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AN OVERVIEW OF THE APPLICATION OF SHARI'AH IN A MULTI-RELIGIOUS SOCIETY: A CASE STUDY OF NIGERIA

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Abstract

The application of Shari'ah in pluralistic society is dated back to the time of Prophet Muhammad's (PBUH) migration from Makkah to al-Madina (622 AD), 1,447 years ago. On the arrival of the Prophet and his companions in the commonwealth nation of al-Madina, there, they met, the Aws, Khazraj, Jews and Christians. The Prophet fashioned out a constitution known as (As-Shaifah) to regulate the conducts of state under his watch-dog, among different ethnic, and different religious people in the state of al-Madina. The situation then, was similar to what we are experiencing today in Nigeria. The application of Shari'ah in Nigeria is dated back to time immemorial, before the coming of colonialists to the place now known and called Nigeria. This article shall examine the application of Shari'ah during the : Pre-colonial; during colonial and post colonial administrations in Nigeria. The Article relied on doctrinal approach that examined into the cases and events of application of Shari'ah how it affect the present and future application of Shari'ah in Nigeria. It relied on primary sources which includes: the glorious Qur'an; the Sunnah of Prophet Muhammad(PBUH);the constitution of the Federal Republic of Nigeria 1999(as amended); judicial decisions(local and Foreign).The secondary sources relied on: Books; Newspapers; Article in journals; Magazines; Internet and unpublished materials. It finally recommended that the application of Shari'ah in Nigeria in recent time is constitutional that would provide solution to the present socio-political, economic, insecurity and religious crisis in Nigeria.

Keywords: Overview, Application, Shari'ah, Pluralistic Society, Nigeria

Introduction

Legal pluralism as contained in the Nigerian Constitution exists under Islamic Constitutionalism brought by Prophet Muhammad (PBUH) 1,447 years back. Islamic system of government accommodates the various bases on religions legal systems and their courts system. Christianity, Judaism and Hinduism are accommodated within the Islamic legal frame work.¹ Likewise, under the western democracies being practiced in Nigeria, there is no gain saying, that legal pluralities exist. The adoption or the application of Shari'ah legal system in a multi- religious society that apply common law and also Islamic law in its judicial system, does not in any way preclude people of other faiths to practice their religious teaching and rites under Shari'ah.² This is the position of Allah when He addressed the faithful Muslims in the early stage of Islam in the glorious Qur'an, thus: There is no compulsion in religion, verily; the Right path has become distinct from the wrong path. Whoever disbelieves in Taghut (a false judge who gives a false judgment) and believes in Allah, then

¹Aariz, H. *Contemporary Issue in Islamic Law*, New Delhi-India (Random Publications,),New Delhi-India 2013, p. 169

² Al-Mallah, H.Y., *The Governmental System of the Prophet Muhammad*, (Published by Dar Al-Kotob Al-Ilmiyah), Lebanon, 2011, pp.45-55.

he has grasped the most trustworthy handhold that will ever break. And Allah is All-Hearer, All-knower.³

For further clarification, Allah said in the glorious Qur'an that, "But how do they come to you for decision while they have the *Taurat* (*Taorah*), in which is the (plain) decision of Allah: Yet even after that they turn away, for they are not (really) believers."⁴

This article shall look into the working of the application of Shari'ah in Nigeria which applies both common law and Shari'ah in its judicial system, as a case study in order to see if the judicial system in Nigeria that combines the common law and Shari'ah can work in other countries where Muslims and people of other religious faith reside.

The study shall examine the position of Islam and Shari'ah prior to the coming of the British colonialists to the Northern and Southern parts of the country and during, and after the colonial rule. The Northern part of Nigeria comprises of three geo-political zones of: north central; north west and north east. The southern part of Nigeria comprises of three geo-political zones: south west; south east and south-south respectively.

Islam and Shari'ah in Northern Nigeria from Pre-Colonial Era to the Present Day

Islam came to the Northern part of Nigeria around 9th Century through trans-Saharan trade links.⁵ The general application of Shari'ah became firmly rooted as a judicial system in the political structure of the North. However, its application in the Northern states of Nigeria to supplant the native customs in the region did not come until late fourteenth century.⁶

The establishment of an Islamic State was the priority of the Muslims in Northern Nigeria, in accordance with Allah's injunction in the glorious Qur'an, that Muslims should have their lifestyle in-line with the provisions of the glorious Qur'an, thus: "He, it is who created you, then some of you are disbelievers and some of you are believers."⁷

Those that uphold the path of Islamic belief struggled to make Islam supreme as the religion encompasses all facets of life of human endeavour. The crux of making Islam supreme by the establishment of Islamic state where Shari'ah will be applied as the law of the land is aimed at the achievement of the following four major things in the life of the people viz: to make the word of Allah supreme; to bring unbelief, corruption and tyranny to naught; to bring dignity and honour to Muslims and save them from the humiliation of having to live under an un-Islamic power; to give the people- Muslims and Non-Muslims alike- the opportunity to enjoy a life that is governed by Islamic faith, permeated by morality and justice-using the glorious Qur'an and the Sunnah as the barometer.⁸ The above-mentioned desires necessitated the application of Shari'ah in Nigeria.

The fact remained that Nigeria was adjudged by the Transparency International in year 2000 as the most corrupt country. In his effort to free his State (Zamfara) and stamp out corruption, Governor Ahmad Sanni established the Zamfara State Anti-Corruption Commission under the watch-dog of Transparency International to jointly look into modality of eradicating corruption from the State.⁹ The re-introduction of the application Shari'ah brought about sanctity into the State. *Dalla Dalla* in the evaluation of the situation in the State prior to the re-introduction of Shari'ah legal System by the Governor said:

³Q 2 : 256

⁴Q 5 : 43

⁵ Suleiman, K. "The Application of Islamic Law in Northern Nigeria: Problems and Prospects" In *Islamic Law in Nigeria, Sokoto* (University of Sokoto Press), 1988. pp. 42 – 51, also for further reading see, Salau, S.O. *Islam in Nigeria*, (Published by the National Open University Course Material), Lagos, (NDP) pp. 28 – 31.

⁶*Ibid*, p. 43.

⁷ Q 64:2

⁸ *Op. cit.*, Salau, p. 36.

⁹ Akintola, I, (2009), *Good Governance in Islamic Eschatology*, Akintola, Yusuf and Salisu (eds) in *Correlates of Islam, Zaria-Nigeria*, (Published by Ahmadu Bello University), pp.122-130.

So many criminal groups like *Bukaloji*, *Waragaja*, *asigidi* and *Maguzawa* Existed in Gusau and environs. It was not a surprise for young members of these groups to abduct a girl and have sexual intercourse with force in the presence of her father. In the pre-Shari'ah period in Zamfara State, criminals broke into houses at will even in the day time and insisted on raping the daughters and wives of the bread winners. But the security in Zamfara State has improved substantially and crime has dropped to almost zero level...¹⁰

The application of Shari'ah in the Northern part of the country continued under the Sokoto caliphate until the arrival of the British colonialist and missionaries into Nigeria. The applications were well rooted and established in all aspect of the governmental processes and activities in the North. The applications were allowed to continue by the British colonialists through the adoption of the indirect rules system of governance.¹¹

The Islamic system of governance and the application of Shari'ah operated uninterrupted until 1900 when the British came up with the proclamation of 1900.¹² The Proclamation was followed by the Native Courts Proclamation, 1906, which introduced two systems of native courts.¹³

It is noteworthy that the *Jihad* introduced by Usmanu Dan Fodiyo in the 19th century was not the factor responsible for the application of Shari'ah in the Northern Nigeria, as being misconstrued by some people. The *Jihad* was only a unification of the then Northern Nigeria under a centralized system of government, with Sokoto and Gwandu as the administrative headquarters respectively.¹⁴ The *Jihad* ensured the application of social justice, women education, and eradication of corruption, sound public administration and, above all, the establishment of virile Islamic state in place of the weak one in existence before the *Jihad*. The *Jihad* ensures true application of the four essentials of governance mentioned above among the people.

The concept of leadership in Islam forbids the elected or appointed public office holders from taking undue advantage of their positions to misappropriate public funds, as being practiced in Nigeria today under the so-called "democratic dispensation."

The Islamic principle of leadership is a call to service, to serve the nation and not use the position for self-enrichment or enrichment of the family and cronies of the public officer.¹⁵ Prophet Muhammad (PBUH) was reported to have said:

Whomsoever we have given some post and he has misappropriated thing with which he will have to appear on the Day of Judgment, there upon a dark Ansari got up and said: O Messenger of Allah! Take away my governorship, the Prophet inquired what was the matter, he replied: I have heard all your talk just now, the Prophet said: I still say whosoever we may make a governor; he should place everything before us. He should take whatever is given to him and should keep away from whatever he is asked to desist. (Muslim)¹⁶

¹⁰*Ibid*, pp. 127-128.

¹¹*Op. cit.* Suleiman pp. 43 – 44.

¹² The substance of this Proclamation continued in force until the Area Court Edict of 1967, enacted by each of the then six Northern states the Area Court Edict, 1967 introduced some changes in respect of the method of appointment and control of the personal of the courts, and consequentially removing them from the control of non-professional officers.

¹³The Alkalis' courts and judicial councils, both of which were to be established by warrants under the resident's hand. The Alkalis' courts were to be presided over by the Alkalis, with or without conciliar helpers, while the Judicial councils were to be presided over by the Emir or Chief with such other members as the Resident might determine. See for further reading *Op. cit.*, Suleiman, p. 46.

¹⁴*Op. cit.*, Salau, p. 46.

¹⁵Mudathir A., *Timeless wisdom for modern Managers, Leadership strategies of Prophet Muhammad*, (Emgee Books Publishing), Ibadan, 2006, p. 11.

¹⁶Suhaeb Abdul Jabbar, *JamiuSaheehLisunanwal- Musaaneed*, (N.P), vol. 6, pp.94.

The combined effect of the Jihad of Usmanu Dan Fodiyo, the glorious Qur'an and the Sunnah of the Prophet Muhammad (PBUH) as narrated above, was the benefit derived from the establishment of Islamic state with the application of Shari'ah. A Christian Reverend once said, as to the true divine rule on earth, that: "if ever any man had the right to say that he ruled by a right divine, it was Muhammad (PBUH)."¹⁷

The government established in the Northern states (with full application of the Shari'ah) was described by a famous British writer and playwright as a system brought by Prophet Muhammad (PBUH). He said that: 'I have studied him, the wonderful man, and in my opinion, far from being an anti-Christ, he (Muhammad) must be called the saviour of humanity.'¹⁸

A proper analysis of Qur'an 64:2 quoted above and what George Bernard Shaw said (by describing and qualifying Prophet Muhammad's leadership and political ideology as the saviour of humanity) indicate that, every sound, reasonable, well thinking society, community, state or nation can borrow from the idea of the governmental system of Islam for the proper solutions to problems in any society. The defunct Northern Nigeria as was governed by Usmanu Dan Fodiyo, adopted the Islamic and Shari'ah system and was able to sanitised the region from corruption and gave sound socio, economic, political and secured administration to the people. The system was allowed by the British colonialists by adopting the principles of the system into their indirect rule, because they considered the system as worthy of emulation by right thinking people.¹⁹

The Islamic system of governance and Shari'ah was observed by the then first Governor General of Nigeria, Lord Lugard, (as quoted by Justice Mahmoud)²⁰ thus:

Lord Lugard found that Islam was well established in the North with Shariah and Islamic religion well entrenched in the lives and affairs of the inhabitants. In fact, in all the areas colonized by the British, nowhere was Islam being observed as thoroughly as in the case of Northern Nigeria, except perhaps in some parts of the Arab World. The Emirs Courts were filled with learned and pious jurists whose decisions were always based on authorities from the Qur'an, Hadith or other Islamic law books and such procedures were always recorded in Arabic. Existing side by side were the Alkali courts, which were also engaged in the administration of justice based on the Shariah.

The salient feature of the above statement by Lord Lugard was that the environment was so peaceful in nature under Islamic system of governance with the application of Shari'ah being administered by those learned in Islamic law, which enhanced fairness and justice to all and sundry. Thus, the application of Shari'ah cannot, in any way, bring injustice as envisaged by the antagonists and application of Islamic mode of governance in any part of Nigeria should not be termed as turning Nigeria into an Islamic state; more so, as the constitution of Nigeria equally envisages legal pluralism. The application of both criminal and civil aspects of Shari'ah was in vogue for centuries under the Sokoto Caliphate before the advent of the colonial administration.²¹ Then, Islam was the state religion in the North and Shari'ah was their official legal system as evident by the speech of Lord Lugard, the first Governor General of Nigeria quoted above by Honourable Justice Mahmud.

Islam and the application Shari'ah in the Southern States of Nigeria

The Second part of this article discusses the application of Shari'ah in the Southern State of Nigeria. The Southern State was made up of the present South-West, South-East and South-South

¹⁷ Smith, B., *Muhammad and Muhammadanism*, London, p. 92, quoted from: What is said about Muhammad, from the website of Institute of Islamic Information and Education Brochure series 12.

¹⁸ Bernad, G.S. op. cit. accessed at <http://www.google.com.ng/ur/visited> on 1st June, 2013.P.3.

¹⁹ Nasir, A.A., *Administration of Islamic Criminal Law under the Nigerian Constitutional Democracy*, (Ahmad Bello University Press Limited), Kaduna, 2011, p. 3.

²⁰ Ibid, Quoted in Nasir, A.A., p. 2.

²¹ Op. cit., Ambali, p. 15. For further reading see, Ruud, P. *Islamic Criminal Law in Nigeria*, (Spectrum Books Limited), Ibadan, 2003, pp. 1 – 12. Ruud was of the view that the application of criminal aspect introduced by the then Zamfara State Governor, Ahmad Sanni Yerima on 27th January, 2000 was a mere Re-Introduction of Shariah Criminal Law. See pp. 13 – 30.

respectively. Unlike the clear proof as to the coming of Islam into the Northern Nigeria, that of the Southern part was uncertain, but most of the writers agreed that Islam entered the South-West around 17th century.²²

South-Western Part of Nigeria

The Yoruba language speaking people occupied the south-western states of Nigeria. The origin of the Yoruba language speaking people was traced down to far Middle East, majority of the writers trace their origin down to *Quraish* in *Mekkah*.²³ Islam and Shari'ah have been with the people of South-West before the advent of the colonialists. In an undisputed fact supported by the statement credited to Late Honourable Justice (Dr.) Muritala Aremu Okunola (JCA),²⁴ that recourse has to be made back to the Yoruba proverb thus: "*Ile la ba'fa, Ile la ba 'male, Osan gangan nilgbagbo de.*" This proverb means that: Ifa Oracle and Islam have been with us from time immemorial while Christianity came very much later.

Tajudeen²⁵ demonstrated that Yoruba people in the South-West not only accepted Islam as a religion but also that they equally adopted the Shari'ah legal system. This could be seen in their popular expressions which go thus: '*O da seriya fun un*' meaning, he meted Shari'ah on him; '*O to Suna*', meaning, the conduct conforms with the Sunnah; that is, it is legally right and morally justifiable under the Shari'ah; '*O je haramu*'; meaning: he has consumed something or engaged or involved in something forbidden by Islam.

A Muslim leader in the South-Western Nigeria, Alao, described Shari'ah and the Muslims in Yoruba ways of life, said that:

Shari'ah has been in existence since the existence of The Holy Qur'an, it is not (just) a law but a divine Message of the Almighty God. It has been in Yoruba land for a hundred years... it was in Ede, Iwo, Epe and even Lagos. There was Alkali house; it is already in Yoruba Language. For Example, (the Yoruba say) "*E mu wa ka da seriya fun*" (i. e. Bring him here so that we can handle his case in accordance With the Shari'ah). We are referring to the Shari'ah of the Holy Qur'an.²⁶

This work is in total agreement with the above view of Alao as to the acceptance of Islam and the legal system in the South-Western states before the coming of the British colonialists.

There is an unimpeachable record which shows that there were Shari'ah Courts in some major Yoruba Towns. During the second half of 19th century, the then traditional ruler of Ede in Osun State of Nigeria, *Oba AbibuLagunju* was said to have applied Shari'ah within his kingdom,²⁷ this led to the official establishment of Shari'ah Court in the town in 1913.²⁸ The same thing was applied to Iwo Town in Osun State of Nigeria under the *Oba Momodu Lamuye* and *Oba Aliyu Oyekunle* the seventh *Akirun* of *Ikirun*²⁹ respectively.

The application of Shari'ah was said to play an important role in the administration and dispensation of justice as among the Yoruba in Ibadan land. Especially, during the reign of *Oba Momodu Lamuye* (1860-1906) of Iwo town and *Oba Aliyu Oyewole*, the seventh *Akirun* of *Ikirun* as confirmed by a renowned historian, Professor (Mrs.) Bolanle Awe.³⁰

The league of Imams and Alfas in Osun State of Nigeria, on behalf of the Muslim Community of Osun State presented memorandum to the Osun State House of Assembly praying for the application of

²²Op. cit. Salau, p. 73 see for further reading, Gbadamosi, T.G.O., *The Growth of Islam among the Yoruba*, (Longman Group Limited), London, 1978, p. 4.

²³ Johnson, S., *The History of Yoruba*, (Lowe and Brydone Printers Limited), Great Britain, 1976, p. 3.

²⁴Tajudeen, A.A., *Application of Shari'ah in Southern Nigeria: The HOAX, THE TRUTH*, (al-Furqaan Publishers, a division of Crescent Investment Limited), Shaki, 2006, pp. 28 -29.

²⁵Ibid, Tajudeen, pp. 28 – 29.

²⁶Arisekola, A., Those who Politicise Shari'ah.... Tell Magazine, 24th July, 2000, p.34.

²⁷Abdullahi, U.Y., *Shariah in Africa*, (Shebiotimo Publications), Ijebu-Ode, 1989, p. 80 see also Dokun, L.A. *Islam in Ede*.

²⁸Op. cit, Tajudeen, p. 30.

²⁹Ibid, p. 30.

³⁰Ibid, Tajudeen, p. 30. quoted from Bolanle, A., *History of Ibadan as a World Power in Yoruba Land*.

Shari'ah in Osun State.³¹ The focus of the memorandum discusses the importance of Shari'ah to the Muslim and it was likened to soul to the body. When separated the body becomes useless; likewise, when Shari'ah is taken away from the Muslim; he becomes useless and hopeless religious-wise. Also, the entire Muslims in Southern Nigeria send a memorandum titled: "THE NON-NEGOTIABLE DEMANDS OF SOUTHERN MUSLIMS IN THE FOURTH REPUBLIC"³² to President Olusegun Obasanjo in which they demanded for the application of Shari'ah in the Southern States of Nigeria.³³

South -East and South-South parts of Nigeria

The two zones above shall be considered together. Islam entered the present South –East and South-South States of Nigeria in the 19th century through the invasion of the areas by the Nupe, a Muslim tribe from the Northern Nigeria. This invasion paved way for the Nupe Scholars³⁴ to establish Islamic religion in the area.

The expansion or the spread of Islam from the North to the present South-West, South-East and South-South regions as narrated above resulted in the present contention that, the most populated people in Nigeria across the six-geopolitical zones are the Muslims. It has been estimated that Muslims account for about half of the population in Yoruba land.³⁵

Thus, not allowing the Muslims in the south western states of Nigeria to establish Shari'ah would amount to fundamental Constitutional breach of their recognized right under the Nigerian Constitution, as to right to freedom of thought, conscience and Religion. The Constitutional provision provide thus:³⁶

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 in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own or a religion not approved by his parent or guardian.

The above constitutional provision was recently given judicial interpretation in the suit between female Muslim Students and the Osun State Government in Nigeria; the Christian Association of Nigeria (CAN) and others voluntarily joined the suit as Respondents. In the said suit, Justice Jide Falola of an Oshogbo High Court, restrained the Respondents from disallowing the use of veil by the female Muslim Students in public schools.³⁷

The application of Shari'ah among Nigerian Muslims was accepted by the British colonialist whose environment comprised of Christians and Muslims, but their legal system did not leave out Christianity doctrines and values. This was confirmed and affirmed by the British Court in the popular case of: **Bowman V Secular Society**.³⁸ In the case, it was stated in an unequivocal language by Lord Summer that:

'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

³¹Adekilekun, A. *Muslims and Islamic Law in Southern Nigeria*(1899-1999), (Published by Moyanjuola Publishers, Islamic Culture Centre), Ede-Osun State, 2001,pp.56-69.

³²New Nigerian, Kaduna 8th April, 1999,p.20

³³*Op. cit*, Adekilekun.pp.70-86.

³⁴*Op. cit*Salau,, p.73.

³⁵*Ibid*, Salau,p.78.

³⁶Section 38 (1) (2) and (3), 1999 Constitution as amended.

³⁷ "An Osogbo High Court granted the prayers of female Muslim Students to wear Hijab (veil) in all public primary and secondary schools in Osun." See <<http://www.vanguardngr.com/2016/06/court-grants-female-muslim-students-order-to-wear-veil-in-osun-schools/>> Assessed on 9th June, 2016 @12:39pm.

³⁸ (1917) A.C., 406 @ 464-465.

apply many of its rules and most of its principles with equal justice and equally good government, in heathen communities and its sanctions, even in courts of conscience is material and not spiritual.'

Lord Finlay in the same case equally adopted the above expression when he said that:

It has been repeatedly laid down by the courts that Christianity is part and parcel of the law of the land, and it is a fact that our civil polity is, to a large extent based upon the Christian religion..... But the fact that Christianity is recognized by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavour to undermine it.³⁹

The above statement by renowned jurists was in support of the agitation by the Muslims in southern Nigeria to establish Shari'ah courts for the adherents of Islam. Therefore, what is good for the goose is equally good for the gander. So, the application of Shari'ah is never a thing of debate having seen the historical antecedents of Islam and the Shari'ah across the country.

Implementation of Shari'ah during the Colonial Era in Nigeria

Following the amalgamation of the Northern and Southern parts of Nigeria in 1914 by the then Governor-General, Lord Lugard, the application of Shari'ah was preserved after the amalgamation. Its adoption as part of the administrative package of indirect rule systems is an acknowledgement by the colonialists that it was an efficient system. It was a useful tool in the hands of the colonial administration to operate popular government and maintain law and order.⁴⁰ In fact, the translation by the colonial masters of *Mukhtasar* of the *Madhhab* Imam Maliki School of Law in Islamic jurisprudential parlance is an eloquent testimony that colonial administration is in full support and recognition of the Muslim legal system which was in existence before their arrival.⁴¹

The only havoc rendered by the colonial rule to the Islamic legal system was the classification of Shari'ah as a native law and custom. Anderson⁴² was of the view that Islamic law (Shari'ah) was extensively enforced throughout large area of West Africa and particularly in Northern Nigeria.

It is the submission of this article that, it is irrational and illogical for the classification of Shari'ah as a native law and custom. Anderson in his appraisal of Shari'ah said: "it was applied in a large area of Africa." This means that the Shari'ah is applicable to large area of Africa which comprises various languages and a cultural background; it is therefore so strong, and it is inappropriate relegating and classifying of such popular and widely applied law under Native Law and Custom. See, **Al-Kamawa v Bello**,⁴³ the Supreme Court upheld the view in this article as expressed above, that Islamic Law (Shari'ah) is not a Customary Law.

The Christian Missionaries activities under the governorship of Lord Lugard and his successors kept Christian Missionary activities away from Muslim areas.⁴⁴ This also ensure that Islam and the practice of Islamic ethics and culture are undiluted with the Christian ideas and unhampered during the leadership of the first Governor-General.

Creation of Native Courts in Nigeria

The havoc done to the Islamic legal system by the colonial master started with the proclamation of the Native Courts Proclamation of 1906. This proclamation created new condition for the judicial system under the British rule in the area known as Northern protectorate.⁴⁵ It was in an effort to overhaul the judicial system which was well established under the administration of Sokoto

³⁹ *Ibid.*

⁴⁰ *Op. cit.*, Ambali, p.16.

⁴¹ *Ibid.*

⁴² Anderson, J.N.D., *Islamic Law in Africa*, (Frank Cass and Company Limited), London, 1979, p. 4

⁴³ (1998), 6 S.C.N.J, 129 @ 136.

⁴⁴ *Op. cit.*, Salau, p.82.

⁴⁵ *Ibid*, p. 93.

Caliphate. Rudd⁴⁶ was of the view that the British exerted control through the administrative and judicial structures in existence. The native courts in the North exercised full Jurisdiction both in civil and criminal causes.

The Native Courts Proclamation of 1906 was reviewed on several occasions before it was replaced by the Native Courts Ordinance of 1933.⁴⁷ This Ordinance introduced a system of courts hierarchy that allowed an appeal from native courts to the higher court (now known as Supreme Court) from where matters went on further appeal to West African Court of Appeal. The Shariah criminal law remained in existence and not abolished in 1904 when criminal code was introduced in Northern Nigeria.

The statutory Courts established for the western and eastern Regions were called 'Customary Courts.'⁴⁸ The Northern Region had a Statutory Customary Courts named 'Native Courts.'⁴⁹ The Northern Region by 1956 established the Muslim Court of Appeal⁵⁰ for the purpose of hearing appeals from the decision of Native Courts in both Criminal and Civil cases governed by Islamic Law.⁵¹ The Muslim Court of Appeal metamorphosed to the present Shari'ah Court of Appeal on 30th September, 1960 on the attainment of Nigeria Independence in 1960.⁵²

The West African Court of Appeal (W.A.C.A) has in some cases affirmed the conviction by native courts based on Shari'ah legal principle. In the case of: **Abdullahi Kogi and Ors V. Kastina Native Authority**.⁵³ The Appellate court (W.A.C.A) explained its position thus:

There is no desire to interfere with decisions which are in accordance with native law, the principle has laid down that the verdict and sentence of a native court which are an integral part of our judicial system carried out in accordance with procedure enjoined by native law and not obviously inequitable will be accepted even though the procedure is widely different from the practice of English criminal code.

In juxtaposing the above position of the Appellate court with the decision by the Emir of Gwandu's Court in the case of: **Tsofo Gubba v Gwandu Native Authority**⁵⁴ in an offence of willful homicide which conviction was based on Islamic law, the Appellate Court (W.A.C.A), in 1947, changed its position that the offence for which Emir's Court convicted the accused person was not a capital offence under the criminal code.

The implication of this decision of the West Africa Court of Appeal was that in case of conflict of laws between the native courts and the criminal code, any conviction founded in the native courts could

⁴⁶ *Op. cit.*, Rudd p. 6. see for further reading, C. O., Okonkwo and Naish on *Criminal Law in Nigeria*, (Spectrum Books Limited 2nd Ed), Ibadan, 1980, pp. 4-17. The Native Court Ordinance of 1933 (S. 10 (2) laid down the jurisdiction of native courts, thus: 'Native Courts (...) may impose a fine or imprisonment (...) or may inflict any punishment authorized by native law or custom provided it does not involve mutilation or torture, and is not repugnant to natural justice and humanity.'

⁴⁷ The Native Court Ordinance of 1933 (S. 10 (2) laid down the jurisdiction as to the native courts thus 'Native Courts (...) may impose a fine or imprisonment (...) or may inflict any punishment authorized by native law or custom provided it does not involve mutilation or torture, and is not repayment to natural justice and humanity.'

⁴⁸ Obilade, A. O., *The Nigerian Legal System*, (Spectrum Books Limited), Ibadan, 2003, p.33.

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ (1930) 14NLR 49, See also for further reading: Karibi-Whyte, A.G., "History and Sources of Nigerian Criminal Law", Ibadan (Spectrum Law Publication) 1993, also; *Op. cit.*, Rudd p. 8.

⁵⁴ (1944) 12 WACA, 141. See for further reading Mohammad, T, "Constraints in the Application of Islamic Law in Nigeria". In *Islamic Law in Nigeria: Application and Teaching*, edited by S. Khalid Rashid, Lagos (Islamic Publications Bureau) 1986, pp. 75 – 85. See also Rudd p. 9.

Ibid, Rudd p. 10

on appeal under the criminal code, be quashed or reversed in the case of sentence for capital offence.

As rightly stated by Rudd in his book, the differences in the British notions of justice in criminal matter and the notion of justice under the Islamic legal system and criminal code became exposed for the first time in the above cited case of **Tsofo Gubba vs Gwandu Native Authority**. This conflict was settled in the case of: **Maizabo v. Sokoto Native Authority**.⁵⁵ It was made clearer that the native courts and customary courts have jurisdiction to apply customary criminal law, regardless of the fact that there is provision in the criminal code on the subject matter of the case.⁵⁶ The only condition or limitation is that the native or customary courts cannot pass a sentence in excess of the maximum sentence for any conviction under the Criminal Code.⁵⁷ The implication is that even where the sentence under the criminal Code is lesser than what it is under the native and customary laws, the sentence in the criminal code must be applied.

The British introduced the Criminal Code after a period of nearly five decades during which Islamic criminal law court has been applying the Maliki *Madhhab* to the cases of homicide, without restriction.⁵⁸

Post Colonial Implementation of Shari'ah in Nigeria

The changes in Shari'ah after the colonial rules can be traced back to the birth of the Penal Code Law, 1959, and the Criminal Procedure Code Law, 1960, replacing the Criminal Code Ordinance and the Criminal Procedure Ordinance.⁵⁹

The problem that gave birth to the Penal Code Law was associated with the fear of non-Muslim minority in the Northern region, a region that has Muslims in majority in its population. This enables the British colonial administration in power, prior to the Independence, to set up a committee to fashion out the Criminal adjudication system that would serve the Muslims and the non-Muslims in the region. The committee was made up of Mr. Justice Abu-Rannat as the (chairman), who was the former Chief justice of Sudan, Mr. Peter Achimugu, Mallam Shettima, (who was then, the Waziri of Bornu), M. Musa Othman and Professor Anderson of the School of Oriental and African Studies. The committee was given three options of the law to be adopted across the region. The options were:

- 1) Whether to adopt one hundred percent Western system of law; or
- 2) to adopt a hundred percent Islamic law or;
- 3) to recommend a hybrid of the two.⁶⁰

The committee could not recommend the adoption of the first option above, because, as far back as 1904, there was in operation in the region the Criminal Code which was basically British law. The committee was, as well, unable to recommend the second option above, that is, a hundred percent Islamic criminal adjudicatory system being in existence since time immemorial. Instead the Committee opted for the third option which is the "adulterated Shari'ah."⁶¹ It is referred to as "adulterated Shari'ah" because the bulk of the laws is completely at variance with the prescriptions in the glorious Qur'an and the Sunnah of Prophet Muhammad (PBUH). For instance; theft under Section 286 of the Penal Code is punishable under Section 287 of the Penal Code with five years' imprisonment whereas, under Shari'ah, the convicted thief would have his hand amputated.⁶² Also robbery under Section 296 is punishable under Section 298 of the same code with ten years

⁵⁵(1947) 12 W.A.C.A. 141.

⁵⁶*Op. cit.*, Okonkwo, pp.8-9.

⁵⁷Chukkol, K S., *The Law of Crimes in Nigeria*, (Ahmadu Bello University Press Limited, Revised and Printed), Zaria, 2010, p.18

⁵⁸*Op. cit.*, Rudd, p. 10.

⁵⁹ *Op. cit.*, Tajudeen, p. 37.

⁶⁰*Op. cit.*, Chukkol, pp.20-21.

⁶¹*Ibid.*, Chukkol, p. 21.

⁶²Doi, A. I., *The Principle of Democracy and Consultation (Shura) in the Earliest Constitution*, in the *Constitutionalism in Islamic Law*, being a paper presented at the National Seminar on Islamic Law, held at the Institute of Administration, A.B.U. Zaria, (Published by Centre for Islamic Legal Studies), 1977, pp. 1-28 at p. 18.

imprisonment. The offence of culpable homicide is strictly criminal under the Penal Code, whereas, under pure Islamic Law, the offence of culpable homicide may partly be considered a crime and on the other hand partly a tort with the deceased's families receiving some form of 'blood money' referred to as *Diyah*.

The real intention of the politicians then, for its adoption of the third option, according to the then Premier, Sir Ahmadu Bello, was 'to reassure the non-Muslims in the Northern region against the apprehension which they felt for the religion.'⁶³

Nigeria became an independent Nation on 1st October, 1960 under the 1960 Nigerian Constitution; therefore, the jurisdiction of Shari'ah Court of Appeal can be traced to the 1960 Nigerian Constitution. The provision relating to its jurisdiction reads thus: "An appeal shall lie from the decision of the Shari'ah Court of Appeal to the Federal Supreme Court as of right in the following cases..."⁶⁴

It is important to note that the application of Shari'ah post-colonial Rule was entrenched in the Nigerian Constitution of 1960 as discussed above. The application of Shari'ah in our judicial system under the Republican Constitution in 1963, was well entrenched; meaning that Shari'ah was in operation alongside the inherited British legal system and the customary law of various communities in Nigeria.

Nigeria, by 1st October, 1963 became a Republic under the 1963 Constitution.⁶⁵ The Republican Constitution of the Federation of Nigeria carried along the provision and application of Shari'ah. The Appeals against the decision of Shari'ah Court of Appeal lies with the Supreme Court of Nigeria.⁶⁶ Between 1966 and 1976 two bodies were set up to examine necessity to abolish the Area Courts in the administration of justice in Northern Nigeria. The Chairman of the first body set up was the former Chief Justice of Nigeria, Mr. Justice Mohammad Bello, CON, and the second body was headed by Dr. Aliyu Abubakar.⁶⁷

The primary assignment of these bodies was whether or/not the Native Courts which try most of the civil and criminal cases should be abolished. The committee observed that the Native Courts handled about 95 percent of the criminal and civil cases in the Region, and that:

The Native Courts try about 95 percent of criminal and civil cases in the Northern Nigeria, and only five percent are tried in the High and Magistrate Courts. The returns from the year 1964 may be taken as a typical example to clarify the problem. The returns show that Native courts tried 223, 262 cases as against 1,961 tried by Magistrates (District) Courts. In 1964 there were 12 Magistrate in Northern Nigeria. If Native Courts were to be abolished, then their civil jurisdiction would have to be transferred to Magistrates' Courts. Simple arithmetic from the returns would reveal that 1,861 additional Magistrates over and above 1964 establishment must be employed. On the assumption that Government has the means to employ such an army of lawyers, the problem of Law applicable immediately steps in. The greater majority of civil cases in Northern Nigeria are governed by Islamic Law. Furthermore, the procedure in Magistrates' courts is too technical and complicated to be understood by the simple and unsophisticated rural communities who are accustomed to the simple and easy methods of the Native Courts.⁶⁸

The above observations show that the bulk of the trials, civil and criminal cases in the Northern Nigeria post- colonial Rule, under Islamic legal procedure are carried out by the Native Courts.

⁶³*Ibid*, 22.

⁶⁴Section 112.

⁶⁵The Constitution of the Federation, 1963.

⁶⁶Section 119 (1). The provision of appeal under the 1963 Constitution provides, thus: "An appeal shall lie from decisions of the Shari'ah court of Appeal to the Supreme Court as of right in the following cases..."

⁶⁷ *Op. cit.* Ambali, pp. 23-24.

⁶⁸*Ibid*, pp. 24-25.

The then government was impressed with the above scenario and the government white paper on the recommendations of the Committee stated, thus: “the government noted the committee’s general conclusion and agreed that the Area Courts, where they operate, have become an indispensable feature of administration of justice, especially as far as the generality of the populace is concerned.”⁶⁹

Conclusion

This Article has examined how Shari’ah can be applied in a multi-religious and multi-ethnic society like Nigeria. It is important that the two major prominent religions in Nigeria- Islam and Christianity, to appreciate the multiplicity of religious as provided for under the constitution of the Federal Republic of Nigeria, 1999 (as amended). The constitution in its federal arrangements, envisages and accommodate religious multiplicity. From the historical and analytical perspective in this article, and the respective practices in our socio-political order: Nigeria is a pluralistic society that takes into cognisance the tenets of belief of each religion.

The Article traced the period of the application of Shari’ah in Nigeria to pre-colonial era in Nigeria. It looked into its application of Shari’ah in the six geo-political zones of: the north-central; north-west; north-east, south-west; south-east and south-south respectively. It traced the period that Islam entered into the six geo-political zones, and the applications of Shari’ah among the people of each zone.

It examined the application of Shari’ah before; during and post colonial administrations in Nigeria, and how Shari’ah was entrenched in the Nigerian constitutionality. The person (s) directly affected by the application of Shari’ah were well defined.

The article finally recommend the application of Shari’ah in all parts of Nigeria in order to curb the problems of insecurity, ethno-religious and political upheaval in Nigeria.

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