

# CHAPTER 5

## THE SHARIA CRIMINAL PROCEDURE CODES

### I.

#### Introduction to Chapter 5

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1. Brief history of the law of criminal procedure in the Northern States of Nigeria.

a. The colonial period. The extreme legal pluralism practised in the Northern Region during the colonial period – even extending to the field of criminal law – has already been described.<sup>1</sup> This phenomenon affected not only the substantive law applied but also the rules of procedure followed in criminal matters in the various Northern courts.

i. The English courts. For the “English” courts – the Magistrates’ and High Courts – there was, to go along with the essentially English Criminal Code applied in these courts, a Criminal Procedure Ordinance, first enacted in the earliest days of British rule in Nigeria.

[T]he Protectorate of Northern Nigeria decided to codify its criminal law and procedure and Gollan, the Chief Justice, proceeded to draft two Codes. The first, one of Criminal Procedure, was modelled on the Gold Coast Ordinance of 1876 and was enacted in 1903...

In 1914 the Protectorates of Northern and Southern Nigeria were amalgamated and the bodies of law operative in the two protectorates had to be synthesised. Criminal procedure presented no problem. In the South there was the Criminal Procedure Ordinance of 1876 originally enacted when Lagos was part of the Colony of the Gold Coast, and in the North there was Gollan’s Criminal Procedure Proclamation of 1903 modelled on the 1876 Ordinance. All that was needed was to replace these with a consolidating Ordinance and the Nigerian Criminal Procedure Ordinance was accordingly enacted in 1914.<sup>2</sup>

The Criminal Procedure Ordinance governed not only procedure in criminal cases prosecuted in the English courts, but also some of the wider matters covered by the modern law of criminal procedure, including certain police procedures and allowable measures for the prevention of offences. In 1945 the old Ordinance – by then much amended – was repealed and replaced with a new one.<sup>3</sup> The new Criminal Procedure Ordinance continued in force throughout Nigeria up to 1960. As from time to time and

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<sup>1</sup> In the Introduction to Chapter 4, this volume 3-4.

<sup>2</sup> H.F. Morris, “A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935”, *Journal of African Law*, 18 (1974), 6-23 at 9. The Gold Coast Ordinance of 1876, and hence the first Nigerian Criminal Procedure Ordinance, was based on models from British jurisdictions in China, Japan, Hong Kong, the Straits Settlements, Fiji and the Leeward Islands. *Id.* at 7-8. As up till then amended it appeared as Cap. 20 of the 1923 Laws of Nigeria.

<sup>3</sup> Ordinance No. 42 of 1945, Cap. 43 of the Laws of Nigeria 1948.

from place to place amended, it is still in force in the Nigerian States carved out of the old Eastern and Western Regions of the country.<sup>4</sup>

ii. The Native Courts. In the North's Native Courts – where “in point of fact more than ninety per cent of all criminal cases were tried”<sup>5</sup> – the Criminal Procedure Ordinance did not apply. The Native Courts instead were charged to administer “the native law and custom prevailing in the area of the jurisdiction of the court”, to the extent it was not “repugnant to natural justice, equity and good conscience”.<sup>6</sup> Along with the substantive rules applied, “the practice and procedure of native courts shall be regulated in accordance with native law and custom.”<sup>7</sup> “Native law and custom’ includes Moslem law”.<sup>8</sup> In the Muslim courts of the North it was therefore according to rules of procedure as found primarily in the classical Maliki books of *fiqh* that Islamic penal law was applied throughout the colonial period. In the non-Muslim courts, the much vaguer and more communal procedures according to which the penal customs of the various ethnic groups were applied were somewhat formalised and perpetuated under the tutelage of the British. The non-Muslim Native Courts are off our point here; there is a literature on them to which the reader is referred.<sup>9</sup>

iii. Criminal procedure in the Muslim courts. Several of the documents reproduced in this work give a sense of the procedures followed in criminal cases in Northern Nigeria's Muslim courts in the colonial period.

Begin with the books of *fiqh* most often consulted to help find the law. Parts II and III of this chapter are reports of committees appointed by the Governor of Sokoto State in 1999 and 2000 to advise him on what to do to implement Sharia in the State; the parts of the reports printed in Parts II and III relate to bringing back Islamic criminal

<sup>4</sup> Now called the Criminal Procedure Act, it appears as Cap. C41 LFN 2004; cf. Cap. 80 LFN 1990, Cap. 43 Laws of the Federation and Lagos 1958, Cap. 43 Laws of Nigeria 1948. Scholarly discussions include L. Brett and I. McLean, *Criminal Law and Procedure of Lagos, Eastern Nigeria and Western Nigeria* (London: Sweet & Maxwell, 1963), and O. Doherty, *Criminal Procedure in Nigeria: Law and Practice* (London: Blackstone Press, 1990) (discussing both the CPA and the Northern Criminal Procedure Code).

<sup>5</sup> J.N.D. Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 28.

<sup>6</sup> Native Courts Ordinance of 1934, Cap. 142 of the Laws of Nigeria 1948, §10(1)(a); Native Courts Law of 1956, Laws of the Northern Region of Nigeria 1956, §20(1)(a), in both cases without distinction between civil and criminal matters.

<sup>7</sup> 1934 Ordinance §14; 1956 Law §26(1). Rules of practice and procedure were also subject to the repugnancy doctrine; for a case in which a Muslim rule of criminal procedure was struck down see Chapter 4, p. 4 *supra*, n. 4 and accompanying text.

<sup>8</sup> 1956 Law §2. Cf. E.A. Keay and S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet & Maxwell; Lagos: African Universities Press, 1966), 228: “In the statutes applying in the Northern Region the term ‘native law and custom’...was used exclusively in pre-1955...statutes but never defined therein... This is because ‘native law and custom’ has always included Moslem law...”

<sup>9</sup> See e.g. the book of Keay and Richardson cited in the previous note. A fuller sense of the non-Muslim Native Courts in action is conveyed in the social anthropologist Paul Bohannan's *Justice and Judgment Among the Tiv* (Oxford: Oxford University Press for the International African Institute, 1957). The other literature on customary law and customary courts in Nigeria and elsewhere in Africa is easily locatable using the standard bibliographical resources.

procedure in the Sharia Courts. Both reports include lists of Islamic authorities consulted by the committees or recommended for consultation. Prominent among them are the works of the great Maliki legal scholars of the Middle Ages early and late: the following outline shows principal authors mentioned – most of them from Al-Andalus or the Maghreb – and commentators on them:<sup>10</sup>

Ibn Abi Zayd (of Qayrawan, in present-day Tunisia; d. 996): *Risala*

- Al-Azhari (15<sup>th</sup> century (?)): *Thamaruddani*
- Ibn Ghunaym (d. 1714): *Fawakibud Dawani*
- Adawi (d. 1775): *Hashiyatul Adawi* and *Khirsbi*

Ibn Juzayy (of Granada; d. 1340): *Qawaninul Fiqhiyyah*

Khalil (of Cairo; d. 1365): *Mukhtasar*

- Al-Azhari (15<sup>th</sup> century (?)): *Jawahirul Iklili*
- Hattab (d. 1547): *Mawabibul Jalili*.
- Al-Dardir (d. 1786): *Sharh al-Kabir*

Ibn Farhun (of Madina; d. 1397): *Tabsiratul Hukkami*

Ibn Asim (of Granada; d. 1427): *Tuhfatul Hukkam*

- Al-Kafi (d. 1426): *Ihkamul Abkam*
- Mayyara (d. 1426): *Mayyara*
- Al-Tawudi (d. 1795): *Al-Tawudi*
- Al-Tusuli (d. 1842/3): *Bahjab*

Al-Zaqqaq (from Fez; d. 1506): *Lamiyyat al-Zaqqaq*

- al-Tawudi (d. 1795): *Sharh al-Tawudi li Lamiyat al-Zaqqaq*
  - Al-Sinhaji (d. 1946): *Mawabibul Khallaq*

A major missing person from this particular list is Ibn Rushd (Averroës, d. c. 1198), the great Maliki philosopher and jurist so influential on Christian thinking in the Middle Ages. He was born in Córdoba, in c. 1126,

into a family of prominent judges and lawyers; his grandfather, bearing the same name, served as the chief *qadi* (judge) of Córdoba, and there is a tradition that his father carried out the same duties. (In Muslim society a *qadi's* professional concepts and practical duties were simultaneously civil and religious. Thus, a “lawyer” had expert knowledge of divine law).<sup>11</sup>

The *Bidayatul Mujtabid* of Ibn Rushd, published in English under the title *The Distinguished Jurist's Primer and the Intermediate Jurist's Goal*, “is a source of solace for jurists world-wide” and is still much read in Nigeria today.<sup>12</sup> Readers familiar with these various works will

<sup>10</sup> For further information on the works listed here see the “Bibliography of Islamic Authorities”, Part IV of Chapter 6 of this work (Vol. V). The short titles used here are those in common use in Northern Nigeria, as in the bibliography; full titles are also given in the bibliography.

<sup>11</sup> S. MacClintock, entry on “Averroës” in P. Edwards, ed. in chief, *The Encyclopedia of Philosophy* (New York: Macmillan, 1967), 1, 220.

<sup>12</sup> For further information on *Bidayatul Mujtabid* as used in Nigeria see the entry on it in the bibliography in Chapter 6. The quotation in this sentence is from M.B. Uthman, “Protecting the

understand what was the law of criminal procedure applied in Northern Nigeria's Muslim courts in the colonial period, and now again to some extent today.

For readers not familiar with the *fiqh* a sense of its character can be gained from the report reproduced in Part II of this chapter: the part, relating to criminal procedure, of the 16<sup>th</sup> December 1999 "Final Report of the Committee set up to Advise the State Government on the Implementation of Sharia in Sokoto State". This is not the sort of thing found in the subsequently drafted and adopted Sokoto State Sharia Criminal Procedure Code, as to which see Parts III and IV of this chapter. Part II is rather an instance of the classical Muslim discourse on criminal procedure, in which some of its characteristics and particular rules can be observed. For instance, the interweaving, in the discussion, of the law of procedure with the substantive law and with the law of evidence: thus procedure is discussed separately as to each category of substantive offence (*budud, qisas, ta'azir*) and within the first two categories as to each particular offence; and much of the discussion relates to evidence. The requirement of the testimony of definite numbers of witnesses of particular reputations to establish particular charges, and the use of oath-taking to complete otherwise insufficient proof or in defence. The discrimination among categories of potential witnesses, based not only on their reputations in the community but on whether they are male or female, Muslim or non-Muslim, free or slave. These rules and others from the same sources were the rules of procedure applied in the Muslim courts in colonial days – with greater or lesser rigour from time to time, from place to place and from one alkali to another. They do not enter explicitly into the new Sharia Criminal Procedure Codes which it is the primary purpose of this chapter to document. But that many of these rules, along with the classical texts that support them, are still very much in view in the new Sharia Courts, is evident from the records of proceedings and court judgments in the two *zina* cases of Safiyatu Hussaini and Amina Lawal that are reproduced in Chapter 6.<sup>13</sup>

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Rights of Accused Persons Through the Proper Implementation of the Sharia Procedural Guarantees in Northern Nigeria" in J.N. Ezeilo et al., eds., *Sharia Implementation in Nigeria: Issues and Challenges on Women's Rights and Access to Justice* (Enugu: Women's Aid Collective, 2003), 177-200 at 183.

<sup>13</sup> The reader is also referred to the papers on criminal procedure presented at various of the Sharia conferences that have been held in Nigeria since 1999. The previous note cites one of them; in the same book at pp. 164-176 see also A.B. Ahmed, "Administration of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospects". An entire conference on "Correct Sharia Criminal Procedure, a Must for Effective Implementation of Sharia Criminal Law in Northern Nigeria", sponsored by the Centre for Islamic Legal Studies, ABU, Zaria, was held at Abuja 8<sup>th</sup> and 9<sup>th</sup> March, 2006: one paper, by Justice Muntaka-Commassie of the Court of Appeal, was on "The Sharia Criminal Procedure in *Qisas* Offences"; another, by M.B. Uthman of the Faculty of Law, Ahmadu Bello University, was on "Criminal Procedure in *Ta'azir* Cases". Two related papers were presented at the Seventh Annual Judges' Conference organised by the Centre for Islamic Legal Studies and held at Zaria on 14<sup>th</sup>-17<sup>th</sup> December 2005: B. Babaji, "Applying Islamic Law of Evidence (*Murafa'at*) in Criminal Proceedings: Problems and Prospects", and U.D. Keffi, "Criminal Trials of an Accused Person in Respect of *Qisas* (Offence Against Human Body): The Sharia Perspective". Copies of all these papers are in the possession of the author.

Finally, the reader is referred to Chapter 1 of this work, particularly Part III thereof, the “Report of the Panel of Jurists Appointed by the Northern Region Government to Examine the Legal and Judicial Systems of the Region”, dated 10<sup>th</sup> September 1958. There will be found a discussion of the problems which were felt – by the Panel of Jurists and many others – to result from the existence of so much legal pluralism in the Northern Region of that day, particularly as to criminal law and procedure. Criminal procedure in the Muslim courts was of especial concern to non-Muslims living within the areas of their jurisdiction: we quote here from the 1958 *Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them* (the Minorities or Willink Commission) on which the Panel of Jurists in part relied:<sup>14</sup>

2. Northern Nigeria is peculiar in that there are at work side by side three distinguishably different systems of law: in the first place, Nigerian law based on the Common Law of England as modified by Nigerian and British Statute; Native Law other than Muslim Law; and finally Muslim Law, which in its turn is divided into the strictly Koranic Law known as *Shari’a* and the law arising from the prerogative of the ruler, which is known as *Siyasa*... [S]ome consideration must be given to the nature of those fears regarding the law which are felt by minorities.

3. These fears are in the main of two kinds. There are those arising from the fact that Muslim Law makes a distinction between Muslims and non-Muslims, and there is also a group of fears based on the belief that the judiciary is at present closely associated with the executive and that in the future this association may become closer. As to the first of these sets of fears, we are aware that in many Muslim courts the distinctions are not observed and we have been impressed by the fact that more than one Emir or Chief has spoken to us of being the father of all his people, not exclusively of those of his own religion or tribe, while it is the declared ideal of the Government of the Northern Region to be “One North, One People” and to make no distinction on account of religion or tribe....

4. It is in procedural rather than substantive law that the distinction between Muslims and non-Muslims is most clearly made. In theory – though as we have said, courts do not always insist on this – the evidence of a male Muslim is of greater value than that of a woman, a Christian or a pagan; indeed, in some traditions the only evidence that is admissible in any degree is that of an adult male Muslim who is regular in his observance of religious duties. Some courts, we understand, do observe this distinction at present, and, since there is no doubt that it does form part of the legal tradition, it is understandable that minorities should be afraid that its observance may spread. Secondly, it is open to the court to give a Muslim accused the option of swearing on the Koran that he is innocent; if he accepts this challenge he is discharged, being left, if he is really guilty, to the vengeance of Heaven. This alternative, however, is not in theory open to a Christian or a pagan, although there are, we understand, some

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<sup>14</sup> *Report of the Commission appointed to enquire into the fears of Minorities and the means of allaying them* (London: Her Majesty’s Stationary Office, 1958), 66-68. For the reference to the Report of the Minorities Commission by the Panel of Jurists see Chapter 1 of this work (in Vol. I), 28.

courts which admit a similar oath on the Bible or on a fetish. But this is irregular and is frowned on by the orthodox.

5. There is a further distinction. If homicide is proved or admitted, the court normally asks the nearest relative of the deceased whether he wishes a life to be exacted for a life; if the relative decides to waive the right of exacting a life, the punishment may be as little as one year's imprisonment, 100 "symbolic" lashes, and the payment of compensation to the relative. This compensation varies from Emirate to Emirate and although it has recently been increased, is widely regarded as in any case too low, even if the deceased is a Muslim. But if the deceased is a Christian, the texts of the Maliki school prescribe that the compensation shall be half as much as for a Muslim, while if the deceased is a pagan, the amount is one-fifteenth.

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8. Again, we recognise that in practice injustice arising from these various anomalies has occurred less often than might be expected and that most of the courts have not acted rigidly according to the letter of the law. This however is partly due to the presence of a body of [British] executive officers, from the Resident downwards, whose outlook is based on the Common Law of England and who have enjoyed wide powers of revision. But it is surely in itself anomalous, and indeed objectionable, that the judicial system should depend for its efficient working on the interference of the executive and it seems likely that an autonomous government would wish to modify this system. Again, from a practical viewpoint there is likely to be at first a shortage of experienced executive officers in the Nigeria of the future [independence was just around the corner] and the Government will wish to reduce their burdens as far as possible. It seems therefore probable that powers of revision will be reduced or removed and that this important factor in the practical working of the present system should therefore be discounted.

One of the solutions recommended by the Minorities Commission was that Nigeria incorporate into its Constitution judicially enforceable provisions guaranteeing certain fundamental rights;<sup>15</sup> this was subsequently done. Other means of reducing the fears of minorities in respect of Muslim law were also recommended:

- (i) Non-Muslims to have the option of being dealt with by non-Muslim courts;
- (ii) A regional service of Alkalai to be instituted who would be appointed and administered by a judicial commission [as opposed to leaving them under control of the local Emirs and Chiefs];
- (iii) Prisoners' Friends [i.e. legal counsel of a sort] to be permitted, and improved arrangements made to facilitate appeals and to ensure that copies of court records are not delayed.<sup>16</sup>

The first of these recommendations – allowing non-Muslims to "opt out" of Muslim courts – was tried for a brief period beginning in 1958; a similar right was allowed to

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<sup>15</sup> Report of the Minorities Commission, 97-103.

<sup>16</sup> Ibid, 70.

Muslims who objected to trial by non-Muslim courts. But this device led to problems; in any case it became superfluous after the criminal law reforms of 1960; and it was quickly abandoned.<sup>17</sup> The other two recommendations of the Minorities Commission – regionalisation of the entire judiciary, including the judges of the Native Courts, under the control of a central Judicial Service Commission, and giving defendants in criminal cases the right to representation by counsel, were both implemented, not immediately, but over the course of subsequent years, and have now become permanent fixtures of the law throughout Nigeria. Control of the judiciary is off our point here, but the evolution of the right to counsel is part of the story we still have to tell.

b. Constitutionalisation of the law of criminal procedure. Separate guarantees of fundamental human rights first entered Nigerian law on 24 October 1959, with the coming into operation of the Nigeria (Constitution) (Amendment No. 3) Order in Council of that year. This Order amended Nigeria's 1954 Constitution, among other things by inserting therein a new chapter on fundamental rights; this chapter was then carried forward into the new Independence Constitution that came into force on 1 October 1960.<sup>18</sup> All subsequent Nigerian constitutions have followed suit, the chapter on fundamental rights growing in scope as time has gone on. Without elaboration, here are the fundamental rights closely related to criminal procedure contained in Chapter III of the 1960 Constitution:

§17: no person to be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty.

§18: no person to be subjected to torture or inhuman or degrading punishment or other treatment. **Except that** any punishment lawful and customary on 1 November 1959 was exempted from this rule.

§19: no person to be required to perform forced labour except in consequence of the sentence or order of a court or in limited other circumstances.

§20: no person to be deprived of his personal liberty except in specified circumstances and in accordance with a procedure permitted by law.

§21: every person, in the determination of his civil rights and obligations, entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. This right specifically includes criminal matters, and as to such matters specifically includes:

- the requirement that all criminal offences be defined and the penalty therefor prescribed in a written law (except in cases of contempt of court).

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<sup>17</sup> "Opting out" is discussed in Chapter 1 at 36 (Report of Panel of Jurists 1958), 52 (Government of Northern Nigeria White Paper 1958), and 66-69 (Memorandum of Attorney-General to returning Panel of Jurists 1962, describing in detail the opting out procedure, the problems it gave rise to, and its abrogation in 1961). See also S.S. Richardson, "Opting Out: An Experiment with Jurisdiction in Northern Nigeria", *Journal of African Law*, 8 (1964), 20-28.

<sup>18</sup> The chapter on fundamental rights included in Nigeria's Independence Constitution was derived primarily from the European Convention on Human Rights of 1950. See further this volume p. 5 n. 5.

- the ban on retroactive criminal legislation.
- the right of an accused to be informed promptly, in detail, in a language he understands, of the nature of the offence charged; to be given adequate time and facilities to prepare his defence; to defend himself in person or by legal representatives of his own choice – **except that** all of Nigeria’s Regions were permitted to prohibit the appearance of legal counsel in their Native and Customary Courts – ; to examine witnesses called by the prosecution; to obtain the attendance of and to examine his own witnesses; and to have without payment the assistance of an interpreter if necessary.
- the right to have proceedings held in public with certain exceptions.
- the presumption of innocence.
- the right of the accused not to give evidence at the trial.
- the requirement that a record of all proceedings be kept and made available to the accused upon request.
- the ban on double jeopardy.

§22: every person entitled to respect for his private and family life, his home and his correspondence.

§27: no person to be discriminated against on the basis of membership of a particular community, tribe, place of origin, religion or political opinion. **Except that** discriminations “reasonably justifiable in a democratic society having regard to their nature and to special circumstances pertaining to the persons to whom they applied” were exempted from this rule.

The reader will note the three exceptions. The first and third, to §§18 and 27, were inserted at the request of the Northern Region, to permit *baddi* lashing and the residual religion-based discrimination inherent in the Northern Penal Code of 1960, respectively.<sup>19</sup> The second exception, to §21, permitted all Regions to exclude lawyers from their Native and Customary Courts, which, in the first years after Independence, all initially did.<sup>20</sup> All three of these exceptions to the general constitutional rules were omitted in Nigeria’s 1979 Constitution and have never since reappeared.

c. The Criminal Procedure Code of 1960. Pursuant to the Settlement of 1960 (see Chapter 1), on 30 September 1960, Independence Day Eve, all varieties of criminal law theretofore applicable in Northern Nigeria were abrogated. This doom fell not only on all varieties of native criminal law and custom applied in the Native Courts, including Muslim criminal law, but also on the English Criminal Code and Criminal Procedure Ordinance theretofore applied in the Magistrates’ and High Courts. All were replaced the same day by two new laws thenceforward to be applied (1) in all courts of the Northern Region, from the High Court down to the lowliest Grade D Native Court, and (2) to all people accused of committing crimes against the laws of the Region, without regard to

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<sup>19</sup> See p. 6 supra nn. 10 and 11 and accompanying text.

<sup>20</sup> Keay and Richardson, *The Native and Customary Courts of Nigeria*, 364. The one exception was “that in the Western Region a party may be represented by a legal practitioner at any stage of proceedings before a customary court of Grade A or any other customary court required to be presided over by a legal practitioner.” Ibid.

community, tribe, place of origin, or religion; sex entered the list of banned categories only in 1979.<sup>21</sup> The era of legal pluralism as to criminal law and procedure in the North was at an end. The two laws that replaced it were the Penal Code of 1960, see Chapter 4, and the Criminal Procedure Code of 1960.

The new Criminal Procedure Code (CPC) was not based on far-eastern models as the old Criminal Procedure Ordinance had been. Rather, the Panel of Jurists recommended that

the Sudan Penal Code and its accompanying Code of Criminal Procedure should be introduced, as soon as possible, as the criminal law of the Northern Region, after such minor amendments have been made therein as the circumstances of this Region may require.<sup>22</sup>

This was accepted by the Government of the Northern Region,<sup>23</sup> and work then started on the adaptation of the Sudan Penal and Criminal Procedure Codes to the Northern Nigerian situation. The Penal Code was the first to be tackled and took the longest to agree on.<sup>24</sup> After that was finished,

[w]ork was then put in hand on the preparation of the following further Bills: the Criminal Procedure Code Bill, the Evidence (Amendment) Bill, the Native Courts (Amendment) Bill, the Northern Region High Court (Amendment) Bill, the District Courts Bill, the Sharia Court of Appeal Bill, the Court of Resolution Bill, the Coroners (Amendment) Bill, and the Adaptation of Legislation Bill.<sup>25</sup>

The then-Attorney-General of the Northern Region, Hedley Marshall, described the process to the Panel of Jurists on their return visit in 1962:

From the very first, there was continuous contact with the Chief Justice and the members of the Judicial Department on these Bills, with the Moslem jurists who had considered the Penal Code Bill, and with other persons representing the varied interests of the Nigerian public. The negotiations and conferences with the Moslem jurists and the representatives of non-Moslem interests were lengthy, but not nearly so difficult as had been those during which the provisions of the Penal Code Bill were discussed. On this occasion, much less criticism came from the representatives of the Moslem world and the native courts' judges and native authority representatives, since the procedures provided for in the Criminal Procedure Bill were far more familiar to the Moslem lawyers and non-Moslem native courts personnel than they were to the members of the English judiciary. It was with the members of the English judiciary that there were protracted discussions, voluminous correspondence and difficult negotiations extending over the period from 16<sup>th</sup> June, 1959, to early October, 1959. During the course of these negotiations, objection was taken by the late Chief Justice to certain parts of the new procedure whereby the

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<sup>21</sup> See §39 of the 1979 Constitution.

<sup>22</sup> Report of the Panel of Jurists 1958, Chapter 1, 34.

<sup>23</sup> Government White Paper 1958, Chapter 1, 51 and 55-56.

<sup>24</sup> The process is described at length in the 1962 Memorandum of the Attorney-General to the returning Panel of Jurists, Chapter 1, 58-60.

<sup>25</sup> *Ibid*, 60.

magistrate took cognizance of a case from the very beginning of the case and directed the police investigations. The Chief Justice also communicated direct with the Colonial Office on several occasions with regard to the Bill. After much correspondence and negotiation, the terms of the draft Bill were finally settled at a conference between the Attorney-General, the Chief Justice and representatives of the Legal and Judicial Departments at the end of September, 1959. The provisions of the Bill were accepted by the judiciary with some amendments on the clauses to which objection had been taken. The main provisions of the new procedure remained substantially unaltered. It appears that many of the difficulties which arose during the course of the discussions with the Chief Justice had been inspired by Mr. A.J. Price, a magistrate who had taken up a strong attitude towards the Bill and had opposed many of its provisions. (He has since left the country. He made an attack on the Codes and on the Northern judicial reforms generally in an article in the *Modern Law Review* of May, 1961,<sup>[26]</sup> which was inaccurate, but to which a complete and comprehensive reply was given in the same issue of the same publication by Professor Anderson, a member of the Panel of Jurists<sup>[27]</sup>). Negotiations also took place with Mr. Bovell, the Inspector-General of Nigeria Police and with the local Nigeria Police officers, as a result of which certain clauses were amended to meet their wishes. The Bill was duly approved by Executive Council and was presented to the House of Assembly in April, 1960, together with the other Bills mentioned above. These were all debated at length.... The Bills were also debated in the House of Chiefs.... All the Bills were subsequently assented to by His Excellency and are now Laws No. 10, 11, 12, 13, 14, 15, 16, 17 and 18 of 1960. They were not brought into force until 30<sup>th</sup> September, 1960 for the reasons explained below.<sup>28</sup>

It would be most interesting to pursue the investigation of this whole episode further – for instance by tracing the records, which must exist somewhere, of the Government's negotiations over the CPC with the Muslim jurists on the one hand and with the English judiciary on the other. More work for some enterprising researcher to do.

Most of the CPC of 1960 can be read in Part IV of this chapter. Part IV is not the CPC, but is rather the Harmonised Sharia Criminal Procedure Code (HSCPC) prepared in recent years by the Centre for Islamic Legal Studies, ABU Zaria. But by the calculation explained in Part VII of this chapter, 88% of the CPC has been copied more or less verbatim into the HSCPC; what has been left out and what has been changed are all accounted for in the annotations to the HSCPC and in Parts VI - IX of this chapter, which, together, show the relationships between the CPC and the HSCPC in detail. We call the reader's attention here to just a few features of the CPC of 1960 which are centrally relevant to this chapter.

i. Different rules for different courts. The Conversion Table given in Part VI shows the chapter and sub-chapter headings of the CPC. Chapter II, on THE

<sup>26</sup> A.J. Price, "Retrograde Legislation in Northern Nigeria?", *Modern Law Review*, 24 (1961), 604-11.

<sup>27</sup> J.N.D. Anderson, "A Major Advance", *Modern Law Review*, 24 (1961), 616-25.

<sup>28</sup> Memorandum of the Attorney-General, Chapter 1, 60-61. See also discussion of the A.J. Price criticisms of the CPC and their consequences in the Introduction to Chapter 1 at 4-7 and notes.

CONSTITUTION OF CRIMINAL COURTS, names six classes of criminal courts in Northern Nigeria: the High Court, four classes of Magistrates' Courts, and "native courts established or deemed to have been established in Northern Nigeria under any law." Chapter III, on THE POWERS OF CRIMINAL COURTS, specifies in great detail (in conjunction with Appendix A to the Code, a lengthy table) the different powers of the six classes of courts to try offences and to impose sentences of varying severity. Chapter XVII, on PRELIMINARY INQUIRY AND COMMITMENT FOR TRIAL TO THE HIGH COURT, defines the "inquisitorial" powers of Magistrates' Courts so much objected to by certain elements of the English judiciary in 1959 and publicly criticized by A.J. Price subsequently. Chapter XVIII deals with TRIALS BY THE HIGH COURT. Chapter XXXIII deals with TRIALS IN NATIVE COURTS. So it was not entirely true that uniform procedures in criminal matters were imposed on all Northern courts by the CPC of 1960.

ii. Guidance. The Panel of Jurists frankly recognised that it would be impossible for most judges of the Native Courts – most by far of whom had no training in English law whatsoever – to immediately apply the complex new Penal and Criminal Procedure Codes being imposed on them. This led to the principle of "guidance".

The Panel is of the opinion...that it would be premature, at this juncture, to provide that the Native Courts must be bound by these Codes in all particulars, and that it would be preferable to prescribe that all such courts should for an initial or interim period, be "guided" by them. This expression is not intended to imply that any other law prevails in the Region, or can properly be applied by Native Courts, in any criminal matter; it merely recognises the fact that at first – and until the schemes for training recommended in another part of this Report can not only be implemented but have had their cumulative effect – a broad and sympathetic view must be taken of courts which are in process of learning a wholly new technique.<sup>29</sup>

The principle of guidance and its meaning in relation to the Penal Code, the Criminal Procedure Code, and subsequently the Evidence Ordinance, are discussed at length in the documents reprinted in Chapter 1 of this work, to which the reader is referred.<sup>30</sup> As to criminal procedure, the guidance principle was enacted as follows in the CPC of 1960:

**386.** (1) In any matter of a criminal nature a native court shall be guided in regard to practice and procedure by the provisions of this Criminal Procedure Code other than those provisions which relate only to any court other than a native court.

(2) Notwithstanding the provisions of subsection (1), all native courts shall be bound by the provisions of sections 388, 389, 390, 391, 392, 393, 394 and 395.<sup>31</sup>

<sup>29</sup> Report of the Panel of Jurists 1958, Chapter 1, 34.

<sup>30</sup> In Chapter 1 see: Report of the Panel of Jurists 1958, 34-35 and 43-44; Government White Paper 1958, 51-52 and 55-56; Memorandum of the Attorney-General 1962, 63-65; Memorandum of the Ag. Chief Justice, 82-83; Memorandum of S.S. Richardson, 96; Report of the Panel of Jurists 1962, 140-141, 153 ("the principle of 'guidance' should be continued indefinitely, but a rising standard of guidance should be required"); Government White Paper 1962, 159, 160, 162.

<sup>31</sup> These are all sections of the CPC chapter on TRIALS IN NATIVE COURTS. §388: Procedure on conviction in native courts when no formal charge made. §389: Right of accused to state case and

## CHAPTER 5: THE SHARIA CRIMINAL PROCEDURE CODES

(3) The fact that a native court has not been guided or properly guided by the provisions of this Criminal Procedure Code shall not entitle any person to be acquitted or any order of the court to be set aside.

(4) Where a native court has not been guided or properly guided by the provisions of this Criminal Procedure Code an appellate court or reviewing authority shall apply to the case the principles contained in sections 288 and 382 of this Criminal Procedure Code and the provisions of the Native Courts Law [in sum: no interference with any finding, sentence or order even if there was error or irregularity, unless the appellate court or reviewing authority thinks that a failure of justice was in fact occasioned thereby].

As to evidence, the guidance principle was enacted by the Evidence (Amendment) Law, No. 12 of 1960, which

provided that in judicial proceedings in any criminal cause or matter in or before a Native Court, such court should be “guided” by the provisions of the Evidence Ordinance in accordance with the provisions of Chapter XXXIII of the Criminal Procedure Code. Some apprehension had been felt at the time of the preparation of this rather far-reaching measure that it would be the subject of considerable opposition from various quarters in the Region and that it would be opposed and criticised in the debates in the Legislature. This, however, was not the case, and the Bill passed through the House of Assembly and the House of Chiefs with virtually no debate at all [citing to the records of the debates in the House of Assembly and House of Chiefs].<sup>32</sup>

The principle of guidance, despite supposedly being an “interim” measure, has persisted as to the North’s Area Courts – the successors to the Native Courts – up to this day, and is also to be found, as we shall see, in some but not all of the new Sharia Criminal Procedure Codes now in effect in the Sharia States.

iii. Witnesses: oaths. The Panel of Jurists’ recommendations were clear:

All witnesses, without discrimination, must be heard. They would not, normally, be put on oath before beginning their testimony, but only regarding the truth of that part of their evidence which is material to the determination of the case. Even so, however, their testimony should not be accepted without the court doing its best to test its reliability by questioning them and by inviting the accused to suggest such questions as he would wish the court to put on his behalf. The case would then be decided, not by some self-operating rule regarding what witnesses are, or are not, admissible, but on the basis of the court’s considered opinion regarding the credibility of these witnesses and the conclusion to which all the available evidence leads. An oath proffered to the accused would, in suitable circumstances, constitute one factor in this evidence. That for a court thus to ascertain the truth by every suitable means in order to

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adduce evidence. §390: Counsel not admitted to native court. §391: Examination of witnesses. §392: Making of finding. §393. Court to record wishes of deceased’s relative in capital cases. §394: Procedure in capital cases. §395: Records in native court.

<sup>32</sup> Memorandum of the Attorney-General, Chapter 1, 65.

effect impartial justice is in no way contrary to the Principles of Islam was emphasised by members of the Panel.<sup>33</sup>

These recommendations were endorsed by the Government of the Northern Region<sup>34</sup> and enacted as several different sections of the Criminal Procedure Code. In a distinct departure from Maliki law, §236 (for guidance of Native Courts only) laid down that “An accused person shall be a competent witness on his own behalf”. The same rule already existed in the Evidence Ordinance, by which the Native Courts were now also to be guided.<sup>35</sup> Section 178 of the Evidence Ordinance also laid down that “no particular number of witnesses shall in any case be required for the proof of any fact” (with exceptions not relevant here). Sections 389, 391 and 392 of the CPC – unlike §236, all binding on the Native Courts – went on to detail the rights of the accused to call witnesses, to have the assistance of the court in procuring their attendance, and to put questions to witnesses through the court; the right of the court to invite any witness to take an oath as to the truth of his evidence and, if the invitation is refused, to “draw such inference...as it thinks just”; and the duty of the court to “make its findings...upon the evidence which is before it and in making such findings nothing shall be taken into consideration which is not supported by the evidence.” Another interesting study for someone to do would be to investigate the interplay, in the early days of the CPC and of Native Court guidance by the Evidence Ordinance, between the Islamic rules of procedure and evidence the al-kalifs had previously been accustomed to apply, and the new rules now imposed on them; and for how long and to what extent Maliki rules of procedure and evidence continued to play a role in criminal proceedings as time went on. A place to start would be the High and Supreme Court cases interpreting and enforcing the CPC and the Evidence Ordinance in cases coming up on appeal from the Native/Area Courts.<sup>36</sup>

iv. Representation by counsel. The rule in the North’s Native Courts had for long been that:

No legal practitioner may appear or act for or against any party before a native court; but a native court may permit the husband, wife, or guardian, or any servant, or the master, or any inmate of the household of any plaintiff or defendant, who shall give satisfactory proof that he or she has authority in that behalf, or a relative of a person administering the estate of a native who was

<sup>33</sup> Report of the Panel of Jurists 1958, Chapter 1, 35.

<sup>34</sup> Government White Paper 1958, Chapter 1, 52.

<sup>35</sup> Evidence Ordinance, Cap. 62 LF&L 1958 §159: “Every person charged with an offence shall be a competent witness for the defence at every state of the proceedings, whether the person so charged is charged solely or jointly with any other person” (with several detailed provisos following); this section became §160 of the Evidence Act, Cap. 112 LFN 1990 and Cap. E14 LFN 2004.

<sup>36</sup> For early cases see Memorandum of the Attorney-General, Chapter 1, 83. See also J.R. Jones, *Criminal Procedure Code in the Northern States of Nigeria* (Zaria: Gaskiya Corporation Ltd., 2<sup>nd</sup> ed. 1978) (annotated commentary based on Nigerian cases and showing amendments to 1978); B. Shani, *Notes on Some Aspects of Criminal Procedure in Northern Nigeria* (Zaria: ABU Press, 1988) (annotated commentary based on Nigerian cases and arguing in the Introduction for abolition of the guidance principle).

subject to the jurisdiction of a native court, to appear for such plaintiff or defendant.<sup>37</sup>

Notwithstanding the other impending changes in criminal law and procedure, the Panel of Jurists recommended that advocates – i.e. legal practitioners – still should not be permitted in the Native Courts – not even the Prisoner’s Friends suggested by the Minority Commission Report.<sup>38</sup> The Government agreed:

The Panel have recommended against Advocates being admitted to Native Courts. Only a professional court can be expected to admit Advocates and ensure that both parties to the dispute have a fair chance to present their case with legal representation. Nor should Prisoner’s Friends be permitted because their introduction would make litigation more expensive and possibly cloudy. On appeal from Native Courts, however, Advocates are now allowed to appear in the High Court and this practice should continue.<sup>39</sup>

This decision was enacted as §390 of the CPC of 1960: “No legal practitioner shall be permitted to appear to act for or to assist any party before a native court.” As we have seen, this provision was licensed under the 1960 Constitution by an exception – made for Native Courts – to the general rule that criminal defendants had the fundamental right to be represented by legal practitioners of their choice. But that exception was omitted from Nigeria’s 1979 Constitution;<sup>40</sup> in 1982 it was held that under the 1979 Constitution, “even in civil trials or appeals, no Court or tribunal in this country has the power to exclude a legal practitioner from representing any person before it”;<sup>41</sup> and since then legal practitioners have been permitted to appear in all types of matters in all courts. The same is true in the North’s Sharia Courts today, see §195 of the HSCPC, in Part IV below: “A legal practitioner shall have the right to practise in the Sharia Court in accordance with the provisions of the Legal Practitioners Act, 1990.” The Sharia Criminal Procedure Codes of all the Sharia States today are in accord.

Much more could be said about the Criminal Procedure Code of 1960, which, as variously amended, still remains in force in all Northern States; but this discussion must not be prolonged further. Let us simply quote the conclusion of a close observer of the code’s operation in its first five years – the long-time Chief Registrar of the High Court of the Northern Region and subsequently a judge of the same court, T.H. Williams:

Mr. Price and others who shared his doubts, will be glad to know, that this Code does not furnish “a most efficient instrument of oppression,” but is rather a Code, which, in spite of or perhaps even because of its not being an exact copy of English criminal procedure, is looked upon as their own by Northern

<sup>37</sup> Native Courts Law, Cap. 142 Laws of Nigeria 1948, §24; cf. §28 of the 1956 Native Courts Law of the Northern Region (same) and §28 of the 1967/68 Area Courts Edicts of the then-Northern States (same).

<sup>38</sup> Report of the Panel of Jurists 1958, Chapter 1, 38, 46.

<sup>39</sup> Government White Paper 1958, Chapter 1, 54.

<sup>40</sup> See §33.

<sup>41</sup> *Peter Uzodinmma v. Commissioner of Police*, (1982) N.C.L.R. 325 (High Court of Benue State).

Nigerians and which on the whole is administered with some pride and with increasing impartiality and efficiency.<sup>42</sup>

d. The new Sharia Criminal Procedure Codes. As we saw in Chapter 4, eleven of the Sharia States have enacted lengthy new Sharia Penal Codes for application in their Sharia Courts, running in parallel with the Penal Code of 1960, which is still applied in the Magistrates' and High Courts; only Niger State adopted a different strategy, instead amending its Penal Code to include new Islamic offences and punishments therein.<sup>43</sup> The approaches to reinstatement of "Sharia criminal procedure" have been more various.

- In six Sharia States – Gombe, Jigawa, Kaduna, Kebbi, Sokoto and Zamfara – lengthy new Sharia Criminal Procedure Codes have been put in place for application in the Sharia Courts. Based substantially on the CPC and covering most of the same territory (but omitting Chapters VII and VIII on PRELIMINARY INQUIRY [in Magistrates' Courts] AND COMMITMENT FOR TRIAL TO THE HIGH COURT and on TRIALS IN THE HIGH COURT), they run in parallel to the CPC, which still applies in the Magistrates' and High Courts.
- In two States – Kano and Niger – the old CPC has merely been amended; as amended it still applies in all courts – High, Magistrates' and Sharia. Kano's amending law replaced the old Chapter XXXIII of the CPC, on TRIALS IN NATIVE [subsequently Area] COURTS, with a new Chapter XXXIII, on TRIALS BY SHARIA COURTS. Niger's amending law did less, essentially only raising the sentencing limits of certain courts; but the situation in Niger has become a bit confused; this is discussed further in the introduction to Part IV below.
- One State – Bauchi – followed Kano's strategy in a different form, enacting a separate new Sharia Criminal Procedure Code, quite short, which essentially limits itself to the governance of trials in the State's Sharia Courts and closely tracks Kano's new CPC Chapter XXXIII. Presumably in Bauchi, as in Kano, the Sharia Courts continue to apply the CPC if and when they must deal with matters not covered by the brief statute now governing trials before them.
- Three States – Borno, Katsina, and Yobe – had at the time of this writing (July 2007) still not enacted any new laws governing criminal procedure in their Sharia Courts at all – beyond the general rule laid down in their Sharia Courts statutes – discussed further below – that the courts are to apply Islamic law as to both substance and procedure. In all these States variants of the lengthy new Sharia Criminal Procedure Codes already enacted elsewhere have been pending in the Houses of Assembly for some time but never passed and signed into law. In the meantime the old CPC – including the old Chapter XXXIII on trials in the

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<sup>42</sup> T.H. Williams, "The Criminal Procedure Code of Northern Nigeria: The First Five Years", *Modern Law Review*, 29 (1966), 258-272 at 272, quoted in Chapter 1, 7. On the CPC see also S.S. Richardson and T.H. Williams, *The Criminal Procedure Code of Northern Nigeria* (London: Sweet & Maxwell; Lagos: African Universities Press, 1963), and the works of Keay and Richardson, Jones, Shani, and Doherty already cited.

<sup>43</sup> See discussion in the Introduction to Chapter 4, this volume, 6-7 supra.

Native/Area Courts – is still being used to guide criminal proceedings in their new Sharia Courts.

- Finally, in all Sharia States the statutes establishing the new Sharia Courts all contain a provision essentially like this one:<sup>44</sup>

The 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. For the avoidance of doubt, Islamic Law comprises the following sources:

- (a) The Holy Qur'an;
- (b) The Hadith and Sunnah of Prophet Muhammad (SAW);
- (c) *Ijmab*;
- (d) *Qiyas*;
- (e) *Masalahab-Mursala*
- (f) *Istihsan*;
- (g) *Istishab*;
- (h) *Al-Urf*;
- (i) *Mashabul-Sahabi*; and
- (j) *Sbar'u Man Kablana*.

The interplay between this general provision and other applicable law relating to criminal procedure and evidence is discussed further below.

## 2. What this chapter comprises.

The purpose of this chapter is to document the new laws put in place by the Sharia States relating to criminal procedure in their Sharia Courts. This is done in several ways.

a. The Harmonised Sharia Criminal Procedure Code annotated. The large Sharia Criminal Procedure Codes already enacted in six states and pending in three others are voluminous – with close to 350 sections each – so they can not all be published here. Instead we publish one of them, with annotations, section by section, showing variations between it and the ones not published. The code we have elected to annotate and publish, in Part IV of this chapter, is in fact not one of those actually enacted by any State, but a “harmonised” version prepared by the Centre for Islamic Legal Studies (CILS) of Ahmadu Bello University, Zaria. The CILS Harmonised Sharia Criminal Procedure Code (HSCPC) is in effect a model law, recommended by CILS for adoption by the States – in six States, in place of the various lengthy codes they adopted in the early days of Sharia implementation, in the three states where such bills are still pending, for adoption now, and in Kano, Bauchi and Niger States, presumably for their further consideration. In fact Zamfara State has already replaced its first Sharia Criminal Procedure Code with the HSCPC. We decided to use the CILS code here for two main

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<sup>44</sup> This is §7(i) of Zamfara State's first Sharia-related piece of legislation, its Sharia Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999, assented to by the Governor on 8<sup>th</sup> October, 1999, published in Zamfara State of Nigeria Gazette Vol. 1 No. 1, 15<sup>th</sup> June 2000, A1-A30. The Sharia Courts Laws of all other Sharia States have provisions closely tracking this one, as the annotations to Zamfara's law to be included in the chapter of this work on “Court Reorganisation” will show.

reasons: it may be the coming thing, and, more practically, CILS very generously let us have a digital copy to work with, so we did not have to retype. We are grateful both to CILS and to the MacArthur Foundation, which provided the funding which made it possible for CILS to prepare it, for their permission to use the HSCPC in this way.

b. Relations to the Criminal Procedure Code of 1960. The main source for all the lengthy new Sharia Criminal Procedure Codes was the Criminal Procedure Code of 1960. This is documented in three ways:

- i. The annotations to the HSCPC, Part IV, note variations between it and the CPC, as well as between it and the Sharia Criminal Procedure Codes of the States – seven enacted, including Bauchi’s, and one pending, namely Borno’s.
- ii. Two conversion tables are provided, one from the CPC to the HSCPC, Part VI, the other from the HSCPC to the CPC, Part VII. Besides facilitating comparison of the codes section by section, these tables show at a glance how extensive the relations between them are.
- iii. Two lists of sections included in one code but omitted in the other are provided, Parts VIII and IX. These distinguish between sections omitted outright and sections omitted because of the collapsing of distinctions made in one code but not in the other; the first sort of omitted sections are quoted in full, the second sort are merely listed by section title. Simple calculations result in estimates of the percentages of sections of the CPC included in the HSCPC (88%) and percentages of sections of the HSCPC included in the CPC (99%).

c. Kano State’s new CPC chapter XXXIII annotated. Kano’s Criminal Procedure Code (Amendment) Law 2000, replacing the CPC chapter on trials in the Native/Area Courts with a new chapter on trials in the Sharia Courts, is reproduced in full in Part V of this chapter. As has been noted Bauchi’s brief new Sharia Criminal Procedure Code closely tracks Kano’s new Chapter XXXIII; variations between Kano and Bauchi are shown in section-by-section annotations to Kano’s new chapter; thus Bauchi’s code is annotated twice.

d. The making of the Sokoto State Sharia Criminal Procedure Code. Part III of this chapter is the “Report of the Committee Appointed to Prepare [Sharia] Criminal Procedure Code for Sokoto State”, submitted to the Governor of Sokoto State in late September or early October 2000 along with the draft Code, which was subsequently enacted and signed into law on 25<sup>th</sup> January 2001. The Code itself is among those annotated in Part IV. The Report of the Committee that prepared it gives interesting background on the steps the Committee took in doing its work; it may be read in conjunction with I.N. Sada’s essay in Chapter 4 on “The Making of the Zamfara and Kano State Sharia Penal Codes”.

e. Underlying uncodified Islamic rules of criminal procedure and evidence. As has already been discussed, the report reproduced in Part II of this chapter – the part, relating to criminal procedure, of the 16<sup>th</sup> December 1999 “Final Report of the Committee set up to Advise the State Government on the Implementation of Sharia in Sokoto State” – is an instance of the classical Muslim discourse on criminal procedure

and evidence, in which some of its characteristics and particular rules can be observed. These rules are not visible in the enacted Sharia Criminal Procedure Codes, but they are nevertheless to a considerable extent now again being applied in the Sharia Courts.

f. This introduction. Finally, this introduction has tried so far to place the new Sharia Criminal Procedure Codes in their historical context; the rest of the discussion brings out some of their interesting features and some of the questions they raise.

3. Comments on the new Sharia Criminal Procedure Codes.

a. Interplay of the Codes with uncodified Islamic rules of procedure and evidence. A word to begin with on the use of the word ‘uncodified’ in what follows. “Uncodified Islamic rules” means rules articulated in the classical Islamic sources of law, including the *fiqh*, but not explicitly set forth in codes or other statutes enacted under the Constitution and laws of Nigeria. This will perhaps become clearer from the discussion.

i. The applicability of uncodified Islamic rules in the Sharia Courts. Section 7(i) of Zamfara State’s Sharia Courts Law, providing that “The 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”, has already been quoted; there are similar provisions in the Sharia Courts laws of all the Sharia States. These provisions cannot be the whole story about the law applicable in the Sharia Courts, of course, because other laws and rules, including for instance the Sharia Courts Laws themselves, the Sharia Penal Codes, the Sharia Criminal Procedure Codes, and the Federal Evidence Act – to say nothing of the Nigerian Constitution – also apply in the Sharia Courts in criminal proceedings, despite the fact that they are largely not “as prescribed under Islamic law”. Nevertheless a very important component of the whole body of law being applied in criminal matters in the Sharia Courts is Islamic law as found in the classical sources including the classical books of *fiqh*. In most States this is done under authority of the general provisions of the Sharia Courts laws. Bauchi State uniquely makes the point explicit in its Sharia Criminal Procedure Code itself. Section 3 of the enacting provisions provides in part that:

(2) Where [this Law] is silent on any issue or criminal matter, the presiding judge is at liberty to resort to the primary sources of Islamic law and any other work of recognised Islamic jurists and proceed accordingly.

Then again, even more strongly, §44 of the Bauchi Code provides in part that:

(4) A judge is at liberty to resort to any Arabic text of recognised Islamic jurists on any procedure notwithstanding the provisions of this Code if the text to be referred to is more in conformity with the primary sources of Sharia....

(5) The provisions of the Qur’an, Sunnah and *Ijma* being the primary sources of Sharia are supreme, accordingly any provision in this Code that is inconsistent with any of the provisions of the said primary sources shall, to the extent of the inconsistency be void.<sup>45</sup>

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<sup>45</sup> Bauchi’s Sharia Criminal Procedure Code, signed into law on 15<sup>th</sup> February 2002, was still not gazetted as of July 2006 when we last checked for it. A signed copy is in the possession of the author.

The question of which is supreme, the uncodified Islamic rules or the enacted codes and other laws of Nigeria, is discussed further below.

ii. Examples of the application of uncodified Islamic rules. The records of proceedings and judgments in the two *zina* cases of Safiyatu Hussaini and Amina Lawal, published in full in Chapter 6 of this work, provide many interesting examples of Islamic rules of procedure and evidence, articulated in the *fiqh* but not in the enacted laws of the Sharia States, that are at work in the Sharia Courts today. Let us mention a few:

- By whom may a charge of *zina* be brought? Under the CPC as still applicable in Katsina State, and under Sokoto State’s new Sharia Criminal Procedure Code, the Nigeria Police have wide powers to receive information concerning the commission of offences, to conduct investigations, and to prosecute alleged offenders in the Sharia Courts – which is exactly how the cases against both Safiyatu Hussaini and Amina Lawal were started. But according to the Sharia Court of Appeal of Sokoto State, Islamic law is stricter than that, essentially restricting, to the guilty person him- or herself, the power to start a *zina* prosecution – by coming forward in a voluntary act of self-submission to the punishment prescribed by Allah for the sin committed. The Court said: “it is *haram* to initiate an action against a person for *zina* based on other people’s reports.... The way the police went to Safiyatu’s house just because they heard that she had committed *zina* is contrary to Islamic law.”<sup>46</sup>
- If a charge of *zina* is brought before a court, how may it be proved? Here there is agreement among Maliki scholars: *zina* may be proved either (i) by the eyewitness testimony of four male Muslims of good character to the very act of penetration; or (ii) by the confession of the guilty person; or, in the case of a female, (iii) by her pregnancy if she is unmarried. But further questions arise; the answers given by the Sharia Courts of Appeal in Safiyatu’s and Amina’s cases are given in parentheses:
  - if the proof is based on the confession of the accused, may she retract the confession? (Yes.) At what stage or stages of the proceedings may she retract it? (At any stage, right up to the moment of execution of the judgment.) May she retract it through her representative or must she do so in person? (Either.) Must she give a particular kind of reason for the retraction? (No.) Finally, if she retracts it, does her prior confession have any further probative value? (None whatsoever.)
  - if the proof is based on the pregnancy of an unmarried woman, what, if any, is the effect, on the probative value of the pregnancy, of the accused’s prior marriage, if any? (Answer: if the accused was divorced less than five years before she gave birth (some authorities say seven

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<sup>46</sup> Chapter 6, 48. Note that HSCPC §141, patterned on CPC §142, would prohibit any court to take cognizance of a charge of *zina* except on the complaint of the woman’s husband or, if she is unmarried, her father or guardian, or in their absence of some person who had care of the woman on his behalf at the time when the offence was committed. For some reason this restriction was left out of all the actually-enacted SCPCs, which is what permitted the prosecutions of Safiyatu and Amina to go forward at the instance of the police.

years) the pregnancy and resulting child will be attributed to her former husband, and the value of the pregnancy to prove *zina* following the divorce is zero.)

On all these issues, all raised, argued and ruled on in Safiyatu's and Amina's appeals, the Sharia Courts of Appeal ruled favourably to the accuseds, based strictly on Islamic law as found in the classical sources. No doubt many other uncodified Islamic rules of procedure and evidence, governing many other particular issues, are being applied every day in the Sharia Courts all across the North.

iii. Potential conflicts between uncodified Islamic rules and other applicable law.

Conflicts between the uncodified rules of Islamic procedure and evidence which the Sharia Courts are directed by the Sharia Courts Laws to apply, and other – enacted – laws which they must also apply, are inevitable.

We have already noted one, as to who is permitted to investigate and bring charges of criminal offences: at least as to *zina*, at least in Sokoto State, it appears that the otherwise plenary powers of the police in these regards, even under the State's Sharia Criminal Procedure Code, are to be restricted by the much narrower uncodified rule of Islamic law announced and relied on by the Sharia Court of Appeal.

A different conflict arose in Amina Lawal's case, and the ruling went the other way. In classical Islamic law a *qadi's* court is constituted by a single judge – in Northern Nigeria called an alkali – sitting alone. But under Katsina State's Sharia Courts Law "A Sharia Court shall be properly constituted if presided over by an alkali sitting with two members."<sup>47</sup> In Amina's trial a single alkali, sitting alone, without members, heard and ruled on the entire case. When this defect – under the statute – was raised by counsel for Amina Lawal on appeal, State Counsel argued that there was no defect – under Islamic law – which, he argued, should, in the Sharia Courts at least, prevail over any man-made law in case of conflict. The Sharia Court of Appeal held otherwise, saying that:

the law that established the courts and the judges was not complied with. It is not possible to apply one section of the law and reject other sections simply because their provisions do not conform with one's wishes.... The non-compliance with this law renders the judgment null and void.<sup>48</sup>

Two conflicts of laws, two rulings in opposite senses, one applying the uncodified Islamic rule instead of the enacted statute, the other applying the statute instead of the Islamic rule. Both rulings, it will be observed, went in favour of the accused. The rulings are from different cases, so defence counsel – in fact two different defence counsel – did not take inconsistent positions before the same court. In Safiyatu's case, the fact that the manner in which the case was commenced was in perfect compliance with Sokoto's Sharia Criminal Procedure Code was not really argued by State Counsel or considered by the Sharia Court of Appeal; State Counsel argued instead that the case was properly commenced under Islamic law, to which the Sharia Court of Appeal said no. How the

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<sup>47</sup> §4(1) of Katsina State's Sharia Courts Law 2000, see Katsina State of Nigeria Gazette No. 5, Vol. 11, 10<sup>th</sup> August 2000, A83-95. "Members", sometime called "muftis", are there to observe the proceedings and to advise the alkali, but rulings and judgment are for the alkali alone.

<sup>48</sup> Chapter 6, 103.

conflict of laws issue would have been resolved had it been squarely argued and considered is of course unknowable. But most likely the outcome, in most cases, will be that enacted statutes, and the Nigerian Constitution, will be made to prevail in the Sharia Courts over uncodified Islamic rules in cases of conflict, as happened in Amina's case. As the Katsina State Sharia Court of Appeal said, the Sharia Courts are creatures of the laws of Nigeria, to which they must conform – or face consequences imposed under the same laws that created them – consequences that might range from reversal of their rulings and judgments to outright abolishment of the Sharia Courts if they were causing too many problems. In common-law jurisdictions like Nigeria, the general rule is that statutes prevail over the unenacted common law, with which the uncodified Islamic rules will perhaps be grouped for this purpose. Specific rules, as found in the Sharia Criminal Procedure Codes and the Evidence Act, prevail over general admonitions like those found in the Sharia Courts laws to “apply Islamic law”.<sup>49</sup> Federal law prevails over State law. The governments of all the Sharia States from the outset declared their submission to the Constitution and laws of Nigeria, and the Federal Courts are there to enforce compliance if need be. As I have written before, “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.”<sup>50</sup>

b. Further comments on the Sharia Criminal Procedure Codes themselves.

i. Classes of Sharia Courts and their powers. Following the pattern of the CPC, the Sharia Criminal Procedure Codes define “classes of Sharia Criminal Courts” for their States and specify in detail (in conjunction with Appendices A to the Codes, lengthy tables) the different powers of the classes of Sharia Courts to try offences and to impose sentences of varying severity. The reader is referred to Chapters II and III of the HSCPC and the annotations thereto, *infra*, for details.

All the Sharia States except Bauchi confine the applicability of their new Sharia Criminal Procedure Codes to the Sharia Courts themselves; in the Magistrates' and High Courts, the old CPC applies.<sup>51</sup> Bauchi again provides an interesting variant. In §4 of its brief new Sharia Criminal Procedure Code it includes the State High Court among “the classes of the criminal courts in the State under this Code” (the Magistrates' Courts are not mentioned); and then it provides in §5(b) that the “High Court shall conduct the trial of the accused persons, being Muslims, in accordance with Islamic law” – i.e. apparently under the Sharia Criminal Procedure Code together with the “primary sources of Sharia” and the “Arabic texts of recognised Islamic jurists” which the Code incorporates by reference. The High Court is thus purportedly turned into a Sharia Court when it is Muslims who are on trial there. But it is only in the actual Sharia Courts, created under

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<sup>49</sup> How Bauchi State's explicit statutory provisions to the contrary, in the case of criminal procedure in the Sharia Courts, might affect the operation of these rules, is a fascinating question we cannot pursue further here.

<sup>50</sup> P. Ostien, “Ten Good Things about the Implementation of Shari'a in Some States of Northern Nigeria”, *Swedish Missiological Themes*, 90 (2002), 163-74 at 166-67, where the concession by the Sharia State governments of the supremacy of the Federal Constitution and laws is also documented.

<sup>51</sup> Kano's new CPC Chapter XXXIII of course applies only per its title: TRIALS BY SHARIA COURTS.

the Sharia Courts Law, that Bauchi's Sharia *Penal* Code is being applied – the Penal Code of 1960 being applied in the Magistrates' and High Courts; and in fact the judges of Bauchi State's High Court are not conducting trials of Muslims under the Sharia Criminal Procedure Code or "in accordance with Islamic law", but in accordance with the CPC and the Evidence Act which they have always been used to apply. In practice therefore these interesting variant provisions of Bauchi's Sharia Criminal Procedure Code so far remain a dead letter.<sup>52</sup>

ii. Witnesses: oaths. Consider first §202(1) of the Harmonised Sharia Criminal Procedure Code – the HSCPC – in Part IV below. This provides that:

An accused person shall not be a competent witness on his own behalf in any trial, whether he is accused solely or jointly with another person or persons, but he may be a competent witness in proceedings against any person or persons tried jointly with him.

All six of the large Sharia Criminal Procedure Codes enacted in Gombe, Jigawa, Kaduna, Kebbi, Sokoto and Zamfara States, and the one pending in Borno, are in accord. This reverses CPC §236 and restores the position under classical Maliki law. It appears to be in direct conflict with §160 of the Federal Evidence Act, by which the Sharia Courts are at a minimum to be "guided":<sup>53</sup>

Every person charged with an offence shall be a competent witness for the defence at every state of the proceedings, whether the person so charged is charged solely or jointly with any other person....

But the rule against an accused testifying in his own behalf is softened by other provisions of the Sharia Criminal Procedure Codes, which appear to give the accused, as his trial progresses, large scope to get his point of view and the evidence for it across. The following sections of the HSCPC outline the procedure:

§§152, 200 and 209: the accused is to be present during the whole of the trial; all evidence in the trial is to be taken in his presence; and he is to be taken on any view or visit during the trial to the place where the offence is alleged to have been committed or to any other place, where the court "may take any evidence or hear any statement or explanation by the accused on the spot."

§155: when the accused is first brought before the court "the particulars of the offence of which he is accused [note: the formal charge comes later] shall be stated

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<sup>52</sup> Based on interviews with several of the judges of the Bauchi State High Court.

<sup>53</sup> See Evidence Act §1: "... (2) This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria [with exceptions not relevant here]. (3) In judicial proceedings in any criminal cause or matter in or before an Area Court [which will likely be read to include the new Sharia Courts] the Court shall be guided by the provisions of this Act... (4) Notwithstanding anything in this section, an Area Court shall, in judicial proceedings in any criminal cause or matter, be bound by the provisions of sections 138 [burden or proof beyond reasonable doubt], 139 [burden of proof as to particular fact], 140 [burden of proving fact to be proved to make evidence admissible], 141 [burden of proof in criminal cases], 142 [proof of facts especially within knowledge] and 143 [exceptions need not be proved by prosecution] of this Act."

to him and he shall be asked if he has any cause to show why he should not be convicted.”

§157: if the accused says he intends to show cause why he should not be convicted, then the court proceeds to “hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution”. During this process the accused may cross-examine the witnesses for the prosecution. Under §166 he may also ask the court to put questions to witnesses on his behalf, which the court must do unless the questions bear only on immaterial facts.

§201: also in this initial stage of the proceedings, or at any other:

- (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the court may, if the accused so agrees...after explaining to the accused the effect of subsections (2) and (3), put such questions to him as the court considers necessary and in such case shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.
- (2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the court may draw such inference from such refusal or answers as it thinks just.
- (3) The answers given by the accused may be taken into consideration in the trial.
- (4) The sole purpose of such examination shall be to discover the line of defence and to make clear to the accused the particular points in the case for the prosecution which he has to meet in his defence and there shall be nothing in the nature of a general cross-examination for the purpose of establishing the guilt of the accused.
- (5) No oath shall be administered to the accused for the purposes of an examination under this section.<sup>54</sup>

Under §200(2) any such examination of the accused and his statements in response thereto are to be recorded in writing like the evidence of any other witness.

§206: this somewhat opaque provision appears to make any statement made by the accused during an examination under §201 “admissible for or against himself and any of the other accuseds” in cases where the accused is tried jointly with others.

§198: although no oath is to be administered to the accused for the purposes of an examination under §201, under this section the classical oaths may be administered to persons of the Islamic faith, apparently including, in appropriate circumstances, the oath of *tubuma*.<sup>55</sup>

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<sup>54</sup> Kebbi and Sokoto omit this section entirely.

<sup>55</sup> *Tubuma*: the “oath of innocence”, offered to an accused against whom the proof required under Islamic law is incomplete. If the accused takes the oath he is discharged.

§159: if after all this “the court is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such court is competent to try and [adequately punish], the court shall frame a charge declaring with what offence [under the Sharia Penal Code or other written law] the accused is charged and shall then proceed as hereinafter provided.”

§160: the formal charge is read and explained to the accused and he is once again asked whether he is guilty or has any defence to make.

§161: if the accused “pleads not guilty or makes no plea or refuses to plead” he is asked whether he wishes to impeach or cross-examine or further cross-examine any of the witnesses for the prosecution; if so they are recalled for this purpose; any further witnesses for the prosecution are called and subjected to the accused’s cross-examination and impeachment; and then the accused is called on “to enter upon his defence and produce his evidence.” “If the accused puts in any written statement, the court shall file it with the record.”

§162: the accused may call any witnesses for his defence, and the court must assist him with the issuance of process “for compelling the attendance of any witness...or the production of any document or other thing” unless the accused’s application therefor “is made for the purpose of vexation or delay or of defeating the ends of justice.” The prosecution has the right to cross-examine and impeach defence witnesses.

§167: the court must make its finding “upon the evidence which is before it and in making such finding nothing shall be taken into consideration which is not supported by the evidence.”

§§163, 168, 169: if the accused is found guilty the court then announces its finding, hears any evidence bearing on what the sentence should be, and pronounces sentence.

It seems doubtful that, if this procedure had been correctly followed in a given case, an appellate court would find that a failure of justice had been occasioned by any failure of the trial court to be guided or rightly guided by §160 of the Evidence Act, giving every accused person the right “to be a competent witness for the defence at every state of the proceedings.”

There is nothing in the HSCPC, or in the large Sharia Penal Codes it harmonises, about definite numbers of witnesses being required to prove particular offences. Kano however has included such a provision in its new CPC chapter on trials in its Sharia Courts, reprinted in full in Part V below. Section 396 provides that:

After taking at least 4 unimpeached witnesses in the case of offences under SS ... to ...<sup>[56]</sup> and at least 2 witnesses in other offences, if court is satisfied that a prima facie case has been established by the prosecution/complainant the court shall call upon the accused person to enter his defence.

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<sup>56</sup> Sic. The intended references are apparently to the sections of Kano’s Sharia Penal Code dealing with *ẓina* and perhaps related offences.

This again appears to be in direct conflict with §179 of the Evidence Act, which provides (for Sharia Court guidance) that “no particular number of witnesses shall in any case be required for the proof of any fact.” But the rule of at least two witnesses and of four in some cases runs in favour of the accused; it is difficult to see how a failure of justice, at least to the accused, can be occasioned thereby; and the rule can be circumvented by the prosecution by the completion of otherwise insufficient proof by the Islamic system of oath-taking by complainants or others. That these rules are being applied in the Sharia Courts even in States where the criminal procedure codes do not specifically incorporate them is demonstrated by the famous case of Sani Rodi, tried for murder in a Sharia Court in Katsina State in 2001. The evidence against Rodi was strong but circumstantial. The prosecution completed it with the *qasama* oaths (sworn 50 times by relatives of the victims) discussed in Part II below at pp. 205-207. Rodi was duly convicted and sentenced to *qisas* – that is, execution by stabbing to death with the same knife that he had used to kill his victims. In the end he was hanged, not stabbed to death; this procedural deviation is discussed further below.<sup>57</sup>

There is nothing in any of the Sharia Criminal Procedure Codes about discrimination among potential witnesses based on character, religion or sex. The extent to which these uncodified Islamic rules are being applied in the Sharia Courts today is not known. Their former applicability in the Muslim courts of the Northern Region was one of the factors that led the Minorities Commission to recommend, and the Northern Region briefly to adopt, the procedure discussed above allowing non-Muslims to “opt out” of trial in Muslim courts. Today the position of non-Muslims is different: the rule in all Sharia States is that they are not subject to trial in the Sharia Courts unless they expressly *opt in*.<sup>58</sup> Today it is Muslims, presumptively triable in the Sharia Courts, who seem to have the privilege, not infrequently exercised, of opting out. This interesting point is discussed further in the chapter of this work on “Court Reorganisation”, forthcoming.

iii. Guidance. All six of the large Sharia Criminal Procedure Codes enacted in Gombe, Jigawa, Kaduna, Kebbi, Sokoto and Zamfara States, the one pending in Borno, and the HSCPC, include the following provision:

In any matter of a criminal nature a Sharia Court shall be bound by the provisions of this Sharia Criminal Procedure Code.<sup>59</sup>

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<sup>57</sup> On Rodi’s trial and conviction see e.g. *The Guardian*, 15<sup>th</sup> November 2001. On his hanging see *BBC World News*, 4<sup>th</sup> January 2002, Internet edition, both cited in G. Weimann, “Judicial Practice in Islamic Criminal Law in Nigeria 2000 to 2004 – A Tentative Overview”, *Islamic Law & Society*, 14/2 (2007), 240-286 at 258.

<sup>58</sup> The rule of §3 of the enacting provisions of the Harmonised Sharia Penal Code Law, see Chapter 4, *supra*, is typical: “Every person who is a Muslim and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of the Sharia Courts established under the Sharia Courts Law shall be liable to punishment under this law for every act or omission contrary to the provisions thereof of which he shall be guilty within the State.” Similar provisions occur in the Sharia Courts laws themselves, some of which require that the consent of a non-Muslim to the jurisdiction of a Sharia Court be given in writing.

<sup>59</sup> This provision is contained in the enacting provisions of all the Sharia Criminal Procedure Code Laws, not in the Schedules which constitute the SCPCs themselves. See e.g. HSCPC, *infra*, §4(3) of the enacting provisions. Bauchi omits this subsection; and see Bauchi’s §42 = Kano §410 after 2001 amendments: “(1) In any matter of criminal nature the Sharia Court shall be guided in

This is a departure from the guidance principle of the CPC, and probably should be welcomed as a stiffening of the rules the Sharia Courts in these States are required to follow. What its practical effect will be, however, is open to question, as all of the same Sharia Criminal Procedure Codes at the same time continue the rules of the CPC, here quoted from the HSCPC, Part IV *infra*, that:

**255.** A court exercising appellate jurisdiction shall not...interfere with the finding or sentence or other order of the lower court on the ground only that evidence has been wrongly admitted or that there has been a technical irregularity in procedure, unless it is satisfied that a failure of justice has been occasioned by such admission or irregularity.<sup>60</sup>

and that:

**345.** [N]o finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons, warrant, charge, public summons, order, judgment or other proceedings before or during trial...unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity.

Whether the Sharia Courts are formally bound by the rules or only required to be guided by them may be a moot point, if the enforcing bodies – the appellate courts – ask the same question under either regime – whether “a failure of justice has in fact been occasioned” by any instance of non-compliance.

Kano and Bauchi States continue the old principle of guidance from the CPC, here quoted from §410 of Kano’s Criminal Procedure Code (Amendment) Law, Part V *infra*:

- (1) In any matter of criminal nature the Sharia Court shall be guided in regard to practice and procedure by the provisions of this Law.
- (2) The fact that a Sharia Court has not been guided by the provisions of the Criminal Procedure Code in any criminal trial shall not entitle any person to be acquitted or any order of the court to be set aside.

Kano adds, in a separate section omitted by Bauchi, that:

**411.** Notwithstanding the provision of subsection (1) of this section [sic: section 410, of which §411 was probably supposed to be subsection (3)], the Sharia Courts shall be bound by the provisions of Chapter XXXIII [sections] 385 to 413 of the CPC [i.e. all sections of Cap. XXXIII].

In Kano State therefore the Sharia Courts are formally bound by the whole of the new chapter on TRIALS BY SHARIA COURTS; in Bauchi State they are bound by none of it but only required to be guided. Again this may be a distinction without a difference, as

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regard to practice and procedure by the provisions of this law. (2) The fact that the Sharia Court has not been so guided by the provisions of this Sharia Criminal Procedure Code shall not entitle any person to be acquitted or any order of the court to be set aside.”

<sup>60</sup> All the actually-enacted SCPCs omit from this section the words “that evidence has been wrongly admitted or that”.

reviewing courts in both States still operate under the CPC rules quoted above: no interference with what a lower court of competent jurisdiction has done, based on its non-compliance with the rules of procedure and evidence, unless a failure of justice has been occasioned.

iv. Representation by counsel. The right of all accused persons to be represented by legal practitioners of their choice, enshrined in the Nigerian Constitution and now in all the new Sharia Criminal Procedure Codes, has already been noted. The problem is not with the right but with its realisation, particularly, in the Sharia States, in the Sharia Courts.<sup>61</sup> At no stage of the criminal justice process are the authorities – police, prosecutors, or courts – required to advise a questioned, arrested, or accused person of his right to be represented by counsel, despite the fact that many such persons, probably most, are quite unaware of this right. In any case, particularly outside the cities and large towns, lawyers are scarce on the ground, and even where they are available most people do not have the money to pay their fees. There is a Federal agency, the Legal Aid Council, with branches in all State capitals, whose purpose is to provide legal representation for indigent accuseds in serious cases.<sup>62</sup> But the Legal Aid Council lawyers are badly overworked and underfunded – finding it difficult, for example, for lack of funds, to move outside the cities where they are based – and it is only a small fraction of all eligible cases in which they ever become involved. In fact most persons tried in the Sharia Courts never have the benefit of representation by a legal practitioner, depending instead on the advice and assistance of family, friends, or the local Court Inspectors.<sup>63</sup>

The situation is better in the High Courts, where in serious cases the judges have the power to appoint private practitioners, at State expense, to represent indigent accuseds. Indeed, under the CPC, in capital cases coming before them the High Courts are required to do so:

**186.** Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence.

Since under the CPC the only courts with power to try capital cases and to impose sentences of death have for many years been the High Courts,<sup>64</sup> this provision has long operated to ensure representation by counsel at least for all persons on trial for capital offences.

But now the situation has changed in the Sharia States. The Sharia Penal Codes define a number of capital offences, including a number, like *zina* by a person who is or has formerly been married, not included in the Penal Code of 1960.<sup>65</sup> The Sharia Penal

<sup>61</sup> Precisely the same problem exists in all States, in the courts descended from the old Native and Customary Courts.

<sup>62</sup> The Legal Aid Council was first established by the Legal Aid Decree, No. 56 of 1976, which became the Legal Aid Act, Cap. 205 LFN 1990 and now Cap. L9 LFN 2004. The classes of cases in which Council lawyers may come in are defined in the Act.

<sup>63</sup> The Native/Area/Sharia Court Inspectorates are an institution dating from colonial days. They are discussed further in the chapter of this work on “Court Reorganisation”, forthcoming.

<sup>64</sup> For further details on this point see Chapter 6, 10.

<sup>65</sup> For several such offences in addition to *zina*, see the table on p. 15 of this volume.

Codes are enforced only in the Sharia Courts, the highest grades of which, under the Sharia Criminal Procedure Codes, have the power to impose any sentence including death.<sup>66</sup> But although the Sharia Criminal Procedure Codes are based substantially on the old CPC, one CPC section left out was §186. This was part of the CPC chapter on TRIALS BY THE HIGH COURT. With the elimination from the Sharia Criminal Procedure Codes of that chapter, and of §186 of that chapter in particular,<sup>67</sup> the requirement that counsel be appointed to defend, at least, persons accused of capital offences, has been left out of the rules applicable in the Sharia Courts.

All of this is clearly visible in the records of proceedings and judgments in the cases of Safiyatu Hussaini and Amina Lawal reproduced in Chapter 6, as supplemented by Aliyu Musa Yawuri's article, also in that chapter, "On Defending Safiyatu Hussaini and Amina Lawal". Both women were on trial for their lives in Sharia Courts in remote villages. Neither was represented at her trial by a legal practitioner or advised that she had the right to be represented. It was only after their sentences of *rajm* – stoning to death – were reported in the newspapers that others – principally two NGOs, the Women's Rights Advancement and Protection Alternative (WRAPA) and BAOBAB for Women's Human Rights – stepped in to help them by providing legal practitioners to prosecute their appeals and with other support. When the issue of right to counsel was raised in Safiyatu's appeal – her lawyer arguing that she should at least have been advised of this constitutional right by the trial court – the Sharia Court of Appeal said no:

It is not the responsibility of the court to inform the accused to engage the services of a lawyer on a matter before the court. Therefore, we will not say anything further about this ground of appeal.<sup>68</sup>

After this rebuff the issue was not even raised in Amina's appeal. One may think that this is a point on which the Sharia States need to reconsider their position and think of amending their Sharia Criminal Procedure Codes, to ensure the realisation of the right to counsel at least in the more serious criminal cases coming before the Sharia Courts.

v. The imposition and mode of execution of certain types of sentences. A great many sentences of "caning" are being imposed by the Sharia Courts; it is worthwhile therefore to call the reader's attention to the detailed provisions for the mode of execution of such sentences contained in all the large new Sharia Criminal Procedure Codes, quoted here from HSCPC §273(2):

- (2) Whenever a sentence of caning is to be executed the court shall ensure that the caning be carried out in the following manner:
  - (a) the whip to be used shall be a light, supple leather whip which is one-tailed;
  - (b) the convict shall be made to sit up;
  - (c) the male convict shall be bared except for his underpants;

<sup>66</sup> Cf. HSCPC §14: "An Upper Sharia Court alkali may pass any sentence authorised by law."

<sup>67</sup> Two sections of the CPC chapter on TRIALS BY THE HIGH COURT have in fact been included in the large new Sharia Criminal Procedure Codes, see Part VIII infra. Why §186 was left out is not known.

<sup>68</sup> Judgment of the Sokoto State Sharia Court of Appeal in Safiyatu's case, Chapter 6, 42.

- (d) the female convict shall be relieved only of heavy outer garments that in the opinion of the court may negate the effect of lashes;
- (e) the convict shall not be bound unless it becomes clear that the punishment cannot otherwise be carried out;
- (f) the executioner shall be of moderate physique;
- (g) the lashes shall be of moderate force so as not to cause lacerations to the skin of the convict;
- (h) the executioner shall hold the whip with the last three fingers; the first finger and the thumb are to be held loosely and the whip emerges between the middle finger and the first finger;
- (i) the executioner shall strike only the back and the shoulders of the convict and where the convict is a female recourse shall be made to strict modesty and decency.

These rules suggest the quasi-symbolic nature of this punishment under Maliki law. Similar rules were issued in 1960 to govern *haddi* lashing under §307 of the CPC – but not “caning” under §308.<sup>69</sup> Whether, in the six Sharia States where the larger Sharia Criminal Procedure Codes have not (yet) been enacted – those old rules are still being applied today in cases of *haddi* lashing proper, or in all cases in which sentences of “caning” or “lashes” are imposed – is not known.

The imposition and execution of sentences of *qisas* is dealt with in several sections of the large new codes. First, as to the wishes of the victim of the crime or, in cases of homicide, his relatives (quoted here from HSCPC):

**170.** A Sharia Court having jurisdiction over *qisas* offences shall, before passing a sentence, 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 *dijah* should be paid or the accused should be forgiven and the court shall record such wishes in the record of proceedings.

The effect of the wishes of the victim or his relatives is different in different States. In Kano and Bauchi, “the court shall be bound by the wishes so expressed”.<sup>70</sup> But under all the large Sharia Criminal Procedure Codes the case comes under the section on the compounding of offences (quoted here from HSCPC):

**303.** Subject to the provisions of the Sharia Penal Code, other provisions of this Sharia Criminal Procedure Code, or any other written law, the offences punishable by *qisas* or *ta’azir* under the Sharia Penal Code may be compounded by the blood relations of the deceased victim or in any case by the person affected by the offence *provided that* the compounding must be before the court trying the offence, and upon the application of the person affected if the court

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<sup>69</sup> See Jones, *Criminal Procedure in the Northern States of Nigeria*, 202, note to CPC §307(1): “Haddi lashing is a symbolic punishment intended to inflict disgrace rather than pain. It must be administered in accordance with the Criminal Procedure (Haddi Lashing) Order in Council 1960, NRLN 85 1960” – which is then quoted in full; the provisions are quite similar to HSCPC §273(2), quoted above.

<sup>70</sup> Kano Cap. XXXIII §405, Bauchi SCPC §38.

sees reason to allow the offence to be compounded and thereafter discharge the accused person.

The “provisions of the Sharia Penal Code” referred to are, for example, that in cases of intentional homicide, where the relatives of the victim remit both *qisas* and *diyah*, the offender shall nevertheless be punished with caning of one hundred lashes and with imprisonment for one year.<sup>71</sup> Where the victim or his relatives refuse to remit *qisas*, then other provisions come into play. As to injuries short of death:

**242.** 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.

In homicide cases:

**241.** When a person is sentenced to death the sentence shall direct that:

\* \* \*

(b) in case of *qisas*, he be caused to die in the like manner he caused the death of his victim except such manner that is contrary to Sharia.<sup>72</sup>

It was under this rule, although still uncodified in Katsina State, that Sani Rodi was sentenced to be stabbed to death with the same knife he had used to kill his victims. As has been indicated, however, Rodi was not stabbed to death in Katsina State where he had committed his crime, but was taken to Kaduna and hanged (the sole method of execution of death sentences specified by §273 of the CPC): it was reported at the time that this was done for fear that execution of the sentence of *qisas* might have sparked off rioting.<sup>73</sup> Several other sentences of *qisas* have been reported. In Katsina State in May 2001, a complainant

asked for the removal of Ahmed Tijjani's right eye in retaliation for the loss of his own eye in a fight with the defendant. The judge ruled that Tijjani should have either one of his eyes removed or pay a compensation of 50 camels. The plaintiff insisted on retaliation. The execution of the sentence was not reported.<sup>74</sup>

Then from Bauchi State:

Two cases of grievous bodily harm were reported: in March 2004, a gang member named Sabo Sarki was arrested and tried. He was accused of having forcefully removed the eyes of a teenage boy to sell them to another man who intended to use them in a ritual. Sarki was sentenced to pay compensation of 5.5 million naira (ca. 27,500 US\$). However, the victim rejected the compensation and insisted on retaliation. The second case of grievous bodily harm involved a

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<sup>71</sup> See Harmonised Sharia Penal Code, Chapter 4, §199.

<sup>72</sup> Kaduna has an illustration to this subsection: “Illustration. A kills B by way of juju or sodomy: A will not be executed in the like manner he caused the death of B because to do so is contrary to Sharia.”

<sup>73</sup> BBC World News, 4<sup>th</sup> January 2002, Internet Edition, cited in Weimann, “Judicial Practice in Islamic Criminal Law in Nigeria”, 258.

<sup>74</sup> Weimann, “Judicial Practice in Islamic Criminal Law in Nigeria, 259 (footnotes omitted).

jealous husband who cut off his wife's right leg with a machete. The wife demanded *qisas*. In January 2003, after a trial that lasted several months, Adamu Hussaini Maidoya was sentenced to have his right leg amputated under the knee without anaesthesia. The judge pointed out that Maidoya had to experience the same pain that he had inflicted on his wife. In August 2006, three and a half years after the verdict of first instance, the Bauchi State Sharia Court of Appeal rejected Maidoya's appeal. The three khadis unanimously [ruled] that the verdict of the Upper Sharia Court was correct since Maidoya had confessed to committing the crime.<sup>75</sup>

It does not appear that any of these sentences has actually been executed. The reasons for this are discussed in the next (and final) subsection of this introduction.

The sentence of amputation of Adamu Hussaini Maidoya's leg just discussed was a matter of *qisas*. Many other sentences of amputation, of the hand for theft (probably 100-200 of these) and at least one of a hand and a foot for *hirabah*, have also been imposed, as a matter of *badd*. It appears that only three amputations, of the hand, have actually been executed.<sup>76</sup> There is nothing in the Sharia Criminal Procedure Codes about how such sentences are to be executed if and when the time comes. It appears that the amputations of hands that have been carried out were done by surgeons.

Finally for this subsection, we merely record the other provisions of HSCPC §241 on the mode of execution of sentences of death:

**241.** When a person is sentenced to death the sentence shall direct that:

(a) in case of *zina*, he be stoned to death; and

\* \* \*

(c) in case of *hirabah*, he be caused to die by crucifixion.

Again, although several sentences of stoning to death have been imposed, none has been executed.<sup>77</sup>

vi. The requirement of the Governor's consent to the execution of certain sentences. We have noted that under the CPC the power to try capital cases and to impose sentences of death has long been limited to the High Courts. Under the CPC no sentence of death can then be executed, until the High Court has made a full report on the case to the State Governor, and the Governor has decided whether or not to exercise any power conferred on him by the provisions of the Nigerian Constitution on the prerogative of mercy.<sup>78</sup> The Constitution permits a Governor to grant a pardon to "any person concerned with or convicted of any offence created by any Law of a State", to grant a period of respite from the execution of any punishment imposed on such person, to substitute a less severe form of punishment for any punishment imposed, or to remit

<sup>75</sup> Ibid., 277 (footnotes omitted).

<sup>76</sup> Ibid., passim. Weimann's article comprehensively surveys what is publicly known about the imposition and execution of such sentences in the years 2000 to 2004.

<sup>77</sup> See *ibid.*

<sup>78</sup> For this procedure see CPC §§294-299, as amended after the coming into force of the 1979 Constitution, in which the mode of exercising the prerogative mercy was somewhat altered; further details are off our point here.



