

**NIGERIAN MUSLIMS AND THE
INTRIGUES OF THE 1999
CONSTITUTION AS AMENDED: AN
EXAMINATION OF ITS PRINCIPLES
WITHIN THE CONTEXT OF ISLAMIC
LAW**

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Abstract

The sovereignty of the Nigerian 1999 Constitution as amended over its citizens which include Muslims and non-Muslims is absolute and binding. In this regard and despite the absolute power ascribed to this Constitution, Nigerian Muslims like other Muslims are also expected to adhere strictly to all Islamic precepts as enjoined in the Qur'an and Sunnah amidst the imposition of British-inclined legal system on which the 1999 Constitution was codified. Though, the present Constitution was enthroned on the Country's nascent democracy by a Military Junta, its constitutionality and appropriateness to Nigerian religious and cultural diversities has become a lingering debate for over two decades. To this end, this paper examines some of the principles of the 1999 Constitution such as Shari'ah application and classification in Nigeria and the syndrome of secularism in the context of Islamic law as they affect Nigerian Muslims. It was then revealed that despite the recognition of Shari'ah as a source of law by the Constitution, its applicability and enforcement has been demeaned as a mere customary law for decades. The paper then suggested that to overturn this incongruity, Nigerian Muslims should renew their concerted agitations for total

application of Shari'ah and enforcement of its jurisdictions from lower to apex courts in Nigeria through constitutional review since the current Constitution was not people-centric.

Keywords: *Constitution, Examination, Islamic Law, Nigerian Muslims, Principles.*

Abstrak

Kedaulatan Konstitusi Nigeria tahun 1999 yang telah diamandemen terhadap warga negaranya yang termasuk Muslim dan non-Muslim adalah mutlak dan mengikat. Meskipun Konstitusi ini memiliki kekuasaan mutlak, Muslim Nigeria, seperti Muslim lainnya, diharapkan untuk tunduk sepenuhnya pada semua prinsip-prinsip Islam sebagaimana yang diamanatkan dalam Al-Qur'an dan Sunnah, meskipun dalam sistem hukum yang dipengaruhi oleh hukum Inggris, di mana konstitusi 1999 ini dikodifikasi. Meskipun Konstitusi saat ini didirikan selama transisi demokrasi awal negara oleh Junta Militer, kekonstitusionalitasannya dan kesesuaian dengan keragaman agama dan budaya di Nigeria telah menjadi perdebatan yang berlarut-larut selama lebih dari dua dekade. Dalam tulisan ini, beberapa prinsip Konstitusi 1999, seperti aplikasi dan klasifikasi Shari'ah di Nigeria, serta sindrom sekularisme dalam konteks hukum Islam, akan diteliti dalam hubungannya dengan dampaknya pada Muslim Nigeria. Dalam penelitian ini terungkap bahwa meskipun Konstitusi mengakui Shari'ah sebagai sumber hukum, implementasi dan penegakannya telah direndahkan menjadi sekadar hukum adat biasa selama beberapa dekade. Berdasarkan temuan tersebut, tulisan ini menyarankan bahwa Muslim Nigeria harus menghidupkan kembali gerakan bersama untuk mendorong penerapan total dari Shari'ah dan penegakan yurisdiksinya dari pengadilan tingkat rendah hingga tertinggi di Nigeria melalui proses tinjauan konstitusi, mengingat Konstitusi saat ini tidak berorientasi pada kepentingan rakyat.

Kata kunci: *Konstitusi, Uji, Hukum Islam, Muslim Nigeria, Prinsip.*

Introduction

The infamous British colonization of Nigeria began in 1850¹ while in both colonial and post-colonial eras of the country, the super-imposed Constitutions based on the imperial English legal system have reigned supreme over the citizenries for over a century with the existence of native or customary laws. This, in all spheres shows that the legal system of Nigeria is a hybrid of received English common and statutory law, various Nigeria's customary laws, and Islamic law (*Shari'ah*). Therefore, total application of *Shari'ah*, which has been firmly rooted and applied

¹ Udogu, Ike "A History of Nigeria" *Africa Today*, Vol 55:4 (2010):124

in larger parts of the Northern Nigeria² and in some towns of Yorubaland in the Southern part of the country³ before the British colonization has been an herculean task; simply put, *Shari'ah* is demeaned and categorized as a customary law.⁴ The presence of English law, *Shari'ah* and other indigenous laws has also bred the problems of legal pluralism within the context of Nigeria legal system. According to Niki Tobi, legal pluralism means the existence of variance but interwoven laws in a legal system acceptable and enforceable within a geographical entity at a particular period. These laws according to him usually emanated from different sources which invariably breed existence of multi-legal system under a single jurisdiction.⁵

In legal and constitutional spheres, all Nigerians are expected to be submissive to the Constitution irrespective of their religious, ethnic or political affiliations. However, there are fundamental questions that are often asked as regards the fate of Nigerian Muslims: Does the Constitution supersede the Muslims' religious text, Al-Qur'an? Who wrote or drafted the Constitution and how Constitutional is the Nigerian 1999 Constitution itself? What is the future of *Shari'ah* application in Nigeria judging from both colonial and post colonials intricacies and the happenings of the last two decades? Is Nigeria a secular nation and does secularism as a notion affect Muslims? What are the effects of the 1999 Constitution on Nigerian Muslims in the area of *Shari'ah* application and plague of secularism? All these are some of the apposite questions this article tends to analyse within the context of Islamic law, the only universally sacred law of Muslims.

² See Yadudu Hamisu Auwal "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria" *Journal of Legal Pluralism*, nr.32 (1992):103-139

³ See also, Salisu, Taiwo Moshood "*Shari'ah*: The Missing Law in the Scheme of Legal Option in South-western Nigeria" *LASU Journal of Humanities*, Vol.9 (2014):53-59

⁴ Oba, Adebayo Abdulmumini "Islamic Law as Customary Law: The Changing Perspective in Nigeria" *The International and Comparative Law Quarterly*, Vol. 51(2002): 817-850 and Busari, Jamiu Muhammad "*Shar'ah* as Customary Law? An Analytical Assessment from the Nigerian Constitution and Judicial Precedents" *AHKAM*, Vol. 21, No 1 (2021): 25-44

⁵ Tobi, Niki. *Sources of Nigerian Law* (Lagos, Nigeria: MIJ Publishers, 2006), 153.

***Shari‘ah* in Colonial and Post-Colonial Nigeria: A Concise Retrospect**

According to Olatoye and Yekini, the Supreme Court Ordinance of 1863 (later replaced by Supreme Court Ordinance of 1874) which was passed by the British colonialists introduced the English-style judicial system for Lagos Colony, and by extension, all Southern parts of Nigeria and laid foundation for the demeaning of customary and religious judicial power previously enjoined by Southern Obas, Obis and other rulers especially in adjudications on civil and crim cases.⁶ By this, all existing laws were weakened with the ceding and conquest of Lagos as British colony in 1886 C.E, the imposition of direct and indirect rules on the people of the country and weakening of the existing strong empires such as Oyo, Benin and Sokoto Caliphate through the amalgamation of Northern and Southern Protectorates to form an entity called “Nigeria” in 1914.

Despite this, as Akintola noted, the official admissibility of *Shari‘ah* in the Nigerian legal system and judicial exponential activities dated back to the proclamation of the Supreme Court Ordinance of 1900 where it was stated that “*The Court shall always apply them(that is, Shari‘ah Customary Laws) in all matters relating to marriage and the family, land tenure, inheritance and succession.*”⁷

However, English law according to Jadesola Lokulo-Sodipe *et al* thus has an unassailable influence on the Nigerian legal system with the enactment of Section 45(1) of the Interpretation Act which were in force in England from 1st January, 1900.⁸ This assertion was corroborated by Obilade when he stated that:

One of the most notable characteristics of the Nigerian legal system is the tremendous influence of English law upon its growth. The historical link of the country with England has left a

⁶ Olatoye, Kareem and Yekini, Abubakar “Islamic Law in Southern Nigerian Courts: Constitutional and Conflict of Laws Perspective” *Benin Journal of Public Law*, Vol.6 (2019):124

⁷ Akintola, Lakin Ishaq *Shari‘ah in Nigeria: An Eschatological Desideratum*, (Ijebu-Ode, Nigeria: Shebotimo Publishers, (2001), 95-96

⁸ Jadesola, Lokulo-Sodipe *et al* (n.d) *Legal Basis for Research Ethics Governance in Nigeria*, (Unknown Publisher, n.d), 2. Accessed online at <https://elearning.trree.org/mod/page/view.php?id=142> on 27th June, 2018

seemingly indelible mark upon the system”⁹

In pre-colonial Northern¹⁰ and Southern¹¹ Nigeria, there were records of *Shari’ah* applications among Muslims on several cases of inheritance (*mirāth*), fosterage (*ḥadānah*), divorce (*Ṭalāq*), punishment for theft (*Sarqah*), adultery (*Zinā*) and so on among Muslims from Kano to Sokoto, Maiduguri to Ilorin, Ede to Epe and Ikirun and other places where their Emirs and Kings had adopted *Shari’ah* as the State law upon their subjects. Furthermore, in colonial Nigeria

Shari’ah is categorized as customary law by the British imperialists. In the North, with the introduction of indirect rule, *Shari’ah* jurisdiction was limited to the execution of Islamic personal law (*Aḥwāl al-Shakhsīyyah*) such as divorce, inheritance or succession and fosterage while enforcement of penal or criminal code (*‘uqubāt*) either for *ḥudūd* (punishable crimes), *qisas* (retribution) or *ta’zīr* (chastisement) as prescribed under Islamic law was demeaned under the supervision and approval of the colonialists before its execution.¹²

However, this leverage, even amidst several protests and agitations against the misrules of the colonialists especially on Muslims’ educational and religious rights as chronicled by Gbadamosi failed to be replicated in Southern Nigeria especially in Yorubaland where the majority are arguably Muslims.¹³

According to Oloyede, several Islamic societies in Nigeria for over a century have struggled unremittingly in affirming the Muslim fundamental human and religious rights against the forces of British colonialism and successive indigenous administrations

⁹ Obilade, Akintude Olusegun. *The Nigerian Legal System* (Ibadan, Nigeria: Spectrum Law Publishing, 1979), 41

¹⁰ See Yushau, Sodiq, *A history of the Application of Islamic law in Nigeria*, (USA: Palgrave Macmillan, 2017), 1-156

¹¹ Gbadamosi, Tajudeen “*Shariah* in Southern-Nigeria: The Experience of Yorubaland” in A. M Yakubu *et al* (eds.) *Understanding Shari’ah in Nigeria* (Ibadan, Nigeria: Spectrum Books Limited, 2001), 114-123

¹² Ruud, Peters “The Reintroduction of Islamic Criminal Law in Northern Nigeria” (2001), 11-13. accessed online on 4th May, 2021 at https://www.ecoi.net/en/file/local/1411812/mv177_peters-ngr0901.pdf

¹³ Gbadamosi, Tajudeen. *The Growth of Islam among Yoruba 1841-1908* (London, UK: Longman Group Ltd press, 1978), 28-70

of post-colonial era especially in the area of education and Islamic law application.¹⁴ To Nigerian Muslims, as embedded in Islam, religion means totality of human deeds, submission and servitude to the Supreme Being (Allah) and entrenchment of peace and harmony as regulated by the Creator. This is a contradiction of what is obtainable in other religions where people such as Goldenberg Naomi believes that “*religion is an invention, a strategy, a technology, a tactic of management and so on*”.¹⁵ However, in post-colonial Nigeria as obtainable in colonial era, amidst several refutations and clarifications, *Shari‘ah* is repeatedly recognized as a customary law in Nigeria despite the avalanche of write ups by several legal luminaries and academia.¹⁶ For example, in exonerating

Shari‘ah from being a customary law, Justice Niki Tobi, a non-Muslim legal luminary states that:

*Islamic law, unlike customary law, is not flexible, Islamic law, unlike customary law, is written. Islamic law is rigid, precise with divine ossification and rigidity. There is no basis for any speculation or conjecture as in the case of customary law. The acceptability of Islamic law is a divine command by the Almighty Allah and therefore spontaneous on the part of all Muslims. Islamic law is therefore does not depend on its acceptability by Muslims because that is taken for granted. Any person who disobeys the divine words of the Qur‘an cannot call himself a Muslim. Such a person is not with Allah and he will be regarded as an unbeliever.*¹⁷

It is then apposite to mention that *Shari‘ah* issue has become an inevitable recurrent decimal in all political and religious discourse in Nigeria even though, the Constitution recognized the

¹⁴ Oloyede, Ishaq “Islam in Nigeria: A Century of National Islamic Societies” *Journal of Islam in Nigeria*, Vol.1, No 1 (1978):7-23

¹⁵ Goldenberg, Naomi “Religion and Its Limit: Reflection on Discursive Borders and Boundaries” *Journal of the Irish Society for the Academic Study of Religion (JISASR)* 7, (2019): 4

¹⁶ Busari, Jamiu Muhammad “*Shari‘a* as Customary Law? An Analytical Assessment from the Nigerian Constitution and Judicial Precedents” 38-40.

¹⁷ Niki, Tobi, *Sources of Nigerian Law*,137

Islamic law as one of the sources of law under Nigerian legal system.

The 1999 Nigerian Constitution as Amended: Formation and Constitutionality.

It is an established principle that every government derives its authority from an existing Constitution and Nigeria is not an exemption.¹⁸ In 2002, in the case of *A.G Abia v. Attorney General of the Federation*, the Nigerian Supreme Courts defined Constitution as “*the grundnorm and the fundamental law of the land from which all other legislations in the land take their hierarchy and legitimacy*”¹⁹ This means that Constitution in every given territorial and independent nation is believed to be a conceptualized supreme written or unwritten document of governance. It is believed to be the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civic rights and civil liberties.²⁰

Therefore, from the inception of colonial rules, the Nigerian legal system was made “pluralistic” in nature with the proliferation of laws and myriad of successive constitutions in which, according to Ilesanmi, prior to 1999, Nigeria has had a total of nine (9) different Constitutions within a century.²¹ These are the 1914 Amalgamation Constitution, the 1922 Clifford Constitution, the 1946 Richards Constitution, the 1951 Macpherson Constitution, the 1954 Lyttleton Constitution, the 1960 Independence Constitution, the 1963 Republican Constitution, the 1979 Constitution, the 1989 Constitution and then, the 1999 Constitution.²²

However, the origin of the 1999 Constitution could be traced to the aftermath of aborted second and third republics of 1979-83 and 1991-1993 respectively. With the annulment of the

¹⁸ See Section 14(2)(a) of the Nigerian 1999 Constitution as Amended

¹⁹ See *A.G. Abia v. A.G. Federation* (2002) 6 NWLR (Pt. 763)264, (2006) 16 NWLR (Pt. 1005) 265 SC.

²⁰ Black’s Law Dictionary, 9th Edition, 353

²¹ Ilesanmi, Simeon (2001) “Constitutional Treatment of Religion and the Politics of Human Rights in Nigeria” *African Affairs*, Vol.100 No.401 (2001):535.

²² See Suberu, Rotimi “Nigeria’s Permanent Constitutional Transition: Military Rule, Civilian Instability and ‘True Federalism’ in a Deeply Divided Society” *Occasional Paper Series Number 34*, (2019):1-25

1993 presidential elections which was widely believed to have been won by Chief MKO Abiola and the subsequent introduction of the defunct Interim National Government headed by Chief Earnest Shonekan, the country kickstarted the process of returning to democratic rules. In 1998, after the sudden death of the then head of military junta in Nigeria, General Sanni Abacha who had initiated the drafting of a new Constitution between 1995 and 1998, the military government of General Abdulsalam Abubakar inaugurated a 24-member constitutional debate Committee (CDC) headed by Justice Niki Tobi to prepare a constitution on which the anticipated democratically elected government will take off in 1999. The committee was aimed at adopting the 1995 drafted Constitution but later adopted the template of the 1979 Constitution due to the public complains and stigma of illegitimacy.²³

Today, it is widely believed that the present 1999 Constitution is a bye-product of the 1979 Constitution through which the CDC absolutely lifted the 1979 Constitution and amended some provisions such as the number of federating units (States) in 1979 which were then nineteen (19) to thirty-six (36) as at 1999 and other area of national concerns. On the issue of legitimacy and constitutionality of the 1999 Constitution, there have been many agitations in fora and symposia for its review and absolute amendment.²⁴

According to some analysts, many factors necessitated the calls for the constitutional review of the 1999 Constitution ranging from its legitimacy, issues of *Shari'ah* and so on. For example, the preamble of the Constitution reads *inter alia*:

"We the people of the Federal Republic of Nigeria, Having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding, And to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for

²³ Ibid.

²⁴ For example, see Chatham House, *The Review of Nigeria's 1999 Constitution: Report of Consultation with UK-based Nigerians*, (UK: 2013), 1-3. <http://www.chathamhouse.org/events/view/189367>

the purpose of consolidating the unity of our people, Do hereby make, enact and give to ourselves the following Constitution”²⁵

The question then continues to be, who are the “WE”? because the word as expressed in the content of the constitution indicates the principles of sovereignty, inclusion and unity of all Nigerians in enacting the constitution for national goals. This statement in all senses suggests that the Constitution was drafted through a participatory process of all citizens especially through their representatives. However, how true the terms of this preamble are based on the way the Constitution was drafted and authored? The Constitution was passed on to the 1999 civilian government of Chief Olusegun Obasanjo by the military government of General Abdulsalam Abubakar with 8 Chapters, 320 Sections and 7 Schedules.

The 1999 Constitution of the Federal Republic of Nigeria acquired the force of law through the Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999, Decree No. 24. The Constitution was gifted to Nigeria by the military in compliance with the Transition to Civil Rule (Political Programme) Decree 1998. Due to its non-inclusiveness from Nigerians before it attained the force of law under civilian rule, the 1999 Constitution has undergone alterations since its promulgation in 2010, 2012 and currently in 2021. These alterations have clearly call into question the legitimacy and constitutionality of the Constitution itself since 1999 to date.

An Examination of the 1999 Constitution within the Context of Islamic Law

Nigeria is a multi-ethnic, multi-lingual and multi-religious society where Muslims constitute more than half of the entire population of over 200 million inhabitants as at 2022 according to the United Nations data.²⁶ The imposition of the current 1999 Constitution upon Nigerians especially the Muslims has bestowed on the faithful some loopholes which are viewed sinful, irreligious and inconsistent with Islamic provisions. In this section, we intend

²⁵ See the preamble of the Federal Constitution of Nigeria 1999 as amended.

²⁶ See <https://www.worldometers.info/world-population/nigeria-population/> retrieved on 27th December, 2022.

to examine the effects of this Constitution on the faiths of Muslims within the context of *Shari'ah* from four perspectives; namely, Nigeria's secularity status, issue of sovereignty and supremacy of the Constitution, classification and application of *Shari'ah* as customary law and the implementation of *Shari'ah* in both Northern and Southern regions of the country:

Is Nigeria a Secular State According to the 1999 Constitution?

Secularism according to Osita Ogbu was a concept that started with the altercations between ancient Churches and rulers especially in the affairs that concern States and religion.²⁷ The word "Secular" as he further explained was derived from a classical Latin word "*Saeculum*" which means "an age", "a generation" or "the people of a given time".²⁸ Therefore, according to Chaturvedi, secularism is the giving up of religious thought and feeling in the normal day to day interaction in the society.²⁹ Accordingly, Omotola according to Kehinde Adegbite defined secularism as '*an ideology that holds that religious issues should not be the basis of politics, or (in the extreme) that religion has no place in public life*'. *Essentially, secularism seeks to preserve the religious neutrality of government and cultures.*'³⁰

Furthermore, Ogoloma avers a secular state as a state where citizens are not discriminated in any form or manner on the basis of their religions.³¹ In essence, a secular state views the individuals as a citizen and not as a member of a particular religious group. Therefore, a secular state claims to treat all its citizens equally regardless of religion, and claims to avoid preferential treatment for a citizen from a particular religion over

²⁷ Ogbu, Osita Nnamani. "Is Nigeria a Secular State? Law, Human Rights and Religion in Context." *The Transnational Human Rights Review* 1. (2014): 136 <https://digitalcommons.osgoode.yorku.ca/thr/vol1/iss1/4>

²⁸ Ibid

²⁹ Chaturvedi A. K. *Dictionary of Political Science*. (New Delhi, India: Academic Publishers, 2006), 280

³⁰ Adegbite, Kehinde "is Nigeria a Secular State?" *The New Jurist, International Law Magazine*, (2022), 2. <https://newjurist.com/is-nigeria-secular.html>

³¹ Ogoloma, I. Fineface "Secularism in Nigeria: An Assessment" *AFRREV IJAH, An International Journal of Arts and Humanities*, Vol. 1:3 (2012):65

the other and it does not profess a state religion. It is a concept that have occupied spaces and generated debates among various analysts on Nigerian newspapers³² especially in the last two decade as the result of incessant religious crises; hence, the salient and lingering question in reference to the 1999 Constitution is: Is Nigeria a secular state? By the provisions of Section 2 (1) and (2) of the 1999 Constitution, Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the “Federal Republic of Nigeria” as no previous Nigeria Constitutions contained a secular clause. The Section 10 of the 1999 Constitution provides that: *“The Government of the Federation or of a State shall not adopt any religion as State Religion.”* This provision propels some analysts to believe that Nigeria is a secular state. However, the phrase “secular state” is not used anywhere in the Constitution and there is no reported Nigerian case so far where Section 10 of the Constitution has been given judicial interpretation. Nigeria, according to Ibrahim Uthman is a highly multicultural and religious colonial creation of the British imperialists over a century ago.³³ In his words, he concisely decries the state of secularism in Nigeria *inter alia*:

For most Christians, Nigeria is a secular state and therefore religion should figure less in the political sphere while the overwhelming majority of Muslims see Islam as "the lodestar" of politics and see Nigeria as a multicultural and religious country where religion does figures prominently in politics.³⁴

³² See the following Newspapers: <https://www.vanguardngr.com/2017/12/nigeria-multi-religious-state-secular-state/>, <https://punchng.com/nigeria-is-a-secular-state/>, <https://independent.ng/is-nigeria-a-secular-state/> and <https://www.thecable.ng/nigeria-a-secular-country-on-paper-multi-religious-state-in-practice>

³³ Uthman, Ibrahim Olatunde “One Country, Many Religions: Muslim/Christian Relations in Nigeria and the Modern Secular State” in Wade Clark Roof *et al* (eds) *The Study of US Institute Religious Pluralism and Public Presence* (n.d), 51

³⁴ Ibid

In reality, the Federal Constitution of Nigeria does not declare the country a secular state but provisioned that Nigeria shall not profess a religion as the state religion but surprisingly, the same Constitution guarantees the citizenries freedom of religious expression and association as enshrined in Section 38, subsection 1 of the Constitution. It is on record that the Constitution despite being neutral about a state religion had mentioned the word “religion” more than seventy times. This simply shows how delicate the issue of religion and secularism are. Therefore, by the provision of Section 10 and assuming the inferences to be drawn from its clear wordings, Nigeria can be regarded as a secular state. But, alas, from experience, it appears Nigeria is secular only in the Constitution and not at all in practice. Surmising thereafter, we can say Nigeria is not a secular state but a quasi-religious state which has not adopted any religion as state’s creed.

However, It must be stated here as reiterated by Ajani Murtala that in Islam, secularism has no base because the philosophy behind secularism is to separate religion from all walks of life.³⁵ This notion contradicts *Shari’ah* provision because the entire sojourn of Muslim on this earth is guided by the principle of Allah’s commandment as entails in the Qur’an and the exemplary teachings (*Sunnah*) of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him). Therefore, the former General-Secretary for the Supreme Council for Islamic Affairs in Nigeria, Dr. Abdullateef Adegbite (d. 2012) affirmatively rejected the notion that Nigeria is a secular State when he declared at a seminar held at the Nigerian Institute of Advanced Legal Studies, Lagos in 2000 that:

*“No Muslim will support a secular state. I want to say it with all the emphasis at my command because as far as we are concerned, secularity means “godlessness”, and Muslims will never support that”.*³⁶

³⁵ Ajani, Murtala Abdus-Salam “The Religious Significance of Unity in Islam: Lessons for the Nigerian Muslims” *Journal of Islam in Nigeria*, Vol. 3 No 2 (2008):347

³⁶ See Ogbu, Osita Nnamani. "Is Nigeria a Secular State? Law, Human Rights and Religion in Context.", 139

Sovereignty and Supremacy of the Constitution

Sovereignty in the words of Bakht Munir *et al* is derived from the Latin word ‘*Supremes*’ that referred to supreme power over all others.³⁷ Also, according to Emilia and Steven, as conceptualized in the Peace of Westphalia in 1648 C.E, sovereignty denotes ultimate political authority within a given territory.³⁸ Sovereignty therefore entails power to do everything in a state without accountability; to make laws and to enforce them. Under Islamic instructions, sovereignty which is known as *ḥākimiyyah* refers to the notion that only Allah possesses the prerogative to make laws, rewards the obedient and punishes the offenders through His divine mechanisms. This, without prejudice to human free wills which could be derived from democracy affirms that Muslims must recognize the authority of Allah and the supremacy of Islamic law, *Shari‘ah*. This is because unlike man-made sovereignty in which mankind give laws to themselves and enforce them, Islam on the other hand requires Muslims to be submissive to divine sovereignty because rulership belongs to Allah.

From the foregoing, it can be inferred that in Islam, Muslims subsumed themselves under the sovereignty of Allah while in constitutional democracy such as Nigeria, the citizens are subjects of man-made Constitution which derives its supremacy and sovereignty from people themselves. The 1999 Constitution while expressing its sovereignty as given to it by the authors (the citizens) in Section 1 subsections 1 and 3 affirmed that:

“This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria”

“If any other law is inconsistent with the provisions of this

³⁷ Bakht, Munir *et al* “The Nature and Philosophy of Sovereignty: A Comparative Analysis of Western and Islamic Notions of Sovereignty” *Global Legal Studies Review*, Vol. V, No. III (2020):13

³⁸ Emilia, Justyna Powell and Steven, McDowell “Islamic Sovereignty Norms and Peaceful Settlement of Territorial Disputes” *iCourts Working Paper Series*, No 47 (2016):4. <https://ssrn.com/abstract=2744651>

Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."

The above provisions which empowered the Constitution to be absolute and supreme over other existing laws is inconsistent with Islamic tenets in which Muslims are obliged to obey the rules of Allah and His Prophets as enshrined in *Shari'ah*. This simply denotes that the Constitution is supreme over Allah and His commandment. Thus, Nigerian Muslims are expected to possess pure *aqīdah* (faith) which entails total belief in Allah, engage in prescribed worships (*'ibādāt*), perfect good relationship between them and other beings (*mu'āmalāt*) and exhibits good characters (*akhlāq*) in both public and private functions. Therefore, anything contradictory to the above is pure disbelief (*kufr*) and disobedience (*nifāq*) to the precept of Islam. Almighty Allah says in Q. 2, verse 208:

"O you who believe! Enter into Islam whole-heartedly; and follow not the footsteps of Satan; for he is to you an avowed enemy"

Classification and Application of *Shari'ah* as Customary law.

Islamic law is categorized as one of the customary laws in Nigeria as enshrined in the 1999 Constitution as amended. This has generated repudiations from Muslims and legal experts who viewed the categorisation as gross misinterpretation of *Shari'ah*. As emphasised by Muneer and Muhammad Mumtaz, *Shari'ah* cannot be understood as a set of civil, criminal, personal or public law alone as erroneously conceived by many in modern age; rather, it is a conglomeration of comprehensive set of fundamental truths, socio-ethical legal precepts and higher principles and a practical way of life.³⁹ In religious jurisdiction, Abdul Rahman Doi sees *Shari'ah* as "a path to be followed as laid down by Allah to liberate man from servitude to other than Him".⁴⁰

³⁹ Muneer, Kuttiyani Muhammed and Muhammad, Mumtaz Ali "The *Shariah* and Law: An Analysis" in *International Journal of Law, Government and Communication*, Vol.2, Issue 5 (2017):49-51

⁴⁰ Doi, AbdulRahman. *Shariah: The Islamic Law* (London: Ta Ha Publishers, 1984), 2

As could be inferred from the submissions, it is crystal clear that *Shari'ah* is not just a legal framework but an embodiment of divine law which deals with *'aqidah*, *ihsan* (goodness), *'ibadah* and *mu'amalah*. This, without mincing words is in concomitant with the revealed order given to Prophet Muhammad as enshrined in the Qur'an *inter alia*:

We made for you a law (Shari'ah), so follow it, and not the fancies of those who have no knowledge. (Q.45:18)

As previously noted, Nigerian 1999 Constitution recognises *Shari'ah* as "Moslem Law" and as a branch of customary law practiced in Nigeria; and this was succinctly put by Yadudu when he says:

The Islamic law as other customary law in the country exists as an appendage of the English Common law. It does not exist as an autonomous and self-regulating legal system. It is defined in terms of Common law. It applies subject to the standard of the Common law. Its Courts are established and its personnel trained and appointed in the same way and using virtually the same criteria as those of the Common law Courts and justice.⁴¹

It has been affirmed that the British colonialists met *Shari'ah* and its impacts in both Southern and Northern parts of Nigeria to the extent that Sir Lord Lugard attested to this in his Supreme Court Ordinance, Section 20 of 1900 when he proclaimed that the Court shall always apply "*Shari'ah Customary Laws*" in all Muslim matters relating to marriage and succession.⁴² Consequently, it is apposite to declare that Islamic law application in Nigeria is not anew but its holistic, total and wholesome implementation has been a concern till present era. Therefore, as Justice Bello noticed, there are obstacles which has made *Shari'ah* in Nigeria a customary law as emanated from the Nigeria Constitution itself; these include, "the provision of Section 1 of the 1999 Constitution as amended which states that the

⁴¹ Yadudu, Hamisu Auwal "Colonialism and the Transformation of Islamic Law in the Northern States of Nigeria", 108

“Constitution” is supreme and its provision is binding on all authorities and that if any law is inconsistent with the provision of the Constitution, the law is void and the Constitution shall prevail”.⁴²

In essence, the categorisation of *Shari‘ah* as customary law is a default; because the promulgation that initiated the classification as a customary law was the sheer ignorance of the British imperialists who through their legal dualism failed to distinguish between the Northern Nigerian native laws and customs and the Islamic law provisions. They based their verdicts on the general practices of the then northern Nigerian Muslims who are mainly Muslims and as such, they fail to distinguish between their culture and *Shari‘ah* provision; hence, the adoption of *Shari‘ah* as customary law.

Also, according to Badaiki, the categorisation of Islamic law as a customary law is a “fallacy”, and succinctly, he traced the origin of such inappropriate pronouncement to the provision of Section 2, Cap.⁴³ of the High Court Law of Northern Nigeria of 1963 which provided that “native law and custom include *Moslem law*”.⁴⁴ However, there are pronouncements which negated the classification of *Shari‘ah* as a customary law and upheld its sacredness; these include:

- a. According to Yusuf and Sheriff, in the case of *Ila Alkamawa v. Albaji Hassan Bello and Another*,⁴⁵ Honourable Justice Bashir Wali JSC pronounced that:

The Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete

⁴² Akintola, Lakin Ishaq. *Shari‘ah in Nigeria: An Eschatological Desideratum*, 93 and Akintola, Lakin Ishaq “Implementation of the *Shari‘ah* in Nigeria: The Impact on the Common Folks” in Zakariyau, I. Oseni (ed.) *A Digest of Islamic Law and Jurisprudence in Nigeria* (Auchi, Nigeria: Darun-Nur, 2003), 151-153

⁴³ See Mohammed Bello’s Key note Address in A. M Yakubu *et al* (eds.) *Understanding Shari‘ah in Nigeria* (Ibadan, Nigeria: Spectrum Books Limited, 2001),13-14

⁴⁴ Badaiki, Afeisimi Dominic (2001) *Development of Customary Law*, 2nd ed., Lagos, Nigeria: Tiken Publishers, 2001), 11-12

⁴⁵ *Albaji Ila Alkamawa v. Albaji Hassan Bello and Albaji Malami Yaro* (1998) 6 SCNJ 127

*system of universal law, more certain and permanent and more universal than the English common law.*⁴⁶

- b. Justice Niki Tobi glaringly enumerated the differences between customary law and *Shari'ah* thus:

*One other issue we would like to take by way of introduction is whether Islamic law is customary law. Colonial legislation generally regarded and treated Islamic law as "native law and custom" which had no separate and distinct existence. For example, Section 2 of the Native Courts Ordinance 1914 provided that "Native Law and Custom includes Islamic Law". This resulted from their negative and uncompromising approach to Islamic law particularly as a distinct and separate religion from Christianity, based on the Qur'an and not the Bible. The Colonial approach merely reflected their Christian background.*⁴⁷

- c. Accordingly, Justice Kolajo argued that by the virtue of pronouncement in the case of *Lewis v. Bankole*⁴⁸ in which customary law was defined as an "*unwritten law of an ethnic group*", the Islamic law can never be called a customary law because the Muslim law is written in the Holy Qur'an and other sources.⁴⁹
- d. Also, the universality of Islamic law as reported by Ambali was acclaimed by non-Muslim legal practitioners including Chief F.R.A Williams who pronounced *Shari'ah* law as "*a law without territorial boundaries*".⁵⁰
- e. According to Olatoye and Yekini, in *Usman v Umaru*,⁵¹ Justice Bello expressed his concern on the conflation of Islamic and customary laws. He queried the statutory of definition of customary law in Section 2 of the Court of Appeal Act, which

⁴⁶ Yusuf, AbdulRashid and Sheriff, E. Okoh *Succession under Islamic Law* (Lagos, Nigeria: Malthouse Press Limited, 2011), 26

⁴⁷ See Niki, Tobi, *Sources of Nigerian Law*, 136

⁴⁸ (1908) 1, NLR 81 at 100

⁴⁹ Kolajo, A. A. *Customary Law in Nigeria through the Cases*, Ibadan, Nigeria: Spectrum Books Limited, 2000), 2 and 10

⁵⁰ Ambali, Muttalib Atanda *The Practice of Muslim Family Law in Nigeria*, 2nd ed., Lagos, Nigeria: Princeton Publishing, 2003), 17-18

⁵¹ (1992) LPELR-SC

defines customary law to include Islamic law. The jurist distinguished the two laws based on their incongruous characteristics. The court then concluded that, it is clear from the foregoing that in its ordinary meaning and within the meaning of Section 2, customary law does not include 'Moslem Law'. It is only by virtue of specific provision in a Law, such as Section 2 of the High Court Law, Cap 49, the Laws of Northern Nigeria 1963 which provided that native law and custom includes Moslem Law', that Moslem Law is regarded as native law and custom.⁵²

Therefore, premised on the above submissions, classifying *Shari'ah* as a customary law denies Muslims their fundamental human rights of practicing their religious and mundane lives according to the dictates of Islam. This, as upheld by Muslims is in violation of their right to practice their religious duties as enshrined in Section 38 (1) of the 1999 Constitution as amended which guaranteed freedom of thought, conscience and religion.

Dichotomy in the Application of *Shari'ah* between the Northern and Southern Nigeria.

Having being recognized as a source of law under Nigerian Constitutions, *Shari'ah* is expected to be enforced throughout the country without any hinderance upon all Muslims. However, its limitation as customary law, repeals of Islamic law penal codes and non-obligation of its enforcement upon all Nigerian Muslims have created dichotomy between Islamic law application and implementation in the Northern and Southern parts of the country. Prior to 1999, Islamic law has been applied in the Northern Nigeria in various categories of *Shari'ah* courts⁵³ before the famous Zamfara declaration of 2000 which spurred over ten Northern States to officially pronounced *Shari'ah* as State law.⁵⁴ However, in

⁵² Olatoye, Kareem and Yekini, Abubakar "Islamic Law in Southern Nigerian Courts: Constitutional and Conflicts of Laws Perspective",132

⁵³ Ostien, Philip *et al* (n.d) "Nigeria's Sharia Courts" in M. Tabiu, A.R. Mustapha and P. Ostien (eds) *Sharia Implementation in Northern Nigeria Twenty Years On* (n.d) 1-63. <https://ssrn.com/abstract=3370453>

⁵⁴ Sanni, Amidu (2007) "*Shari'ah* Conundrum in Nigeria and Zamfara Model: The Role of Nigerian Muslim Youth in the Historical Context, *Journal of Muslim Minority Affairs*, Vol. 27:1 (2007):126 and Yadudu, Hamisu Auwal "Dialogue of the Deaf: The *Shari'ah* Debate in Nigeria" in Zakariyau, I. Oseni

contrast, none of the Southern States has statutorily introduced, implemented and applied Islamic law in matters concerning Muslims till date.⁵⁵

Furthermore, in the area of *Shari'ah* application in the North, the 1999 Constitution has not favoured Muslims and this could be inferred from the views of Justice Muntaka-Comassie who expressed his disappointment of *Shari'ah* demeaning in *Maida v Modu*⁵⁶ when he says:

*"It seems to me settled that the new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Sharia Court in this country. It does not enhance the jurisdiction of those courts. This in my view, with all sense of responsibility, is unfair. In most cases, this appeal inclusive, one discovered that the land in dispute is situated in such a way that the rule of lex situs applies. The parties are both Moslems and consented to be governed by Islamic Law in Shari'ah Courts and lastly that the subject matters and issues involved called for intensive application of Islamic law and procedure which are not available in common law system. Moreover, the law to be applied in the High Court is quite alien to the parties and the Shari'ah Court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter."*⁵⁷

However, despite these inequalities, *Shari'ah* is still applied to some extent in the Northern part of Nigeria.⁵⁸ In the Southern part, with the agitations for its implementation and application in both colonial and post-colonial Nigeria,⁵⁹ no succor has been in sight. The Constitution in Section 275, subsection 1 allows any state that wishes to establish the *Shari'ah* courts and implements

(ed.) *A Digest of Islamic Law and Jurisprudence in Nigeria* (Auchi, Nigeria: Darun - Nur, 2003), 5

⁵⁵ Salisu, T.M "Shari'ah: The Missing Law in the Scheme of Legal Option in South-western Nigeria", 53-56

⁵⁶ 2000 4 NWLR (Pt. 659), 99

⁵⁷ Mwinyi, T. Haji and Sambo, O. AbdulFatai "The Influence of Common Law Advocates and Judges in the *Shari'ah* Adjudication: A Critical Exposition of the Experience in Nigeria and Zanzibar" *Journal of Law, Policy and Globalization* Vol 5 (2012):5

⁵⁸ Yushua, SadIq. *A History of the Application of Islamic Law in Nigeria*, 27-36

⁵⁹ See Gbadamosi, Tajudeen "Shariah in Southern-Nigeria: The Experience of Yorubaland", 114-123

Islamic law to do so through legislative means, but, these provisions have not seen the light of the day due to anti *Shari'ah* forces in the political arena of southern governments especially in Yorubaland, southwest Nigeria.

Nonetheless, in the absence of this, the southwestern Yoruba Muslims have adopted the ideas of institutionalizing non-statutorily courts known as Independent *Shari'ah* Panels (ISP) which have been waxing stronger in Lagos, Oyo and Osun States respectively for over two decades.⁶⁰ Equipped with qualified jurists and Islamic scholars who work *pro bono*, the panels which have been operating as advisory and dispute resolution centers had adjudicated hundreds of cases which involves divorce, inheritance and disputes. Therefore, the dynamism of these ISPs in the face of all impediments especially from the non-Muslim antagonists was succinctly summed-up by Adetona when he said:

*The judgement given by ISP besides being adhered to, without any agent of enforcement, has neither attracted any opposition from known authorities of law-Islamic or civil- in Nigeria nor any litigation in any government Court”.*⁶¹

The Way Forward

It is crystal clear that for foreseeable future, Nigerian Muslims would continue to live as citizens subjected to the sovereignty and supremacy of the Constitution and as subjects of a quasi-secular nation against the provision of *Shari'ah* which requires total application of its norms. In ameliorating this menace and to safeguard the faith of the Nigerian Muslims, the following are recommended:

⁶⁰ For ISP in Yorubaland, see Makinde, AbdulFatai Kola and Ostien, Philip (2011) “Independent *Sharia* Panel of Lagos State” *Emory International Law Review*, Vol. 25 (2011):921-944 and Makinde, AbdulFatai Kola “The Entanglement of *Shari'ah* Application in South-western Nigeria” *Africology: The Journal of Pan African Studies*, Vol.10, No 5 (2017):84-98

⁶¹ Adetona, Lateef Mobolaji “Dynamics of the Independent *Shari'ah* Panel in Lagos State, Southwest Nigeria” in Adetona, L.M (ed.) *Essays on Islam, Youth and Contemporary Issues*, (Ibadan, Nigeria: Free Enterprise Publishers, 2011),29-30

- a. Muslims should join the forces who are agitating for the total review of the 1999 Constitution in order to amend all the debatable provisions.
- b. They should also agitate for the total application of *Shari'ah* as a distinct law applicable to only Muslims at all States and at federal level.
- c. The jurisdiction of *Shari'ah* courts should traverse beyond Appeal Courts; hence, the establishment of Federal *Shari'ah* Court through constitutional amendment adorned with legislative backing.
- d. Muslims living in Northern Nigeria should patronize the existing *Shari'ah* courts and *Shari'ah* courts of Appeal by putting forward their cases before the provisioned Islamic judges (*Qādi*, pl. *Qudāt*) of Islamic courts, while those in the Southern part should enhance the peaceful adjudications of the ISPs instead of patronizing the statutory courts
- e. Muslims in Nigeria should also embark on enlightenment programmes enunciating the jurisdiction and benefits of *Shari'ah* to Muslims and non-Muslims alike. This, if properly executed would settle myriad of misconception about Islamic law and lessen the forces of anti-*Shari'ah* advocates among the politicians, religionists and the media houses which have been used as potent tools against *Shari'ah* acceptability for decades.

Conclusion

Nigeria as an independent nation is facing numerous challenges of nationhood ranging from the hullabaloo of *Shari'ah* implementation, economic crises and security challenges. Since its amalgamation in 1914, *Shari'ah* application has prominently featured in all its Constitutions while secularism is stylishly embedded in the mode of governance without any recourse to any constitutional backing which has declared the country a secular state. This meagre work in its entirety has discussed the sovereignty and supremacy of the 1999 Nigerian Constitution, the introduction and application of *Shari'ah*, the concepts of secularism in Nigeria and the constitutionality of the 1999 Constitution among others. It further discussed the effects of this Constitution as it contradicts the faiths of Muslims within the context of Islamic law which ranges from constitutional

sovereignty, classification of *Shari'ah* as customary law and the application of *Shari'ah* in Nigeria.

It is then clear as previously enunciated that the 1999 Constitution which is currently operational in Nigeria and has the power of enforcement within the statutory laws of Nigeria cannot be equated with the provision of Islamic law. Therefore, to avoid altercations with the constituted authority in a non-*Shari'ah* State such as Nigeria, Muslims are enjoined to renew uncompromising and non-violence concerted efforts towards the total application of *Shari'ah*. If this could be achieved with legislative and judicial backing, the incessant crises of *Shari'ah* application and self-induced secularism will become things of the past.

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