all the way to Timbuktu in the west. Barth's *Travels and Discoveries in North and Central Africa* (1857-1859, five volumes) is one of the great works of scientific observation and analysis of the nineteenth century.

From the mid-nineteenth century, the British gradually extended their influence into Nigeria. In 1849 and 1852 they declared protectorates over the Bights of Benin and Biafra, at the southern coast. In 1861 they annexed Lagos. Trade with the interior (notably for palm oil, used among other things to lubricate the industrial revolution in Britain), Christian missionary activity, and political control, all gradually

increased. At the Berlin Conference (1885), the British were granted a protectorate over the southern parts of Nigeria (comprising the later Eastern and Western Regions). In 1886, seeking to extend their dominions northward at the least possible expense, the British granted the National African Company, now renamed the Royal Niger Company, a charter empowering it to govern as well as to trade throughout the still vaguely-defined territories of the later Northern Region, all expenses of government to be paid out of revenues from trade. Treaties were signed between the Company and a number of northern rulers, including the Sultan of Sokoto, purportedly ceding extensive rights to the Company (Flint 1960: 89, 129-155). The Company, however, never managed to achieve 'effective occupation' of the North – the new criterion for international recognition of territorial claims laid down at the Berlin Conference – even along the banks of the Niger and Benue rivers where its trading posts were sited. In 1900 the British revoked the Company's charter and declared the Protectorate of Northern Nigeria, making Frederick Lugard High Commissioner. Units of Britain's West African Frontier Force then quickly defeated the forces of various lesser emirates where resistance to British rule was offered (1901-1902); Borno capitulated without a fight; and in 1903 Kano and Sokoto were taken, the latter only after a bloody battle (Muffett 1964). The North was administered separately until, in 1914, the Protectorates of Northern and Southern Nigeria were amalgamated with the Colony of Lagos under the name of the Colony and Protectorate of Nigeria. Lugard was the first Governor-General of the amalgamated Nigeria (1914-1919) as he had been the first High Commissioner of its Northern Region (1900-1906).<sup>5</sup>

Lugard is famous for his articulation of the sometime British policy of 'indirect rule', according to which colonial powers should not attempt to step directly into the shoes of indigenous rulers, but should govern through them. The British would rule, but local administration would be by native rulers, institutions, and laws found already in place, which would only gradually be modified or developed under British guidance. The testing-ground for Lugard's policies was initially Northern Nigeria under Lugard himself. When, in 1914, he became the first Governor-General of the whole country, Lugard extended his system of indirect rule to the Southern provinces as well (Perham 1937).

For Northern Nigeria, a major effect of indirect rule was to perpetuate and strengthen the rule of the Muslim emirates of Sokoto and Borno. In their search for indigenous authorities through whom to rule, the British did not go behind the ruling houses of the emirates to the peoples they ruled. On the contrary, the emirs and those already holding office under them were confirmed in power, under the name of 'Native Authorities', and emirate administration was sometimes even extended by the British to previously independent Northern peoples. 'A

policy of preserving the very special identity of the Northern Provinces was consciously followed' (Perham 1937: 326). Under this regime 'the north entrenched itself in a policy of self-protective withdrawal from Western culture, whereas people in the south were deeply influenced by it' (Rasmussen 1993: 43). When, with the approach of independence, the principle of federalism was introduced into the government of Nigeria, and the Northern Region gained its own legislative and executive bodies, these in turn were initially dominated by the emirate ruling classes. The giant Northern Region, comprising about two-thirds of the land-mass of Nigeria and about one-half its population, dominated as it was by Muslims, and the much smaller but more modernised and Christianised Eastern and Western Regions, eyed each other with mutual distaste and suspicion as independence approached. The North, much slower to embrace Western education, feared that if self-government came too soon, Southerners would get all the best jobs in the North, if they did not actually dominate it. For their part the East and West feared domination at the centre by the more populous North, and a possible programme of Islamisation of the whole country by Northern rulers. But we have gone ahead of our story.

As to the law and its administration, indirect rule implied two systems (broadly speaking) of law, administered by two systems of courts. On the one hand there was 'native law and custom' – defined to include Islamic law – applied in most cases involving natives, in Native Courts staffed by native judges, according to native rules of procedure and evidence. In the North, consistently with emirate rule, most Native Courts were emir's or *alkali's* courts, and native law and custom was largely equated with Islamic law of the Maliki school. But even in the North, in the non-Muslim areas, and of course throughout the rest of the country, all of the more or less vague bodies of native law and custom of the many local ethnic groups were also applied in the Native Courts serving their territories. On the other hand there was 'English' law. Public law, including Orders in Council of the Government of Britain (in the case of Nigeria's colonial constitutions) and some of the enactments of the Governors-General, was of course 'English'. The British also enacted various other laws specific to Nigeria, including penal laws, and imported their statutes of general application, their doctrines of equity, and their common law. English law was applied in English courts staffed by British judges, according to British rules of procedure and evidence. On its private side, English law was originally intended for application primarily to non-natives, and most by far of all cases coming before Nigerian courts – upwards of 90 per cent, including, for a long time, criminal cases – were handled in the Native Courts according to native law and custom. The proviso was that no native law or custom should be enforced which was 'repugnant to natural justice, equity and



good conscience [as determined by the British] or incompatible either directly or by necessary implication with any [English] law for the time being in force' (Keay & Richardson 1966: 233-238). Under this rule the penalties imposed in the Native Courts, in particular, were quickly brought under control. Mutilation – in the North whether as *hudud*<sup>6</sup> or as *qisas*<sup>7</sup> – was abolished; death sentences had to be carried out in a humane manner (Milner 1969: 263-264). Various means were used to enforce the repugnancy rule, including supervision of the Native Courts by British administrative authorities and finally, in 1933, rights of appeal from the Native to the English courts.

Islamic law never made the same impact in the southern parts of Nigeria as it had in the North. Islam did enter the South, notably what became the Western Region, where there is some record of Muslim communities already in the seventeenth century; Islam was well established in the Yoruba towns along the route to Lagos when the British began to extend their control there in the second half of the nineteenth century. But the character of the Islam practiced by the people of this part of the country was different from that of the North: faithful to that part of the sharia known as *ibadat*, which regulates matters of religious belief and worship, but much less concerned than in the North about *mu'amalat*, which regulates the conduct of Muslims in social life and is enforced in the *qadi*'s courts.

The majority [of Southern Muslims] appear content to follow the religion of Islam more or less closely in matters of doctrine and ritual but to adhere to their tribal customs in such matters as marriage, divorce, adultery, guardianship and succession (Anderson 1954: 222).

The British found no Islamic courts in this region when they took over, nor were any established by them: 'no specifically Muslim court nor any formal application of Islamic law is known throughout the South, even in those areas where the proportion of Muslims is high' (*ibid*). This has remained true until quite recently. The establishment, beginning in 2002, of 'Independent Sharia Panels' in some Western cities, is a subject to which we shall return below.

### 13.2 The period from 1920 until 1965

The making of a nation; the settlement at independence of the place of Islamic law

Much of the story of this period has to do with the constitutional change that occurred with increasing rapidity after World War II,

culminating in Nigerian independence in 1960. This subsumed a major change in the administration of Islamic law in the Northern Region that also took effect in 1960. We deal with these matters in turn.

### *Constitutional change 1920 to 1960*

Indirect rule gave Nigerian officials considerable authority at local levels, subject to British supervision; but Lugard's constitution of 1914 gave them practically no say in the regional or national councils of government. Lawmaking was for the Governor-General alone. There was a Legislative Council, whose assent was required to some laws – but for Lagos only. The 'Nigerian Council', a national body which included a few Nigerian chiefs, was advisory and deliberative only, and all its 'unofficial' members were appointed by the Governor-General in any case. Executive power was concentrated in the Governor-General, his all-British Executive Council, his British Lieutenant-Governors for North and South, and all the officials of the British Colonial Service under them.

This arrangement was objected to by some Nigerians already in 1920. Not by Northern Muslims, but by Southerners – Christianised and Western-educated – who throughout the colonial period led the campaign for more say by Nigerians in government at the highest levels, more democracy in the selection of those Nigerians who would speak and act, more independence from British control, and the sooner the better. In 1920 such demands – in this case for fully competent Legislative Councils half composed of elected Africans, among others – were made by the West African National Congress on behalf of all Britain's colonies in West Africa. Later, in Nigeria, Nnamdi Azikiwe (from the East) and Obafemi Awolowo (from the West) came to the fore as leaders of what became the independence struggle. Northern leaders, with some exceptions, were never so anxious to see the British go.

The 1920 demands of the West African National Congress bore some fruit in Nigeria, resulting in new constitutional arrangements which took effect in 1922 and lasted until 1947 – longer than any other Nigerian constitution to date. After 1947 constitutional change became much more rapid. We can do no more here than summarise what in lived history was a complex and fraught process of political modernisation and nation-building. For details the reader is referred to the various works on Nigerian constitutional history, among the best of which are Elias 1967 and Nwabueze 1982.

*a. The Clifford Constitution, 1922.* This established a new 'Legislative Council of Nigeria', whose assent was required to certain laws. But a majority of its members were colonial officials, and of the unofficial members only four were elected (three from Lagos, one from Calabar), the rest being appointed by the Governor (as the Governor-General was

renamed in 1919). Furthermore its jurisdiction extended only to the Southern Provinces and Lagos, the Governor alone retaining the power to legislate for the North. The all-British Executive Council and the rest of the apparatus of the colonial government remained in place.

*b. The Richards Constitution, 1947.* Pent-up demand for change, Azikiwe and Awolowo to the fore, was released after the war; the then-Governor, Sir Arthur Richards, had little choice but to make concessions. Under the new constitution he put in place:

- New ‘Provincial Councils’ were established, one each for what were now the Northern, Eastern and Western Provinces; these were the first regional bodies on which Nigerians were represented, each with majorities of ‘unofficial’ members largely selected by the Native Authority Councils from among themselves. The Provincial Councils were advisory and deliberative only, with an important exception: they each sent some of their unofficial members, selected by themselves, onward to the central Legislative Council. In the North a House of Chiefs was also established, which also sent some of its members to the Legislative Council.
- The central Legislative Council for the first time was given nationwide jurisdiction and a majority of unofficial members. But still only four of these were directly elected; the rest were nominated by the Provincial Councils (16), the Northern House of Chiefs (4), or the Governor (4). Meantime the old all-British central Executive Council survived as before.

Several points are worth noting. (1) While Southern politicians were far from satisfied with progress under the Richards Constitution, the Northerners struggled to master the new ways and to think how they would find enough qualified Northerners to fill all the posts that looming self-government would soon open up. (2) The tendency towards regionalisation is clear; this became full-blown federalism in 1954. (3) Of the twenty unofficial members of the new central Legislative Council that were nominated by regional bodies, nine – almost half – came from the North. This incipient predominance of the North in the national councils was in recognition of its predominance in size and more especially in population, but it was a matter of grave concern in the East and West.

*c. The Macpherson Constitution, 1951.* This was the first Nigerian constitution drafted in a process which included Nigerians themselves, starting with village, district and regional meetings, continuing with a General Conference in Ibadan in January 1950, and culminating in debates in the Provincial Councils, the Northern House of Chiefs, and the central Legislative Council. The result was the new constitution promulgated in July 1951.

- The three provinces were renamed regions. The Provincial Councils became much-enlarged and mostly-elected regional Houses of Assembly with real legislative authority. The Northern House of Chiefs was also enlarged and given legislative powers, and the Western Region got a House of Chiefs of its own. Regional Executive Councils were formed, with majorities of 'unofficial' members, now called Ministers, drawn from the Houses of Assembly and of Chiefs.
- At the centre, the Legislative Council became a much-enlarged and mostly-elected House of Representatives, with wide authority to legislate for the peace, order and good government of the whole country. Members of this House were still not elected directly, but by the Regional Houses of Assembly and of Chiefs from among themselves. The North was given as many elected members in the House of Representatives as the East and West put together. The old central Executive Council now became a Council of Ministers, with a majority of Nigerian Ministers drawn from the House of Representatives.

*d. The Lyttleton Constitution, 1954.* The 1951 constitution was widely understood to be a stepping-stone towards fuller democracy and self-government. Several crises hastened both its demise and the tendency towards a more robust federalism. One of these was precipitated in Lagos in early 1953, at a sitting of the House of Representatives, when a discussion of the timing of Independence threw the House into an uproar. The Northern standpoint – no definite date to be set yet – prevailed. The Northern members were then roughly treated by mobs in Lagos and all along their train-ride home, and a few weeks later serious fighting, rooted in the trouble in Lagos, broke out between Hausas and Igbos in Kano. This was the first major crisis of interethnic violence since the British occupation; unfortunately it presaged much more of the same to come. Northern leaders, much disturbed, seriously contemplated secession from Nigeria, but were deterred, it is said, by their lack of access to the sea. The Northern House of Assembly instead demanded a new constitution giving the regions much more authority and the central government practically none. Conferences in London (1953) and Lagos (1954) resulted in a new constitution popularly named after the then Colonial Secretary, Oliver Lyttleton:

- Nigeria officially became a federation of its three regions. Wide legislative, executive, and judicial powers were transferred to the regions; exclusive competence over a restricted list of subjects was reserved for the federal government.
- 'Official' members almost completely disappeared from the regional Houses of Assembly and the federal House of Representatives, which, except in the North, were now elected directly; in the North

'electoral colleges' based in the Native Authorities were still used except in some urban areas. In all regions the members of the federal House of Representatives were elected independently of the regional Houses of Assembly.

- Premiers were appointed in each region, from the party commanding a majority in the House of Assembly. The first Premiers were Nnamdi Azikiwe in the East, Obafemi Awolowo in the West, and Ahmadu Bello, Sardauna of Sokoto, in the North. The Premiers, responsible to the Houses of Assembly, took over the presidencies of the regional Executive Councils from the British Governors when regional self-government was achieved in 1957 (in the East and West) and 1959 (in the North).
- New High Courts were established for each region, with judges appointed by the regional governments. The regional Houses of Assembly were empowered to establish by law such other courts as they deemed expedient.
- At the centre, most British officials were withdrawn from the Council of Ministers in 1954; full Ministerial control, with a new federal Prime Minister at the head of the government, was achieved in 1957. The first Prime Minister was Abubakar Tafawa Balewa, the leader in the House of Representatives of the predominant Northern political party, the Northern Peoples Congress. Tafawa Balewa subsequently achieved international fame as the first leader of independent Nigeria.

*e. Constitutional Conferences in 1957 and 1958.* The Lyttleton Constitution of 1954 set the basic pattern of government which Nigeria was to take into Independence. Important steps forward, some already noted, were then taken at further constitutional conferences held in 1957 and 1958. A new upper legislative chamber, the Senate, was added at the centre. It was agreed that a Bill of Fundamental Human Rights, modelled on the European Convention on Human Rights of 1950, would be included in the Independence Constitution; the same basic provisions, from time to time expanded, have appeared in every Nigerian constitution since. Independence Day was set for the 1<sup>st</sup> of October, 1960, and other decisions were taken, on revenue allocation, the procedure for creation of new regions ('states') out of old should this be desired in the future, and other matters. Independence was well on its way.

#### *Change in the administration of Islamic law in the Northern Region*

Few changes were made in the system of Native Courts between 1920 and 1954. The various grades of courts, each with its own jurisdiction and powers, had already been established by statutes of 1906 and 1914.

From 1906 appeals were allowed from courts of lower grades to the Grade A courts of the emirs and chiefs. Until 1933 there were no appeals outside the Native Court system: British control was through the supervisory and quasi-appellate jurisdiction of the British administrative officers. The only other form of control exercised by the British was over the power of emir's courts to pass death sentences, which were made subject to review by the Governor. This was indirect rule, as applied to the Native Courts, at its height, involving, in the North, only the most minimal interference by the British in the administration of Islamic law.

This changed in 1933, when for the first time appeals were allowed from the Native Courts to the British Magistrate's and High Courts, a move designed to integrate the native and British courts. But there was an important exception:

No appellate authority other than a native court of appeal could hear an appeal from a native court order relating to marriage, family status, guardianship of children, inheritance, testamentary disposition or administration of an estate (Keay & Richardson 1966: 39).

As the Native Courts also had exclusive original jurisdiction of such cases, exclusive control of these 'personal law' matters was kept in the hands of the Native Courts, a matter of particular concern to Northern Muslims. All other matters, including criminal cases decided under Islamic law, could and often did go on appeal to the British courts, which thus now began to interfere in the administration of Islamic law by the Muslim jurists best qualified to know it.

The unhappiness of the Northern *ulama*<sup>8</sup> with this situation is indicated by the fact that very soon after the regions were empowered (in 1954) to control their own court systems, the Northern House of Assembly set up a new 'Moslem Court of Appeal', whose appellate jurisdiction extended to *all* cases, civil and criminal, decided under Islamic law in the Native Courts. Appeals from the Native Courts in other cases went to the regional High Court. The introduction of the Moslem Court of Appeal 'was welcomed by Chiefs and Moslem jurists as a means of protecting Moslem law from encroachment as a result of appeal to "English" courts' (Keay & Richardson 1966: 56). But there were problems. The court had no permanent judges, but was merely constituted as needed from panels of *alkalis* and assessors learned in Islamic law. Moreover, Muslim suspicions of the High Court continued, because a right of further appeal from the Moslem Court of Appeal to the High Court was 'rendered inevitable since jurisdiction [of the Moslem Court of Appeal] extended to criminal matters' (*ibid.*).

But with Independence fast approaching, pressures now came from other directions which overtook these problems. Chief among them were the fears of the non-Muslim minorities in the North – both indigenous peoples and Southern immigrants – about how they would be dealt with when the British were gone and they were left at the mercy of a powerful regional government and its Native Courts, dominated by Muslims. This was one of many issues looked into by the so-called Minorities Commission that was appointed after the 1957 constitutional conference and which held extensive hearings throughout Nigeria in the first half of 1958. In its lengthy report, submitted to the resumed constitutional conference in 1958 (Report 1958), the Commission rejected the demands of minorities in all the regions for subdivision of the country into more ‘states’ where some regional minorities could become self-governing majorities; the process of state-creation only began ten years later, on the eve of the Nigerian civil war. But the Minorities Commission did recommend, as one form of protection for minorities in all regions, the inclusion of a Bill of Fundamental Human Rights in the Independence Constitution. As we have seen, this was done.

Many felt that more radical reform was needed in the North, particularly in the matter of the continuing application there of Islamic criminal law. In this respect Northern Nigeria was out of step even with the rest of the Muslim world at the time:

[T]he case of Northern Nigeria was, indeed, almost unique, for up till [1960] this was the only place outside the Arabian peninsula in which the Islamic law, both substantive and procedural, was applied in criminal litigation – sometimes even in regard to capital offences (Anderson 1976: 27).

The pressure to change this was intense.

If the fears of the considerable Christian and animist minorities in the North were to be allayed, they needed to be assured that *Sharia* law would not be imposed upon them in the native and customary courts. [...] The Eastern and Western Regions were insistent that the [...] law which was administered in any part of the Federation [...] should respect the Fundamental Human Rights of Nigerians as set out in the constitutional instruments. [...] The U.N. Trusteeship Council had expressed reservations about the capacity of an independent Federal Government in Nigeria to uphold Fundamental Human Rights for the minorities without a radical reform of the law in the Northern Region. The British Government had made its position clear: reform of the legal and judicial systems in the North was a necessary

preliminary to the granting of self-government to the Region (Richardson 2001: 209<sup>9</sup>).

The result of all this pressure was 'The Settlement of 1960' (Ostien 2006: 224-231), worked out and agreed to in general terms during 1958 and implemented in a spate of legislation all coming into operation on 30 September 1960, literally on the eve of Independence. Concluding that the North should keep up with the pace set by the Eastern and Western Regions in the race for independence, although it was less 'ready' than they, and that Northern independence, when it came, should after all be in federation with the East and West, the North's Muslim ruling class agreed to reform the legal and judicial systems of the Region, most notably by abrogating all the then-prevailing systems of criminal law, including Islamic criminal law, in favour of new Penal and Criminal Procedure Codes applicable in all courts of the Region to all persons without regard to religious or ethnic affiliation. Islamic personal law, and other Islamic civil law, continued in force for application in the Native Courts as appropriate, but parted company at the appellate level. Cases involving Islamic personal law went to the new Sharia Court of Appeal, whose jurisdiction was limited essentially to such questions. Cases involving other Islamic civil law went to the new Native Courts Appellate Division of the High Court. The Moslem Court of Appeal was abolished. The judicial powers of the emirs were curtailed; in subsequent years these powers were abolished completely. These concessions were balanced, to some degree, by the new prestige and privileges accorded to the Sharia Court of Appeal. It was made a permanent court with a standing membership and given a status equivalent to the Regional High Court. Its judgments, on matters within its jurisdiction, were made final and unappealable to any other court. Its jurisdiction was subject to extension beyond personal law matters, to questions of other Islamic civil law, at the instance of the parties to particular cases. Perhaps most importantly, its judges were given a seat on the Native Courts Appellate Division of the High Court, so that the North's Muslim jurists had a formal role in the application and development of all the law applied in the Native Courts, not limited to Islamic law. Beginning in 1959 and in the years following independence a huge effort went into making these new arrangements work properly (Ostien 2007: I, 57-133); and until the Settlement of 1960 fell apart in 1979, it seems that they actually did.

### *The First Republic*

Under its Independence Constitution Nigeria became completely self-governing, but it nevertheless remained a 'part of Her Majesty's



dominions'. In practice this meant, for instance, that Nigeria's Governor-General and the Governors of the Regions 'shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and [...] shall be Her Majesty's representatives' in their respective jurisdictions; but the appointments were made, of course, on the advice of the federal Prime Minister and the regional Premiers. Appeals still lay from the Federal Supreme Court to the Privy Council. There were other badges and incidents of the continuing monarchy. In 1963 it was decided to do away with these vestiges and to convert Nigeria into a republic. Under the new constitution, which took effect on 1 October 1963, instead of 'The Federation of Nigeria' it became 'The Federal Republic of Nigeria'. The basic plan and most details of the constitution remained unchanged. The first Governor-General of independent Nigeria, Nnamdi Azikiwe, became the first President of the Republic. Other high officials also remained in place.

Unfortunately things did not go smoothly for the new country. The following brief summary may serve to give the uninitiated reader some idea of the range of problems that arose.

The North-South and ethnic tensions, the politics of vindictiveness, oppression and thuggery, the Action Group crisis of 1962 [the party, rooted in the Western Region, split; after protracted violence and rioting and the apparent collapse of government in the Region the Federal Government declared a state of emergency and the Region was ruled by a federal administrator for about a year], revenue allocation disputes, the treason trials of Chief Obafemi Awolowo and twenty other members of the Action Group [accused of plotting to overthrow the Federal Government by force], the census controversy of 1962-1964 [the census, necessary to the allocation of seats in the House of Representatives, attempted twice, figures never accepted], the realignment of political parties before the 1964 federal elections [leaving the main party of the Eastern Region, led by President Azikiwe, in a weakened position], the 1964-1965 federal elections [boycotts in the East, violence, supplementary elections required], the dispute between the President and the Prime Minister over the 1964 elections, the Western Nigeria elections of 1965 and the civil violence that followed in the Region, contributed in varying degrees to hasten the fall of the First Republic and to the military takeover of January 1966 (Joye & Igweike 1982: 38-39).

### 13.3 The period from 1965 until 1985

#### Military coups, civil war, and the sharia debate of 1976-1978

##### *Rule by the military, civil war, and the return to civilian rule*

The military takeover proceeded in stages. On the night of 14-15 January 1966, a group of army majors, mostly Igbo by tribe, carried out coordinated assassinations of the Premiers of the Northern and Western Regions (Ahmadu Bello and Samuel Akintola), several other politicians, and a number of fellow-officers from the North and West. They also kidnapped and later killed the federal Prime Minister, Abubakar Tafawa Balewa. The next day the majors declared their allegiance to the General Officer Commanding, Major-General Aguiyi-Ironsi, also an Igbo but apparently not involved in the initial plot. President Azikiwe was out of the country at the time. On 16 January the Acting President, with the backing of the Council of Ministers, handed over administration of the country to the Armed Forces with Aguiyi-Ironsi at the head. The parts of the constitution relating to the legislative and executive branches of the federal and regional governments were suspended, the politicians were thrown out of office, and Military Governors were appointed for each region. Legislation thenceforward was by decree (federal) and edict (regional). The courts continued to function more or less as before.

Besides being an Igbo, Aguiyi-Ironsi pursued some unpopular policies, including dissolution of the regions and transformation of Nigeria into a unitary state. In July 1966, before this went very far in practice, there was a second coup within the military, this time led by Northern officers, in which Aguiyi-Ironsi and a number of other Igbo officers were killed. A young Northerner, Lieutenant-Colonel (later General) Yakubu Gowon, was installed as the new head of the Federal Military Government, and the federation was restored. Subsequently, in many parts of the North, there were pogroms against Igbos, precipitating a massive migration of Igbos back to the East.

The situation finally descended into civil war in mid-1967. On 30 May, Lieutenant Colonel Chukwuemeka Ojukwu, the Military Governor of the Eastern Region, declared the Region's secession from the Federation and its independence as a new nation under the name of 'The Republic of Biafra'. When discussions aimed at reversing this declaration went nowhere, the Federal Military Government commenced hostilities on 5 June. The war, which resulted in perhaps a million deaths, mostly in the East, ended in 1970 with the defeat of Biafra and its reincorporation into the country. Rule by the military continued.

One important by-product of the crises of 1966-1967 was the subdivision, so much talked of for such a long time, of Nigeria's regions into

smaller states. In May 1967, in a futile attempt to stave off Eastern secession, General Gowon divided the country into twelve states, six of them in the North. This exercise was repeated in 1976, when seven additional states were created, four in the North. This process made the formerly monolithic North, in particular, much more palatable to the rest of the country. All the new states were legal clones of the regions from which they came, the laws and institutions of the old regions becoming the laws and institutions of the new states carved out of them, with much scrambling to staff all the new institutions thus created in the new states. State-creation had important effects on the administration of Islamic law in the states of the ex-Northern Region, to which we shall return shortly.

After the civil war General Gowon promised the early return of the country to civilian rule. Fulfilment of this promise always seemed to be put off, however, and, finally losing patience with the delays and with the mounting corruption throughout the government, in July 1975 another group from within the military deposed Gowon and replaced him as head of state with General Murtala Mohammed. In addition to taking drastic steps to combat corruption, Murtala quickly established a schedule for transition to civilian rule, and took the first step: appointment in late 1975 of a Constitution Drafting Committee (CDC) charged with preparing a new draft constitution for later consideration by a Constituent Assembly. Murtala was assassinated in February 1976, in yet another attempted coup from within the military, which this time failed. Murtala's successor was his second in command, General Olusegun Obasanjo (who subsequently served as Nigeria's elected president from 1999 to 2007). Obasanjo stuck to Murtala's transition schedule, handing the country back to an elected civilian government on 1 October 1979, under the new-modelled constitution of 1979.

The 1979 constitution preserved the federal structure of Nigeria – now with nineteen states plus the new Federal Capital Territory of Abuja (the capital was finally moved from Lagos to Abuja in 1991). But it made important changes in the system of government, the chief of which was to switch from the Westminster style inherited from Britain to a presidential system modelled on the United States. This change extended also to the state governments, so that in addition to an independently-elected president for the federation, with extensive executive powers laid down in the constitution, each state now also had an 'executive governor' elected independently of its House of Assembly. The new constitution also entrenched local government reforms decreed by the Military Government in 1976, guaranteeing a 'system of local government by democratically elected local government councils' (Art. 7); this was the final death-knell for emirate administration in the North. Many other adjustments were made. All of Nigeria's subsequent constitutions,

including the 1999 constitution currently in effect, have been substantially identical to the 1979 constitution, with variations only at the margins.

### *The sharia debate of 1976-1978*

The most contentious issue thrown up by the constitution-making process of 1976-1978 is directly related to our main subject here: it was the controversy over the proposal for a new Federal Sharia Court of Appeal. The call for such an institution was a by-product of the state creation exercises of 1967 and 1976. As we have seen, each new state inherited the laws and institutions of its parent region. In the North this meant (among other things) that in place of the one original Sharia Court of Appeal for the entire Region, there would now be, first six Sharia Courts of Appeal, and then ten, one for each of the states into which the Region was divided. All these new Sharia Courts of Appeal were legal clones of the original one for the Region; hence the judgments of each were final and unappealable to any other court. This raised the problem the proposed Federal Sharia Court of Appeal was intended to solve: the possibility of conflicts between the judgments of the Sharia Courts of Appeal of the states. They would all be adjudicating on the same class of cases – Islamic personal law. Inevitably cases involving the same legal issue would come before the Sharia Courts of Appeal of different states, and they would decide them differently, thus creating a conflict. But since the judgments of each of the courts were final, any conflict that might arise would be unresolvable. As early as 1972 it was proposed to create a new Federal Sharia Court of Appeal that would sit to hear appeals from the state Sharia Courts of Appeal and thus (among other things) to resolve any conflicts that might crop up between them. The CDC agreed with this proposal and included it in the draft constitution which it put before the country in 1976.

What happened is well known (Ostien 2006: 238-243 and authorities cited). The Report of the CDC, including the draft constitution, was published in September 1976 and became the subject of one year of public discussion and analysis. In October 1977 a mostly-elected Constituent Assembly convened to debate the CDC draft and to make such amendments as it saw fit. In one year of discussion Christian opinion on the Federal Sharia Court of Appeal had polarised and hardened, and in the Constituent Assembly the Christian delegates ‘unleashed a storm of protest’ against it (Hunwick 1992: 149). No compromise was found possible in protracted debate. In the end it was the Christians who had the votes, and in early April 1978, the Federal Sharia Court of Appeal was officially eliminated from the constitution. The Muslim members of the Constituent Assembly walked out the next day,

maintaining their boycott for almost three weeks; only the intervention of the Head of State (Obasanjo) persuaded them to return. The Assembly then quickly wrapped up its work, adjourning finally on 5 June. After some further adjustments the constitution was officially enacted by a decree of 21 September 1978, to take effect on 1 October 1979.

State Sharia Courts of Appeal were indeed provided for, 'for any state that requires it' (Art. 240(1)); this was balanced by also allowing new Customary Courts of Appeal 'for any State that requires it', to which appeals in cases decided under customary law might be directed (Art. 245(1)). But the judgments of neither of these types of court were any more final, even in the fields of Islamic or customary personal law; all their judgments were made appealable to the federal Court of Appeal and thence to the Supreme Court. Thus the long-standing right of Muslim courts in the North to finally and autonomously decide all issues of Islamic personal law was lost. The possibility of extending Sharia Court of Appeal jurisdiction to questions of other Islamic civil law at the instance of the parties to particular cases was also lost. The right of judges of the Sharia Courts of Appeal to sit with judges of the High Courts to decide all other appeals from the Native Courts was also lost. In sum, the single high Muslim appellate court of days gone by, with wide territorial jurisdiction, finality in its judgments, and a voice in the decision of appeals by the High Court, was gone, replaced by many lesser offspring: no longer even clones of the former Regional Sharia Court of Appeal, they were lesser not only in their territorial reach and in their dignity, but also in their jurisdiction, powers, and autonomy. As the Muslims saw it, these new losses for Islamic law in Nigeria were the result, not of a negotiated settlement voluntarily entered into by the Muslim leadership, as in 1960, but of a humiliating defeat at the hands of Nigeria's Christians. As we shall see, various attempts were made in subsequent years, through the courts and the constitution, to repair the damage, until finally, in 1999, Zamfara State, seizing on a constitutional loophole, took the debate in a whole new direction.

### *Return to military rule*

Nigeria was governed under the 1979 constitution for only a little over four years – 1979 to 1983. Shehu Shagari, elected president in 1979, was re-elected in 1983; but on 31 December 1983 the military stepped in once again, once again promising to clean up rampant corruption. General Muhammadu Buhari was installed as the new head of state, large parts of the constitution were suspended as before, and the country was ruled by decree and edict for the next sixteen years.

### 13.4 The period from 1985 until the present

Return to civilian rule at last; sharia implementation in twelve northern states

#### *Constitutional developments*

General Buhari is famous for his 'War Against Indiscipline', including the military tribunals he set up to pursue the recovery of public property looted during the Shagari era and to prosecute those who had stolen it. Many politicians were arrested and languished in prison awaiting trial; those tried and convicted were sentenced to serve long terms. But the tribunals became notorious for their arbitrary and highhanded behaviour, to the point that the Nigerian Bar Association instructed its members not to appear before them. Buhari's initial popularity faded as he resorted to ever more drastic methods to stifle criticism. It is said that the last straw was a threatened investigation into contracts awarded by the Ministry of Defence, which if pursued would have implicated senior military officers (Alli 2001). However that may be, in August 1985 Buhari was deposed by yet another coup from within the military, and replaced by General Ibrahim Babangida.

Babangida, like Murtala Mohammed a decade earlier, laid down a schedule for return of the country to civilian rule, complete with another Constituent Assembly convened (1988) to revise the 1979 constitution. But the last stage of Babangida's transition programme, the presidential election of 1993, was botched, and the country fell back into the hands of the military, this time under its worst tyrant to date, General Sani Abacha. Under the reign of Abacha (1993-1998), Nigeria drifted deeper into a morass of crime, corruption, and violence, resulting in its increasing international isolation. The 1995 hanging of human rights activist Ken Saro-Wiwa and eight of his companions, by orders of Abacha, led to widespread international condemnation. Nigeria was suspended as a member of the British Commonwealth and was targeted by economic sanctions imposed by the European Union among others. Abacha too announced a schedule for return of the country to civilian rule, convening yet another Constitutional Conference (1994-1995) for revision of the constitution, but he died in office before his sincerity on this point was tested.

Abacha died in June 1998. His successor was Major-General Abdulsalami Abubakar. Although Abubakar initially lacked even a modicum of support or legitimacy, and people feared for a continuation of the military dictatorship, he quickly took decisive steps towards the recovery of the Nigerian democracy (Nzeh 2002: 40-41). He released political prisoners, the international sanctions were lifted, and what many

consider to be Nigeria's freest and fairest elections ever were held, to all local, state, and federal offices. On 29 May 1999, power was transferred to the new state governors and the new president, Olusegun Obasanjo. The 1999 constitution, which came into force the same day and under which the country is still governed, was essentially the 1979 constitution reinstated.

Nigeria is now continuing its longest period of uninterrupted civilian rule since Independence. Elections were held as scheduled in 2003; Obasanjo was returned to power for another four years. Elections were again held as scheduled in 2007. Although these elections were widely condemned as badly flawed, the presidency changed hands peacefully for the first time in Nigeria's history, and election tribunals, convened according to constitutional processes, have dealt with the irregularities apparently unswayed by political considerations. The new president, Umaru Yar'Adua of Katsina State, has pledged himself and his government to respect and enforce the rule of law.

#### *Sharia and national law, 1985-present*

The collapse of the Settlement of 1960 in the constitution-making process of 1976-1978 has been described. In the twenty years between 1979 and 1999 two types of attempts were made by Muslims to repair the damage. (1) A new field of constitutional litigation was opened up, focussed on the Sharia Courts of Appeal. New pressure had been put on Sharia Court of Appeal jurisdiction because judges of the Sharia Courts of Appeal no longer sat on the Appellate Division of the High Court. This meant that Muslims litigating, for instance, contract, tort, or land cases under Islamic law in the Area Courts (successors in the North to the Native Courts), who wanted specifically Muslim jurists to examine the matter on appeal, had no choice but to try for the Sharia Courts of Appeal. But the trouble now was that the possibility of extending Sharia Court of Appeal jurisdiction to such cases at the instance of the parties had been cut off; this was what a succession of cases held (Ostien 2006: 243-244). (2) The constitution being against them, the Muslims turned their attention to amending the constitution. The first attempt, decreed by General Babangida in 1986, deleted the word 'personal' wherever it occurred after the word 'Islamic' in the sections of the 1979 constitution touching on Sharia Court of Appeal jurisdiction. This theoretically should have done the trick, but the courts held otherwise, finding the amendment to be 'of no jurisdictional consequence and in practical terms [to have] achieved nothing' (ibid: 244-245). Under the Babangida and Abacha constitutions, the crucial section was therefore redrafted and simplified, unequivocally extending the jurisdiction of the Sharia Courts of Appeal to all 'civil proceedings involving

questions of Islamic law where all the parties are Muslims'; but neither the Babangida nor the Abacha constitution ever came into force. When General Abubakar returned Nigeria to civilian rule in 1999, he disregarded the Babangida and Abacha constitutions almost entirely, simply reinstating the 1979 constitution (with some amendments not affecting our point here). The position looked hopeless.

It was at this point that Alhaji Ahmad Sani came into the picture. Sani was elected Governor of Zamfara State in the governorship elections held on 9 January 1999 – the first such elections after sixteen years of military rule. Zamfara State, in Nigeria's far north, has a predominantly rural population of about three million, of which 90 per cent or more are Muslim. Governor Sani was its first elected governor, the state only having been created (out of Sokoto State) in a new round of state-creation decreed by Sani Abacha in 1996. Governor Sani says that during his campaign,

In any town I went to, I first started with *kafaral*, which is chanting *Allahu Akbar*<sup>10</sup> thrice. Then I always said, 'I am in the race not to make money, but to improve on our religious way of worship, and introduce religious reforms that will make us get Allah's favour. And then we will have abundant resources for development' (*Tell Magazine*, 15 November 1999: 19).

This promise was little noticed outside Zamfara during the campaign. But after his inauguration on 29 May 1999, Governor Sani proceeded to make it good – at least as to the religious reforms – and thus began a new chapter in the history of Nigeria's Muslims and of their relations with their non-Muslim neighbours and compatriots.

'Religious reforms that will make us get Allah's favour'. By this Governor Sani did not mean reforms of the religion, of Islam. He meant reforms of the laws and institutions of Zamfara State, to bring them more into conformity with Islam – in particular with Islamic law. 'Sharia implementation', as the reforms quickly came to be called, has been effected primarily by legislation at the state and local government levels, aimed at making the legislating jurisdictions, in various ways, more 'sharia compliant' than they had formerly been. After Zamfara showed the way, eleven other states – Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe – followed with similar legislative programmes. Here is a summary of what has been done:

- The principal point conceded by the Muslims in the Settlement of 1960 – the abrogation of Islamic criminal law – has been reclaimed. Relying on their constitutional power to legislate on criminal matters, and their constitutional right to freely practice their



religion, all sharia states have reinstated Islamic criminal law, in the form of new Sharia Penal and Criminal Procedure Codes applicable to Muslims.

- Relying on their constitutional power to regulate their own court systems, all sharia states have established inferior Sharia Courts, with original jurisdiction to apply the full range of Islamic law, civil and criminal, to Muslims.
- Seizing on an anomalous clause in the constitutional language defining Sharia Court of Appeal jurisdiction – until 1999 little noticed – all sharia states have extended the jurisdiction of their Sharia Courts of Appeal to all matters, civil and criminal, decided in the inferior Sharia Courts. This move simply bypassed all the litigation relating to Sharia Court of Appeal jurisdiction, and all the attempted constitutional amendments, of the previous twenty years.
- A wide range of other legislation has been enacted aimed at particular ‘social vices’ and ‘un-Islamic behaviour’, like the consumption of alcohol, gambling, prostitution, unedifying media, and the excessive mixing together of unrelated males and females. Two states – Zamfara and Kano – uniquely among all Nigerian states – have even tackled the pan-Nigerian problem of corruption, setting up their own statutory Public Complaints and Anti-Corruption Commissions in accordance with Islamic principles.
- Other institutions have been established – Sharia Commissions and Councils of Ulama with important advisory and executive functions; boards for the collection and distribution *zakat*<sup>11</sup>; *hisbah*<sup>12</sup> organisations to monitor and try to enforce sharia compliance, but also to engage in mediation and conciliation within the society; and others; – all with the aim of deepening and enforcing the application of sharia law in the lives of the Muslims of the states that have established them.

Not all the sharia states have done all of these things, and what has been done has been done differently from state to state. Still, taken together, these interlocking measures – in theory at any rate – have restored the application of Islamic law to Muslims, in the states that have enacted them, to a state of completeness and a degree of autonomy from the ‘English’ legal system, that it has not had for over a century. In practice, of course, things have not always worked out as hoped. Extensive documentation of what has been done can be found in Ostien 2007.

Governor Sani’s announcement of his sharia implementation programme exhilarated Nigeria’s Muslims, and produced tremendous pressure on the governments of other northern states to follow suit. But it aroused fear and loathing among Christians, who expected the worst;

civil war was even predicted by some (Barends 2003: 19; Ostien 2002: 172-73). Everyone's worst fears seemed to be confirmed by the first amputation of a hand for theft already in March 2000, and then by the stoning cases of Safiyatu Hussaini (2001-2002) and Amina Lawal (2002-2003), which caused an uproar around the world.<sup>13</sup> In Nigeria serious fighting, killing and destruction of property, sparked off directly by agitation for and against sharia implementation, did break out, in Kaduna State, in February 2000, leaving hundreds, perhaps thousands, dead. Subsequent lesser outbreaks of violence elsewhere in the North, in the first year or two after sharia implementation started, perhaps resulted from it in part, and in part from all the other causes of inter-religious and inter-ethnic strife that have rankled for many years (see e.g. Boer 2003; Ostien 2009). Since those early days, however, the clamour has died down completely, to the point that sharia implementation was a non-issue, virtually never mentioned, in the state and federal election campaigns of 2007. Some of the reasons for this will be discussed below.

It remains to mention the 'Independent Sharia Panels' (ISPs) established in the South in the wake of sharia implementation in the North. As we have seen, there has never been any state-sanctioned application of Islamic law in the South. With no chance of changing this through legislation, Muslims in several southern cities (e.g. Lagos, Ibadan, and Ijebu-Ode) have set up what amount to private arbitration panels, to apply Islamic law in the settlement of disputes submitted to them by parties consenting to their jurisdiction and agreeing to abide by their judgments. These panels have gained recognition and status through the involvement of such national bodies as the Supreme Council for Islamic Affairs and the Supreme Council for Sharia in Nigeria. Intended primarily to resolve private disputes, especially in the field of personal and family law, the panels have sometimes also been drawn reluctantly into application of the penal law as well. In one famous case a self-confessed fornicator submitted himself to the ISP in his city, demanding the *huddud* punishment for his sin. Evidently never having been married, he was duly given his one hundred strokes of the cane. One wonders what would have happened had he been a married man.<sup>14</sup> Whether the courts would enforce the judgments of the ISPs, if asked to do so, is not known.

### ■ 13.5 Constitutional law

In this section we deal with sharia-related matters arising under articles of Nigeria's constitution other than those on Fundamental Rights, which are dealt with in section 13.9. As much of the discussion, here

and in section 13.9, pertains to various details of the new programmes of sharia implementation, it should be remarked at the outset that sharia implementation in northern Nigeria was not done in defiance of the constitution. In most sharia states, before they did anything, the governors appointed ‘Sharia Implementation Committees’ charged among other things to ‘study what steps should be taken [and] to consider the constitutionality of the measures proposed’ (Ostien 2007: II, 3). Then, in announcing their programmes, the governors explicitly acknowledged the supremacy of the federal constitution and laws. Governor Sani of Zamfara State said from the beginning that ‘[w]hatever I am doing must be [...] within the agreement signed by the people of Nigeria to live together which is referred to as the Constitution’ (Nigerian *Guardian*, 6 December 1999: 69). Governor Kure of Niger State said that sharia law as implemented in his state would

submit to the supremacy of the nation’s constitution. [...] [H]e assured that where the system ran contrary to the provisions of the constitution, *shari’a* would bow to give the constitution the right of way. [...] He said that having vowed to preserve and protect the nation’s constitution during his swearing in, his administration would do nothing to flout the provisions under any guise (Nigerian *Guardian*, 17 January 2000: 71).

Many other examples could be given. ‘The Muslims of northern Nigeria are saying that they want to implement as much of their law as they possibly can within the constitution and laws of the federation. That attitude is entirely politically correct’ (Ostien 2002: 167). The question remains, of course, whether the sharia implementation programmes, or any of them, do in any way go outside the bounds of the constitution and laws of the federation. Various aspects of this question are dealt with in the rest of this section and in section 13.9.

### *Sharia in Nigeria’s constitution*

Sharia finds its place in Nigeria’s 1999 constitution only in a number of provisions relating to the Sharia Courts of Appeal of the Federal Capital Territory and of ‘any State that requires it’; in fact, eighteen of the nineteen states of the ex-Northern Region have Sharia Courts of Appeal, the nineteenth, Benue State, sharing with Plateau. The constitution provides in detail for their establishment, the appointment and removal of their judges (since 1979 denominated ‘kadis’ in the constitution and laws), their jurisdiction, appeals from their judgments, and other matters relating to them (Chapter VII, on the judicature). For most purposes the Sharia Courts of Appeal are grouped with the

Supreme Court, the federal Court of Appeal, the state and federal High Courts, and the Customary Courts of Appeal. Thus, they are superior courts of record (Art. 6). The salaries of their kadis are set by the National Assembly and paid out of the Consolidated Revenue Fund of the federation (Art. 84). Their Grand Kadis (chief judges) may administer the oaths of office taken by state governors (Art. 185). Their Grand Kadis also serve on the National Judicial Council and the State Judicial Service Commissions, and all kadis may be (and many are) appointed to serve on Election Tribunals (III<sup>d</sup> and VI<sup>th</sup> Scheds.). The Sharia Courts of Appeal and their kadis are familiar and accepted features of Nigeria's judicial landscape.

The existence of Sharia Courts of Appeal implies the existence of courts inferior to them in which Islamic law is applied and from which appeals to them may be taken. These were the North's Native Courts, which in 1967-1968 were reconstituted as 'Area Courts'. As we have seen, from 1960 the parts of Islamic law applied in these courts was limited to Islamic personal law and other Islamic civil law, Islamic criminal law having been abrogated. All appeals involving Islamic personal law went to the Sharia Courts of Appeal. Most appeals involving other Islamic civil law went to the High Courts until 1979, and all did thereafter. Since 1999-2000, in the twelve sharia states, the inferior courts in which Islamic law is applied have been reorganised once again: the Area Courts have been abolished and replaced by 'Sharia Courts', charged to apply the full range of Islamic law, civil and criminal, to Muslims. Appeals from the Sharia Courts in all types of cases have been directed to the Sharia Courts of Appeal.

#### *Establishment of inferior Sharia Courts*

The states may establish, below their superior courts, 'such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws', and any court a House of Assembly can establish it can also abolish (Art. 6). Thus in the sharia states the Area Courts have come and gone and the Sharia Courts have replaced them. (This involved little change of personnel: most of the Area Court judges simply became Sharia Court *alkalis*.) Like the Area Courts before them, the Sharia Courts have criminal as well as civil jurisdiction, now to apply the new Sharia Penal Codes (see 13.7), as the Area Courts applied the Penal Code before. With all of this *per se* there appears to be no constitutional problem.

But there are problems with some provisions of the new Sharia Courts laws. Administrative responsibility for the Area Courts (and of the Native Courts before them) was in the hands of the Chief Judges of

the High Courts. Now, in the sharia states, administrative responsibility for the Sharia Courts has been transferred to the Grand Kadis of the Sharia Courts of Appeal. Some of the Chief Judges have objected, resenting, perhaps, their loss of jurisdiction, and citing their *ex officio* chairmanship of the state Judicial Service Commissions, mandated by the constitution (III<sup>d</sup> Sched. Pt. II C). This is perhaps not very convincing; nevertheless, as of October 2009, transfer of control from the Chief Judge to the Grand Kadi has yet to be accomplished in two sharia states (Borno and Katsina).

A more serious constitutional question is raised by the direction of all appeals from the Sharia Courts, in criminal as well as civil matters, to the Sharia Courts of Appeal, cutting out the High Courts completely. We consider this point next.

#### *Expansion of Sharia Court of Appeal jurisdiction*

Article 277 of Nigeria's constitution provides as follows (italics added):

277. (1) The Sharia Court of Appeal of a State shall, *in addition to such other jurisdiction as may be conferred upon it by the law of the State*, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide

- (a)
- (b) } [specified questions of Islamic personal law, e.g. marriage,
- (c) } divorce, guardianship, inheritance, etc.]
- (d) }
- (e) – [any other question of Islamic personal law at the instance of Muslim parties to particular cases]

The question is whether subsection (2) lays down the *maximum* jurisdiction any Sharia Court of Appeal can have, or whether it lays down the *minimum* only, the states being free, under the italicised clause of subsection (1), to add any further jurisdiction they please. If the former, then the sharia states, by expanding the jurisdiction of their Sharia Courts of Appeal to matters well outside the bounds of Islamic personal law, have acted unconstitutionally. If the latter, then the sharia states have found a brilliant bypass to the constitutional roadblock, set up in 1979, which the North's Muslims then spent twenty years trying to remove.

If Article 277 is read by itself, the position of the sharia states looks strong. If it is read in the light of its history and of the rest of constitution, the position looks much weaker. Article 277 entered the constitution as Article 242 of the 1979 constitution, in identical terms except for a small difference in the wording of subsection (2)(e). There is no question but that the drafters of the 1979 constitution intended to limit Sharia Court of Appeal jurisdiction to questions of Islamic personal law only, and that the insertion of the italicised clause of subsection (1) was a draftsman's error that somehow escaped detection (Ostien 2006: 248-252). The other articles of the constitution dealing with the Sharia Courts of Appeal relentlessly use the phrase 'Islamic personal law'. To take just one example, the class of cases in which appeals lie from the Sharia Courts of Appeal to the federal Court of Appeal is defined as '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' (Art. 244(1)); but it cannot have been the intention to leave unappealable other types of questions that the state Houses of Assembly, if they were allowed, might empower their Sharia Courts of Appeal to decide. The High Courts of two states have already held that expansion of Sharia Court of Appeal jurisdiction beyond questions of Islamic personal law is unconstitutional.<sup>15</sup> In those states the old pattern has returned, appeals from the Sharia Courts in Islamic personal law cases going to the Sharia Courts of Appeal, appeals in all other cases going to the High Courts. More of the same is likely as time goes on.

*Enactment of other elements of the sharia implementation programmes*

Article 4(7) of the constitution provides that:

The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say

- (a) any matter not included in the Exclusive Legislative List [...];
- (b) any matter included in the Concurrent Legislative List [...] to the extent prescribed [therein];
- (c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

We consider briefly the authority of the sharia states under this provision to enact four other elements of their sharia implementation programmes.

a. *Criminal law.* The power to create and punish criminal offences is vested in both the state and federal governments in Nigeria, within their respective spheres of authority (II<sup>d</sup> Sched. Pt. III(2)). Thus the Penal Codes in force in all northern states are state enactments. There are of course limitations. No legislative body has power, 'in relation to any criminal offence whatsoever, [...] to make any law which shall have retrospective effect' (Art. 4(9)). Every criminal offence must be 'defined and the penalty therefore [...] prescribed in a written law', i.e. 'an Act of the National Assembly or a Law of a State [or] any subsidiary legislation or instrument under the provisions of a law' (Art. 36(12)). The new Sharia Penal Codes enacted by the sharia states comply with these broad requirements, except in one particular. Seven of the codes contain (with minor variations) the following provision, captioned 'General offences':

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 *ijtihad* of the Maliki 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 N5,000.00 [about € 22<sup>16</sup>], or with any two of the above punishments (Ostien 2007: IV, 60 n.e 118).

This incorporation by reference of otherwise undefined offences no doubt violates Art. 36(12), and would be struck down if challenged in a proper case. The other constitutional questions raised by the Sharia Penal Codes relate not to the power of the sharia states to enact them, but to issues of fundamental rights considered in section 13.9 below.

b. *Evidence.* Since 1979 the subject of evidence has been on the constitutional Exclusive Legislative List (II<sup>d</sup> Sched. Pt. I §23), and therefore presumptively reserved for the National Assembly alone; and there is a federal Evidence Act, in force in Nigeria with few changes since 1945. At the same time, the North's Area Courts, and presumably the South's Customary Courts as well, have continued to apply, as the case may be, Islamic or 'native and customary' rules of procedure and evidence in civil matters coming before them, without regard to the Evidence Act; and now the new Sharia Courts are doing the same in criminal matters as well. Can this be correct?

As to civil matters there is clearly no problem. The Evidence Act by its own terms is inapplicable 'to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court' (§1(2)(c)). It may be presumed

that the term 'Area Court' will be read to include the new Sharia Courts as well. This exemption recognises the continuing duality of Nigeria's court systems and the continuing applicability, in the latter-day 'native' courts, of Islamic law and native law and custom, including the law and custom relating to procedure and evidence.

Criminal matters are a different question. The Evidence Act says that the North's Area Courts (we presume Sharia Courts are included), in criminal causes or matters, are to be *guided* by its provisions, except that they are *bound* by six specific sections all relating to burden of proof (§1 (3) and (4)). This distinction, between being guided and being bound, entered the law of the Northern Region in 1960, supposedly on an 'interim' basis, while the judges of the Native Courts became accustomed to the new Penal and Criminal Procedure Codes and the Evidence Act, all very different from the law they had been accustomed to applying up till then (Ostien 2007: I, 63-65 and IV, 181-182). But the distinction has persisted until the present, and has even been perpetuated in some of the new Sharia Criminal Procedure Codes enacted in the sharia states (Ostien 2007: IV, 195-197). Whether the principle of guidance, as used in §1(3) of the Evidence Act, leaves room for the application, in criminal cases in the Sharia Courts, of Islamic rules of evidence which are sometimes inconsistent with the Act, is a complex question on which we cannot enter further here.

c. *Zakat*. 'Taxation of incomes, profits and capital gains' is on the Exclusive Legislative List (II<sup>d</sup> Sched. Pt. I §59). But eleven of the sharia states have set up official agencies for the collection and distribution of *zakat*, the Islamic 'alms' tax (see note 11). In most states payment remains voluntary, but in three defaulters can be prosecuted, and in one other *zakat* can be recovered as a civil debt. *Zakat* is a tax on wealth. The levy of *zakat* on their wealthy Muslims by the sharia states, if it is ever challenged, seems unlikely to be held inconsistent with the federal government's exclusive prerogative to tax incomes, profits and capital gains.

d. *The hisbah groups*. 'Police and other government security services established by law' are also on the Exclusive Legislative List (II<sup>d</sup> Sched. Pt. I §45), and Art. 214(1) makes the point very clear:

There shall be a Police Force for Nigeria, which shall be known as the Nigeria Police Force, and [...] no other police force shall be established for the Federation or any part thereof.

But seven of the sharia states have set up official *hisbah* organisations (see note 12) (in other states *hisbah* groups have organised themselves as NGOs), which, along with preaching, admonishing, and a good deal of mediation and conciliation, also do what looks like policing –



monitoring and trying to enforce sharia compliance. This has sometimes brought them into conflict with members of the public and with the police, particularly in Kano, where *hisbah* attempts to enforce bans on commercial motorcycles carrying female passengers resulted in late 2005 in serious clashes between *hisbah*, motorcycle drivers, and police (Nasir 2007: 110-111). Things came to a head in February 2006, when the federal government accused the Kano *hisbah* of being an illegal police force, purported to ban it, and arrested its Commander and his deputy, charging them with three counts of felonious membership and management of an unlawful society (Nigerian *Guardian*, 10 February 2006: 1). In response, two lawsuits against the federal government were promptly filed: Kano State sued in the Supreme Court, seeking a declaration that its *hisbah* organisation was legal, and the Commander and his deputy sued in the Federal High Court, seeking damages for unlawful arrest and illegal detention. The Supreme Court case was inconclusive: the court dismissed it as not within its original jurisdiction and said it should be refiled, if at all, in the Federal High Court (it never was). Kano was the clear winner in the other two cases: the *hisbah* Commander and his deputy were acquitted of the criminal charges, and in their own suit for illegal detention they won N500,000 (about € 2,222) each.<sup>17</sup> The Kano and other *hisbah* organisations are still very much in business.

### *The 'state religion' question*

Article 10 of Nigeria's constitution provides that 'The Government of the Federation or of a State shall not adopt any religion as State Religion.' Have the sharia states, or any of them, violated this provision? This is a difficult question, because the measures taken differ significantly from state to state, most importantly in the scope of 'implementation of sharia' attempted, and also because no Nigerian court – certainly not the Supreme Court – has yet interpreted or applied Article 10 in any concrete case, so that one does not know what test the courts will use to determine whether a particular enactment or combination of enactments amounts to adoption of a state religion within the meaning of Article 10. Nevertheless, it is possible to say something on this point, at least in a negative sense: Article 10 does not imply a regime of strict separation between religion and state such as that obtaining in the United States and some other countries (Ostien & Gamaliel 2002). Its language is not so sweeping as the U.S. 'establishment clause', for instance,<sup>18</sup> and other parts of Nigeria's constitution, some mentioned already, imply a degree of accommodation, cooperation, and even of entanglement between religion and state that would be unimaginable in the U.S. For instance, Article 38(2), part of the fundamental rights

provision on freedom of thought, conscience, and religion, clearly permits religious instruction to be given and religious ceremonies and observances to be conducted in the public schools, all of which is done everywhere in Nigeria but is strictly prohibited in the U.S. Articles 6, 247, 275-279, and 288, all touching on the Sharia Courts of Appeal, clearly permit the enforcement of at least large parts of the sharia in the public courts. The provisions on the Sharia Courts of Appeal bring out another point: Article 10 does not require even that all religious groups be treated identically by the state. The case of religion in the public schools obscures this, since Muslims and Christians both want it and both get it on equal terms. But they do not both want to live under their own religious law: only the Muslims want that, and under Nigeria's constitution they may to a large extent have it: Article 10, read in the light of Articles 6, 247, 275-279, and 288, permits the state and federal governments to accommodate *them in particular* in this way. But whether any or all of the sharia states have gone too far with their sharia implementation programmes, passing beyond the bounds permitted by Article 10, remains, until the Nigerian courts clarify what Article 10 means, a moot point (Peters 2003: 45).

### 13.6 Personal status, family, and inheritance law

This part of the law – ‘personal law’, to use the term often applied – is extremely complex, or should we say ‘plural’, in Nigeria.

Under the constitution, the federal government has the exclusive right to regulate ‘the formation, annulment and dissolution of marriages *other than marriages under Islamic law and customary law* including matrimonial causes relating thereto’ (II<sup>d</sup> Sched. Pt. I §61, italics added). Accordingly there is a federal (originally English) Marriage Act dating from the colonial period, and a federal (also substantially English) Matrimonial Causes Act dating from 1970, the latter having replaced the prior rule that in matrimonial causes the courts should simply proceed ‘in conformity with the law and practice for the time being in force in England’. Marriages under the Marriage Act must be officially registered. Matrimonial causes must be litigated in the High Courts.

But most marriages by far, and most dissolutions of marriage, and most issues closely related to marriage such as guardianships, child custody and, particularly for women, personal status and property rights, are governed not by the federal statutes at all, but by Islamic law or customary law. Islamic law is the classical Maliki *fiqh*,<sup>19</sup> with all its familiar features; customary law is as multifarious as are Nigeria's many ethnic groups. But in truth it is heterogeneous amalgams, of Islamic

law with local custom, or of one set of customs with another, which are in practice applied; and none of it is codified. Administration is often informal, by family, clan, or community elders; few of the proceedings, including marriages and divorces, are officially recorded anywhere. If it comes to that, litigation is in the local Sharia, Area, or (in the southern states) the Customary Courts.

The constitution leaves regulation of inheritance entirely to the states. In all states there are statutes, again derived from English law, governing testate and intestate succession. These interact in various ways with the Marriage Act and with Islamic and customary law. Thus, for instance, the inheritance statutes usually apply only if one is married under the Marriage Act; but even if one is, one's power to dispose of property even by will may be limited by Islamic or customary law (Ezeilo undated: 3). But again, because most people are not married under the Marriage Act, most estates by far are disposed of, usually informally but sometimes through the local courts, under Islamic and/or customary law.

We have noted that in Nigeria's southern states Islamic personal law has never ousted customary personal law even among the Muslims (perhaps the new Independent Sharia Panels will begin to change that); so in practice it is only in the northern states that Islamic personal law is formally applied, in the Sharia Courts of the sharia states and in the Area Courts of other northern states in cases involving Muslims. The Area Courts also apply the appropriate customary personal law in cases involving non-Muslims, and there are statutory choice-of-law rules for 'mixed' cases.

As to non-Muslims in the sharia states, who might wish their own customary law to be applied in the adjudication of their disputes, the situation has become confused – the Area Courts, which used to apply customary law, having been abolished, the new Sharia Courts having jurisdiction to apply Islamic law only, and the Magistrate's and High Courts having historically been excluded from original jurisdiction of personal law matters arising under 'native law and custom'. In some places non-Muslims are nevertheless quietly being catered for in the Sharia Courts, the *alkalis* applying local customary law as if they were still the Area Court judges that most of them used to be. In other places the Magistrate's Courts come in, although their jurisdiction to do so too is questionable.

In the sharia states, appeals from the Sharia Courts should all go to the Sharia Courts of Appeal: it is anybody's guess what would happen to an appeal by a non-Muslim whose divorce or inheritance case had been decided by the *alkali* under customary law. In the non-sharia northern states, appeals from the Area Courts go to the Sharia Courts of Appeal in cases decided under Islamic personal law and to the High Courts or the Customary Courts of Appeal in cases decided under

customary personal law. All appeals from the Magistrate's Courts go to the High Courts. High Court decisions have always been appealable further to the federal Court of Appeal and then to the Supreme Court, and similarly, since 1979, for decisions of the Sharia and Customary Courts of Appeal. The federal appellate courts both therefore do sometimes decide questions of Islamic and customary personal law.

The old patriarchies remain strong all over Nigeria, and accordingly much personal law and custom is skewed in favour of men. Many girls are married off at young ages to much older men, sometimes against their will (in Muslim cases, under the Maliki doctrine of *ijbar*, the overruling power of the father or guardian to act purely (theoretically) in the girl's best interest). Polygamy is lawful and remains common in all parts of the country under both Islamic and customary law. *Purdah*<sup>20</sup> is widely practiced among northern Muslims. Physical abuse of wives by their husbands is tolerated and even protected: §55(1)(d) of the Penal Codes of all northern states, now perpetuated in the new Sharia Penal Codes as well, provides that:

Nothing is an offence which does not amount to the infliction of grievous hurt upon any person and which is done [...] by a husband for the purpose of correcting his wife.

Divorce is everywhere easier for men than for women (including the unfettered privilege of *talak*<sup>21</sup> for Muslim men), so they do it more often, and sometimes evade their putative obligations to wives and children in the process. But it is perhaps in the area of inheritance rights that women, especially in parts of the south, suffer the most – particularly widows, who under the customary practices of some ethnic groups are denied any right to inherit from their husbands, are sometimes themselves treated as heritable property, and are ritually humiliated and abused in the process (Sossou 2002 and authorities cited). Muslim women are generally not subjected to such extremes, but even they at best receive lesser shares than similarly situated males under the Islamic rules of inheritance. Much of this falls through the gaps of the fundamental rights provisions of the constitution. Finer-grained provisions, such as those embodied in the U.N. Convention on the Rights of the Child and the U.N. Convention on the Elimination of All Forms of Discrimination against Women, unfortunately do not apply: both conventions were ratified long ago by Nigeria, but neither has yet been domesticated, so neither yet has the force of law. We return to this subject in section 13.9 below.

Further details of any of Nigeria's bodies of personal law and custom are beyond the scope of this paper. Readers interested in Islamic personal law as applied in northern Nigeria in particular might well start

with J.N.D. Anderson's long essay on Nigeria in his book on *Islamic Law in Africa* (Anderson 1954: 171-224). Anderson, himself deeply versed in the *fiqh* of all the major schools of Islamic law, made a tour of all parts of the then-Northern Region, conversing, often directly in Arabic, with the Sultan of Sokoto, many emirs, the chief *alkalis* and other court personnel, the Sudanese lecturers at the Kano School of Arabic Studies, and leading *ulama* (ibid: 183-184). The survey based on those discussions ranges over many aspects of Islamic law as applied in the various parts of the Region, including 'those modifications of the pure Shari'a in favour of local custom which are noticeable, in greater or lesser degree, in the day to day work of even the most staunchly Muslim courts' (ibid: 172). Let one example suffice:

The maintenance due to a wife [...] is everywhere calculated by exclusive reference to the husband's means: and this, while reasonable enough, is directly contrary to the normal Maliki rule, as the better jurists in Nigeria fully realise. This provides a good example of a point on which customary law has everywhere triumphed (ibid: 208).<sup>22</sup>

No doubt the position has changed in some respects in the half-century since: probably not very much, but no one really knows because the sort of investigation made by Anderson, certainly on anything like the same scale, has never been repeated. That Islamic personal law as applied in northern Nigeria is still often contaminated by local custom antithetical to women is confirmed by the work of the Federation of Muslim Women Associations in Nigeria (FOMWAN), founded in 1985 (Yusuf 1993), and more recently by the attitude taken toward sharia implementation by Muslim women activists.

Most Muslim women activists are working within the Sharia implementation paradigm: trying to use the [...] Islamic legal tradition to achieve more gender and social justice within Muslim families and communities. The enemy is "merely traditional practices" oppressive to women, which do not have – or should not have – the sanction of religion (Nasir 2007: 118, with details of the activist agenda at 100-105).

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has stimulated many women to a deeper study of Islamic law and its sources. [...] [This] has in turn fed back into the work of individual women lawyers and of NGOs like WRAPA and BAOBAB, of providing legal education and counsel and

representation to women in legal matters of all sorts – not only criminal cases, but especially family matters such as marriage contracts and divorce settlements, child custody, maintenance, and widow's inheritances (ibid: 99-100).

### 13.7 Criminal law

Nigeria's southern states apply criminal and criminal procedure statutes dating from colonial days, derived from English law. In all northern states, the Penal and Criminal Procedure Codes of 1960 are still in force, as variously amended by the states. And now, in the sharia states, running in parallel to the Penal and Criminal Procedure Codes of 1960, there are also *Sharia* Penal and Criminal Procedure Codes: the 1960 codes are applied in the Magistrate's and High Courts, the sharia codes in the Sharia Courts.<sup>23</sup> In this section we briefly discuss the new Sharia Penal and Criminal Procedure Codes. We can do no more than skim the surface of this interesting topic. For further details see Peters 2003 and Ostien 2007: IV.

The sharia codes are substantially based on the 1960 codes, with about 89 per cent of Sharia Penal Code sections coming from the Penal Code, and all of 99 per cent of Sharia Criminal Procedure Code sections coming from the Criminal Procedure Code (Ostien 2007: IV, 157-68 and 338-43). Particularly in the Sharia Penal Codes, however, there has been considerable alteration of Penal Code sections used, with the effect, together with new sections added, of infusing the Sharia Penal Codes with the letter and the spirit of Islamic criminal law of the Maliki school.

Thus, the substantive offences, covered in eighteen chapters of the Penal Code (312 sections), have been reorganised into just three chapters of the Sharia Penal Codes (290 sections on average). The three chapters are entitled 'Hudud and Hudud-Related Offences', 'Qisas and Qisas-Related Offences', and 'Ta'azir Offences'. The sections defining the classical *hudud* and *qisas* offences (see notes 6 and 7) have been re-drafted in accordance with Maliki doctrine, and the classical punishments – amputation for certain thefts, stoning to death for certain acts of extra-marital sex, retaliation in kind for woundings and homicides unless waived by the victims or their heirs, and so on – have been imposed. Apostasy is not criminalised in any code,<sup>24</sup> but in some of them, in their sections on offences relating to religion, insulting the Prophet or defiling the Qur'an are made punishable by death. The defence of provocation to woundings and homicides, available under the Penal Code, has been eliminated from the Sharia Penal Codes, and other defences inserted, for instance, for acts 'done by a person compelled by

necessity to protect his person, property or honour, or the person, property or honour of another from imminent grave danger’.

The ‘*ta’azir* offences’<sup>25</sup> have been copied wholesale from the Penal Code, but the punishments have been much adjusted, by tinkering with numbers of years of imprisonment or amounts of fines, and often by specifying a certain number of ‘lashes’ in addition or in the alternative to imprisonment or fine. The Penal Code already allowed judges considerable discretion in sentencing, including discretion to substitute caning or payment of compensation for any other punishment in most cases; the Sharia Penal Codes continue this broad discretion and expand it further, allowing also a sentence of reprimand, warning, exhortation, or boycott to be passed ‘on any offender in lieu of, or in addition to any other punishment to which he might be sentenced for any offence not punishable with death, or offences falling under *hudud* and *qisas*’. This restores the almost unlimited discretion of the classical *qadi* in *ta’azir* cases, at least in the matter of sentencing.

There is considerable variation among the Sharia Penal Codes, some of it trivial, some of it less so. To give just one example: whereas most Sharia Penal Codes punish criminal breach of trust by a public servant with imprisonment, fine, and/or lashing, Kano punishes it with ‘amputation of his right hand [...] and [...] imprisonment for not less than five years and stolen wealth shall be confiscated’. There has been a project on to ‘harmonise’ the Sharia Penal Codes (and also the Sharia Criminal Procedure Codes, among which there is less variation), so far without much success.

The Sharia Criminal Procedure Codes are almost completely copied from the Criminal Procedure Code of 1960, not, of course, without some changes. A number of CPC sections are left out, notably entire chapters on proceedings in Magistrate’s and High Courts not necessary in codes to be used only in Sharia Courts. The Sharia Criminal Procedure Codes also all omit, unaccountably, a section of the Criminal Procedure Code prohibiting a court from taking cognisance of an adultery case except upon the complaint of the husband or guardian of the woman involved, or, if she is unmarried, of her father or guardian: this section, if present, would have stopped before they started most of the *zina* cases so far prosecuted, including the famous cases of Safiyatu Hussaini and Amina Lawal. The ‘Harmonised Sharia Criminal Procedure Code’ put forward by the Centre for Islamic Legal Studies of Ahmadu Bello University restores this section, and in Safiyatu’s case the Sharia Court of Appeal of Sokoto State went even further, essentially restricting to the guilty person him- or herself the power to bring a *zina* case (Ostien 2007: IV, 189 and V, 15-16).

Only three sections are entirely new to the Sharia Criminal Procedure Codes. Two allow *alkalis* to order restitution or compensation

in amounts beyond their powers to impose fines or civil damages (different grades of courts have different powers in these regards). The third relates to *qisas*:

When a person is sentenced to suffer *qisas* for injuries the sentence shall direct that the *qisas* be carried out in the like manner the offender inflicted such injury on the victim.

This is closely related to the section on mode of execution of death sentences. The Criminal Procedure Code of 1960 had: 'When a person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead'. The Sharia Criminal Procedure Codes have instead:

[...] the sentence shall direct that: (a) he be beheaded; (b) in case of *qisas*, he be caused to die in the like manner he caused the death of his victim...; (c) in case of *zina*, he be stoned to death; and (d) in case of *hirabah* [see note 6], he be caused to die by crucifixion.

Before a sentence of *qisas* is passed, the court is to 'invite the blood relatives of the deceased person, or the complainant as the case may be, to express their wishes as to whether retaliation should be carried out, or *diyyah* should be paid or the accused should be forgiven';<sup>26</sup> in some states the court is bound by the wishes expressed, in some it may apparently go against them if it 'sees reason' to do so.

Two other variations from the Criminal Procedure Code raise questions of conflict with other law. Under the CPC, 'an accused person shall be a competent witness in his own behalf in any inquiry or trial'. Most Sharia Criminal Procedure Codes, consistently with Maliki doctrine, have reversed this, saying 'shall not'. But the Evidence Act, by which the Sharia Courts are at a minimum to be 'guided', says 'shall'. The other conflict relates to numbers of witnesses required to prove particular facts. The Evidence Act says that 'no particular number of witnesses shall in any case be required for the proof of any fact'. But Kano's Sharia Criminal Procedure Code requires 'at least four unimpeached witnesses' in prosecutions for *zina* and 'at least two witnesses in other offences' (ibid: IV, 321). The Sharia Penal Codes of two other states go even further, extending the four-witness rule to other types of cases and distinguishing between witnesses depending on whether they are Muslim or non-Muslim, male or female – Niger doubles the number of witnesses required in many types of cases if they are females (ibid: 142). But this raises a final point. The laws establishing the Sharia Courts all lay down that '[t]he applicable laws and rules of procedure for



the hearing and determination of all civil and criminal proceedings before the Sharia Courts shall be as prescribed under Islamic law.' Under this general directive the Sharia Courts in all states are applying a great many Islamic rules of procedure and evidence not contained in any enacted code but found only in the classical Islamic sources including the books of *fiqh*. The rules about numbers of witnesses are an example: they are expressed in only some of the codes, but are nevertheless presumably being applied in all the Sharia Courts. This opens up a wide potential for conflict of laws. How two of the conflicts that have arisen so far were resolved, is discussed in Ostien 2007: IV, 190-191.

The Sharia Penal and Criminal Procedure Codes have been in force for a number of years now. Many sentences shocking to modern sensibilities – of amputation of hands for theft, of other forms of mutilation as retaliation for injuries inflicted, of dire forms of execution, including stoning to death for *zina* and stabbing to death with the same knife the condemned man had used to kill his victims – have been imposed by the Sharia Courts (Weimann 2007 studies the cases from 2000 to 2004; more have accumulated since). What is notable, however, is how few of these sentences have actually been executed. Of the probably several hundred sentences of amputation of hands for theft, only three have been carried out, all very soon after sharia implementation started. None of the other sentences of mutilation appear to have been executed, no one has been stoned to death, and Sani Rodi, the double murderer sentenced to be stabbed to death, was hanged instead.

The reason for this is to be found in another provision of all Sharia Criminal Procedure Codes, which lays down that no sentence of the type under discussion can be executed unless and until the state governor expressly consents: and the governors are not consenting. The governors' immediate constituencies are the mostly-Muslim populations of their states, yes. But the governors, more than most other citizens, are brought face to face with the wider interests of their states within the Nigerian federation and internationally, where many pressures have been brought to bear against permitting the execution of types of sentences viewed in most of the rest of the federation and in much of the rest of the world as outmoded and inhumane. Moreover many of the sharia state governors – including Alhaji Ahmad Sani of Zamfara State, who started the sharia implementation ball rolling – have harboured ambitions for national office, including the presidency, and they must have recognised that to permit execution of the many sentences of amputation, stoning to death and severe forms of *qisas* that the Sharia Courts have imposed would ruin their hopes. The result has been that with the exception of the three amputations for theft carried out in the very early days of sharia implementation, the persons on whom such sentences have been imposed are being quietly dealt with in other ways.

Unfortunately, this often amounts simply to leaving them indefinitely in prison waiting (often for years, for small offences) for someone to do something about them. Nevertheless, the fact that the archaic punishments now reinstated in the laws of the sharia states, although they are being imposed as sentences by the Sharia Courts, are not actually being executed, is one important reason why the early Nigerian and world clamour over sharia implementation has so thoroughly subsided. We return to the problem of all those unexecuted sentences in section 10 below.

We have been discussing the Sharia Penal and Criminal Procedure Codes. But we must not leave the subject of criminal law without mentioning the assorted other statutes having penal implications enacted by various sharia states, or in some cases by local governments within the states. Aimed at ‘sanitising society’, these laws address subjects sometimes also touched on in the penal codes or other existing legislation: liquor, gambling, prostitution, the operation of cinema houses and video and film viewing centres, obscenity, certain sorts of extravagance, women’s dressing, hawking by young girls, women riding on commercial motorcycles, unwholesome market practices, begging, and so on. For instance, four states, not content simply to revoke existing liquor licences and refuse to issue any more, have repealed their Liquor Laws entirely and enacted total bans on the manufacture and sale of liquor; Kano has also gone further to ban consumption – by anyone, not just Muslims – on pain of a fine of fifty thousand naira (about € 222) or up to one year’s imprisonment or both; although this was enacted in 2004 it has yet to be enforced in the non-Muslim parts of Kano City and it is hard to see how it ever can be. In Gummi Local Government Area of Zamfara State, to try and cut down on frivolous expenditure and unseemly display, ‘all forms of procession during wedding and naming festivities’, including ‘rallies with vehicles, motorcycles, bicycles, donkeys, horses, camels, etc.’, and ‘all types of musical concerts’, including ‘drumming, praise singing and dancing in whatever form and howsoever called’, are prohibited on pain of a fine of three thousand naira or six months imprisonment or both. Zamfara State has added to existing national anti-corruption legislation by enacting its own Anti-Corruption Commission Law complete with a series of sections defining criminal offences and prescribing punishments. This miscellany of legislation is collected and analysed in Ostien 2007: III.

### ■ 13.8 Other legal areas, especially economic law

Dividing the sharia up according to Western categories, we have discussed ‘Islamic personal law’ and ‘Islamic criminal law’. On the private

law side what is left over is what we have been calling 'other Islamic civil law', including all the rules that still govern the business relations and commercial transactions of millions of northern Muslims on a daily basis: 'sale, loan, bailment, security, hire, lost property, tort, agency, coproprietorship to mention some of those that commonly come before the courts' (Report 1952: 121).

Like Islamic personal law, other Islamic civil law survived the Settlement of 1960, when Islamic criminal law was abrogated. Again like Islamic personal law, other Islamic civil law as applied in Nigeria has never been codified: it is still applied, primarily in the north's Sharia and Area Courts, on the basis of the Maliki *fiqh*, no doubt modified in favour of local custom in various ways in various places. The difference is that other Islamic civil law was not protected from exposure to the 'English' courts in the ways that Islamic personal law was. The High Courts have long had concurrent original jurisdiction, with the Native Courts and their descendants, of cases arising under all the 'other civil' part of 'native law and custom'; and as we have seen, appeals from the judgments of the Native and subsequently the Area Courts in all such cases, even when governed by Islamic law, were from 1960 directed to the High Courts, not to the Sharia Courts of Appeal.

The primary reason for this difference of treatment seems to have been a felt need in certain circles for uniformity in this 'other civil' area of law:

Economic development may be retarded by a piecemeal system of law, and it may be fostered if there is one unified system of law which enables all persons in the territory to enter freely into commercial transactions. [...] Laws concerning trade and commerce should, in any event, be uniform throughout a territory. [...] The general law of torts or wrongs, and of restitution for money had and received, should be uniformly applicable to persons of all communities. [...] There should be a general law of contract [...] uniformly applicable to persons of all communities, races or creeds (Allott 1971: 6-8, quoting conclusions of the 1960 London Conference on the Future of Law in Africa).

Joined to the felt need for uniformity was the hope that the High Courts, and the federal appellate courts above them, could perhaps bring it about:

It is vital that [this part of Islamic and customary law] should be moulded and developed by the superior courts so that it fits in, both with the social needs of the country, and with the rest of the law which is of statutory or exotic origin (Allott 1964: 192).

Whether the decisions of the superior courts have had the desired effect may be doubted. Whether any failure in this regard (as opposed to a thousand other factors) has retarded economic development may also be doubted. Perhaps Allott and his colleagues got the developmental cart before the horse. In Nigeria many subjects crucial to modern economic development – bankruptcy, banks, corporations, insurance, labour, patents, professional occupations, securities, trade and commerce with other countries and between the states, and more – are governed exclusively by federal legislation (1999 constitution, II<sup>d</sup> Sched. Pt. I). As the economy develops, more and more of it will come under the sway of this legislation and of the lawyers and their common law which the legislation will inevitably carry along with it, and related litigation will go more and more to the High Courts only. In the meantime, most Nigerians, not having reached that stage, are still content to order their affairs in accordance with the law they know, which in the Muslim north is the ‘other Islamic civil law’ we have been discussing. The programmes of sharia implementation have brought little new in this regard: the venue of litigation changed from Area Courts to Sharia Courts, and, more problematically, the redirection of appeals to the Sharia Courts of Appeal instead of the High Courts. As we have seen (see 13.5), the expansion of Sharia Court of Appeal jurisdiction in the sharia states, beyond the subject of Islamic personal law, to other Islamic civil law and to Islamic criminal law as well, has already been declared unconstitutional by the High Courts of two states, and in the end will probably fail altogether unless the constitution is amended.

A great deal of business in the north is conducted in open-air markets in all the cities and towns. Among the hopes expressed for sharia implementation was that it would purify practices in these markets.

[U]nscrupulous people have filled our markets and nobody can stop them from what they are doing. [...] The above [particularly the practices of self-imposed middlemen, discussed at length] are the main problems facing us and we hope that as the implementation of Sharia takes shape in this State, such practices will in time be wiped out [...] because they are harmful to both Islam and to Muslims. [...] Government should ensure standard measuring units in terms of weights and volume for goods to ensure fairness in business transactions. Price and quality control task forces should be established at various levels to supervise and enforce strict adherence to Islamic laws on business transactions (from memoranda to the Bauchi State Sharia Implementation Committee, in Ostien 2007: II, 52, 91, 96).

These goals of sharia implementation are being pursued by various organisations that have been charged with these tasks. In Kano State, for instance, the Sharia Commission is to 'initiate and implement policies that will sanitise business transactions in our markets and ensure orderly relationships among the general public in accordance with dictates of Islamic injunctions' (Kano State Sharia Commission Law 2003: §4(iv)). In Zamfara State the Markets Affairs Committee of the Joint Aid Monitoring Group on the Application of Sharia 'is responsible for enlightening the dwellers in our markets on the provisions of Sharia in their respective business transactions. It also mediates and resolves amicably any case between buyers and sellers, ensures the use of Government-approved measures/scales in our markets, monitors any transaction in the market and refers any breach of Sharia law in buying and selling to the appropriate authority' (Joint Aid Monitoring Group, undated). At least one local government, in Yobe State, has enacted a by-law 'to make provision for the prohibition of certain un-Islamic practices such as non-maintenance of standard grains measure, middlemanship and other matters related thereto'; other matters prohibited by this law include 'any act of slaughtering and selling of meats of donkeys, horses, pigs, dogs and other categories of prohibited animals' (Ostien 2007: III, 230-233). Obviously none of this involves new applications of sharia but attempted purging from old applications of corrupting local custom.

We have already mentioned (see 13.5) the attempts in most sharia states to revivify and institutionalise the collection and distribution of *zakat*, with four states going so far as to make payment mandatory and enforceable in the courts (it is not known that any such action has so far been taken). The institutions charged with administering *zakat* are variously the Ministries of Religious Affairs, the Sharia Commissions, or, in six states, new Zakat Boards set up especially for the purpose, but in all cases working with and through the emirate councils, the local governments, and local committees going all the way down to village level. Good is being done. For instance Zamfara State's Zakat Board reports that between 2000 and 2005 it collected N106,855,630.63 (about € 474,915) in *zakat* from which about 35,000 destitute persons benefited, plus 49,590 bags of grain from which almost 124,000 benefited. With the money the sick are being treated, low-cost housing is being built or refurbished, small capital and equipment are being provided to help people start businesses, marriages are being facilitated, debts are being paid off, wayfarers are being assisted, and so on (Zamfara State Zakat and Endowment Board 2006). Several of the new boards also have charge of pious endowments (*awqaf* or *wakfs*), which they are to encourage and to administer as trustees. This is a fairly recent departure: in the early 1950s Anderson found that in Northern Nigeria 'there

are no endowments or trusts of the sort termed *ahbas* or *awqaf*, except in so far as mosques are concerned' (Anderson 1954: 217).

Land law is a subject apart. The basic document is the federal Land Use Act, dating from 1978, Chapter L5 of the Laws of the Federation of Nigeria 2004. According to the explanatory note, the Act

vests all land comprising the territory of each State (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agricultural, commercial and other purposes, while similar powers with respect to non-urban areas are conferred on Local Governments.

There are thus 'statutory rights of occupancy', granted by the governors, and 'customary rights of occupancy', granted by the local governments. One might have rights under Islamic law *to* either of these forms of R of O, e.g. by inheritance or by prescription. Or one might have rights under Islamic law *under* a customary R of O, such rights being included in the bundle the R of O itself comprises. But here an important historical fact comes in again: even under the Sokoto Caliphate, 'the customary land law remained valid and was enforced by the councils of the sultan and of the emirs' (Schacht 1964: 86, already quoted in section 13.1 above); in the early 1950s Anderson found that '[i]t is in the matter of land tenure that native law and custom has won its most decisive victory over the general ascendancy of the Shari'a in the Muslim Emirates of Northern Nigeria' (Anderson 1954: 184). In other words the strict Islamic sharia has never had much influence on land law as actually practiced even in the Muslim parts of the North. Whether that influence is waxing or waning at the present time we cannot say.

Finally, we come to Islamic banking and insurance, both subject to federal regulation. *Takaful* is a form of insurance that is 'sharia compliant'.

[Nigeria's] main *takaful* provider, African Alliance Insurance (AAI) [...] began offering life and family *takaful* in 2003 and quickly attracted thousands of applications. This prompted a host of other Nigerian financial organisations to apply to the National Insurance Commission for licences to underwrite *takaful* products (Ford 2007).

Similarly, the Central Bank of Nigeria, responding to a growing demand, has granted permission to a number of banks to offer sharia

compliant accounts and other products, and in doing so has showed itself responsive to a growing demand for this kind of banking. Nigeria's first 'fully-fledged Islamic bank', to be known as Jaiz Bank International, has been in the works for some time, but is still trying, it seems (October 2009), to raise the minimum capital reserve required under the banking regulations before it can start in business.

### ■ 13.9 International treaty obligations and human rights

Since 1960 all of Nigeria's constitutions have included a chapter on Fundamental Rights; this is a standard bill of civil and political rights derived primarily from the European Convention on Human Rights of 1950, enforceable in the courts. Another chapter on 'Fundamental Objectives and Directive Principles of State Policy', articulating broad social, economic, environmental and other aspirations, is not justiciable. In 1981 Nigeria also ratified the African Charter on Human and Peoples' Rights; the Charter was then domesticated in Nigeria in 1983, and has now become Chapter A9 of the Laws of the Federation 2004. This raises a point to which we shall return, which is that in Nigeria, no treaty has the force of law domestically unless and until it is enacted by the National Assembly, then ratified by a majority of the state Houses of Assembly, and finally signed by the president (Art. 12 of the constitution). Nigeria has in fact ratified or adhered to most of the world's human rights instruments, but in some cases domestication has been difficult (Obiagwu & Odinkalu 2003: 229). There is a National Human Rights Commission, mandated to 'deal with all matters relating to the protection of human rights as guaranteed by [the constitution, the African Charter], the Universal Declaration on Human Rights and other international treaties on human rights to which Nigeria is a signatory' (§5 of the National Human Rights Commission Act 1995, now Chapter N46, Laws of the Federation 2004).

In any case the main problem in Nigeria, as in many other countries, is not with the rights but with their realisation. Violation of even the most basic civil and political rights by state organs and their agents, to say nothing of social and economic rights, is a commonplace of everyday life throughout Nigeria. We needn't rehearse these problems here. At least two organisations – the U.S. Department of State and Human Rights Watch – issue annual reports on human rights practices in most countries of the world, including Nigeria; the sad story can be read in those reports.<sup>27</sup> Here we have space only to mention some of the human rights issues raised by the sharia implementation programme in particular.

### *Criminal law*

The reinstatement of Islamic criminal law is the obvious place to start. Three issues immediately suggest themselves. (1) In the sharia states, parallel penal codes are now being applied, under which, for the same crime, different punishments are prescribed for different people depending solely on their religion. This seems clearly to violate the constitutional ban (Art. 42) on discrimination based solely on religion. (2) Article 42 also bans discrimination based on sex, but as we have seen discrimination between male and female witnesses has been reinstated, implicitly under the Sharia Courts Laws and explicitly in some of the Sharia Penal and Criminal Procedure Codes. Notoriously, certain sorts of evidence apply against females only; hence several women, pregnant out of wedlock, have been convicted of *zina* and sentenced to death, while the equally guilty men, denying everything, got off scot-free. (3) The archaic punishments now reinstated seem to many to violate the constitutional ban (Art. 34) on cruel, inhuman or degrading punishment or treatment. This provision has hardly been applied by the Nigerian courts. But courts elsewhere have held that it means, among other things, that punishment must not be disproportionate to the offence; and death for adultery, or amputation of a hand for theft of a cow, today seem disproportionate. Lawful punishments may not be carried out in an unlawful manner; and although the death penalty is lawful in Nigeria, its infliction by stoning, stabbing, or crucifixion should be beyond the bounds. Some punishments have in some jurisdictions been declared unlawful *per se*: the death penalty in South Africa; flogging in the European Union. What of amputation of hands and other forms of mutilation? The Nigerian courts might outlaw these if given the chance in proper cases.

But the interesting point about all these issues is that the courts are not being given the chance to address them, because they are not being raised by parties with standing to do so – i.e. defendants in criminal cases in the Sharia Courts. Most such defendants are not represented by counsel and have no conception of their constitutional rights. Even where counsel – in most cases themselves Muslims – do come in to defend, they are not raising issues that might strike at the very heart of the sharia implementation programme. Why they are not has been discussed in a paper by one of the lawyers who represented Safiyatu Hussaini and Amina Lawal (Yawuri 2007: 133, 139). Meantime, as we have seen, actual execution of the punishments in question has been very rare, the executive and judicial officials of the sharia states, between them, finding ways to limit the many kinds of damage this would cause.



### Women

The classical Islamic law of personal status, the family, and inheritance, still applied in Nigeria, discriminates in various ways against women. These issues, some touched on in section 13.6 above, are well known and need no further discussion here. A number of the new enactments of the sharia states also specifically affect women. Most of these have to do in one way or another with trying to keep unrelated males and females apart, or, where they do mix together, with trying to make the females less sexually attractive to the males. Thus, some jurisdictions have made the *hijab*<sup>28</sup> compulsory for all female Muslims ten or more years old appearing in public. Even where no law requires it, the *hijab* has become quasi-compulsory through regulations governing state institutions, including schools, and, outside such institutions, through pressure exerted by *hisbah* groups. Attempts have been made to keep males and females separated in taxis and buses, and to keep females off of commercial motorcycles (all operated by men); the result of the attempts of the Kano *hisbah* to enforce the ban there on commercial motorcycles carrying female passengers has already been described. The regulation of hawking by young girls, a matter of concern in the North for some time because it exposes the girls to unscrupulous men ready to pay for sex or have it by force, has in some states been tightened. Some jurisdictions have tried, without much success it seems, to stop social mixing of Muslim males and females at events like weddings and naming ceremonies (also targeted by sumptuary laws as we have seen). Whether any of this violates the human rights of the women is debatable. In any case women apparently do not feel particularly oppressed by most of it, except where it has impinged on their livelihoods or mobility or on their traditional modes of socialising and enjoyment; there the women have resisted or simply ignored it (Nasir 2007: 105-118). As we noted in section 13.6, Muslim women activists have not so much objected to sharia implementation, as they have tried to work within it, to effectuate rights of women under the sharia which 'merely traditional practices' have denied them (ibid: 100-103).

One such right is the right to education; and here we come to the case of a human rights instrument which Nigeria has ratified, but has not yet been able to domesticate. The U.N. Convention on the Rights of the Child (CRC) was ratified by Nigeria in 1991. The CRC's most controversial provision (in Nigeria) puts the minimum age for marriage at eighteen years. But in Nigeria's Muslim north particularly, girls are often married off much younger, even as early as nine or ten. This obviously keeps them out of school; it also contributes to a serious public health problem in the north, vesico-vaginal fistula, which results from early pregnancy and child-birth. In 2003 the National Assembly took

the first step towards domestication of the CRC by enacting it, over considerable (male) Muslim opposition, as the Child Rights Act. Many prominent Muslim women and women's organisations, among others, have since campaigned for ratification of the Child Rights Act by the states. But, despite their efforts, the necessary nineteen states have still (October 2009) not ratified.<sup>29</sup> The fate of the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been even worse. Although Nigeria ratified CEDAW in 1985, to date no bill for domestication has even been enacted by the National Assembly for ratification by the states.

### *Non-Muslims*

What of the effects of sharia implementation on non-Muslims? In treating of this topic one must be wary of reports in the popular press, allowing for the errors and exaggerations of reporters who are often ill-trained and undisciplined and writing for a credulous public ready to believe anything bad about Islam. Thus, for instance, early reports that all churches in Zamfara State would be demolished and everyone made to learn Arabic were sheer nonsense – which nevertheless did their work of inflaming Christian alarm. One must also try to distinguish between continuing manifestations of long-standing problems for non-Muslims, more specifically Christians, living in the northern states, and anything new resulting from sharia implementation in particular. The various forms of official discrimination against non-Muslims sanctioned by the classical sharia have since Independence been officially in abeyance.<sup>30</sup> Nevertheless, for many years there have been problems, ranging from difficulties with whether and where a church may be built, up to periodic outbreaks of communal violence sparked off by some incident usually involving not only religion but ethnicity and 'place of origin' as well. One variant of this, in Hausaland, is 'indigenous' Hausa Muslims vs. 'settler' Igbo or Yoruba (or other) Christians. In Plateau State, where there were serious outbreaks in 2001, 2004 and 2008, it is rather 'indigenous' Plateau Christians (from one tribe or another) vs. 'settler' Hausa or Fulani Muslims; and so on, there are many such problems all over the country. These problems can unfortunately be said to be 'normal' right now in Nigeria (see e.g. Human Rights Watch 2006; Ostien 2009).

Bad as all that is, the further question is, what new problems for Christians or other non-Muslims living in the sharia states have been added by the programmes of sharia implementation? This is less clear. Non-Muslims are for the most part expressly exempted from the new laws, which are frequently said by the authorities to be 'for Muslims only'. Most importantly, non-Muslims are not subject to the Sharia Penal Codes

or to the jurisdiction of the Sharia Courts (unless they consent in writing), and it appears that these rules are being strictly observed. Non-Muslim women and girls are not subject to the rules aimed at separation of the sexes. Sharia-related laws that do affect non-Muslims, such as the new ways of regulating liquor and prostitution, are often approved of by Christian leaders, and in any case are well within the constitutional authority of the states to enact (Ostien & Umaru 2007).

This does not mean that there has not been some additional trouble for non-Muslims in the sharia states resulting from sharia implementation, especially in its early days when the zeal of irregular Muslim enforcers was at a high pitch. For instance, in some places lawless attempts by self-appointed *hisbah* groups to enforce new liquor laws resulted in wanton destruction of property. Christian women sometimes suffered from attempts of over-enthusiastic youths to enforce the *hijab* and separation of the sexes in public transportation. In one famous case, the director of a *federal* medical centre in Bauchi State imposed a new uniform of trousers and *hijab* on his nursing staff, and sacked eleven Christian nurses who refused to comply (they were subsequently reinstated). But most of this sort of thing died down fairly quickly, as the authorities got the social forces unleashed by sharia implementation under better control. Other problems are less acute. Many sharia states are spending considerable sums on new programmes and institutions specifically for Muslims, probably not balanced by proportionate spending on non-Muslims.<sup>31</sup> Non-Muslim access to justice may in some places have been impeded by conversion of the old Area Courts, open to everybody, into Sharia Courts primarily for Muslims. Nevertheless, for some time Christians living in the sharia states have been complaining, not so much about sharia, as about all the many other troubles with Nigeria. The fact that non-Muslims living in the sharia states have not had to face significant new or additional continuing burdens resulting from sharia implementation specifically, is a second important reason (along with non-execution of the archaic penalties being imposed on some Muslims) why the early Nigerian clamour over sharia implementation has so completely died down. Although it continues as an official programme of a number of northern state governments, and is still advancing on various fronts, sharia implementation has nevertheless become largely irrelevant to the national discourse.

### 13.10 Conclusion

How are the sharia implementation programmes in northern Nigeria likely to develop in the next five to ten years? Let us begin our answer by going back to the matter of the sentences of *hudud* and *qisas* being

imposed by the Sharia Courts but never executed, the convicts instead languishing in prison, sometimes for many years, serving time to which they were not sentenced and never knowing their fate. How is this outcome – acceptable to no one – likely to be resolved?

We consider three possibilities.

- (i) *The governors, under pressure from ardent and impatient sharia implementers, will at last give their consent to execution of these sentences. The large backlog of pending sentences will be carried out, as will new sentences as they are imposed.*

Probability: practically nil.

This would stir up the Nigerian and world-wide clamour all over again, and result in all sorts of sanctions against any state that tried it. More importantly, there is now little sentiment among Muslims even in the sharia states for such a course. After several years of experience with it, most see that sharia implementation, even in all the useful forms it is taking, will not quickly cure all social ills, as many at first believed. Real progress will require the deepening of religious knowledge and practice among the people; the state also has much work of its own to do; and it will take a long time. Meantime, of all the forms of sharia implementation that have been tried, bringing back Islamic criminal law has proved least useful of all as a means of social betterment, in practice falling in its harshest aspects only on the poor, who need help more than punishment, while the richer and more powerful, despite all their evident sinning, escape unscathed. Few in any social stratum want to see mutilations resume or anyone stoned to death; the governors will not consent.

- (ii) *The sharia states will continue to muddle along under the penal legislation now in place, finding various ways to limit and mitigate the damage.*

Probability: high over the near to medium term.

Outright repeal of the Islamic penal legislation so recently enacted would be politically impossible. But three states (Borno, Gombe and Yobe), even eight or nine years after enactment, have not yet even begun to apply their Sharia Penal Codes. In other states the use of the Sharia Courts to try criminal matters is declining, the charging authorities – the police and the public prosecutors – preferring to charge even Muslim accused persons in the Magistrate's and High Courts especially in serious cases. Where they do try criminal matters, the Sharia Courts, recognising that they will not be carried out, are imposing *hudud* punishments less frequently than at first, finding reasons in the doctrine to

dispose of such cases in other ways. In *qisas* cases complainants are encouraged to accept *diyyah* in lieu of *qisas*; at least one state (Kano) has made this more attractive by enacting that the state must pay if the defendant and his family cannot.

But still: there remain those large backlogs of unexecuted sentences, the convicts still languishing in prison waiting for something to happen, and more will doubtless accumulate. What to do with these cases is very much under discussion in the sharia states. One idea is that the governors, in the exercise of their constitutional prerogative of mercy, should substitute less severe forms of punishment for the ones imposed, or remit the punishments after some suitable time served, or pardon the convicts completely; in fact in 2005 twenty-one persons sentenced to amputation of their hands for theft were set free by the governor of Sokoto State in this way, and the same may also be quietly happening elsewhere. Another idea is that where the governors refuse to act, the courts, or one of them, perhaps the High Court or the Sharia Court of Appeal, should bail the convicts after some time served – presumably subject to revocation in the unlikely event that the governor should at some point decide to execute the sentence after all. Something like this has happened in the case of the Niger State couple, Fatima Usman and Ahmadu Ibrahim, found guilty of *zina* in 2002 and sentenced to stoning to death. They appealed to the Sharia Court of Appeal, which admitted them to bail pending the outcome. While the appeal was pending the jurisdiction of the Sharia Court of Appeal to decide it was called into question by the High Court (see note 15 and accompanying text). The appeal therefore has never been decided by the Sharia Court of Appeal, but it has also never been transferred to the High Court. The couple are still out on bail, and they are unlikely ever to hear from the authorities about this matter again. None of this is very tidy, but for the time being it will probably continue.

- (iii) *The federal courts will rule that the penal legislation now in place is unconstitutional. The penal law of all sharia states will revert to what it was before sharia implementation started. All persons still in prison under sentence of hudud or qisas will be released and no more such cases will arise.*

Probability: quite high in the not too distant future.

Consider only the problem of running parallel penal codes in the same jurisdiction, under which different punishments for the same crime are prescribed for different people depending on their religion. This clearly violates the anti-discrimination provisions of the constitution. The probability that it will be challenged in the courts is increased by the fact

that the burden of the discrimination falls not only on Muslims, who might not be inclined to complain: sometimes it falls on non-Muslims, who for some crimes can be punished more harshly under the Penal Codes than Muslims can be under the Sharia Penal Codes (Ostien 2007: IV, 14). It is likely, therefore, that before too long somebody will raise this issue, that it will eventually reach the federal Court of Appeal and the Supreme Court, and that they will rule that different penal codes for people of different religions will not do: each state must have one and only one penal code applicable in all courts to all persons regardless of their religion. Which code will that be? We may be sure that non-Muslims will never tolerate application of the Sharia Penal Codes to them. Furthermore, it is the Sharia Penal Codes that expressly discriminate on the basis of religion: for that reason they will likely be struck down, and the Penal Code of 1960, always intended for universal application and still the law in all sharia states, will once again cover the whole field. When this happens, any persons still in prison awaiting execution of sentences of *hudud* or *qisas* under the then-outlawed Sharia Penal Codes will be released, and this problem will finally, and correctly, have been resolved.

It will have been resolved, moreover, in a way palatable to the vast majority of the north's Muslims. They will have done their utmost in the cause of sharia. The responsibility – or the guilt – for saying 'no' once again to the application of Islamic criminal law will fall on the federal constitution and the distant federal judges who administer it. The judges, Muslims and non-Muslims all concurring, will give clear and convincing reasons – reasons that in no way impugn Islamic criminal law *per se* – why under the constitution the Sharia Penal Codes may not be run in parallel with the Penal Codes and must be dropped. Muslims will resign themselves to this as a matter of necessity under present historical circumstances – there being no possibility, in the foreseeable future, of withdrawing from the federation or changing the constitution. Resignation will be easier because of the evident inutility, even unfairness, of trying to apply Islamic criminal law in its full rigor under present social conditions. This is moreover but a very small part of the whole fabric of the sharia, historically often in abeyance even in Muslim lands. Letting it go for the indefinite future once again, perhaps with some sense of relief, the north's Muslims will pray for better times ahead, when, God willing, it will come to pass that circumstances will not be so much against them.

So much for the likely fate of Islamic criminal law, which always tends to monopolise the discussion. Two important points stand out, which also apply to all the other, more useful, forms that sharia implementation is taking. One is the psychological and symbolic importance of having tried so comprehensively to bring Islamic law and Islamic

institutions back into the governance of these large Muslim populations, after the depredations of the British and of the post-colonial era. The other is the practical education in modern principles of governance and politics which the continuing sharia implementation effort is bringing with it.

Sharia implementation had to be tried: to work through the obsession, to honour and reconnect with the north's Islamic past, and to restore the Islamic sharia to an honourable position in the Nigerian public space. Being tried, sharia implementation is doing all those things. At the same time, it is teaching many useful lessons all around – about how democracy and constitutionalism and federalism work and what it takes to make them work; about the real causes of social problems; about which programmes of amelioration and improvement will go how far and what more might be needed; and about who is serious and who is not, among others. On all of these subjects sharia implementation has revitalised and complicated the public discourse involving sharia, including bringing in new voices, notably those of women, whose assertions of their own Islamically correct positions against oppressive male practices are making themselves felt. The new Islamic institutions – sharia courts, councils of *ulama*, sharia commissions, *zakat* boards, *hisbah* organisations, and so on – which will still be there when the Sharia Penal Codes pass into history, are providing useful opportunities, for many people, for the responsible expression of Islamic learning and piety and the beneficial application of Islamic precepts in all aspects of life.

These are all good things about sharia implementation: ways in which it has been a positive development for Nigeria itself and for many of its people. These good things are going some distance in their various directions towards helping to resolve some of the 'troubles with Nigeria'. Unfortunately Nigeria's troubles are legion, and, along with the north's most sincere Muslims, it will also take the sustained and cooperative efforts of many other people of all religious and ethnic persuasions all over the country to even begin to address them. Perhaps, if it doesn't just 'fizzle out' as President Obasanjo predicted it would, sharia implementation may at least provide good examples, so sorely needed in Nigeria, of what can practically be done by committed public officials working with ordinary citizens to improve the unfortunate circumstances in which so many of the people are living.

## Notes

- 1 Philip Ostien taught for many years in the Faculty of Law of the University of Jos, Nigeria; he is the author or editor of a number of works on the laws and legal institutions of northern Nigeria and the programmes of sharia implementation that began

- there in 1999. Albert Dekker is a reference librarian with the Van Vollenhoven Institute for Law, Governance and Development of Leiden University.
- 2 World Factbook: see Bartleby 2010: Nigeria. Linguists: see Lewis 2009: Nigeria.
  - 3 *Jihad*: 'struggle' or 'striving', in Islam usually meant in the sense of 'striving in the way of Allah', which may range from personal striving to correct one's own faults to armed warfare against those labeled as unbelievers.
  - 4 *Qadi*: an Islamic judge charged to apply the sharia in cases brought before him. *Alkali*: Hausa form of *al-qadi*.
  - 5 A note on terminology: the Northern Region was sometimes called the Northern Province or Provinces, and similarly for the South = the East + the West. The names the British gave to their high officials in Nigeria also changed from time to time. At the center, Governors-General of the whole country (1914-1919) became Governors (1919-1954) and then Governors-General again (1954-1963). In the regions High Commissioners (1900-1908) became Governors (1908-1913), then Lieutenant Governors (1914-1932), then Chief Commissioners (1932-1951), then Lieutenant Governors again (1951-1954), and finally Governors again (1954-1966).
  - 6 *Hudud*: punishments prescribed by Allah for specific offences, namely, in Maliki law, *zina* (roughly, sex outside of marriage; punishment: either one hundred lashes if the offender has never been married or stoning to death if the offender is or has ever been married); *qadhif* (wrongful accusation of *zina*; punishment: eighty lashes); *sariqah* (theft meeting certain conditions; punishment: amputation of the right hand for the first offence and further amputations for subsequent offences); *shurb* (drinking wine, and by extension imbibing other intoxicants; punishment: eighty lashes); *hirabah* (roughly, armed robbery; punishment ranges from amputation of right hand and left foot up to death by crucifixion depending on circumstances); and *rida* (apostasy from Islam; punishment: death).
  - 7 *Qisas*: retaliation in kind for woundings or killings: an eye for an eye, etc.
  - 8 *Ulama* (sing. *alim*, scholar): Islamic scholars; those learned in the theology and law of Islam and the literature, mostly in Arabic, proper to these disciplines.
  - 9 In this quotation from Richardson, the order of the last two sentences has been reversed, in hopes of enhancing clarity.
  - 10 *Allahu Akbar*: Allah, God, is great, or the greatest.
  - 11 *Zakat*: the Islamic 'alms' or religious tax, payable annually, in cash or in kind, on most forms of wealth, and meant in various proportions for the support of specified classes of people including the destitute, the poor, those in debt, those in bondage, strangers stranded on the way, new converts to Islam, those 'striving in the way of Allah' including e.g. Qur'anic teachers, and those who administer the tax itself.
  - 12 *Hisbah*: enjoining what is good and forbidding what is wrong according to the sharia; by extension, those who enjoin and forbid.
  - 13 The first amputation was performed on 22 March 2000, when the right hand of Bello Buba Jangebe of Zamfara State was cut off for theft of a cow. Jangebe had declined to appeal the sentence, accepting it as his just desserts under divine law. See e.g. Nigerian *Guardian* of 24 March 2000. The complete records of proceedings and judgments of the courts in the Safiyatu Hussaini and Amina Lawal cases, in English, together with other information and analysis, are given in Ostien 2007, Vol. V.
  - 14 This episode was reported in Abdulfattah Olajide, 'Shariah Gains More Ground in Yorubaland', *Weekly Trust*, 15 November 2002, see <http://www.corpun.com/ngj00211.htm>.
  - 15 *Mai Tangaram vs. Mai Taxi*, High Court of Borno State, case no. BOM/5A/2002, ruling dated 28 June 2002 (unreported), notice of appeal filed but appeal abandoned; and *Ibrahim Haruna Kuta vs. Ahmadu Galadima*, High Court of Niger State, appeal no. NSHC/MN/6A/2003, ruling dated 12 September 2004, reported in *Law Report of*



- Northern Nigeria* 2004, 398, appealed on other grounds, CA/A/151/2004, appeal decided 15 March 2006, see [http://courtofappeallibrary.gov.ng/index.php?option=com\\_sobi2&sobi2Task=sobi2Details&catid=3&sobi2Id=325&Itemid=](http://courtofappeallibrary.gov.ng/index.php?option=com_sobi2&sobi2Task=sobi2Details&catid=3&sobi2Id=325&Itemid=).
- 16 This and subsequent conversions of naira to euros have been calculated at the rate of 225 to 1, around which the actual rate fluctuated in October 2009.
- 17 The Supreme Court case is reported, see *Attorney-General of Kano State vs. Attorney-General of the Federation* (2007) 3 NILR 23, see <http://www.nigeria-law.org/Attorney-General%20of%20Kano%20State%20v%20Attorney-General%20of%20the%20Federation.htm>. For the victory of the Commander and his deputy in their civil suit, see *Daily Triumph*, 29 March 2007, internet edition see <http://www.triumph-newspapers.com/archive/DT29032007/right293207.html>. The acquittal in the criminal case was reported to one of the authors in a visit to the Kano State Hisbah Board in March 2008.
- 18 The establishment clause is the first clause of the First Amendment to the U.S. constitution: 'Congress shall make no law respecting an establishment of religion....' The U.S. Supreme Court has read this very broadly: 'Not simply an established church, but any law respecting the establishment of religion is forbidden. [...] The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed, or religion. [...] It was to create a complete and permanent separation of the spheres of religious activity and civil authority.' *Everson vs. Board of Education*, 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting). Or, as Justice Black, writing for the majority, said in the same case: 'In the words of Jefferson, the clause was intended to erect a "wall of separation between Church and State."' Ibid: 16.
- 19 *Fiqh*: Islamic jurisprudence; the detailed working out of the sharia and its proper application in various circumstances.
- 20 *Purdah*: the seclusion of women, particularly married women.
- 21 *Talak*: pronouncement by the husband that he divorces his wife. No special form of words is necessary, nor are witnesses; the mere pronouncement effects the divorce.
- 22 Cf. Yusuf 1982: 46-47: 'local [customs] among the Hausa and other Moslem societies have become a major source of Islamic law in the Northern States' (giving many examples). Doi 1984 gives interesting details of the lives of Nigeria's Muslims in all parts of the country, including chapters on 'The Life-Cycle of Hausa-Fulani Muslims', 'The Life-Cycle of Yoruba Muslims', 'Sufism and Mystical Practices in Nigeria', and 'Syncretism in the Belief and Practices of Muslims in Nigeria'. The 'Izala' movement, very active in the 1970s and 1980s, was in many ways an effort to purge Nigerian Islam of its syncretism, see Umar 1993 and Loimeier 1997.
- 23 The situation is actually more complicated than this sentence suggests, in ways it is perhaps unnecessary to explain here: see Ostien 2007: IV, 6-7, 185-186. But the reader should be aware that the following discussion is subject to a variety of exceptions and qualifications.
- 24 Unless it has unconstitutionally been incorporated by reference under the section on 'General offences' included in some codes, see discussion in 13.5 above.
- 25 *Ta'azir* offences: in classical Islamic law, offences defined and punished at the virtually unfettered discretion of the *qadi* in particular cases coming before him. In modern penal law these are defined and the punishments are prescribed by statute. Outside northern Nigeria the word is more usually transliterated as *ta'zir*.
- 26 *Diyah*: compensation that may be paid to the victim of a wounding, or to certain of the victim's relatives in cases of homicide, if the victim or the relatives elect to forego *qisas* and accept the *diyah* instead. Elaborate rules specify the amounts to be paid for which types of injuries. Acceptance of *diyah* in lieu of *qisas* is encouraged; even more meritorious is the free pardon of the perpetrator by the victim or the relatives.

- 27 For the latest reports on Nigeria, both covering 2008, see U.S. Department of State (2009) and Human Rights Watch (2009).
- 28 *Hijab*: a covering worn over other clothing, drawn tightly around the face and draping loosely down to the knees.
- 29 There is even debate among the constitutional lawyers as to whether what has been done so far, by the National Assembly and by the states that have acted on the Child Rights Act, amounts to steps towards “domestication” of the CRC within the meaning of Art. 12 of the constitution at all. Our thanks to Dakas C.J. Dakas for drawing this controversy to our attention, on the complexities of which we cannot enter further here.
- 30 One example: in *Tela Rijiyan Dorowa vs. Hassan Daudu* 1975 NSNLR 87, the Muslim judge of an Area Court in Sokoto rejected the testimony of a non-Muslim against a Muslim on the ground that it was ‘not acceptable in Islamic law’. On appeal the High Court, per another Muslim judge, reversed, holding that under Maliki law the evidence of a non-Muslim against a Muslim is acceptable in all cases of necessity, and in Nigeria ‘the necessity [...] has always been with us. This is because this country [...] is not a Muslim country but a country where a large number of its inhabitants are Muslims. Business transactions are bound to occur and have always been occurring between Muslims and non-Muslims. Equally disputes leading to litigations of Muslims against non-Muslims, as in this case, and vice versa must happen and have always been happening. In a large cosmopolitan community as exists in Sokoto engaging in a multitude of commercial transactions it would be impossible to do justice in litigation if a distinction is drawn on the religion a witness adheres to before he could give evidence in a given case. It would [also] be unconstitutional for any law enforced in this country to provide for the rejection of any witness because of his religion’ (quoting Art. 28(1) of the 1979 constitution prohibiting discrimination on the basis of religion).
- 31 To take the extreme case of Zamfara State: there is a Ministry of Religious Affairs dealing almost exclusively with Muslim matters, including the organisation of Islamic preaching and teaching across the state, a Council of Ulama, a Sharia Research and Development Board, a Qur’anic Recitation and Memorization Board, a Religious Preaching and Establishment of Jumu’at Mosque and Idi Praying Ground Commission, a Hisbah Commission, and a Zakat and Endowment Board (all to be documented in forthcoming volumes of Ostien 2007). All of these have their own offices, vehicles and other equipment, paid staffs, and operating budgets.

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