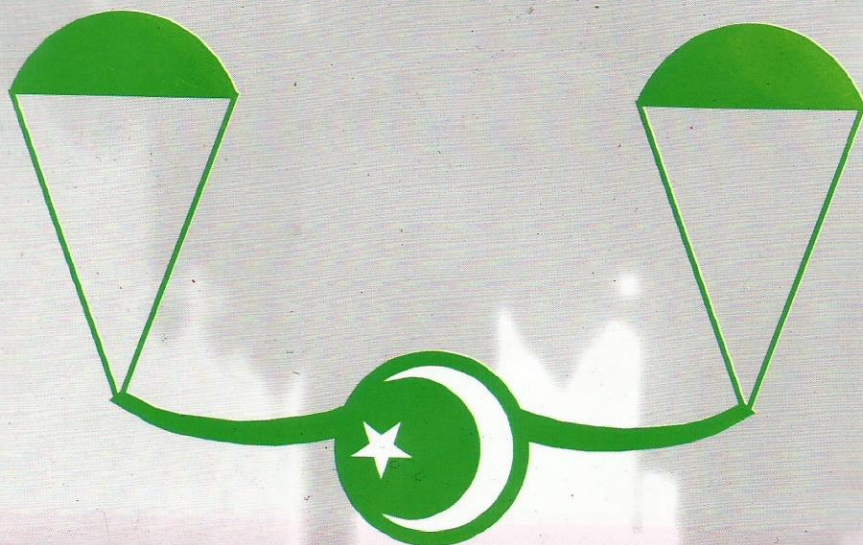


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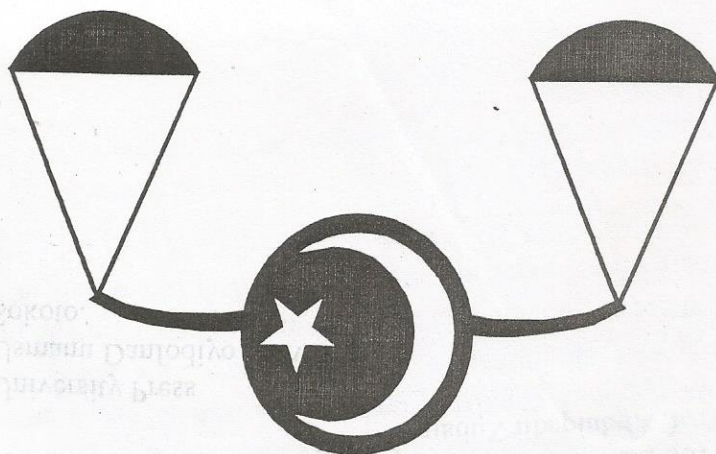
DEPARTMENT OF ISLAMIC LAW

USMANU DANFODIYO UNIVERSITY, SOKOTO



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

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A CRITICAL REVIEW OF THE POWERS OF SHARI'AH COURTS UNDER THE 1999 CONSTITUTION

By

Edu, H.O.*

INTRODUCTION

1. Historical Background

Nigeria being a State operating a tripartite legal system, to wit: Customary Law, Islamic Law and the Received Common Law¹, had been struggling against how to come about an appropriate unifying Laws acceptable to all indigenous populace forming the citizenry of the nation since her independence.

Prior to the attainment of independence, the colonial masters simply adopted two different methods of governance; 'the indirect rule' believed to be suitable for the Muslims in the north who were placed under qualified self rule while those of the south were fully colonized under a system called 'direct rule' method of governance. The similarity between them is the blatant inability to apply "Shari'ah"² fully except the personal aspect of it, a thing that is tantamount to loss of Islamic identity. Therefore, both the since independent and 1963 constitutions limited the scope of Shari'ah to personal matters while Shari'ah also remained volatile within the polity of the country, because of the absolute preference given to the received Common Law, which itself is a combination of native Laws of Britain, and Christian ethic as stated by the legendary Lord Sumner since 1917³ when he concluded that "Ours is and always has been a Christian state. The English family is built on Christian ideals, and if the national religion is not Christian, there is none. English may well be called a Christian Law"⁴.

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- * Lecturer, Department of Islamic Law, Lagos State University.
- 1 Sources of Nigerian Law – by E.W. Clerk – Suzeset & Maxwell, Lond. 1963 p. 35. Note the order of sequence – it is the order of arrival in Nigeria.
- 2 Rashid, S.K (Dr.): Islamic Law in Nigeria: Application & Teaching, P. 85.
- 3 Reports of Appeal cases, 1918 No. 406 – Law Report 1920. All England Laws Report.
- 4 Bowman v. Secular Society Ltd (1917).

The position of the two older systems – customary and Islamic Law⁵ – were and are still relegated. Various cosmetic attempts were made by the colonialist to recognise them in the legal system like the passage of the Native Court Ordinance Act of 1933 and the Shari'ah Court of Appeal Act (Northern Nigeria) of 1956. However, the gains of these efforts were eclipsed by the introduction of repugnancy and inconsistency and tests. These two way test for the validity of 'native laws' (Islamic Law inclusive) have their origins in the Native Court Ordinance of 1933. This Ordinance defines the jurisdiction of Native Courts created by it across the Federation, being a post-amalgamation law. It stated that the jurisdiction of Native Court shall be 'application of native laws and custom applicable within the jurisdiction of each court, and the biding law between the parties to litigation in civil and criminal cases. The court is empowered in both criminal and civil cases to impose punishment under Native Law and Custom, provided it does not result in inhuman treatment. Also they can not apply any Native Law and Custom that is repugnant to natural justice, equity and good conscience, or inconsistent directly or indirectly with any written law for the time being in force'. It should be noted that the word 'repugnant' is yet to be given a clear meaning by any Court of law in Nigeria except what Lord Wright stated in *Laoye v. Oyetunde*, where he said "the term (repugnant) was aimed at voiding barbaric customs". However, this comment raised more issues than it solved as to what constitute 'barbaric customs'. Although case laws identified some indigenous customs as barbaric⁸, none is identified under Islamic Law. The only semblance of the word 'repugnant' in our law presently was retained in The Evidence Act⁹ where it was written "Provided that in case of any custom relied upon in any judicial proceeding, it shall not be enforced as law if it is contrary to public policy and it is not in accordance with natural justice, equity and good conscience."¹⁰

One may conclude here that the word 'repugnant' means 'not in accordance with', Islamic Law had not been formerly pronounced as such, but the attitude of those administering law in Nigeria is suggestive of such with their aversion to full

Termed "Native & customary Law" by the colonialists.

S.2 of The Native Court Ordinance, 1933.

(1942) C.A.106 of 1945.

See *Edet v. Essien* (1932) 11 NLR. 47, 189.

Cap E14 of LFN 2004.

S. 14 of Evidence Act, Cap E14 of LFN 2004.

their conducts. This is possible with the proper "codification" of Islamic Laws. This may not be of ultimate importance with Islamic Law, being a written Law that had been applied for a long time, but writing it down in a determined form explaining crimes and their punishments, and legal consequences of other transactions will foreclose the abuse or miscarriage of justice by those charged with the administration of justice.

Although, there had been serious arguments among Muslim scholars for and against codification of Quranic legal provisions, what must be noted here is that, the dynamic nature of human being, which Islamic Law did not deny (it is even emphatic about this, hence the injunction to think, observe, study and search for knowledge where ever it can be found speak volume of Islamic opinion on this), supports such codification. However, in doing such codification care must be taken of Law like that of Maliki, Hanafi, Shafi'i and Hambali are taken as opinions within this expansive school to eliminate or at least reduce drastically human errors, and so that scholars can have more space to maneuver in codifying Islamic Law provisions regarding legal or judicial decisions and or pronouncements in the best way that suits the need of the Muslim Ummah (community).²⁹ This opinion is supported by most of the modern scholars and one of them said:

law (Qanun), when it is extracted from the Shar'iah provisions is also Islamic legislation, but in a new and easier form that helps correct application, stability and reliability of legal decision, unlike opinions of various scholars that can hardly meet collective agreement among the jurists and judges.³⁰

In summary Islamic Law must be taken from the whole schools without straight jacketing it within a school in this modern time, "for easy application of Shar'iah with little or no operational difficulties".³¹

3. The Inherent Problems

Throughout Nigerian constitutional history since the advent of colonialists, Shar'ah had been a volatile issue. The 1979 Shar'ah debate clearly confirms this assertion. Also, in 1988, Shar'ah debate almost tore the Constituent Assembly into pieces to

- 29 Yusuf Al-Qardawi, *Madkhal Li Dirasati ash-shar'iah*, publisher: Daar an-Nahdatu al-arabiyyah.
- 30 Mustapha Ahmad Az-zargau, *Al-Madkhal al-Fiqh al'Am*, Publisher: Daar al-Fikr, Lebanon. Cairo 1973, P 112.
- 31 Report of Sudanese Law Review committee, 1975 series 9, Page 2.

the extent that the Constituent Assembly had to refer the issue of Islamic Law in the 1989 constitution to the then Military Rulers, who made significant amendment to the provision in the 1989 Constitution.³² The Abacha/Abubakar's Drafting Committee made further amendment that formed what we have today in the 1999 Constitution. The latter amendment happened to be the worst. S.262 (2) (e)³³ & 277 (e)³⁴ required even Muslims to request from the court of the first instance to be heard in accordance with Islamic Personal Law. This is the level of contempt poured on application of Shari'ah – the law that is supposed to be a way of life.³⁵ It should be noted that all Constitutions of the Federal Republic of Nigeria from 1963 to date have partially recognized Shari'ah one way or the other. For instance, 1963 Northern Constitution recognized Shari'ah court as imperative on Muslims and option for non-Muslims.³⁶ As for 1979 Constitution, Shari'ah court, though a matter of choice,³⁷ is made imperative on Muslims and optional to non-Muslim.³⁸ 1989 Constitution limited Shari'ah court to Muslims only,³⁹ and the current 1999 Constitution made Shari'ah court optional to Muslims only.⁴⁰

One thing that deserves mention here is that while the Constitution recognized the right of each state that requires Shari'ah Court of appeal to establish one, the Constitution is silent on the procedure of such establishment. This is a fundamental oversight which should be addressed.

- 32 S.277(2)(e) of the 1989 constitution reads, 'where all the parties to the proceedings, *being Muslims*, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic Personal Law...'
- 33 Shari'ah Appeal Court of Federal Capital Territory.
- 34 Shari'ah Appeal Court of a State.
- 35 Quran 4:18.
- 36 S.53(5) of the Constitution of Northern Nigeria 1963.
- 37 S.2(1) of the Constitution reads: "There shall be for any state that requires it, a sharia court of Appeal for that state" (now in s. 275(1) of 1999 Constitution).
- 38 S.277(2)(e) of 1999 Constitution.
- 39 S.262(2)(e) & 277(2)(e) of 1999 Constitution.
- 40 S.262(2)(e) reads in part: "...being Muslim, have *REQUESTED* the court that hears the Case in the first instance to determine that case in accordance with Islamic Personal Law".

1. Obstacle to Application Removable

Writers on legal issues in Nigeria had put together what constitute obstacles to application of Islamic law in Nigeria; they can be summarized into the following:

a) Constitutional Obstacles: This article has identified one area of such obstacles i.e. the supremacy of the Constitution that renders all other laws that are inconsistent with it null and void to the extent of its inconsistency.⁴¹ This obstacle had actually played itself out a long time ago with the enactment of the Penal Code in 1959. The 1999 Constitution divided the legislative power between the Federation and the States,⁴² and in its second schedule it listed items which are the exclusive right of the Federation to legislate as well as items on which the state can legislate concurrently with the Federation, leaving residual list as third list. Hon. Justice Mohammed Bello wrote "In addition, it (S. 4) empowers the State to make laws on any other matter not included in the two lists."⁴³ Shari'ah falls within the residue and consequently, a state has the constitutional power to make law relating to Shari'ah.⁴⁴ That means since Laws relating to Islamic Law are within the ambit of the Nigerian Constitution, the issue of inconsistency cannot arise. Even in the area of criminal law, Justice Bello wrote "The constitution does not stop there it proceeds to adopt all the laws and the courts which existed before 29 May, 1999 when the Constitution came into force."⁴⁵ Accordingly, the Shari'ah Civil Law, the Penal Code and the Area Courts have been adopted.⁴⁶

b) Lack of Codification: This obstacle also has its origin from the Constitution as S.38 categorically stated:

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 therein 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 provision of a law.

- 41 S. 1(1) & (2) of the 1999 Constitution.
- 42 Ibid. S. 4.
- 43 Exclusive and Concurrent Legislative list (Schedule II of the 1999 Constitution).
- 44 Shari'ah in the Light of Nigerian Constitution, op. cit. p. 69.
- 45 S. 315 and 316 of the 1999 Constitution.
- 46 Bello, M., op. cit. p. 69.

Strong as this may look, the fact that the matters relating to Islamic Law is within the jurisdiction of State Legislatures means that all it takes is for the latter to have the will to make such laws since not making it previously is just a matter of fact and not of law as stated earlier.⁴⁷

These are Laws that can only conveniently work with the Constitution; but Shari'ah, as highlighted in its primary source – The Qur'an – is supreme to any man made imposition – may it be called Acts or Constitution.⁴⁸

CONCLUSION

Shari'ah or Islamic Law as an integral part of our tripartite legal system had been applied in Nigeria for centuries, before the imposition of the received common law. Therefore, the Shari'ah Court as the custodian of Islamic Law needs to be given more prominence in our basic law. The Constitution shall in addition to providing or recognizing right to establish a Shari'ah court, provide the procedure for establishing such courts in states where they are needed.

Likewise, states should be encouraged to establish courts with jurisdiction lower than the High Court to handle Islamic Law matters by ensuring the use of such courts, a thing which can be achieved by making their use imperative on Muslims, instead of subjecting its use to the will of Muslims as it is now.

Lastly, Shari'ah or Islamic Law should be taken wholesome because Islamic Law itself does not emphasize an aspect of its scope of application more than the other.⁴⁹ Equal status should be accorded all segments of Islamic Law, be it criminal, civil or personal law.

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47 Shari'ah in the Light of Nigerian Constitution. op.cit. p.66.

48 Q5:43.

49 Q:2:85 reads "Then do you believe in a part of the book and reject the rest?..."