

CHAPTER 4

THE SHARIA PENAL CODES

I.

Introduction to Chapter 4

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1. Brief history of the penal law of the Northern States of Nigeria.

a. The colonial period. Until 1960, Islamic criminal law and procedure were widely applied in the Native Courts of Northern Nigeria.

[T]he case of Northern Nigeria was, indeed, almost unique, for up till [1960] this was the only place outside the Arabian peninsula in which the Islamic law, both substantive and procedural, was applied in criminal litigation – sometimes even in regard to capital offences.... [T]here was also a Nigerian Criminal Code – corresponding, in general terms, to English criminal law – which was administered in the Magistrates’ Courts and in the High Court, although in point of fact more than ninety per cent of all criminal cases were tried in the indigenous or ‘native’ courts.¹

Indeed, the situation was more complicated than this, for besides Islamic criminal law and the Nigerian (i.e. English) Criminal Code, in the parts of the North not dominated by Muslims all of the vague bodies of “native [criminal] law and custom” of the many local ethnic groups were also applied in the Native Courts serving their territories; and in ethnically and religiously mixed places heterogeneous amalgams of Islamic and native law and custom were applied. None of this – except of course the Nigerian Criminal Code administered in the Magistrates’ and High Courts – was codified. In Muslim areas the *alkalis*, without any body of judicial precedent to work with, were finding Islamic criminal law afresh from the basic sources (the Qur’an, the Hadith, the books of *fiqh*) on each occasion of judgment.² Where Islamic law was not determinative, the judges of the

¹ J.N.D. Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976), 27-28. The Criminal Code became Cap. 42 of both the 1948 and 1958 Laws of Nigeria. It continues in force today, as amended, as Federal law and as the law of the States carved out of the former Eastern and Western Regions, see Cap. 77 LFN 1990 and Cap. C38 LFN 2004. On the Criminal Code see C.O. Okonkwo and M.E. Naish, *Criminal Law in Nigeria, excluding the North* (London: Street & Maxwell; Lagos: Nigerian Universities Press, 1964).

² Unlike English common law, but like Roman law, Islamic law, in its form as *fiqh*, was worked out by jurists – the *fukaha* – not by judges – the *qadis*. In Islamic lands in former times there was no hierarchy of courts, and no doctrine of judicial precedent or of *stare decisis* developed. Each *qadi* was expected to find the law from its basic sources afresh in every case. The basic sources, to begin with the Qur’an and the Hadith, grew, via the doctrine of *ijma* or consensus, to include the elaborate scholarly works – the *fiqh* – of the real specialists in the Islamic Sharia, the *fukaha*. The *qadis* were expected to follow the *fiqh*, and had little influence on its development, except as they may have contributed to it as *fukaha* themselves.

non-Muslim and “mixed” courts were taking the advice of tribal elders as to what the law or custom applicable in a given case might be. There were some limitations on the application of Islamic law and of native law and custom, particularly on forms of punishment:

[F]rom the very beginning of British rule it was made clear to the local rulers that their customary penal structures would be brought under the close scrutiny of the administration. Some customary penalties were therefore specifically abolished by statute. Prohibitions on mutilation and torture appeared at once... The remaining penalties were made subject to the requirement that they should not be repugnant to “natural justice and humanity”... Death sentences passed by native courts had to be carried out in a humane way... The humanity of the various forms of corporal punishment was apparently not questioned until 1933, but restrictions introduced in that year limited the weapons to rattan canes and single-tailed whips of prescribed dimensions.³

Other limitations could also result from application of the repugnancy doctrine. For example, in 1959 it was held that a rule of Islamic criminal procedure barring a person accused of highway robbery from putting up any defence during his trial, was “repugnant to natural justice, equity, and good conscience.”⁴ Except for these few restrictions, however, the English Criminal Code, Islamic criminal law, the native criminal laws and customs of many different ethnic groups, and amalgams of all of the above, were all being applied in the many various courts all over the North right up to Independence Day (1 October 1960). Which law was applied to the facts of a particular case depended on which court – in which province, city or town, or even on which side of the street in the same town – the accused was tried in, and further, sometimes, on the wide discretion of the judge sitting in that court on that particular day.

In the early days of colonial rule, before much ethnic mixing had occurred, and under the controlling hand of the British, this extreme form of legal pluralism worked without too much difficulty. But by the 1940s and 50s, when people of all ethnic and religious groups had dispersed to all parts of the country, the resulting unpredictability and inequalities in the administration of the criminal laws in the Northern Region were reaching levels that were felt by many, Muslims and non-Muslims alike, for various reasons, to be intolerable. Among other pressures for change was the onrush, at least as viewed from the North, of Nigerian independence, as a self-governing federation of its three regions. The controlling hand of the British would soon be removed. In part to replace it, the Eastern and Western Regions, supported by the British, were demanding inclusion in the Federation’s new Independence Constitution of an enforceable chapter on fundamental human rights, which would, among other things, require that all criminal law be enacted as written law in which all criminal offences were defined and the penalties therefor prescribed (in short, all criminal law to be codified); that no person be

³ A. Milner, “Sentencing Patterns in Nigeria”, in Milner, A., ed., *African Penal Systems* (London: Routledge and Kegan Paul, 1969), 263-64 (footnotes omitted).

⁴ *Guri v Hadejia N.A.* (1959) N.N.L.R. 98. For further discussion of the repugnancy doctrine and its impact on Islamic law, see M. Tabi’u, “The Impact of the Repugnancy Test on the Application of Islamic Law in Nigeria”, *Journal of Islamic and Comparative Law*, 18 (1991), 53. Criminal procedure is discussed further in Chapter 5.

discriminated against by any agency of government solely on the basis of his or her religion or ethnic affiliation among others; and that no person be subjected to torture or to inhuman or degrading punishment or other treatment.⁵ The North's largely-Muslim ruling class concluded that the North should keep up with the pace set by the East and the West in the race for independence, although it was less "ready" than they, and that Northern independence, when it came, should be in federation with the Eastern and Western Regions. To achieve these goals, the Government of the Northern Region agreed to reform the legal and judicial systems of the Region, including, most notably, to abrogate all the then-prevailing systems of criminal law, including Islamic criminal law, in favour of a single new Penal Code applicable in all courts of the Region to all persons without regard to religious or ethnic affiliation. This was the Penal Code of 1960. Along with the Penal Code a new Criminal Procedure Code, discussed further in Chapter 5, was also introduced. The process by which all of this was accomplished was much influenced by the Panel of Jurists brought in by the Government of the Northern Region in 1958 and again in 1962 to study the legal and judicial systems of the Region and to recommend changes. Readers interested in pursuing this history further are referred to Chapter 1 of this work, where the two reports of the Panel of Jurists and many of the documents they considered on their second visit are published for the first time.⁶

b. The Penal Code of 1960. The new Penal Code that was introduced⁷ derived from the Sudan Penal Code (1899), itself derivative of the Indian Penal Code (1834), both of which had been enacted by the British for populations similar to Northern Nigeria's in their proportions and mixtures of Muslims and non-Muslims and had found acceptance there among all groups.⁸ The contents of the Penal Code were negotiated at length with Northern politicians and legal scholars of various schools, particularly the North's leading *ulama*. Basically English in derivation, the resulting Code also incorporated various principles of Islamic law. For instance, seduction and enticement – mere torts in England – were made crimes under the Penal Code (§389),⁹ as was "insulting the modesty of any woman" (§400). Adultery and fornication were

⁵ The chapter on fundamental rights ultimately included in Nigeria's Independence Constitution was derived primarily from the European Convention on Human Rights of 1950. For further discussion see T.O. Elias, "The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms", *Journal I.C.J.*, II (1959-60), 30-46, and S.A. de Smith, "Fundamental Rights in the New Commonwealth", *International and Comparative Law Quarterly*, 10 (1961), 83-102 and 215-237.

⁶ For contemporaneous views of these developments, in addition to the documents published and the authorities cited in Chapter 1, see J.N.D. Anderson, "Conflict of Laws in Northern Nigeria", *Journal of African Law*, 1 (1957), 87-98; P.C. Hubbard, "Conflict of Laws in Northern Nigeria", 3 *Journal of African Law*, 3 (1959), 85-88, with a response by J.N.D. Anderson 88-89; "Legal and judicial reform in Northern Nigeria", *West Africa*, September 24, 1960.

⁷ N.R. No. 18 of 1959, which became Cap. 89 of the *Laws of Northern Nigeria* 1963.

⁸ J.N.D. Anderson, "A Major Advance", *Modern Law Review* 24 (1961) 616-25 at 618. See also S.S. Richardson, *Notes on the Penal Code Law* (Kaduna: Government Printer, 1960) and A. Gledhill, *The Penal Codes of Northern Nigeria and the Sudan* (London: Street & Maxwell; Lagos: African University Press, 1963).

⁹ Interestingly, §389 has been removed from all the new Sharia Penal Codes, see ¶4d of this essay, below.

criminalised for persons (like Muslims) “subject to any native law or custom in which extra-marital sexual intercourse is recognised as a criminal offence” (§§387-388). Whereas drunkenness was criminalised generally (§§401-402), *any* consumption of alcohol was criminalised specifically for Muslims (§403). Muslim offenders, in addition to the punishments otherwise specified, were also made “liable to the punishment of Haddi lashing as prescribed by Muslim law” for adultery and fornication, alcohol-related offences, and defamation and injurious falsehood (§68(2)). The residual religion-based discrimination inherent in these provisions was protected from the constitutional ban on such practices by a proviso;¹⁰ *haddi* lashing was similarly protected from the ban on cruel, inhuman and degrading punishment and treatment.¹¹ Along with the Penal Code an elaborate new Criminal Procedure Code was also made applicable in all cases.¹² These two codes – the Penal Code and the Criminal Procedure Code both of 1960 – were inherited by and are still in effect in all of the States into which the Northern Region has subsequently been divided, including the Sharia States.

c. The new Sharia Penal Codes. Alongside the old Penal Codes we now have, also, in all the Sharia States except for Niger, new Sharia Penal Codes running in parallel. The Sharia Penal Codes bring Islamic criminal law back into more or less full force within the Sharia States as to persons tried for crimes in the new Sharia Courts. They do so in the form of lengthy codes, in compliance with the constitutional requirement that all criminal law be enacted as written law in which all criminal offences are defined and the penalties therefor prescribed. At the same time all the old Penal Codes, clones of the Penal Code of 1960, remain on the books – to be applied to persons tried in the Magistrate or High Courts. In short, as in colonial days, which penal law is applied to a person depends on which court he or she is tried in. The choice of court seems to a large extent to be the accused’s. There is a presumption that non-Muslims will be charged and tried in the Magistrate and High Courts (and therefore be subject to the old Penal Codes); but they may *opt into* the Sharia courts (and therefore be subject to the Sharia Penal Codes) if they give their consent in writing. Equally, Muslims, by one means or

¹⁰ Section 27(1) of the 1960 Constitution prohibited discrimination based among other things on ethnicity and religion. §27(2): “Nothing in this section shall invalidate any law by reason only that the law: * * * (d) imposes any disability or restriction or accords any privilege or advantage that, having regard to its nature and to special circumstances pertaining to the persons to whom it applies, is reasonably justifiable in a democratic society.” The same proviso appeared in the 1963 Constitution, but it was taken out of the 1979 Constitution; probably, therefore, from 1979 the provisions of the Penal Code providing different punishments for different people based solely on their religion have been unconstitutional. This point appears never to have been ruled on by a court of record however, probably because since 1979 the discriminatory provisions have not been applied – so it seems – so the point has been moot.

¹¹ Section 18(1) of the 1960 Constitution prohibited the subjection of any person to torture or to inhuman or degrading treatment.” §18(2): “Nothing in this section shall invalidate any law by reason only that it authorises the infliction in any part of Nigeria of any punishment that was lawful and customary in that part on the 1st day of November, 1959”, which *haddi* lashing was. The same proviso appeared in the 1963 Constitution, but was taken out of the 1979 Constitution; from 1979, therefore, it has been an open question whether *haddi* lashing would be in violation of the ban.

¹² Cap. 30 of the *Laws of Northern Nigeria* 1963. The Criminal Procedure Code of 1960 and the new Sharia Criminal Procedure Codes deriving from it are the subject of Chapter 5, below.

another, seem always able to *opt out* of the Sharia courts, if they prefer to go under the old Penal Codes in the Magistrate or High Courts. Thus are large degrees of uncertainty and inequality, including discrimination based solely on religion, reintroduced into the criminal justice systems of the Sharia States.

Niger State adopted a different drafting strategy to approximately the same effect. Instead of adopting a whole new Sharia Penal Code, it amended its existing Penal Code, by adding a new section 68A, which lays down that certain other sections of the code, when applied to Muslims, will carry different burdens of proof and different punishments than when applied to non-Muslims. In Niger, since the same Penal Code, as amended, still applies in all courts of the State, it appears that even when Muslims are charged in the Magistrate and High Courts they should have the new Sharia-inspired provisions of §68A applied to them. If so, then the only way a Muslim charged in the courts of Niger State could opt out of §68A would be to deny his or her faith. But it appears not to be so: §68A, though part of the Niger Penal Code, is nevertheless not being applied in the Magistrate and High Courts, even when the accuseds are Muslims. All these interesting jurisdictional and choice-of-law points will be discussed in greater detail in a forthcoming chapter of this work on “Court Reorganisation”.

Some states initially adopted yet a third legislative strategy for bringing Islamic criminal law back into force. Without taking the time or trouble to draft lengthy Sharia Penal Codes, they enacted that in criminal matters their Sharia Courts should simply apply Islamic criminal law as found in the basic and classical sources: the Qur’an, the Hadith, and the *fiqh*. This would really have brought the position back to what it was before 1960, and even more so, before 1900. An example of this sort of legislation – Katsina State’s Islamic Penal System (Adoption) Law 2000 – is given in Part V of this chapter. Possible motivations for the use of this strategy are discussed in Ibrahim Na’iya Sada’s essay in Part II of this chapter. But the consensus among the lawyers was that it was clearly unconstitutional to try to bring Islamic criminal law into force in this way, and all states, except Niger as noted, have now adopted comprehensive Sharia Penal Codes.

2. What this chapter comprises.

The purpose of this chapter is to document the eleven Sharia Penal Codes themselves, as well as Niger State’s “Sharia amendment” to its existing Penal Code. This is done in several ways.

a. The Harmonised Sharia Penal Code Annotated. The Sharia Penal Codes are voluminous – with upwards of 400 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 all the ones not published. The code we have elected to annotate and publish, in Part III of this chapter, is in fact not one of those actually enacted by the States, but a “harmonised” version prepared by the Centre for Islamic Legal Studies (CILS) of Ahmadu Bello University, Zaria. The CILS Harmonised Sharia Penal Code is in effect a model law, recommended by CILS for adoption by the States in place of the various codes they adopted in the early days of Sharia implementation; in fact Zamfara State has already replaced its first Sharia Penal Code with the CILS Harmonised Sharia Penal Code. We decided to use the CILS code here for two main 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 to CILS for its permission to use the Harmonised Sharia Penal Code in this way.

b. The Niger State Penal Code Amendment Law 2000. Since Niger State did not enact a whole new Sharia Penal Code, but only a relatively brief amendment to its existing Penal Code, and since the drafting strategy is interestingly different, we have reproduced the Niger State Penal Code Amendment Law in full in Part IV.

c. The Katsina State Islamic Penal System (Adoption) Law 2000. This one-page document, since superseded, illustrates one possible strategy for bringing Islamic criminal law back into force; it is reproduced in Part V.

d. Relations to the Penal Code of 1960. The main source for all the Sharia Penal Codes was the Penal Code of 1960. This is documented here in three ways:

- i. The annotations to the CILS Harmonised Sharia Penal Code, Part III, note variations between it and the Penal Code of 1960, as well as between it and the Sharia Penal Codes of the States.
- ii. Two conversion tables are provided, one from the Penal Code of 1960 to the CILS code, Part VI, the other from the CILS code to the Penal Code of 1960, 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 Penal Code included in the CILS Harmonised Sharia Penal Code (90%) and percentages of sections of CILS included in the Penal Code (89%).

Much of the following discussion is derived from these five documents.

e. Sada's essay on the making of the Zamfara and Kano State Sharia Penal Codes (Part II). Dr. Sada served as the Director of the Centre for Islamic Legal Studies from 2002 to 2006, and was closely involved in the making of the Harmonised Sharia Penal and Criminal Procedure Codes reproduced in this work. His essay in this chapter provides a behind-the-scenes look at the making of two of the Sharia Penal Codes.

f. This introduction. Finally, the remainder of this introduction attempts to bring out some of the interesting points that came up in the process of putting the rest of the materials of this chapter together.

3. Tracing the origins of the codes back further.

A work that needs to be done is to unearth and study any remaining evidence relating to the discussions and negotiations between the Northern Region's *ulama* and the British over the precise wording of the various sections of the new Penal Code, as the sections

were studied and agreed to one by one in late 1958 and early 1959.¹³ A good place to start is the work just cited – the memorandum drafted in April 1962 by the still-British Attorney-General of the Northern Region, Hedley Marshall, to brief the Panel of Jurists, who were returning for a second visit, on how far the Panel’s 1958 recommendations had been implemented and how things were going along. The Attorney-General’s memorandum contains a detailed outline of the process by which the various aspects of the Penal Code were agreed to between the British and the North’s Muslim leaders; the leads it gives should be followed up.

As has been indicated, the Penal Code of 1960 derived in the first instance from the Sudan Penal Code of 1899. For those wishing to study this relationship further, a place to start is S.S. Richardson’s *Notes on the Penal Code Law*, cited above, which among other valuable features correlates the sections of the Penal Code of 1960 with the corresponding sections of the Sudan Penal Code. Richardson’s book, also published in Hausa, is still a staple in Nigeria’s various institutions of legal learning, including the schools and colleges of Islamic legal studies where many of the al-kalims of the new Sharia Courts have received their training.¹⁴

4. Differences between the Penal Code of 1960 and the Sharia Penal Codes.

a. Reorganisation of sections. The numbers of sections in the various codes are not much different: 412 in the Penal Code (including three sections added in 1962), 414 in the CILS Harmonised Sharia Penal Code, which for present purposes may represent all the Sharia Penal Codes. But the numbers of chapters are very different: 25 in the Penal Code, only 10 in CILS.

The first seven chapters in both codes cover the same ground (although with somewhat different content):

CILS Harmonised Sharia Penal Code	Penal Code of 1960
Cap. I: GENERAL EXPLANATIONS AND DEFINITIONS	Cap. I: GENERAL EXPLANATIONS AND DEFINITIONS
Cap. II: CRIMINAL RESPONSIBILITY	Cap. II: CRIMINAL RESPONSIBILITY
Cap. III: PUNISHMENTS AND COMPENSATION	Cap. III: PUNISHMENTS AND COMPENSATION
Cap. IV: JOINT ACTS	Cap. IV: JOINT ACTS
Cap. V: ABETMENT	Cap. V: ABETMENT
Cap. VI: ATTEMPTS TO COMMIT OFFENCES	Cap. VI: ATTEMPTS TO COMMIT OFFENCES
Cap. VII: CRIMINAL CONSPIRACY	Cap. VII: CRIMINAL CONSPIRACY

It is the subsequent 18 chapters of the Penal Code that the Harmonised Sharia Penal Code (following the Sharia Penal Codes enacted by the States) reorganises into just three, as follows:

¹³ For a detailed account of the drafting process, see ¶¶4-7 of the “Memorandum by the Attorney-General to the Panel of Jurists as to the Implementation of the Policy of the Northern Region Government on the Reorganisation of the Legal and Judicial Systems of the Region based on the Recommendations of the Panel of Jurists dated 10th September, 1958”, reproduced in Chapter 1 of this work (in Vol. I).

¹⁴ See e.g. Chapter 2 of this work (in Vol. II), 28, where Richardson’s book is included among those recommended for students of the A.D. Rufa’i College for Legal & Islamic Studies, Misau, Bauchi State.

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Chapter VIII on HUDUD AND HUDUD-RELATED OFFENCES, includes or covers the same ground as the indicated parts of the following chapters of the Penal Code:

- Cap. XVIII, OFFENCES AFFECTING THE HUMAN BODY (parts, covering rape, “unnatural offences”, and gross indecency)
- Cap. XIX, OFFENCES AGAINST PROPERTY (parts, covering theft, armed robbery, extortion, criminal misappropriation, criminal breach of trust, receiving stolen property, cheating, and criminal trespass)
- Cap. XXII, OFFENCES RELATING TO MARRIAGE AND INCEST (parts, covering adultery and incest)
- Cap. XXIII, DEFAMATION (parts, put immediately after SPC sections on false accusation of *zina (qadhf)*)
- Cap. XXIV, CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE AND DRUNKENNESS (sections on use of alcoholic drinks only)

Chapter IX on QISAS AND QISAS-RELATED OFFENCES, includes or covers the same ground as the indicated parts of the following chapter of the Penal Code:

- Cap. XVIII, OFFENCES AFFECTING THE HUMAN BODY (parts, covering offences affecting life, causing miscarriage etc., hurt, criminal force and assault, and kidnapping, abduction, and forced labour)

Chapter X on TA’AZIR OFFENCES, includes most sections of the following chapters or indicated parts of chapters of the Penal Code:

- Cap. VIII, BREACH OF OFFICIAL TRUST
- Cap. IX, OFFENCES AGAINST THE PUBLIC PEACE
- Cap. X, OFFENCES BY OR RELATING TO PUBLIC SERVANTS
- Cap. XI, CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS
- Cap. XII, FALSE EVIDENCE AND OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE, including all five subdivisions of this chapter
- Cap. XIII, PUBLIC NUISANCE
- Cap. XIV, LOTTERIES AND GAMING HOUSES
- Cap. XV, CRUELTY TO ANIMALS
- Cap. XVI, OFFENCES RELATED TO RELIGION
- Cap. XVII, OFFENCES RELATED TO ORDEAL, WITCHCRAFT AND JUJU
- Cap. XVIII, OFFENCES AFFECTING THE HUMAN BODY (sections on wrongful restraint and wrongful confinement)
- Cap. XIX, OFFENCES AGAINST PROPERTY (sections on mischief)
- Cap. XX, FORGERY, including the subdivision on *Property and Other Marks*
- Cap. XXI, CRIMINAL BREACH OF CONTRACTS OF SERVICE
- Cap. XXIV, CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE AND DRUNKENNESS (sections on criminal intimidation, insult and annoyance)
- Cap. XXV, VAGABONDS

The reorganisation thus effected is quite tidy: only three chapters of the Penal Code are sorted into more than one chapter of the Harmonised Sharia Penal Code. Chapter

XVIII, on OFFENCES AFFECTING THE HUMAN BODY, goes partly into the CILS chapter on HUDUD, partly into QISAS, and partly into TA'AZIR. Chapter XIX, on OFFENCES AGAINST PROPERTY, goes partly into HUDUD and partly into TA'AZIR. Chapter XXIV, on CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE AND DRUNKENNESS, also goes partly into HUDUD and partly into TA'AZIR. Within their new settings the order in which types of offences are dealt with has also sometimes been changed.

Note also the expansion in the Sharia Penal Codes of the concepts of *hudud* and *qisas* to “*hudud*-related” and “*qisas*-related” offences. The *hudud*-related offences include, for example, receiving stolen property, for which no penalty is fixed in the Qur’an or Hadith and which is punished under the Sharia Penal Codes with imprisonment and lashing.¹⁵ The *qisas*-related offences include forced labour, which the Sharia Penal Codes do not punish with retaliation in kind but with imprisonment or fine or both.¹⁶ Kidnapping is included in the chapter on QISAS AND QISAS-RELATED OFFENCES, but is punished in some of the codes under the section on theft punishable with *hadd*.¹⁷ Whether there is precedent in Islamic jurisprudence for these extensions, others will have to say.

b. Substantial changes in the sections on *hudud* and *qisas* offences. The most substantial redrafting, not only as to punishments but as to definitions of the offences themselves, went into the Sharia Penal Code sections covering the *hudud* and *qisas* offences proper. The punishments laid down in the Sharia Penal Codes of course include, most controversially, stoning to death for *zina* and related sexual offences by persons who are or have been married,¹⁸ amputation of the hand for certain cases of theft (*sariqah*),¹⁹ multiple amputations or even crucifixion for armed robbery (*hirabah*),²⁰ and retaliation in kind (*qisas*) for homicide and causing hurt – a life for a life, an eye for an eye and a tooth for a tooth.²¹ The sections of the different codes dealing with the *hudud* and *qisas* offences invite detailed comparison and analysis which we do not undertake here, except to make three points about the re-definitions of the crimes and punishments falling under the heading of *qisas*, with particular reference to homicide.

i. Elimination of the defence of provocation. Under the Penal Code, a defendant can plead “provocation” in defence or in mitigation of certain offences punishable with *qisas* in Islamic law, for instance homicide.²² However, consistently with Maliki law,

¹⁵ See CILS Harmonised Sharia Penal Code §§168-171 and notes thereto.

¹⁶ Ibid. §238 and notes.

¹⁷ Ibid. §231 and notes.

¹⁸ Ibid. §§126 (*zina*), 128 (rape), 130 (sodomy, *limat*), 132 (incest), and notes. Kano and Katsina also punish lesbianism (*sibah*) with stoning to death, see note to CILS §134.

¹⁹ Ibid. §144.

²⁰ Ibid. §152.

²¹ For this one must consult the Sharia Criminal Procedure Codes as well as the Sharia Penal Codes. See CILS Harmonised Sharia Criminal Procedure Code (Chapter 5 below), §§241 and 242. “241. When a person is sentence 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 ...” “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.” This is discussed further in the Introduction to Chapter 5.

²² What counts as provocation is discussed in Cap. I of the Penal Code on GENERAL EXPLANATIONS AND DEFINITIONS, §38. The concept is then used in §222 on culpable homicide

which recognises no such defence, all mention of provocation has been eliminated from the Sharia Penal Codes. The result in homicide cases, for instance, is that “the death penalty [*qisas*] is applicable, on the demand of the heirs of blood, where the accused caused the death of the deceased by any hostile assault, however intrinsically unlikely to kill or wound” and no matter how extreme the provocation.²³ So the Sharia States seem to be back to the position that gave rise to the famous 1940s case of *Tsofo Gubba v. Gwandu Native Authority*.²⁴ In this case the accused was convicted of intentional homicide and sentenced to death by the Emir of Gwandu’s court (applying Islamic law), although had the accused been tried on the same facts in the English courts (applying the Criminal Code), he would only have been convicted of manslaughter and sentenced to a term of imprisonment (because of the element of provocation). The West Africa Court of Appeal ultimately quashed the conviction and set aside the sentence, holding that whenever a native court tried any person for any offence defined in the Criminal Code it was bound to follow the Code to the exclusion of Islamic law or native law and custom. This ruling, for many reasons, caused consternation in the North; it brought to a head the problem of the conflict of criminal laws in the Northern Region and was an important factor in the decision to adopt the Penal Code of 1960.²⁵

ii. Possible remittance of *qisas* by the victim’s heirs. Elimination of the defence of provocation can expand the scope of the death penalty in cases of homicide beyond the circumstances in which it would apply under the Penal Code; this is the point just made. The other side of the coin is that the punishment of *qisas*, including the death penalty in most cases of homicide, can be remitted by the victim’s heirs, in favour of payment of “blood-money” or *diyab*; and even payment of *diyab* can be waived so that the offender gets off quite lightly – in cases in which he would be put to death under the Penal Code.²⁶ This point applies not only to cases of intentional homicide, but to other crimes as well:

Offence	CILS		Penal Code	
	§	Max. punishment	§	Max. punishment
giving false evidence to procure conviction of capital offence resulting in execution of innocent person	330(2)	<i>qisas</i>	159(2)	death

not punishable with death, §§244-247 on causing hurt, §266 on assault or criminal force with provocation, and §399 on intentional insult with intent to provoke breach of the peace.

²³ Quoting “Report of the Panel of Jurists Appointed by the Northern Region Government to Examine the Legal and Judicial Systems of the Region”, Chapter 1 of this work, ¶5; compare CILS Harmonised Sharia Penal Code §§198-199 and notes. Similar remarks apply to other offences punishable with *qisas*, for instance causing grievous hurt: if A and B get into a fight and A knocks out B’s tooth, A’s punishment (unless remitted) will be to have his tooth knocked out in turn, no matter how much B may have provoked A into fighting him, see CILS §§214-220.

²⁴ (1947) 12 W.A.C.A. 141.

²⁵ The discussion here of the *Tsofo Gubba* case relies on and to some extent paraphrases E.A. Keay and S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Street & Maxwell, 1966), 46-51.

²⁶ See CILS §199 and notes (remittance of *qisas* in cases of intentional homicide); cf. §219 (remittance of *qisas* in cases of intentional causing of grievous hurt). Under §199 even if both *qisas* and *diyab* are remitted by the deceased’s heirs, the convict will still be punished by the state “with caning of one hundred lashes and with imprisonment for a term of one year.”

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trial by ordeal resulting in death of any party to the proceeding	407	<i>qisas</i>	214	death
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In sum, the switch to the Maliki law of homicide can not only expand the scope of the death penalty beyond those cases in which it would be applied under the Penal Code (no defence of provocation), but can also reduce it (remittance of *qisas*). It is notable that Muslims are encouraged to remit *qisas* as a meritorious act.²⁷ It would be interesting to know how often this is done in practice.

iii. Introduction of new defences. Moreover, two new defences to offences punishable with *qisas* have been introduced in the Sharia Penal Codes, which may restrict the scope of infliction of the death penalty even further than remittance of *qisas* alone would do.

Act of necessity. Both the Penal Code and the Sharia Penal Codes provide in some detail for “The Right of Private Defence”, set out in the CILS Harmonised Sharia Penal Code in §§84-92. In addition to this, CILS and all the Sharia Penal Codes of the States have inserted a new section entitled “Act of necessity”, §81 in CILS, which provides that:

It shall not be an offence if an act is done by a person who is compelled by necessity to protect his person, property or honour, or person, property or honour of another from imminent grave danger which he has not wilfully caused or wilfully exposed himself or other persons to and which he or that other person is not capable of avoiding.

In what ways and how far this may go beyond the right of private defence already provided for are questions that deserve further study.

Retaliatory killings by certain heirs of a deceased person. All the Sharia Penal Codes define a class of persons known severally as *waliyy al-damm*. This class, as to any person, includes his or her “male agnatic heirs, daughters, full sisters, paternal aunts and consanguine sisters.”²⁸ This notion is then used in the section on homicide as follows:

Whoever being a *waliyy al-damm* of a deceased person causes the death of the suspect alleged to have killed the deceased²⁹ shall be punished:

- (a) with imprisonment for a term of six months and shall also be liable to caning which may extend to fifty lashes, if it was proved that the person killed was the one who caused the death of the deceased; or
- (b) where it was not proved that the suspect was the one who caused the death of the deceased, or it was proved that the death of the

²⁷ See for example Qur’an 42:40 and 43: “The recompense for an injury is an injury equal thereto (in degree), but if a person forgives and makes reconciliation, his reward is due from God, for (God) loves not those who do wrong.... But indeed if any show patience and forgive, that would truly be an exercise of courageous will and resolution in the conduct of affairs.” Thanks to Dr. I.N. Sada for providing these passages.

²⁸ See CILS §50 and note.

²⁹ Bauchi inserts here: “with the intention of retaliation before taking the matter to court”.

deceased was caused by the suspect but with legal justification the *waliyy al-damm* shall be deemed to have committed intentional homicide punishable under section 199 [i.e. punishable with *qisas*].

In sum, a *waliyy al-damm* may take the law into his own hands if his relative is killed, and kill the killer in return, if he is sure he knows who the killer is and if he is willing to pay the relatively small price exacted by the State for this usurpation of its supposed monopoly on the lawful use of violence. This is not permitted under the Penal Code.

c. Many variations as to punishment of other offences. Beyond the fairly narrow field of the *hudud* and *qisas* offences proper, the definitions of offences as contained in the Penal Code have mostly been retained in the Sharia Penal Codes, but the punishments have been thoroughly revised. We mention three types of revisions: those affecting only lengths of terms of imprisonment and the like; those affecting life or death; and those affecting the discretion in sentencing accorded the judges.

i. How many years and/or how many lashes and/or how much fine. Let four illustrations suffice, two in which the maximum punishment under the CILS Harmonised Sharia Penal Code is more severe than under the Penal Code, and two in which it is less severe; in all cases the definition of the offence is the same. Many other instances of both these phenomena occur in the codes.

Offence	CILS		Penal Code	
	§	Max. punishment	§	Max. punishment
disturbance of public peace	287	2 years and 50 lashes and fine	113	1 year or fine or both
inciting disturbance	288	3 years and 60 lashes and fine	114	2 years or fine or both
giving false evidence in judicial proceeding	329(1)	5 years and 60 lashes	158(1)	14 years and fine
giving false evidence to procure conviction of capital offence	330(1)	5 years and 60 lashes	159(1)	life and fine

It is sometimes thought that the penalties under the Sharia Penal Codes are always more severe than those under the Penal Code for the same offence. Muslims say this is a burden they have voluntarily agreed to bear in order more fully to practise their religion (thinking particularly of the *hudud* offences). But we have been seeing here and in the discussion of *qisas* that this is by no means always the case: the religion-based discrimination inherent in the codes also sometimes works against non-Muslims rather than in their favour. The system of dual penal codes now operating in the Sharia States is therefore open to constitutional challenge on this ground from the side of the non-Muslims as well as from that of the Muslims. Up to the time of this writing, however, no person with the *locus standi* to do so has raised the issue in his or her defence: Muslims, perhaps because they or their lawyers do not wish to raise fundamental challenges to the system, and non-Muslims perhaps because they or their lawyers have not thought of it. This subject will be discussed further in a forthcoming chapter of this work discussing on constitutional questions raised by Sharia implementation.

ii. Life or death. As to some offences unrelated to *hudud* or *qisas* the Sharia Penal Codes have gone far beyond the Penal Code in the severity of their punishments.

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Offence	CILS		Penal Code	
	§	Max. punishment	§	Max. punishment
insulting or exciting contempt of religious creed	402	2 years or fine and 30 lashes	210	2 years or fine or both
insulting, abusing, etc. any prophet recognised by Islam	406(1)	death	--	--
injuring or defiling place of worship or object held sacred	403	2 years or fine and 30 lashes	211	2 years or fine or both
damaging, defiling, or destroying the Holy Qur'an	406(2)	death	--	--
witchcraft, broadly defined	409	death	216	2 years or fine or both
cannibalism	413	death	218	2 years or fine or both
possession of human body parts as trophy, juju or charm	414	death	219	5 years or fine or both

Conceivably infliction of the death penalty in these sorts of cases could be held to violate the constitutional ban on inhuman or degrading punishment, as being disproportional to the magnitude of the offence.

iii. Discretion in sentencing. The Penal Code already allows judges a very substantial discretion in the matter of sentencing. This is reflected not only in the discretion to sentence to “up to” so many years imprisonment, for example, but also in the discretion granted by §§77 and 78 to *substitute* caning or payment of compensation in lieu of any other punishment in most cases. The Sharia Penal Codes continue this broad discretion and expand it further, allowing also a sentence of reprimand (*tawbikh*), warning (*tabdid*), exhortation (*wa'aḥ*) or boycott (*bajar*) to be passed “on any offender in lieu of, or in addition to any other punishment to which he might be sentenced for any offence not punishable with death, or offences falling under *hudud* and *qisas*.”³⁰ This restores the almost unlimited discretion of the classical *qadi* in *ta'aḥir* cases, at least in the matter of sentencing.

d. Other differences. In two other sections the Sharia Penal Codes significantly expand, in rather vague terms, offences more narrowly defined in the Penal Code:

Unlawful societies. The Penal Code (§97A) defines an unlawful society as one “declared by an order of the Governor in Council to be a society dangerous to the good government of Northern Nigeria or any part thereof.” The Sharia Penal Codes have: “Any society which by its composition, nature, or conduct is anti-social, counter productive or opposed to the general belief and culture of the people of the State, or is dangerous and obstructive to the good governance of the State or any part thereof, is said to be an unlawful society.”³¹ The punishment for managing or belonging to an unlawful society can be harsh: up to seven years imprisonment under all codes, plus fine or caning.

Sale, printing, exhibition of obscene books etc. The Sharia Penal Codes enact the Penal Code section on this subject (§202), but then add a second subsection as

³⁰ See CILS Harmonised Sharia Penal Code §101. Query: do the “offences falling under *hudud* and *qisas*” meant by this section include also the “*hudud*-related” and “*qisas*-related” offences of the Sharia Penal Codes?

³¹ See CILS §123 and note.

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follows: “(2) Whoever deals in materials contrary to public morality or manages an exhibition or theatre or entertainment club or show house or any other similar place and presents or displays therein materials which are obscene, or contrary to public policy shall be punished with imprisonment for a term which may extend to one year and with caning which may extend to twenty lashes.”³² What is or is not “obscene” is already vague enough; this is compounded by the introduction of “contrary to public morality” and “contrary to public policy”, which the alkalis of the Sharia courts hardly seem qualified to define.

Finally, we conclude this discussion of differences between the Penal Code of 1960 and the Sharia Penal Codes by merely noting the titles of some sections included in the Penal Code but not in the Sharia Penal Codes, or vice versa. The full texts of all such sections are quoted in the two documents entitled “Sections of the [one code] omitted in the [other code]” which appear later in this chapter.

Offence	CILS		Penal Code	
	§	Max. punishment	§	Max. punishment
abetment of suicide	--	--	228	10 years and fine
attempt to commit suicide	--	--	231	1 year or fine or both
buying or disposing of slave	--	--	279	14 years and fine
deceitfully inducing belief of lawful marriage	--	--	383	10 years and fine
marrying again during life-time of husband or wife	--	--	384	7 years and fine
re-marriage with concealment of former marriage	--	--	385	10 years and fine
marriage ceremony fraudulently gone through without lawful marriage	--	--	386	7 years and fine
enticing or taking away or detaining with criminal intent a married woman	--	--	389	2 years or fine or both
false accusation of <i>zina (qadhf)</i>	139	80 lashes (may be remitted)	--	--
manufacturing, transporting, or dealing in alcoholic drinks or other intoxicants	149	40 lashes or 6 months or both	--	--
blasphemous acts, utterances, etc. against the Prophet or the Qur'an	406	death	--	--

5. Variations among the Sharia Penal Codes themselves.

So far we have been concentrating on differences between the Penal Code of 1960 and the Sharia Penal Codes as exemplified by the CILS Harmonised Sharia Penal Code. We now look at some variations among the Sharia Penal Codes themselves.

a. Definitions of some *budud* and *qisas* offences. The most substantial redrafting of Penal Code sections went into the Sharia Penal Code sections covering *budud* and *qisas* offences proper; this has already been noted. It is not surprising therefore that variations among the Sharia Penal Codes themselves have come into the definitions of some of these offences. The relevant sections invite detailed comparison and analysis which we do not undertake here.

³² See CILS §374(2) and note.

b. “General Offences”. One *hudud* offence not explicitly included in any Sharia Penal Code is apostasy from Islam – *ridda*. This has been left out for good reason: §38(1) of the Constitution guarantees every person “freedom of thought, conscience and religion, including freedom to change his religion or belief.” Nevertheless, seven of the codes³³ have inserted a section entitled “General Offences”, as follows:

Any act or omission which is not specifically mentioned in this Sharia Penal Code but is otherwise declared to be an offence under the Qur’an, Sunnah, and *ijtihad* of the Maliki school of Islamic thought, shall be an offence under this code and such act or omission shall be punishable: (a) with imprisonment for a term which may extend to five years, or (b) with caning which may extend to 50 lashes, or (c) with a fine which may extend to ₦5,000.00, or with any two of the above punishments.³⁴

Anyone charged under this section would surely have a good defence under the same constitutional provision that necessitated the enactment of detailed Sharia Penal Codes in the first place, §36(12), which bears full quotation here:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

c. Variations as to punishment of other offences.

i. Trivial variations. As perusal of the annotations to the CILS Harmonised Sharia Penal Code will show, there is a very large amount of more or less trivial variation among the Sharia Penal Codes in the specification of punishments particularly for *ta’azir* offences (but also for “*hudud*-related” and “*qisas*-related” offences). We illustrate this with the punishment information for just one offence. The definition of the offence is the same in all codes. Information about the Penal Code is also included as in the annotations.

Offence	CILS		Other Sharia Penal Codes	
	§	Max. punishment	§	Max. punishment
making or possessing counterfeit seal with intent to commit forgery	256	3 years and fine	var.	PC: 14 years/fine. Bauchi: 15 years/40 lashes. Gombe, Jigawa, Sokoto, Yobe, Zamfara: 5 years/fine. Kano, Katsina: 5 years/₦50,000 fine/both. Kebbi: 5 years and fine or 40 lashes. Kaduna: <i>ta’azir</i> .

This example may also serve to illustrate some broad generalizations about the various Sharia Penal Codes which the annotations seem to bear out:

- The maximum punishments under the Bauchi code are often the harshest of any.

³³ Bauchi, Gombe, Jigawa, Kebbi, Sokoto, Yobe and Zamfara.

³⁴ Gombe omits the word *ijtihad* and puts instead “*qiyas* and *ijma* and other sources of the Maliki school of thought”. Bauchi varies the punishments: imprisonment may extend to 1 year only, caning may extend to 40 lashes only, and the fine may extend to ₦50,000.00.

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- Gombe, Jigawa, Sokoto, Yobe, and Zamfara States often march together; this is no doubt because the others were largely copied from Zamfara’s code which was drafted and enacted first.
- Kano and Katsina often march together. Kano’s code was enacted first (November 2000, as opposed to Katsina’s June 2001), so Katsina has probably followed Kano where the two are alike but different from the others. One respect in which Kano and Katsina frequently differ from the others is in specifying more definitely the maximum fine imposable for a given offence (as above), but this is not done consistently (see e.g. notes to CILS §§355 and 356). Another respect in which Kano and Katsina sometimes differ from the others is in simplifying somewhat the language of sections otherwise copied from the Penal Code (see notes to CILS §§308, 309, 310, 311 and 313).
- Kebbi’s punishment formulations are frequently more convoluted and therefore more ambiguous than the others. In the illustration above, for example, Kebbi’s full formulation is “shall be punished with imprisonment for a term which may extend to five years and may also be liable to fine or caning which may extend to forty lashes.”³⁵ A logician will wonder which connective has the larger scope, the “and” or the “or”.
- Kaduna, alone among the Sharia Penal Codes, has in almost all sections dealing with *ta’azir* offences not specified any punishment at all except for “*ta’azir*”, meaning “correction” or “chastisement”, in effect leaving everything up to the discretion of the sentencing judge without giving him any guidance at all.

ii. Non-trivial variations. One of these has already been noted: Kaduna’s substitution of the single word “*ta’azir*” for all further specification of the punishments for most offences. As with the “General Offences” discussed above, query whether this device is constitutional under §36(12) of the Constitution.

Several other variations in the punishment provisions also count as non-trivial: we simply list them here without further comment.

Offence	CILS		Other Sharia Penal Codes	
	§	Max. punishment	§	Max. punishment
<i>hirabah</i> were murder is committed and property is seized	152	<i>salb</i> (Kaduna: same)	var.	Borno, Gombe, Jigawa, Kebbi, Sokoto, Yobe, Zamfara: crucifixion. Bauchi: “death by impalement (crucifixion)”. Kano, Katsina: death.
criminal breach of trust by public servant or by banker, merchant or agent ³⁶	167	7 years with fine and 60 lashes (with trivial variations in other codes)	Kano 134B	amputation of right hand and not less than 5 years imprisonment and stolen wealth confiscated.

³⁵ Kebbi State Penal Code (Amendment) Law 2000, First Schedule, §257.

³⁶ The definitions of the offence as contained in CILS (and most other SPCs) on the one hand, and Kano on the other, are somewhat different and bear further comparison.

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kidnapping of person over the age of 7 ³⁷	231(2)	3 years and 40 lashes (with trivial variations in other codes)	var.	Bauchi, Kano and Katsina: punished as theft punishable with <i>badd</i>
fraudulent cancellation, destruction or theft of document of title	259	5 years and 50 lashes and fine	var.	All SPCs except Kaduna: amputation ³⁸ if the value of the title amounts to <i>nisab</i> . Kaduna: <i>ta'azir</i>

d. Other variations among the Sharia Penal Codes. We note just two interesting additions to two of the codes:

Prohibition of praise singing, drumming, begging, playing cards, etc. Bauchi inserts in its code (§376), amid the sections on “idle persons” and “vagabonds”, the following: “Any person who in any street or place of public resort or within sight or hearing of any person or in any social, public or private ceremony, engages in praise singing (*roko*), begging (*bara*), playing cards (*karta*), *wasan maciji*, *wasu da kura*, *wasan wuta*, *wasan wuka*, *wasan bori*,³⁹ etc. is guilty of an offence and liable on conviction to imprisonment for a term which may extend to one year and a fine of not less than ₦5,000.00 and shall also be liable to canning of twenty lashes.” Other States or Local Governments have enacted somewhat similar prohibitions, aimed at various widespread practices considered to be “social vices”, see Chapter 3, but Bauchi is the only one to incorporate them in its Sharia Penal Code.

Criminal charms. The practice of various forms of witchcraft, magic and “juju” remains widespread throughout Nigeria, although the Penal Code of 1960 prohibited it and the Sharia Penal Codes all follow suit, in virtually identical chapters (subchapters in the SPCs) on *Offences Relating to Ordeal, Witchcraft and Juju*.⁴⁰ Kano and Katsina have all this but add some different twists as well. All the Sharia Penal Codes have essentially the same provision (derived from the Penal Code) on “criminal charms”, prohibiting possession of “any fetish or charm which is pretended or reputed to possess power to protect a person in the committing of any offence.” Kano and Katsina have this section but give it a new twist by prohibiting, more broadly, possession of “any fetish object or charm which is pretended or reputed to possess power to protect or give illegal benefit to any person in the committing of any offence”, and adding a second subsection, as follows:

³⁷ CILS and all SPCs punish kidnapping of a person under the age of 7 as theft punishable with *badd*.

³⁸ Presumably of the hand as in theft punishable with *badd*.

³⁹ *Wasa* = play, here, with various dangerous things (respectively snakes, hyenas, fire and knives), under the guise of protection by charms or other supernatural powers, for whatever the on-lookers may be willing to donate. Crowds are frequently attracted; *boka* or “malams” ply their trade in charms, fortune-telling and traditional medicines; and thieves and pick-pockets circulate. *Wasan bori* is more directly associated with the cult of spirit-possession: the devotee by incantations and turning in a circular dance achieves a state of possession in which he/she performs various feats before passing out. This is usually not for public consumption, but only for members or potential members of the cult.

⁴⁰ See Penal Code §§214-219; CILS §§407-414 and notes.

Whoever engages in unlawful sexual behaviours under the guise of offering medical treatment, invocation [sic: ?] under the guise of curing an illness or causing a favour to a person shall be imprisoned for five years or sentenced to a fine of fifty thousand naira and shall also be liable to caning of sixty [Katsina: 50] lashes.⁴¹

This addresses what seems to be a common problem: the use of charms or the exploitation of alleged healing powers for sexual purposes. The unlawful sexual behaviours punished here are presumably unlawful under other sections of the code in any case, and punishable far more severely, but this section calls attention to them explicitly and perhaps allows conviction upon lesser evidence than would be required to convict, for instance, of *zina*.

6. The harmonisation project.

The many variations among the Sharia Penal Codes (and among the Sharia Criminal Procedure Codes, as the next chapter shows) were quickly noted among lecturers in the universities' law faculties, among practising lawyers, and among the *ulama*. Two schools of thought developed regarding all this mostly trivial diversity among the Sharia Penal and Criminal Procedure Codes.

In some influential circles the diversity was thought to be a bad thing – violating jurisprudential canons of legal certainty and uniformity and perhaps appearing a little unseemly – which if possible ought to be eliminated or at least minimized. There was a further reason why harmonisation might be desirable: the sometimes badly-drafted, badly-typed, and badly-proofread actually-enacted codes could be replaced with a more professional product. Those who felt this way were able to obtain funding from the Governors of the Sharia States, in 2001-02, to finance the production of a “Harmonised Sharia Penal Code” which could then be recommended back to the States for adoption in replacement of their already existing, needlessly diverse Sharia Penal Codes. The prestigious Centre for Islamic Legal Studies, a unit of Ahmadu Bello University closely associated with the Faculty of Law, was commissioned to make the draft. The result is the document reproduced in the Part III of this chapter – the Harmonised Sharia Penal Code made by CILS. As far as we know no learned body, except CILS, has formally approved the CILS code or recommended its adoption by the States. Nevertheless one State – Zamfara – has enacted it into law *in toto*, in fact enacting a photocopy of CILS's product with CILS's headers still visible upon the pages. The same thing was done with the CILS Harmonised Sharia Criminal Procedure Code reproduced in the next chapter.

Not everyone approves of the harmonisation programme. The sceptics ask: what is the point? They argue that the Sharia itself – not so concerned as some Westerners with legal certainty and uniformity – permits a great deal of diversity of opinion and exercise of discretion, and that most or all of the variations the harmonisers worry about are perfectly tenable in Islamic law. They say the diversity is not causing any particular problems within the Federation, such as might be caused, for example, by similarly diverse commercial laws. They say that in fact the diversity among the codes has positive effects. This is a Federation, after all, and the most important of all State's Rights – too

⁴¹ §§388 and 394 of the Kano and Katsina Sharia Penal Codes, respectively.

little exercised in Nigeria up till now – is the right to be different: the Sharia States are setting an excellent example. They are moreover doing it in a quite democratic way, reflecting in their legislation the consensus of committees of mostly-local scholars, lawyers and *ulama*, appointed by elected Governors to draft their codes, with contentious issues put to votes in elected Houses of Assembly in the process of enactment.⁴² What is bad about all this? – This, I conceive, is more or less the argument of those who have no problem with all the diversity among the Sharia Penal and Criminal Procedure Codes and think the States should not be badgered into uniformity.

Only time will tell how the harmonisers fare politically against the sceptics. So far no other State has followed Zamfara in enacting the CILS codes into law, and there does not seem to be a clamour anywhere to do so. But new Governors and Houses of Assembly were elected⁴³ in April 2007; perhaps the CILS harmonised codes will prosper under their regimes. In the mean time the debate between the harmonisers and the sceptics deserves more public articulation and more scholarly attention than it has received so far.⁴⁴

⁴² One example: §134B of Kano’s Sharia Penal Code, laying down amputation of the hand as the punishment for criminal breach of trust by a public servant, banker, merchant or agent, was put into the code by the committee first appointed by the Governor to draft it; was removed by a second committee appointed to review the draft before submission to the House of Assembly; and was restored by the House of Assembly itself before final enactment. See Part II, *infra*.

⁴³ The word is used loosely.

⁴⁴ The foremost sceptic about harmonisation is Professor Auwalu H. Yadudu of Bayero University, Kano. His view is presented in his paper (among others) “Evaluating the Implementation of Sharia in Nigeria: Challenges and Limiting Factors Revisited”, presented at the National Conference on Leadership, State & Society under the Sharia in Nigeria: The Dividends, organised by the Institute for Contemporary Research, Kano, held at the Shehu Yar’adua Centre, Abuja, 10-12 July 2006 (copy in possession of the author). I am aware of no similarly detailed articulation of the arguments of the harmonisers; but in his paper at the Conference just mentioned, the Grand Kadi of Kaduna State said that “If I may suggest: a) Concerted effort be made by all the stakeholders to bring about uniform Sharia Laws and Rules for use in all the states implementing the Sharia Law Reform....” Dr. Maccido Ibrahim, “The Achievements of Sharia in Kaduna State” (copy in possession of the author). So the debate continues. The arguments on both sides of a similar debate in a different context are made in A. Klip and H. van der Wilt, eds., *Harmonisation and Harmonising Measures in Criminal Law* (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002).