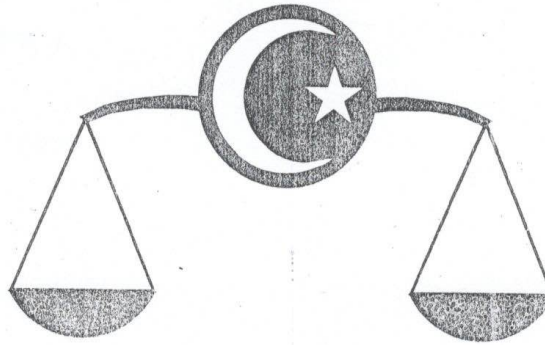




**JOURNAL OF ISLAMIC AND COMPARATIVE LAW
(UDUSJICL)**



Volume 2, 2010

**DEPARTMENT OF ISLAMIC LAW,
Faculty of Law, Usmanu Danfodiyo University, Sokoto.**

TABLE OF CONTENTS

		Page
	Copyright Page	ii
	Editorial Board Members	iii
	Editorial Comment	iv
	Table of Contents	v
1	The Objectives and Intents of Islamic Law as a Paradigm of Development Strategies and Policies <i>Mohammad Manzur -E- Elahi (Ph.D)</i>	1 – 15
2	The Legal Framework for Islamic Banking in Nigeria <i>Abdulqadir Ibrahim Abikan (Ph.D)</i>	16 – 37
3	Whither the Law of Adultery in Islam: A Need for Redefinition? <i>M. I. Sa'id (Ph.D) and M. D. Mahmud (Ph.D)</i>	38 – 49
4	An Appraisal of the Oversight Function of the Judiciary over the Legislative and the Executive under the American and Nigerian Constitutions <i>B. Y. Ibrahim</i>	50 – 67
5	Islamic Law Viewpoint on Transsexuality <i>K. G. Muhammad</i>	68 – 77
6	The Islamic Veil in the Contemporary World: Challenges and Prospects. <i>Ibrahim Abdullahi</i>	78 – 89
7	A Critical Review of the Powers of Shari'ah Courts under the 1999 Constitution <i>Edu, H. O.</i>	90 – 99

115

The Sharia Criminal System and Administration of Criminal Justice in Nigeria: Issues and Challenges by <i>A. A. Isiaka</i>	100 – 108
Maintenance and its Significance as an Inalienable Right of the Wife <i>A. U. Ruwan Dorowa and S. S. Auta</i>	109 – 115
The Unending Crisis on the Status of Shari'ah in Nigerian Constitution: A Critical Appraisal <i>Ibrahim Imam and M.A.A. Mustapha</i>	116 – 132
Islam and Ownership of Property in Cyberspace <i>K. G. Muhammad and Ibrahim Shehu</i>	133 – 142
Islamic Law of Pre-Emption Through the Cases: An Appraisal of Some Shariah Court Cases <i>Muhammad Nuhu</i>	143 – 152
An Appraisal of Rights of a Child in Islamic Law and the Child's Right Acts <i>A. U. Alkali; A. L. Haruna and M. Chiroma</i>	153 – 162

THE UNENDING CRISIS ON THE STATUS OF SHARI'AH IN NIGERIAN CONSTITUTION: A CRITICAL APPRAISAL

By

*Ibrahim Imam** AND *M.A.A. Mustapha***

INTRODUCTION

The Constitution of the Federal Republic of Nigeria is expected to represent the total views and interests of the generality of Nigerian citizen for the sustenance of the corporate existence of the Country. It is instructive to note that the Constitution as a legal framework and as grundnorm ought to provide solution to whatever problems connected with the Nigerian state, this is paramount because of the assumption of a general consensus that Nigeria should remain as one indivisible and indissoluble sovereign nation.

The Nigerian Constitution, like the Constitution of any other civilized country of the world is not perfect. Therefore, for purpose of expediency and for it to be acceptable as a leading document in all and sundry, it must take into cognizance the diverse multi-religious and multi-ethnic nature of the Country. Against this backdrop, this paper will examine and analyze the status of *Shariah* in Nigerian Constitution while showing the justification for Muslims' demand for a distinct legal system and to finally offer suggestions on the best way to handle constitution review in the Country.

MEANING OF SHARIAH

Shariah by definition and concept is the natural order established by Allah for mankind to achieve balance, justice and equity not only among men, but also among all things created by Allah material or non material. It is a whole system that does not give room for the selective appreciation of nature. Ibn Qayyim has this to say about *Shariah*:

The basis of *Shariah* is the wisdom and welfare of the people in this world as well as hereafter. This welfare lies in the complete Justice, mercy, welfare and wisdom, anything that depart from justice to

* Lecturer, University of Ilorin, Faculty of Law, Department of Public Law, Ilorin.

** Lecturer, University of Ilorin, Faculty of Law, Department of Public Law, Ilorin.

As
st
G

TI
SY

Sh
the
the
thr
All
anc
mu

Hu
whi
pro
wit
inte
suc
that
the

1
2
3
4
5

oppression, from mercy to harshness, from welfare to misery and from wisdom to folly, has nothing to do with the Shariah¹

According to M.A Ambali² quoting the Holy Quran thereafter, *Shariah is the straight path or the path that lead to the spring where drinking water is fetch*. As God Almighty Allah puts it:

Finally, we sent thee (Mohammed) on a way Shariah by which, the purpose of faith may be fulfilled. So follow this way and follow not the likes and dislikes of those who do not know the truth³

THE JUSTIFICATION FOR THE MUSLIM CLAIM TO SHARI'AH LEGAL SYSTEM

1. Shari'ah as a religious obligation on Muslims

Shari'ah Law does not grow out of, and is not molded by society, as is the case with the Western systems adopted by Nigeria. Human thought, unaided, cannot discern the true values and standards of conduct; such knowledge can only be attained through divine revelation. Similarly, acts are good or bad/evil exclusively because Allah (SWT) has attributed this quality to them. In Islamic concept, law precedes and moulds society; to it eventually valid dictates the structures of state and society must ideally conform⁴.

Human made law is not always adequate or all encompassing as against Shari'ah which is divine in origin from Allah (SWT). Human made law is more or less a product of human reasoning which can neither be perfect nor produce uniformity within the field of conduct or omission nor address most often, the conflicting interest in society to which they apply as do the law of Allah (SWT). This is succinctly summed up by M. Muslehuddin thus: "The peculiarity of divine law is that they are eternal and immutable and yet contain principles broad enough to meet the growing need of society. They are also universal and embracing in character."⁵

1 Ahmad, K. (ed), *Islam: Its Meaning and Messages*, (the Islamic Foundation, London, 1980) p. 176.

2 Ambali, M.A., *The Practice of Muslims Family Law in Nigeria* (Tamaza Publishing Ltd, Zaria 1998) p.1.

3 Quran 45 v18.

4 N. J. Coulson; *A History of Islamic Law*, (Edinburgh, 1964) 85.

5 M. Muslehuddin, *Islamic Jurisprudence and the Rule of Necessity and Needs*, (Islamic Research Institute, Pakistan 1975) 11.

Islam is not a religion in limited sense and Shari'ah is an integral part of Islam. As Allah (SWT) says "...And those who disobey Allah and His Messenger and transgress His limits. He will make them enter into the fire, therein they shall abide, and they shall have a humiliating punishment."

Thus, the justification for the demand of the Muslims for Shariah legal system is purely based on the law, which is sacred in nature and having its origin from Allah (SWT) Himself and extended to mankind through Prophet Mohammed (PBUH). It covers all aspects of Muslims life socially, economically, politically and it regulates religious practice. Significantly, Shari'ah is binding on all Muslims, thus to deny them the right to this basic sacred law is in itself a violation of their fundamental right to freedom of religion.⁶ The importance of Shariah to a Muslim can be understood from the statement of S H Nasi⁷ that:

Religion to a Muslim is essentially the divine law which include not only universal moral principles but details of how man should conduct his life and contains in it tenets that guide for Muslims to conduct his life in harmony with divine will.

In compendium, the reason for the Muslim quest for Shariah is not more than the fact that the law is an obligation on them to obey and disobedience to it is a disobedience to the commandment of Allah. Nigeria is a multi-religious country and the Constitution attested to it through several provisions of the constitutions⁸ and therefore must give Muslims their freedom of religion.

2. Right of Freedom of Religion

The right to freedom of religion is so fundamental to the extent that it forms part of the Fundamental Human Rights, which every government, municipal or international passionately sought to guard, and protect. Therefore, Shari'ah, being part of religious aspects of Muslim life ought to be guaranteed and protected. The Constitution⁹ on right of religion provides that:

6 Constitution of the Federal Republic of Nigeria Constitution, 1999, Section 38. Any further reference to the Constitution is simply a reference to the Nigerian Constitution 1999

7 Nasi H.S., *Ideal and Reality of Islam*, (George Allen and Unwin Ltd, London 1971,) pp 95-96

8 Sections 10, 23, 38, 39 etc of the Constitution, recognise the right of individual to practice his religion freely without any hindrance.

9 Constitution (n 6) section 38(1). See also Article 9(1) of European Convention on Human Right.

Every person shall be entitled to freedom of thought conscience and religion, including freedom to change his religious in belief and freedom (either alone or in common with others and in public or private) to manifest and propagate his religion or belief or worship or teaching and observation.

Thus, Muslims have constitutional right to demand for Shari'ah to fully comply with their religious obligation. According to Muslims' understanding, religion is a very fundamental aspect which cannot be divorced of law, politics or moral aspect of human life that deserve adequate and undiluted protection.

3. Christian Origin of the Nigeria Legal System

Another important justification for the Muslim demand for Shari'ah legal system in Nigeria cannot be divorced from the very historical antecedents of the country Legal System that is, the English Common Law. It is instructive to note that the Nigeria Legal System has its very foundation from a religion (Christianity) because England from where Nigeria inherited its legal system is officially a Christian state having particular affinity with religion¹⁰. This postulation is supported by the statement of Lord Sumner in the case of *Bowman Vs Secular Society*¹¹ thus:

Ours is and always has been a Christian state. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities and its sections even in courts of conscience...

The antagonism of Shari'ah by some Christians¹² and their allies is thus a mischief to deny the Muslims of their right to Shariah legal system, especially when the

10 See Malik S.H.A., *Shariah Legal System and a Way of Life* in M.O AbdulRahman (ed) *Perspectives of Islamic Law and Jurisprudence* (NAMLAS Publication, 2000) 36-37. Y.A Quadri, *Sharish: The Islamic Way of Life* (2000) 7th Ramadan Lecture Organised by University of Ibadan Muslim Community. 27

11 (1917) A C 406

12 Sunday Mbang, CAN president in 1999 when Zamfara adopted Shari'ah Legal System said, 'we are worried about entrenching the shari'ah in the Constitution as it means Nigeria is an Islamic state, see *Tell Magazine* of 10th May, 1999, p. 1, Rev Peter Akinola, said shari'ah imbroglio would lead to the conversion of many Muslims a...it is not the life style that anybody can live successfully in the 20th Century, see *The Punch Newspaper* of September 12, 2000 p. 1&2 and Sanya Onayode in his own statement said that shari'ah controversy is gradually becoming a time bomb to national unity

interests of the Christians have been adequately taken care of. Considering the above justifications, it is only fair that the Constitution should provide, protect and guarantee Muslims right to Shari'ah.

DEVELOPMENT OF SHARIAH LAW IN NIGERIA

It is significant to revisit the origin of dual legal system (i.e. Shariah and Nigeria Legal System) to drive home the intended discourse. Shariah as a practical religion and way of life had been a force to reckon with in many part of what today constitutes the Federal Republic of Nigeria. It has been a vehicle of development in the entire facet of human endeavors such as education, economic, arts of governance and administration of justice for long before the appearance of any British Colonial agent in any part of Nigeria¹³.

The application of Shariah as a legal system predated the popular amalgamation of the protectorate of Northern and Southern Nigeria in 1914 by Lord Lugard. The Protectorate of Northern Nigeria, virtually made up of Sokoto Caliphate, which was established in 1804, and the Borno Empire, the Islamic culture had been deeply rooted entrenched especially since the time of Usman Danfodio and Mai Idris Aloma. In all the places under the influence of the Sokoto and Borno Empire, the Shariah flourished because the Qadis courts were established to dispense justice in accordance with the Shariah.¹⁴

In the Western part of Nigeria it is on record that in towns like Epe, Iwo, Ikirun, Eko, Lagos and Ede Shariah legal system was in application shortly after the Sokoto jihad of the 19th century. In other words, Shariah in its entire ramification both civil and criminal aspects was observed and practised in these places. It was said that Qadis did held regular courts to administer Shariah in places of notable Yoruba Obas. It was even seen as a mark of civilization that, an Oba had somebody learned in Islamic law presiding over his court, the proximity in most Yoruba cities of the Mosque to the palaces of the Obas is a point in the direction.¹⁵

Oba Abibu Olagunju for instance, who was the first Muslim Timi of Ede in the present Osun State accorded Shariah Official recognition during his reign in the

especially if viewed in light of how non-Muslims live in shari'ah states. See the Punch Newspaper of 2nd November, 2000.

13 Obilade A.O., *The Nigerian Legal System* (Spectrum law Publishing, Ibadan 1979) 17,18 & 34,35 and A E W Park *The Sources of Nigeria Law* (Sweet and Maxwell, London 1963) 60-70

14 Anderson J.N., *Islamic Law in Africa* (Frank Cass and Co Ltd, London 1970) 3

15 S H AbdulMalik, *Shariah* (n 10) 35, see also 31-34.

nd half of 19 century. These practices continued into the colonial era as late as when Shariah court was officially established in the town.¹⁶

he arrival of the British conquerors they found an established system of both and government organized on the Shariah. In the north when they established themselves as the new rulers, a change of policy, and direction were ipso facto oduced so that the Shariah not only ceased to be the ultimate legal basis and the test of legitimacy, but its very application became dependent on the law oduced by the conquerors, thereby subjugating Shariah to merely a personal us and at the mercy of the received English law¹⁷. The British colonialist in geria progressively cut the wings of Shariah, its application and jurisdiction, by ckmatting and decimating it until its confinement to just Muslim personal law. wever Shariah having been firmly entrenched especially in the North due to the ong Islamic tradition established by the Sokoto reformers, made it expediently ificult for anybody to ever attempt its total extermination¹⁸.

re English law came to replace Islamic law and customary law by a slow but dculated legislative policy. In 1933, Native Courts Ordinance and the Protectorate ourt Ordinance were enacted. This causes the establishment of High Court for the hole protectorate of Nigeria (excluding Lagos Colony) with jurisdiction throughout ie protectorate. This ordinance was the forerunner of the present day legislation on ie subject of Area Court which is to be found in all Area Court Edict 1967.¹⁹

t is important to note therefore that, the British by their calculated and deliberate ct, established new courts which had the powers not only to apply English, Islamic and Customary laws but also to act as the final arbiters in any dispute over the validity of Islamic and customary law in resolving conflict between either of them and the English law²⁰. Thereby reducing these laws to mere customary laws to be accepted subject to repugnancy test. An attempt will be made in the subsequent

16 Ibid pp 33-34

17 Obilade A.O., (n 13) pp 34.

18 Rashid S.K., (ed) Islamic Law in Nigeria: Application and Teaching (Islamic Publication Bureau, Kaduna 1986) 43

19 T O Elias, The Nigeria Legal System, (Rout ledges and Kegan Paul, London 1963) 59 C O Okonkwo, Introduction to Nigerian Law, (Sweet and Maxwell, London 1980) 1-10

20 AbdulSalam v Salawu (2002) 6 SCNJ 388, 398 Alhaji Saidu Usman v Alhaji Saliu Kareem (1995) 2 NWLR (pt 379) 537. The cases exemplified the limited nature of the Shariah Courts jurisdiction to determined Islamic matters. It evidenced the effect of the colonial influence on the Shariah Legal System.

pages to explain the various issues of Shariah Legal System in Nigeria, the Constitutional basis and limitations and possible way forward.

THE STATUS OF SHARI'AH IN THE CONSTITUTION PAST AND PRESENT

1. Establishment of Shari'ah Courts

One of the very important ways to discuss the status of Shari'ah is the establishment of courts in Nigeria. The Constitution of the Federal Republic of Nigeria 1999 provides for the establishment of Shariah Courts of Appeal but this is based on discretion of the state that desires it. "There shall be for any State that requires it a Shari'ah Court of Appeal for that State..."²¹

This discretionary power given to a state under the Constitution, account for non existence/establishment of Shari'ah Court of Appeal in some parts of the Country (South West and South East) despite persistent demand by the Muslims living within the Area. The agitation for the establishment of Shari'ah in those parts of the Country, started as early as 1923 and till the present day. Notwithstanding, there are abundance of evidence that buttress the influence of Shari'ah among the Yoruba even before the amalgamation of Nigeria 1914²². The 1999 Constitution made provision for the establishment of courts saddled with judicial power to exercise Shari'ah Legal System. The Constitution provides that: "The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts establishment subject as provided by the constitution for a state."²³

The conventional courts at the superior level exercising judicial power based on Shari'ah legal system includes; the Supreme Court of Nigeria²⁴ and the Court of Appeal. The Constitution, however in recognition of Shari'ah Legal system provides that in the appointment of justices of the superior courts mentioned above, the "President shall have regard to the need to ensure that there are persons learned in Islamic Personal Law".²⁵ High Court, as a court of unlimited jurisdiction, has both original and appellate jurisdiction in any civil or criminal proceeding except Islamic

21 Constitution, (n 6) ss 260 (1) and 275 (1)

22 S.H Abdulmalik (n 10) 31-34

23 Constitution (n 6) s 6(1)

24 ibid s 233 (1) Apex Court having appellate jurisdiction on all appeals from the Court of Appeal, including Islamic matters

25 ibid s 244 (1) hears appeal from High Courts (Federal and State), Shari'ah Court of Appeal and Customary Court of Appeal in all matters including Islam Law.

personal matters²⁶, brought to it from Upper Area/Shariah Court²⁷. Shari'ah Court of Appeal has appellate and supervisory jurisdiction over courts that are competent to determine Islamic Personal Law. There is also the Upper Area Courts, with judicial powers to exercise jurisdiction on Islamic Personal Law, other Islamic Law as well as Customary and Common Law. Area Court, at the lower level, carries the bulk of judicial burden. The courts are to exercise their judicial power on Shari'ah matters subject to the limitation or as provided under the Constitution. Except in Zamfara and other states in the North where Shari'ah is adopted nothing has change in the status of Shariah Court till date.

2. Constitutional jurisdiction of shariah courts

a. Civil Jurisdiction

The 1999 constitution, provide for the jurisdiction of court on matters upon which Shariah legal system is applicable, these powers are limited to Islamic Personal Law, involving marriage, family relation, wakf, gift, will and guardianship of infant. The constitution defined the jurisdiction of the court thus:

The Shariah Court of a State shall in addition to such jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Islamic Personal Law that the court is competent to decide in accordance with the provision of subsection (2) of this section.

This section of the Constitution limits the powers of Shariah Courts only to civil proceedings involving Islamic Personal Laws as stated and by implication any matter which does not fall within this purview of the powers go to High Court irrespective of whether the matter is related to Islamic law and parties thereto are Muslims²⁸.

It is pertinent to further explain that even with the attempt made by the Military government during the reign of Ibrahim Badamasi Babangida (Former President of Nigeria) to expand the jurisdiction of the Shariah with the removal of "Personal" from the provision of the Constitution wherever the word "Islamic Personal Law"

26 ibid

27 Constitution (n 6) s 277 (1)

28 *Abdulsalam v Salawu* (n 20) 193, the parties in this case are Muslim and the matter of dispute between was the Imamship, but the Supreme Court held that the dispute did not fall within the jurisdiction of Shari'ah Court.

appears, was held not to have conferred any additional jurisdiction to the powers of Shariah Court of Appeal.²⁹

The civil jurisdiction of Shariah court from all discussed is not all inclusive of every matters of dispute in Islamic law as contained in the Constitution, this is not in conformity with the Muslim desired Shariah Legal System. It has been and still the position despite the Muslims cries for their right.

b. Shariah and Criminal Matters

The Nigerian Constitution does not confer jurisdiction on any Shariah court or any conventional court to exercise Shariah Criminal Matters. This is a position which stem from 1960 constitution which made provision that oust the application of Shariah Legal System on criminal matters, it provides that "No person shall be convicted of criminal offence unless that offence is defined and the penalty therein is prescribed in a written law"³⁰

Subsequently, all Constitutions made thereafter contained similar provisions (1963, 1979, 1985, 1989, and 1999 Constitutions of the Federal Republic of Nigeria). It should be noted that it is erroneous to hold that Shariah law is not written, when the main sources of Shariah the Holy Quran, the Sunnah are written and several other Books on Shariah Legal System developed by various Schools of Islamic jurisprudence are written. This has constituted a serious obstacle to adoption of Shariah in Nigeria.

It is instructive to note that even if we subscribe to the fact that Shariah Legal System are contained in written manuscripts, there still exist other obstacles relating to the status of Shariah in the Constitution which made the Constitution supreme and having a binding force on all persons throughout Nigeria. This can be distilled from the fact that application of Shariah Law outside those limited jurisdiction provided under the Constitution shall be regarded as inconsistent with the Constitution and as such null and void³¹.

The sum total of the above postulate the limit/scope of Shariah and its application under the constitution. This is even supported by the statement of Justice Muhammed Bello (Rtd) who said:

29 Saidu Usman v Sadiu Kareem (n 20) 537

30 Section 21 (10) 1960 Constitution, Section 33 (12) 1979 and now Section 36 (12) of the 1999 Constitution

31 Constitution (n 6) ss 1(1) and (3)

It should be stated here for the avoidance of doubt that the Shariah law as stated in the Quran Hadith and other sources is not a "written law" within the meaning of section 36 (12) of the 1999 Constitution.³²

c. Shariah and Fundamental Human Right

The right to freedom of religion carved out a right for the individual which is free from governmental interference or private encroachment within those areas allotted, this include the right to arrange his affairs as he so pleases,, to achieve his maximum development and welfare. The relevant section of the 1999 constitution of Nigeria on freedom of religion provides:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief and freedom (either alone or in community with others and in public or private to manifest and propagate his religion or belief in worship, teaching practice and observance.³³

It is important to examine the extent to which this constitutional provision guaranteed the right of Muslim to freedom of religion, as this may assist in determining the position of Shariah legal system in Nigeria. This may include:

- i. How freely can a Muslim manifest and propagate his religion in accordance with the dictate of Shariah either in public, private, alone or in community with others where Shariah is not in its desired application as provided under the constitution.
- ii. How can the Muslim demonstrate, teach, practice and observe their religion based on Shariah when they are denied the right to apply Shariah legal system whereas Allah (SWT) has warned that:

You who profess faith embrace Islam perfectly by obeying all the rules and regulations of the Islamic Religion) and follow not the footsteps of devil. Verily he is to you on open enemy.³⁴

The truth that needs to be explicated from the supposed freedom of religion is the inadequacy of the right which is not all encompassing; more so that the right is not

32 The Guardian of 11th December, 1999 p. 16

33 Section 38 (1) of the Constitution

34 Quran Chapter 2 v 208

absolute because of derogatory and restrictive provision in the constitution which limits the extent to which individual exercise his right. The Constitution provides that:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

(a) In the interest of defence of public safety, public morality or public health or

(b) For the purpose of protecting the rights and freedom of other person³⁵.

It is important to submit that the Muslims in their pursuit of happiness in this world and hereafter demand for Shariah which is their inalienable right, can it then be said that they are demanding more of what they rightly deserve being a citizen of the country, and having subscribed to live in unity with others of different culture and religious affiliation, if such rights are not adequately guaranteed. The joy of Muslim is attached strongly to Shariah as it is expected of Muslim to submit his entire life to Allah as provided in the Quran thus: "Say truly, my prayer, my sacrifice, my living and my dying are all for Allah, the Lord of the world".³⁶

The provisions guaranteeing fundamental right to freedom of religion is one of the ostensible imbalances in the Constitution against the Muslims in relation to Shariah legal system while imposing the received common law legal system which is acknowledged to be Christian in origin, on the Nigerian Muslims. Lord Finely, the then Lord Chancellor said:

There is a abundant authority for saying that Christianity is part and parcel of the laws of the land but the fact that Christianity is recognized by the law is the basis to a great extent for holding that the law will not help endeavors to undermine it.³⁷

It is instructive to note further that in Islamic Law, freedom of religion is meant to safeguard that every inhabitant within a Muslim territory is free to follow religion of

35 Constitution (n 6) s 42 (1)

36 Quran, Chapter 6 verse 162.

37 Bowman v Secular Society Limited (n 11).

which provides his choice... The Law of Allah on this subject is unambiguous that "Let there be no compulsion in religion".

3. Secularism and Shariah

Secularism according to Oxford advanced learner's dictionary 5th edition is "The belief that laws, education etc, should be based on facts science, rather than religion".³⁸ The question is, 'is Nigeria a secular State?' It is important to state from onset that the basis upon which Nigeria is referred to as a secular state is on provision of the 1999 Constitution that provides that "The government of the Federation or of a State shall not adopt any religion as a State Religion".³⁹

By implication, this does not reflect that Nigeria is a state without religions, and this is a fact which is supported by some provisions of the Constitution given significant recognition to religions considering the nature of the Nigerian state. It is pertinent to make reference to some of these provisions of the Constitution.

Under Chapter II of the 1999 Constitution dealing with the fundamental objective and directive principle of the state policy in recognition of religions, provides that "The National ethic shall be discipline, integrity, dignity of labour, social justice, religious tolerance, self reliance and patriotism."⁴⁰ (Underline mine for emphasis).

Under Chapter IV of the Nigerian Constitution dealing with the fundamental human right, a section therein guarantees the freedom of citizen to religious belief as well as freedom against discrimination on ground of religion. The section provides:

Every person shall be entitled to freedom of thought, conscience and religion including to change his religious or belief and freedom (either alone or in community with others and in public or in private to manifest and propagate his religious or belief in worship, teaching practice and observance).⁴¹

A citizen of Nigeria of a particular community, ethnic group place of origin, sex, religion or political opinion shall not by reason only that he is such a person... be subject either expressly, or in the practical application of any law in force in Nigeria or in any executive or administrative action of the government to disability or restriction to

38 Oxford Advance Learner Dictionary (5th ed; Oxford University Press, 1995) 1062

39 Constitution (n 6) s 10

40 ibid s 23

41 ibid s 38 (1)

which citizen of Nigeria of other communities ethnic groups, place of origin, sex, religious or political opinions are not made subject.⁴²

The above shows that Nigeria is not a state without religion, which has been the consistent assertion of the Nigerian Christian leaders in response to the Muslim demand for Shariah legal system. The adversaries of Shariah have argued that the interpretation of section 10 of the 1999 Constitution is that, the Country is a secular state in attempt to defend the status of the legal system, a position which the Muslims have rejected as against their interest. Ibrahim Sulaiman said:

Historically and in practice, secularization is a development peculiar to Christian civilization...It is a child albeit a bastard of Christianity. Secularism has become a sinister but convenient mechanism to blackmail Muslims and impede the progress of Islam and reduce it to the level of earthly concepts and ideology.⁴³

It is pertinent to explain that section 10 of the Constitution does not affect the existence and recognition of Shariah as supported by other provisions of the Constitution enumerated above. Islam makes no distinction between what is a religion or secular, all facets of human existence in life have their legitimate place in all encompassing system of Shariah. Schacht⁴⁴ while rejecting the argument that secularism is a reasonable compromise frame work on a multi religious country argued that:

Secularism is alien to Islamic doctrine. Islam is a way of life and subsumes both the spiritual and the temporal under its doctrine. Islam necessary regulates adherent's conduct politically, socially and economically.⁴⁵

The Muslims have discovered a connection between the Nigerian secular ideology of state and Christianity and thus reject and demand for a pure Islamic Legal System based on the Law of Allah (SWT). Shariah represents the practical and divine obligations that Muslims have been commanded by the Lawgiver to follow and it is an integral part of the religion of Islam.

42 ibid s 42

43 Ibrahim Suleiman, Sunday Triumph 24/4/85

44 J. Schacht, An Introduction to Islamic Law, (Oxford University Press, 1964) 1

45 ibid

IN
N
Z:
fo
in
th
th
Sl
se
Co
re
H:
Ti
an
Z:
is
It
se
N:
Co
Sh
re
be
Sc
of
Ti
de
di
an
O
M
es
—
46
47

INITIATIVE AT THE ADOPTION OF SHARI'AH BY SOME STATES IN NIGERIA

Zamfara initiative and some other states⁴⁶ in the Northern part of the Country that follow suit on the issues of the status of Shariah in the Constitution since the inception of democratic governance in Nigeria in 1999 is highly commendable with the adoption of Shariah Legal System in their states. Notwithstanding anything to the contrary, non Muslim would concede that, the Constitution does recognize Shariah though with limited jurisdiction. However, by the combined effect of sections 4 (7), 6(4) & (5), 38, 262, 277 and the Second Schedule to the 1999 Constitution of the Federal Republic of Nigeria etc, there is constitutional recognition of the freedom of religion as well as the legislative competence of a House of Assembly of State to establish other courts in addition to existing ones. The adoption of Shariah, the establishment of additional Shariah Courts and the amendment made to the Penal Code to accommodate Shariah Penal Laws by Zamfara State Government and other States in the Northern Nigeria that follow suit, is an exercise of their right within the confine of the Constitution.

It should be noted therefore that, the opposition and attack on its status based on secularism in line with section 10 of the 1999 Constitution does not hold water, Nigeria is a multi-religious state and as much adequate provisions were made in the Constitution to protect and recognize same. Even a non-Muslim antagonist of Shariah appreciates this empirical truth, that to hold Nigeria as a state without religion infringe upon the right of Muslim to have access to the freedom of worship, because Islam is not just a set of rituals but a complete way of life. On this Joseph Schacht has this to say: "The Shariah is the typical manifestation of the Islamic way of life....the cure and kernel of Islam itself."⁴⁷

The challenges posed by this demand for Shari'ah on the Constitutional review, democracy and national integration border on the ability of Nigeria to cope with the diverse interests of its citizen. An amicable resolution through the Constitutional amendment will be highly commendable.

OBSERVATION/SUGGESTIONS

Muslims in this country deserve a better treatment in the scheme of things especially, their right to a legal system. This position informs a rejection of the

46 Kano, Kaduna, Sokoto, Kebbi and Niger state have also adopted Shari'ah Legal System

47 Schacht (n 43) 5

argument that secularism is a reasonable compromise framework in multi-religious country; the Muslim Students Society (MSS) argued that:

The Muslim in this country thought they constitute the majority have compromised enough...Islamic political system is therefore our irreducible minimum charter for future political arrangement. The argument that Nigeria is heterogeneous is undeniable. But it is also true that Muslim have no choice but to abide by the Holy Quran and Sunnah.⁴⁸

Having identified the status of Shariah under the Constitution, it is instructive to state that Muslims in the country need to work assiduously to achieve their desired legal system. This is possible by taking advantage of the opportunity created since the inception of constitutional democracy in Nigeria on 29th May 1999.

The Muslims being stakeholders in the Nigerian policy should canvass and respond to the constitutional review by submitting memoranda and demand for an amendment to reflect the nature of Shariah legal system they aspired. The provisions which constitute a stumbling block in the operation of Shariah be revisited-

- The popular notion that the adoption of Shari'ah or the establishment of Shari'ah court of different jurisdictions in the Nigerian Constitution would amount to an adoption of state religion against the spirit of section 10 of the Constitution does not hold water. Because of the abundant evidence that the Nigeria Legal System has its basis and well rooted in Christianity. Thus, if that is the case and Nigeria is not said to have adopted Christianity as state religion, equity demand fairness to the Muslims by giving them their desired Shari'ah. This is based on the general principle to freedom of religion envisaged by section 38 of the Constitution.
- Aside, there is no controversy on the fact that Shari'ah legal system was well established in Nigeria with all its laws, procedures and application contained in a written law i.e. Quran, Hadiths and a well developed and sophisticated jurisprudence by different Schools of Law of which Nigeria belongs to the Maliki School ever before the advent of the colonialists. Thus, the facts that Shari'ah laws are written should address the defect of its categorization as unwritten customary law, invented by the colonialists

48 New Nigeria (Newspaper) of 26th April 1986 at p. 26

at all levels. Thus, Area Courts be confined to handle Islamic matters and Magistrate Courts handle non-Islamic matters.

- Because appeal from Shariah Courts of Appeals goes to the Court of Appeal (section 247 of the Constitution) whereas members that sit on Islamic matters are usually not all Muslims. Without prejudice to the fact that the panel must have a member learned in Islamic law, this has not helped matters and had caused a lot of injustice to the Muslims.⁴⁹
- Qualification of the judges or kadis: This is very important, Islam is an organized religion and its matters cannot be left in the hands of persons that are not well versed therein. Dispute settlement is a very serious matter in Islam. Allah is the overall judge, thus, a person saddled with this responsibility need to know that he would be questioned on how just he was on matters he decided on the Day of Judgment. Thus a judge who should sit and decide over a Shari'ah matter shall be:
 - i. A Muslim;
 - ii. Trustworthy, must not have been found wanting;
 - iii. Must possess adequate knowledge of Islamic law particularly he must be well versed in Arabic language to be able to consult the primary sources of Islamic law, which are in Arabic;
 - iv. He must be a graduate of Islamic law either from any of Nigerian University or any other countries in the world; and
 - v. He must have been called to the Nigerian Bar.

CONCLUSION

Muslims should not succumb to man's effort to relegate Shariah, they must struggle for justice and stand against injustice being perpetrated against Shariah. The Constitution demands from the governments Federation, States and Local, to ensure that governance and exercise of power be geared towards achieving public order, safety and good government. The provision of all these and more is the basis of the Shariah. The very objective of Shariah is to promote people welfare, safe guarding their faith, their life, their intellectual, their prosperity and ensure the safe-guard of these, serve public interest and its desire.

49 Salami v Salawu, Sidi Usman v Saliu Kareem (n) Adesunbokun v Yinusa.