

Islamic Law and Constitutionalism - Diversity in Unity: Lessons for a Developing Nigeria Nation

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Abstract

Islamic law is known for its greater stability and continuity of values, thought and institutions when compared to some other legal system² This claim is arguably validated by reference to the respective sources of law in the Islamic and Western legal systems.³ While rationality, custom and judicial precedents constitute the prominent basis of most Western legal systems, morality and religion acquire greater prominence in the former.⁴ Shari'ah (Qur'an and Sunnah) is the Law and usul al-Fiqh (Jurisprudence) is the interpretation of the Law. While the former is of transcendental origin, the later is the totality of process of human intellectual activity which ascertains and discovers the terms of the divine will and translate them into a legal system that stipulates rights and duties.⁵ From this point, Ikhtilaf, difference of opinions became a reality and from there, the need arose to ascertain the objectives of the law (Maqasid al-Shari'ah). It is on the same premises that the need arose to answer the question, to whom belong the sovereignty - God or human? Thus, the concept of Islamic Constitutionalism developed and the first Islamic State of Medina and its Charter serves as template. This paper will then attempt to contextualize the Nigerian current political and constitutional challenges within the framework of this analysis and chart a part towards a solution.

Introduction

According to the Qur'an humankind, originally, was one nation 'Ummah'. However, this unity was fractured by various differences which the human beings created among themselves.⁶ It follows that the main purpose of divine guidance through various Prophetic mission is to rehabilitate the balance and unity (of humankind) which once existed in the earliest period of human history.⁷

A nation that is united will not only be strong but, also an invincible force. It will be capable of overcoming hindrances and challenges. Thus, the Islamic nation rights from its nascent

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² Kamali, H.M., *Principles of Islamic Jurisprudence*, The Islamic Texts Society, (2003). p. xix.

³ Ibid

⁴ Ibid.

⁵ Coulson, N.J., *Conflicts and Tensions in Islamic Jurisprudence*, University of Chicago Press, (1969), pp. 1-2.

⁶ Qur'an 10:19.

⁷ Qur'an 2:213. See also Sadik, M., Unity Among Muslims, http://www.ahl-alquran.com/English/show_article.php?main_id=8443 (accessed 1 Nov., 2017).

history was based on unity.⁸ Unity of the Muslims is epitomized in the concept of the “*Ummah*” which is an epithet and unifying classification of the community of the Muslim faithful globally. Islam teaches egalitarianism, meaning that all Muslims are equal, regardless of culture, nationality or gender. In Islam, human differences are natural, but the unity of God's word is equally supreme to all.⁹

Laws regulate behavior with a view to achieve communal cohesion, integration and unity and guarantees the rights and equality among the people.¹⁰ Historically, legal systems with religious orientation played a significant role even in settling of secular matters. Islamic law is not an exception. Thus, it is stated in the Holy Qur'an that: "Then we put thee on the (right) Way of religion: so follow thou that (way), and follow not the desires of those who know not."¹¹ It has been argued that the Islamic *Shari'ah* is the world's most widely used religious law as it served as the primary legal system in some countries of the world.¹²

The belief in oneness of God known in Islamic terminology as *Tawheed* is the corner stone of faith and most fundamental concept. It is what makes Islam the 'Unitarian' faith.¹³ The entire edifice of Islamic teaching and philosophy rests on this principle.¹⁴ According to this principle, Allah is a universal God rather than a local tribal or parochial Being. He is absolute Who integrates all affirmative values and brook no evil.¹⁵ Thus, He is the origin of all things and thus, He is the Author of the universe and everything in it. To that extent, He is the Author and Maker of Law. From this premise the concept of legislation emanates as far as Islamic legislation is concerned.

'Reason, Emma Gallegos observes, 'is not extraneous but woven into the very fabric of belief, which presupposes that one already has support and evidence for this idea held to be true. The emphasis on reason then is an outgrowth of the Islamic notion of belief. It is thought of as a necessary part of belief, rather than a tool one uses in response to the challenges of

⁸Hassan, M., 'Unity of the Muslim Ummah, It's Need, Importance and Suggestion', International Multilingual Journal of Contemporary Research, Vol. 3, No. 1, (2015), pp. 26-32.

⁹ Lazuk, E., The Importance of Unity in Islam, <http://classroom.synonym.com/importance-unity-islam-7845.html> (accessed 1 Nov., 2017).

¹⁰ Robertson, G., *Crime Against Humanity*, Penguin Book Limited, (2012), p. 90.

¹¹ Qur'an 45:18.

¹² The Origins of Islamic Law, Constitutional Rights Foundation, <http://www.crf-usa.org/america-responds-to-terrorism/the-origins-of-islamic-law.html> (accessed 28 Oct., 2017)

¹³ Philips, A.A.B., 'The Fundamentals of Tawhid (Islamic Monotheism) <http://icrs.ugm.ac.id/book/35/the-fundamentals-of-tawhid-islamic-monotheism.html> (accessed 2 Nov., 2017)

¹⁴ Tariq, R., *Western Muslims and the Future of Islam*, Oxford University Press, (2005), p. 203.

¹⁵ Asma, B., *Believing Women in Islam*, University of Texas Press, (2002), p. 96.

skeptics.¹⁶ From this premise, diversity in unity emerges. This paper is divided into three parts. Part I addresses the basic theory of Islamic Law and Jurisprudence. Part II focuses on the concept of constitutionalism in Islamic Jurisprudence. Part III examines the political and constitutional development of Nigeria with a few to contextualize the challenges facing the country within the framework of Islamic Law and Jurisprudence and some aspects of Nationalism and Internationalism.

Theory of Law in Islamic Jurisprudence

Community of nations subsists on norms which regulate their conduct *inter se*.¹⁷ But different societies develop different legal systems, and every matured system reveals the ways in which the society from which it sprang endeavors to protect what it honors.¹⁸ A nation which assumes that man is incapable of determining what his ultimate good may be and be able to rise above his evil propensities, requires a super-human or a divine power to provide guidance and security for its people.¹⁹

Therefore, as total and unqualified submission to the will of Allah is fundamental to a Muslim's belief, Islamic law is thus the expression of Allah's command for Muslim society and, in application, constitutes a system of duties that are incumbent upon a Muslim by virtue of his religious belief.²⁰ *Shari'ah*, literally, means "the path leading to the watering place" is the law which constitutes a divinely ordained path of conduct and which guides Muslims toward a practical expression of religious conviction in this world and the goal of divine favor in the Hereafter.²¹

Law in Islam is thus, legal theory God-made, human requirements, political expediency, the evolutionary movement in civilized life, the lessons of anthropology and embodiment of justice.²² Nations that uphold the sovereignty of God seem to take for granted the potential capacity of men to be governed by one law, eternal and just, given by a Divine Legislator.²³ In stable societies where the fundamental issues have been resolved, the law is the framework

¹⁶ Gallegos, E., 'Reason in Islamic Law', *Macalester Islam Journal*, Vol. 1, Issue 1, (2006), p. 50.

¹⁷ Oyebo, A., *International Law and Politics: An African Perspective*, Bolabay Publication, Lagos, (2003), p.4

¹⁸ Abu Hanifa, (n.d.), *Sad-Us-Shari'ah*, p.9.

¹⁹ *Ibid*.

²⁰ Coulson, N.J., *Shari'ah, Islamic Law*, <https://www.britannica.com/topic/Shariah> (accessed 3 Nov., 2017).

²¹ *Ibid*.

²² Asaf A.A.F. (1963), *A Modern Approach to Islam*, Asian Publishing House, Bombay1, p. 29.

²³ Shaybani, M., *The Islamic Law of Nations*, The John Hopkins Press, Baltimore, Maryland, (1966), p. xi.

for human interaction, as Lon Fuller would have put it.²⁴ In the concept of Islamic nation-state, the settled fundamental issues are that God is the Law-giver, and He is the source of Law. Also, His law was received and explained by one through whom the law was revealed. Human is also empowered to interpret the Law especially where the Book speaks in general term. Thus, *Fiqh* (Jurisprudence) which literally means "understanding" developed. It is the science of ascertaining the precise terms of the *Shari'ah*.²⁵

Sources of Law

There are two sources of the *Shari'ah*, namely, revealed and non-revealed. While the revealed source provides the basic proof and clues from which detailed rules may be deduced, the non-revealed provides the principle and *modus operandi* to ensure precise application of the source evidence. Thus, *Usul al-Fiqh* elucidate and explicate the indication and methodology by which the rules of *Fiqh* are derived from their source evidence.²⁶ The *Qur'an* and *Sunnah* are basically the revealed sources. The former is a direct revelation from Allah, the Law-maker while the latter is the Prophetic legislation.

The *Qur'an* is universally accepted by all Muslims as the first primary source of law in Islam. *Sunnah* is the second primary source to the extent that while the majority adhere to the traditionally reported *Sunnah*, a cross-section of a minority group such as the Qur'anists reject it in its entirety. The *Qur'an* is the holy book of Islam, believed by Muslims to be the direct and unaltered revelation from Allah to His Prophet. The *Sunnah* consists of words, actions and tacit approvals of the Prophet as narrated by his Companions and the Imams (per the beliefs of the Sunni and *Shi'ite* schools respectively).²⁷ Extensive works have been done on the *Qur'an* and *Sunnah*, thus, no attempt will be made in this paper to further elaborate on them.

As the revealed sources do not explicitly deal with every conceivable eventuality, the *Usul al-Fiqh* must refer to resources and authentic documents to find the correct course of action. Thus, *Ijtihad* (and its derivatives) is the most important source next to the revealed source.²⁸ It was through the mechanism of *Ijtihad* that the chain of other non-revealed (which I here

²⁴ Oyebode, A., *supra* at p. 21 quoting from *Human Interaction and the Law*, 14 Am. J. Jur. 1 (1969)

²⁵ Coulson, N.J., *supra*.

²⁶ Kamali, M.H., *Principles of Islamic Jurisprudence*, The Islamic Text Society, (2003), p. 1.

²⁷ See generally, Morteza, M., *Jurisprudence and Its Principles*, translated by Salman Tawhidi, *Moslem Student Association (Persian Speaking Group)*, (1983).

²⁸ *Ibid* at p. 468.

referred to as *Ijtihad* derivatives) sources were developed. They include, *Ijma*, (consensus of Muslim Jurists); *Qiyas* (analogical deduction); *Urf* (common practice among the Muslims); *Istihsan* (rules for public interest in a matter that is not otherwise prohibited). There are other secondary sources considered to be derivatives of *Ijtihad*.

It must be noted that if *Ijtihad* and its derivatives draw their validity from divine revelations, their propriety is assessed and determined by their consistency and conformity with the Qur'an and *Sunnah*. It follows that the sources of law are essentially and colossally unitary.²⁹ The major difference between the revealed and non-revealed sources lies in the fact that non-revealed is a continuous process of development whereas divine revelation and prophetic legislation discontinued immediately after the demise of the Prophet.³⁰

Scope of the *Shari'ah*

Shari'ah legislative framework is wider in scope than some other legal systems. In the first instance, it regulates an individual's relationship with his Creator - Allah. This is a transcendental relationship that has a spiritual interlink in his personal relationship with his own conscience. The rituals that the individual is expected to perform such as the daily prayers, almsgiving, fasting, and pilgrimage serve as means of maintaining relationship with his Creator but are strictly regulated under the norms of the *Shari'ah*. Under the *Shari'ah*, the individual also has to maintain a relationship with his neighbors both near and far as well as his larger community under the state sovereignty.³¹

The *Sharī'ah* further regulates ethical standards as with legal rules, indicating not only what an individual is entitled or bound to do in law but also what one ought, in conscience, to do or refrain from doing.³² These come under the classification of *Mandub* (praiseworthy) which implies that performing them attracts divine favor while omitting them attracts disfavor. There is also *Makruh* (blameworthy) which implies that omitting them attracts divine favor while committing them attracts divine disfavor. It follows that *Sharī'ah* is not merely a

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

system of law, but an all-inclusive code of behavior that covers both private and public activities.³³

Ijtihad: Path to discovering the Law

The process that makes Islamic law dynamic is its evolution in the changing circumstances possible, results from a particular type of academic research and intellectual effort which, is known in legal terminology as *Ijtihad*.³⁴ *Al-Shafi'i* remarked that “*Qiyas* and *Ijtihad* represent the intellectual process whereby a finite body of revealed texts may be rendered relevant to the infinite complexity of human events. Every event that befalls a Muslim has its necessary religious value (*hukm lazim*), and there is evidence as to the true path in that matter. It is incumbent on the Muslim if there is a specific ruling on a matter to follow it. If there is no specific ruling then evidence as to the true path must be sought by *Ijtihad*.”³⁵

Literally *Ijtihad* means ‘the expending of maximum effort in performance of an act’³⁶ or ‘the expending of effort and the exhaustion of all power.’³⁷ In technical sense however, it means ‘the expenditure of effort in seeking and arriving at rules from the various sources of law’,³⁸ or the effort made by the *Mujtahid* in seeking knowledge of the *ahkam* (rules) of the *Shari’ah* through interpretation.³⁹ It is defined as the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari’ah* from their detailed evidence in the sources.⁴⁰ It is also defined as the application by a jurist of all his faculties either in inferring the rules of *Shari’ah* from their sources, or in implementing such rules and applying them to particular issues.⁴¹

‘Closure’ of the Door of Ijtihad

In the early period of ‘Abbasid dynasty the schools of Islamic law had emerged. Not only that, Islamic law itself had approached the end of its formative phase. And, with active

³³ Ibid.

³⁴ Maududi, S.A.A., *The Islamic Law and Constitution*, Taj Company, New Delhi, (1986), p. 76.

³⁵ Calder, N., *Interpretation and Jurisprudence in Medieval Islam*, (ed. By Mojaddedi, J. and Rippin, A.,) Ashgate Variorum, (2006), pp. 61-2.

³⁶ Ibid at p. 263.

³⁷ Mahmassani, S., *Falsafah al-Tashri’ fi al-Islam – The Philosophy of Jurisprudence in Islam*, Penerbitan Hizb, Malaysia, (1987), p. 92.

³⁸ Ibid.

³⁹ Nyazee, I.A.K., *Islamic Jurisprudence, (Usul al-Fiqh)*, the Other Press, The Institute of Islamic Thought, and Islamic Research Institute, Islamabad, Pakistan, (2000), at p. 263.

⁴⁰ Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, vol. IV, Beirut: al-Maktab al-Islami, (1402/1982), p. 162;

Kamali, M.H., *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, (2003), p. 469.

⁴¹ Abu Zahrah, M., *Usul al-Fiqh*, Cairo: Dar al-Fikr al-‘Arabi, (1973), p. 301; Kamali, M.H., *ibid*.

patronage of the government, the whole sphere of law had been brought to its horizon.⁴² It was shortly after lapse of that formative period that the question of *Ijtihad* and who was capable or qualified to exercising it was raised.⁴³ By the early part of the fourth century of the *hijra* (about A.D. 900), Islamic law had attained a pinnacle of development. During this formative period, the first two and a half centuries of Islam (or until about the middle of the ninth century A.D.), scholars or specialists of law had unfettered right and freedom to explore Islamic law to solving legal issues.⁴⁴

Shortly afterward, the administration of the state and religious law drew apart again.⁴⁵ Similarly, scholars of all schools felt that all essential questions had been thoroughly examined and conclusively determined. Consequently, unanimity unwittingly emerged to the effect that henceforth, no one might be eligible to form independent legal opinion – implying that all subsequent activity would have to be strictly restricted to the explanation, application, and, at the most, interpretation of the doctrine that had been laid down once and for all.⁴⁶ This marked the beginning of the notion of the 'closure of the door of *Ijtihad*' and again implying asking for the adoption of *taklid*. *Taklid* itself is a term which had originally denoted the kind of reference to Companions of the Prophet that had been customary in the ancient schools of law, and which now came to mean the unquestioning acceptance of the doctrines of established schools and authorities.⁴⁷

Schacht argues that the first indications of an attitude which denied to contemporary scholars the same liberty of reasoning as their predecessors had enjoyed are noticeable in *Shafi'i*, and from about the middle of the third century of the *Hijrah* (ninth century A.D.) the idea began to gain ground that only the great scholars of the past who could not be equaled, and not the epigones, had right to 'independent reasoning'.⁴⁸ J. N. D. Anderson, like many others, contended that about the end of the third/ninth century it was commonly accepted that the gate of *Ijtihad* had become closed.⁴⁹ And to confirm this assertion, H. A. R. Gibb argued that

⁴² Schacht, J., *An Introduction to Islamic Law*, Clarendon Press, Oxford, (1982), p. 69.

⁴³ *Ibid* at p. 70.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*.

⁴⁶ Hallaq, W.B., 'Was The Gate of Ijtihad Closed?' *International Journal of Middle East Studies*, Cambridge University Press, 16 (1984), p. 3.

⁴⁷ *Ibid*.

⁴⁸ Schacht, J., *supra* at p. 70.

⁴⁹ Anderson, N. D., *Law Reform in the Muslim World* (London, 1976), p. 7. See also M. Khadduri, "From Religious to National Law," in J. H. Thompson and R. D. Reischauer, eds., *Modernization of the Arab World* (Toronto, 1966), p. 41; F. Rahman, *Islam* (Chicago, 1966), pp. 77-78; H. A. R. Gibb, *Mohammedanism* (New York, 1962), p. 104; A. S. Triton, *Materials on Muslim Education in the Middle Ages* (London, 1957), p. 163;

the early Muslim scholars held that the gate "*was closed, never again to be reopened.*"⁵⁰ W. M. Watt doubted the accuracies in the standard account about this subject without suggesting an alternative view.⁵¹ Some historical accounts relate the subject in explaining the immunity of the *Shari'ah* against the government interference, and others use it to establish a link between the problem of decadence in Islamic institutions and culture.⁵²

Against what appears to be the general and traditional position however, Wael, B. Hallaq, argues that a systematic and chronological study of the original legal sources reveals that these views on the history of *Ijtihad* after the second/eighth century are entirely baseless and inaccurate.⁵³ He contended further that the gate of *Ijtihad* was not closed in theory nor in practice. According to him, *Ijtihad* was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God. In order to regulate the practice of *Ijtihad* a set of conditions were required to be met by any jurist who wished to embark on such activity. All these put together serve as evidence to disprove the argument of closure of the door of *Ijtihad*.⁵⁴ He argued further that the idea of closing the gate of *Ijtihad* or the notion of the extinction of *Mujtahids* did not appear during the first five Islamic centuries. According to him, this is entirely in consonance with the fact that the practical and theoretical importance of *Ijtihad* had not declined throughout this period: *Ijtihad* and *Mujtahids* were employed in the domain of law and were required in the higher ranks of government.⁵⁵ That *Ijtihad* constituted the backbone of the Sunni legal doctrine was manifest in the exclusion from *Sunnism* of all groups that spurned this legal principle.⁵⁶

Wael Hallaq's argument that the '*gate of Ijtihad was not closed in theory nor in practice. ...Ijtihad was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God*' is correct against the background of the historical challenges Islamic law had encountered and survived.

N. J. Coulson, *A History of Islamic Law* (Edinburgh, 1964), p. 81. See also the introduction of G. L. Lewis to Katib Chelebi's *The Balance of Truth* (London, 1957), pp. 18-19. For additional citations on this, see notes 6 and 7 below.

⁵⁰ Gibb, H. A. R., *Modern Trends in Islam* (Chicago, 1947), p. 13; *idem.*, *Mohammedanism*, p. 98.

⁵¹ Watt, W. M., "The Closing of the Door of Ijtihad," *Orientalia Hispanica*, I (Leiden, 1974), 675-678.

⁵² Watt, W. M., *Islam and the Integration of Society* (Evanston, 1961), pp. 206-207, 242-243; H. Liebesny, "Stability and Change in Islamic Law," *Middle East Journal*, 21 (1967), 19; Coulson, *History*, pp. 80-81; Schacht, *supra* at, p. 75; Rahman, *Islam*, pp. 77-78.

⁵³ Hallaq, W.B., *supra* at p. 4.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at p. 33.

⁵⁶ *Ibid.*

Benjamin Jokisch holds similar view. He first noted that Western accounts of Islamic law is that ‘door of *Ijtihad*’ was closed in about the fourth/tenth century and since then, *Shari’a* has been unable to take account of changes through time because it has lost its flexibility.⁵⁷ Contrary to this traditional view and agreeing with recent research,⁵⁸ he explains that *Ijtihad* in reality continued to exist after the fourth/tenth century.⁵⁹

Be that as it may, the fact remains that Islamic law, which until the early ‘Abbasid period, had been adaptable and growing, from then onwards, became subjected to rigidity and put in a final mould.⁶⁰ This stagnating position of the law has remained till the present time. This is very obvious in a comparative assessment of Islamic law with other modern legal systems. Schacht maintained in this regard that taken as a whole, Islamic law reflects and fits the social and economic conditions of the early ‘Abbasid period, but has grown more and more out of touch with later developments of state and society.⁶¹ Muhammad Hashim Kamali reached the same conclusion.⁶²

Al-Tamawi has expressed similar view when he stated that *Ijtihad* by individuals in the manner that was practiced by the *fuqaha* of the past is no longer suitable to modern conditions. He then recommended the setting up of a council of qualified *Mujtahidun* to advice in the preparation and approval of statutory law so as to ensure it harmony with *Shari’ah* principles.⁶³

⁵⁷ Goldziher, I., ‘*Muhammedanisches Recht in Theorie und Wirklichkeit*, *Zeitschrift für vergleichende Rechtswissenschaft*, 8, (1989), pp. 406-23, esp. 409; Bousquet, G., *Du droit musulman et de son application effective dans le monde*, Algiers, (1949), p. 7; Coulson, N., *A History of Islamic Law*, Edinburgh, (1964), p. 2; *ibid* ‘*Doctrine and Practice in Islamic Law*’, BSOAS 18, (1984), p. 69; Crone, P., *Roman Provincial and Islamic Law*, Cambridge, (1987), p. 18; *Sjukijajnan, I., Musuljmaniskoe Pravo, Moskau*, (1986), p. 97.

⁵⁸ Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182; Krawietz, B., *Die Hurma, Schariatrechtlicher Schutz vor Eingriffen in die korpeliche Unverschrtheit nach arabischen Fatwas des 20. Jahrhunderts*, Berlin, (1991), p. 323; North, A., ‘*Die Scharia, das religioesse Gasetz des Islam Wandlungsmöglichkeiten, Anwendung und Winkung*’, in Fikenstcher, Frank and Kohler eds, *Entstehung und Wandel rechtlicher Traditionen*, Freiburg/München, (1980), pp. 415-37 esp. 429; Johansen, B., *The Islamic Law on Land Tax and Rent*, London, (1988), p. 21; Hallaq, W., *Usul al-Fiqh: Beyond Tradition*, *Journal of Islamic Studies*, 3 (1992), pp. 172-202, esp. 182.

⁵⁹ Jokisch, B., *Ijtihad in Ibn Taymiyya’s fatawa* in ‘*Islamic Law, Theory and Practice*, ed. by Gleave, R., and Kermili, E., I.B. Tauris Publishers, London and New York, (2001), p. 119.

⁶⁰ Schacht, J., *supra* at p. 75.

⁶¹ *Ibid*.

⁶² Kamali, H.M., *supra* at pp. 494-95.

⁶³ Al-Tamawi, S.M., *Al-Sultatt al-Thalath fi’l-Dasatir al-‘Arabiyyah wa fi’l-Fikr al-Sihasi al-Islami*, 2nd ed. Cairo: Dar al-Fikr al-‘Arabi, (1973), p. 307; Kamail, H.M., *ibid*.

Abdur Rahman I. Doi, also held the same view when he observed that: ‘*if the process of Ijma, Qiyas, Masalih al-Mursalah, Istislah and Istidlal are properly made to work, the Shari’ah will meet the challenges and the necessities of the modern life.*’⁶⁴

The decline in the growth of Islamic law becomes more manifested in the subject of *Ijma*. Under classical theory, *Ijma* had been subjected to conditions that virtually consigned it to the realm of utopia.⁶⁵ Hashim Kamali noted that the unreality of the classical formulations of *Ijma* is reflected in modern times in the experience of Muslim nations and their efforts to reform certain areas of the *Shari’ah* through the medium of statutory legislation. He further observed that: ‘the classical definitions of *Ijtihad* and *ijma* might, at one time, have served the purpose of discouraging excessive diversity which was felt to threaten the very existence and integrity of the *Shari’ah*. But there is no compelling reason to justify the continued domination of a practice that was designed to bring *Ijtihad* to a close.’⁶⁶ As earlier stated, there is element of accuracy in the assertion of Wael Hallaq.⁶⁷

Ijtihad and Modern Legislation

As could be seen from the above, *Ijtihad* is primarily a practical tool for legislation. *Ijtihad* had effectively played this role in the course of historical development of Islamic law. However, when legislation became a monopoly of the state, any rule emanating from *Ijtihad* made by later days *Mujtahidun* are no long relevant except it is accepted by the state and converted into law through legislation.⁶⁸ In the same vein, an *Ijtihad* ruling may be accorded judicial recognition by the state judiciary. The *Mujtahid* in such a case would be the state through its legal or judicial apparatus and not the individual.⁶⁹ The trend in Muslim majority states of the present is that various councils or commissions of scholars are created and financed by the states under an officially appointed *Mufti* who in most instances may not be officially recognized as a qualified *Mujtahid* in the traditional Islamic scholarship. Their opinions on issues are, in most cases, advisory and sometimes recommendatory, since those Councils or Commissions are part and parcel of the state. At international levels, there are a number of such bodies like, the Muslim World League, the Islamic *Fiqh* Academy of the Organization of Islamic Co-operation whose opinions are

⁶⁴ Doi, A. R., *Basis of Shari’ah (Islamic Law)*, Gaskiya Corporation, Zaria, Nigeria, (1983), p. 635.

⁶⁵ Kamali, H.M., *supra* at p. 259.

⁶⁶ *Ibid.*

⁶⁷ Hallaq, W., *Supra*

⁶⁸ Nyazee, I.A.K., *supra* at p. 272.

⁶⁹ Nyazee, I.A.K., *ibid* at p. 273.

mere advisory and recommendatory. Their opinions on issues may not enjoy official enforcement and sanction.⁷⁰

Maqasid al-Shari'ah

The term '*maqâsid*' was first used in the early fourth century and appeared in the juristic autography of Abû 'Abd Allâh al-Tirmidhî al-Hakîm (d. 320/932) and it was regularly referred to in the works of Imâm al-Haramayn al-Juwaynî (d. 478/1085) who was said probably the first to have classified the *maqâsid al-Shari'ah* into the three categories of essential, complementary and desirable (*darûriyyât, hâjiyyât, tahsîniyyât*).⁷¹ His classification enjoyed general recognition ever since. Abu Hamid al-Ghazali, a student of al-Juwaynî later developed his idea and wrote in details on public interest (*maslahah*) and ratiocination (*ta'lîl*) in his works, *Shifâ' al-Ghalîl* and *al-Mustasfâ*.⁷²

Ghazâlî was prepared to recognize *maslahah* if it was to promote the *maqasid* of the *Shari'ah*. That explained why he was categorical in his treaty on the subject contending that the *Shari'ah* pursued five values, namely, faith, life, intellect, lineage and wealth or property all of which were to be protected as a matter of absolute priority.⁷³ It was at a later stage that a number of leading jurists began to contribute in expanding the scope of the theory. For instance, Sayf al-Dîn al-Âmidî (d. 631/1233) identified the *maqâsid* as criteria of preference *al-tarjîh* among conflicting analogies and elaborated on an internal order of priorities among the various classes of *maqâsid*.⁷⁴ He also restricted the essential *maqâsid* to only five.⁷⁵

The Mâlikî jurist, Shihab al-Din al-Qarâfî (d. 684/1285) added a sixth to the existing list, namely the protection of honor (*al-'ird*)⁷⁶ and this was endorsed by Taj al-Din 'Abd al-Wahhab ibn al-Subki (d. 771/1370) and later by Muhammad ibn 'Ali al-Shawkânî (d. 1250/1834). The list of five essential values was evidently based on a reading of the relevant parts of the *Qur'ân* and the *Sunnah* on the prescribed penalties (*hudud*). The value that each of these penalties sought to vindicate and defend was consequently identified as an essential

⁷⁰ Ibid.

⁷¹ Kamali, H.M., supra note no. 77 at p. 513.

⁷² Al-Ghazali, A.H. M.M., *Shifâ' al-Ghalîl fi Bayan al-Shabah wa-al-Mukhil wa Masalik al-Talil*, Baghdad, (1971).

⁷³ Ibid.

⁷⁴ See Al-Amidi, S. D. A. M., *al-Ihkam fi Usul al-Ahkam*, 4 vols., ed. 'Abd al-Razzaq 'Afifi, 2nd edn. Beirut: al-Maktab al-Islami, (1402/1982).

⁷⁵ Ibid.

⁷⁶ Al-Qarafi, S.D.A., *Sharh Tanqil al-Fusul fi Ikhtisar al-Mahsul fi al-Usul*. Cairo, (1393/1973).

value. The latest addition (i.e. *al-'ird*) was initially thought to have been covered under lineage (*al-nasl*, also *al-nasab*), but the proponents of this addition relied on the fact that the *Shari'ah* had enacted a separate *hadd* punishment for slanderous accusation (*al-qadhf*), which justified the addition. 'Izz al-Dîn 'Abd al-Salâm al-Sulami's (d. 660/1262) renowned work, *Qawa'id al-Ahkam*, was in his own characterization a work on '*maqasid al-ahkam*' and addressed the various aspects of the *maqasid* especially in relationship to '*illah* (effective cause) and *maslahah* (public interest) in greater detail. Thus he wrote at the outset of his work that "the greatest of all the objectives of the *Qur'ân* is to facilitate benefits (*masâlih*) and the means that secure them and that the realization of benefit also included the prevention of evil." Sulamî added that all the obligations of the *Shari'ah* (*al-takalif*) were predicated on securing benefits for the people in this world and the next. For God Most High is Himself in no need of benefit nor is He in need of the obedience of His servants. He is above all this and cannot be harmed by the disobedience of transgressors, nor benefit from the obedience of the righteous. The *Shari'ah* is, in other words, concerned, from the beginning to the end, with the benefits of God's creatures.

Taqi al-Din ibn Taymiyyah (d. 728/1328) was probably the first scholar to depart from the notion of confining the *maqasid* to a specific number and added, to the existing list of the *maqasid*, such things as fulfillment of contracts, preservation of the ties of kinship, honoring the rights of one's neighbor, in so far as the affairs of this world are concerned, and the love of God, sincerity, trustworthiness, and moral purity, in relationship to the hereafter. Ibn Taymiyyah thus revised the scope of the *maqasid* from a designated and specified list into an open-ended list of values, and his approach is now generally accepted by contemporary commentators, including Ahmad al-Raysuni, Yusuf al-Qaradawi and others. Qaradawi has further extended the list of the *maqasid* to include social welfare and support (*al-takaful*), freedom, human dignity and human fraternity, among the higher objectives and *maqasid* of the *Shari'ah*. These are undoubtedly upheld by both the detailed and the general weight of evidence in the *Qur'an* and the *Sunnah*

Classification of Maqasid

The values or objectives of law as specified by Al-Ghazali with approval of majority of jurists including al-Shatibi, are first of two types, namely, *dini* or values of the Hereafter and

dunyawi or values pertaining to this world.⁷⁷ The worldly values (*dunyawi*) are further classified into four, namely, the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *‘aql* (intellect), and the preservation of *mal* (wealth or property).⁷⁸ The totality of these classifications yield five ultimate values of the law, namely, *din* (religion), life, progeny, intellect, and wealth or property.⁷⁹ The entire range is thus classified into three in order of importance - the essential (*daruriyyat*), followed by the complementary benefits (*hajiyyat*), and then the embellishment (*tahsiniyyat*).⁸⁰ The first category is that of the necessities (*darurat*), which jurists believe have been maintained by all societies and without which existence of any kind of society is difficult.⁸¹ This category is considered the primary *maqasid* and thus, the jurists pay particular attention on all the units of this category.⁸² The remaining two categories play supportive role to this major category.

The Essentials (daruriyyat): The essential interests are classified into five, namely, faith, life, lineage, intellect and property. These are, by definition, essential to normal order in society as well as to the survival and spiritual well-being of individuals, so much so that their destruction and collapse will precipitate chaos and collapse of normal order in society.⁸³ The *Shari’ah* seeks to protect and promote these values and validates measures for their preservation and advancement.⁸⁴ *Jihad* has thus been endorsed and authorized with a view to protect religion, and so is just retaliation (*qisas*) which is designed to protect life.⁸⁵ The *Shari’ah* takes affirmative and also punitive measures to protect and promote these values. Theft, adultery and wine-drinking are punishable offences as they pose a threat to the protection of private property, the well-being of the family, and the integrity of human intellect respectively. In an affirmative sense again, but at a different level, the *Shari’ah* encourages work and trading activity in order to enable the individual to earn a living, and it takes elaborate measures to ensure the smooth flow of commercial transactions in the market-place.⁸⁶ The family laws of the *Shari’ah* are likewise an embodiment largely of guidelines and measures that seek to make the family a safe refuge for all of its members. The *Shari’ah*

⁷⁷ Nyazee, I.A.K., supra note 116 at p. 231.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ See Al-Shatibi, A.I.I., ibid, ii, pp. 8-13; Kamali, H.M., <http://www.sunniforum.com/forum/>, ibid.

⁸¹ Nyazee, I.A.K., supra note 116 at p. 236.

⁸² Ibid

⁸³ Hallaq, W.B., *Shari’a, Theory, Practice and Transformations*, Cambridge University Press, (2009), p. 104.

⁸⁴ Kamali, H.M., supra at p. 513.

⁸⁵ Ibid.

⁸⁶ Ibid.

also encourages pursuit of knowledge and education to ensure the intellectual well-being of the people and the advancement of arts and civilization. The essential *masalih*, in other words, constitute an all-encompassing theme of the *Shari'ah* as all of its laws are in one way or another related to the protection of these benefits. These benefits are an embodiment, in the meantime, of the primary and overriding objectives of the *Shari'ah*.⁸⁷

The essentials or necessities (*daruriyyat*) are followed by other categories under the *maqasid al-Shari'ah*. These fall under the heading of needs (*hajjiyyat*). They are not regarded as indispensable necessities; they are needed for maintaining an orderly society and for laying the grounds to achieving the successful implementation of *daruriyyat*.⁸⁸ *Hajjiyyat*, or complementary interests, are not an independent category as they also seek to protect and promote the essential interests, albeit in a secondary capacity.⁸⁹ These are defined as benefits, which seek to remove severity and hardship that do not pose a threat to the very survival of normal order. *Hajjiyyat* are illustrated in the area of criminal justice where a *hadith* is said to proclaim that "prescribed penalties are suspended in all cases of doubt". The rule in this *hadith* protects a secondary interest in that it regulates the manner in which punishments are enforced. These punishments are in turn designed to protect the essential interests through judicial action.⁹⁰ In the sphere of *mu'amalat*, the *Shari'ah* validated certain contracts, such as the sale of *salam*, and also that of lease and hire (*ijarah*) because of the people's need for them notwithstanding a certain anomaly that is attendant in both.⁹¹

The third categories are those known as embellishments, adornment, improvements or desirabilities (*tahsiniyyat*). They are those that include legal elements related to issues not directly connected with the *necessary* and *needed* goals of the law.⁹² *Tahsiniyyat* seek to attain refinement and perfection in the customs and conduct of people at all levels of achievement.⁹³ For example, the *Shari'ah* encourages gentleness (*rifq*), pleasant speech and manner (*husn al-khulq*) and fair dealing (*ihsan*). The judge and the head of state are similarly counseled not to be too eager in the enforcement of penalties, such a course being considered

⁸⁷ Ibid.

⁸⁸ Hallaq, W.B., supra.

⁸⁹ Kamali, H.M., supra.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

a desirable one to take.⁹⁴ Attainment of beauty and perfection in all spheres of human conduct are the primary objectives of *tahsiniyyat*.

Illustrating the practicality and applicability of the *maqasid* to general welfare of man, Muhammad Hashim Kamali has this to say:

“It should be obvious, then, that the classification of masalih need not be confined to the ahkam of the Shari’ah or to religious matters alone as it is basically a rational construct that applies to customary, social, political, economic and cultural affairs and so forth. To build the first hospital in a town is likely to be necessary and essential, but to build a second and third may be only complementary and desirable. And then to equip each one with the latest and most efficient health care facilities may fall under the category either of the second or the third classes of interests, depending, of course, on the general conditions of each locality.”

***Ikhtilaf* (Juristic Differences) in Islamic Law**

Difference of opinions in Islamic law and jurisprudence are indeed a reality. It is reflected in the existence of a number of different schools of jurisprudence as well as volume of books that had continued to develop in the Islamic scholarship. It is a practical proof that Islamic law has a rich tradition of diversity and disagreement in spite of its vulnerability to diverse cultures and legal traditions. It is thus described as 'being one of diversity within unity - diversity in details and unity in principles.'⁹⁵

As earlier noted in this paper, *Tawhid*, the belief in the Oneness of God is the corner stone of article of faith in Islam. The difference of opinion should therefore be contextualized in this principle. It has thus been argued that *Tawhid* is a major *Qur'anic* theme underscoring the concept of One God, one Islam, one scripture and one *Ummah*.⁹⁶ To that extent, the *Shari'ah*, despite the differences of opinion, remains only source of legislation as far as Muslims and Islam are concerned. It should be emphasized that the Islamic Schools of Thought interpreted the *Shari'ah* with a view to respond to the realities of their time and thus may not acquire characteristic of permanence like the *Shari'ah* itself. Similarly, it should be noted that *Ijma*

⁹⁴ Ibid.

⁹⁵ Kamali, M.H., 'The Scope of Diversity and Ikhtilaf', <http://www.worde.org/wp-content/uploads/2011/12/scope-of-diversity-and-ikhtilaf.pdf> (accessed 08 Nov., 2017).

⁹⁶ Ibid.

which is theoretically the benchmark for proof and source of Islamic law after the *Qur'an* and *Sunnah* is capable of limiting the scope of *Ikhtilaf*.

For *Ikhtilaf* to be valid only, it must meet certain requirements namely that, (i) it must be based on valid evidence; (ii) it cannot lead to something unrealistic; and (iii) those two requirements must be based on *Ijtihad* supported by valid evidence.⁹⁷ And to the extent of limitation effects of *Ijma'*, the moment there is general agreement on a ruling in a matter, the dynamic of *Ikhtilaf* on that same matter is automatically terminated. This is because *Ijma* is essentially to regulate the checkmate *Ikhtilaf* so as to preserve the inherent Unitarian mettle which is more fundamental to Islam.

Grounds of Ikhtilaf

Three factors are responsible for differences of opinion, namely: i) Linguistic and language interpretation of the particular subject-matter; ii) Knowledge and the question of authenticity of a *Hadith*; and, iii) Principles and proofs of *Usul al-fiqh*.⁹⁸

Linguistic Interpretation

There are words and sentences in the *Qur'an* that are capable of several meanings. While interpreting them disagreement arises. Disagreement also arises from homonyms which sound alike or are spelled alike, but have different meanings. For example the word *quru'* concerning the waiting period of (*iddah*) a divorced woman must observe before she can remarry. Basically, her *iddah* consists of three *quru'* which could be interpreted to mean either three menstruations (*hayd*) or three clean periods (*tuhur*) between menstruations. The latter attracts a longer waiting period. The Companions are said to have held different views on this, and as the position remained like that, the generations of scholars that came after them inherited these differences and thus remained unresolved.⁹⁹

Ikhtilaf on Hadith

It is argued that the scope of *Ikhtilaf* over the *Sunnah* is more extensive than that which may exist regarding the *Qur'an*. This is because there is absence of disagreement over the authenticity of the contents of the *Qur'an*. Disagreement over the *Hadith* or *Sunnah* extends not only to questions of interpretation but also to authenticity and proof.¹⁰⁰ Ignorance of a

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Kamail, M.H., *Principles of Islamic Jurisprudence*, The Islamic Text Society, (2003), p. 78.

Hadith is an important cause of *Ikhtilaf*. Historically, some of the disagreement that developed between the Traditionalists (*Ahl al-Hadith*) and Rationalists (*Ahl al-Ray*) related to the fact that the scholastic centers of *Kufa* and *Basrah* in Iraq were said to be unaware of some of the *Hadith* known in *Makkah* and *Medina*. Thus, the scholars of Kufa were probably on account of that resorted more frequently to *ra'y* and *qiyas* (analogy). Where scholars of Medina on the other were not at times unaware of the particular *Hadith* relating to issues at hand, usually resorted to Medina practice.¹⁰¹

Ikhtilaf on Methodology

Differences also arise from methodologies and principles of *Usul al-Fiqh* particularly on issue of *Istihsan* (juristic preference). This is a principle of *Usul al-Fiqh* which has close semblance to the doctrine of equity in Western Jurisprudence. According to this principle, a judge or *mujtahid* is authorized to find an alternative solution to an issue when the strict application of existing laws leads to unsatisfactory results. Majority of Islamic schools accepts this principle. However, the *Shafi'i* school rejected it altogether.¹⁰²

Varieties of Ikhtilaf

Ikhtilaf has been classified into three types, namely, praiseworthy (*mahmud*). A good example is a disagreement with the advocates of heresy and misguidance. There is also the blameworthy (*madhmum*) and the other one that falls between the two above. In *Shafi'i* jurisprudence, *Ikhtilaf* could be categorized into two, namely, forbidden disagreement (*al-ikhtilaf al-Muharram*) and permissible disagreement (*al-Ikhtilaf al-Jaiz*). Disagreement is forbidden in matters that are clearly decided by textual evidence in the Qur'an and *Sunnah* for anyone who is acquainted to it. Permissible *Ikhtilaf*, according to the *Shafi'i* School, is in reference to the general rules and guidelines of *Ijtihad* analyzed in *Risalah*, with proviso that priority should be given to supportive evidence obtained from the *Sunnah* or through *Qiyas*.

Ikhtilaf as Blessing

There is a popular *Hadith* on *Ikhtilaf* to the effect that the differences of opinion (*Ikhtilaf*) between the Muslim faithful (*Ummah*) is a form a blessing. The authenticity of this *Hadith* has been a subject of controversy. There is argument that it is a hadith, but it is not mentioned in the six authentic collections of *Hadith* but, it has been argued that its chain of narrators is also not known. There are various versions of this statement. In some versions it is

¹⁰¹ Kamali, M.H., "The Scope of Diversity and *Ikhtilaf*", supra.

¹⁰² Ibid.

mentioned, "The difference of opinions among my Companions is a mercy for you." Or "The difference of opinions of my Companions is a mercy for my *Ummah*." Many scholars of *Hadith* consider all these versions as weak or *da'if* as far as their narration is concerned.¹⁰³

In spite of the controversy surrounding the authenticity of this *Hadith*, the fact remains that *Ikhtilaf* as a working mechanism in the concept of *Ijtihad* has shown the dynamism in the *Shari'ah* and thus enriched it in theory and practice. Therefore, disagreement has thus been blessing to the Muslims after all.

As can be seen from Part I above, Allah is the Law-maker and *Shari'ah* (*Qur'an* and *Sunnah*) is the Law and *usul al-Fiqh* (Jurisprudence) is the interpretation of the Law. The former is of divine origin, the latter is the product of human intellectual efforts to ascertain and discover the law and translate same into a legal system that regulates human activities - spiritual and mundane.¹⁰⁴ This is known in the Islamic terminology as *Ijtihad*. Having passed through historical turbulence, the door of *Ijtihad* was said to have been closed. However, this has been proved to be a mere theoretical debate. In practice, *Ijtihad* has been continued to be exercised as challenges facing human being had never stopped. However, in exercising *Ijtihad*, *Ikhtilaf*, difference of opinions emerged. This, of course, is normal and in fact blessing if it is situated within the framework of the *Shari'ah*. Law does not operate in vacuum. It is aimed at achieving certain goals. Thus, under the concept of *Maqasid al-Shari'ah*, certain objectives are to be achieved namely, *dini* or values of the Hereafter and *dunyawi* or values pertaining to this world. The worldly values (*dunyawi*) are further classified into four, namely, the preservation of *nafs* (life), the preservations of *nasl* (progeny), the preservation of *'aql* (intellect), and the preservation of *mal* (wealth or property) .

Part II

Islamic Constitutionalism, Medina Charter as Template

Introduction

In the Western legal theory, constitutionalism is a collection of ideas, attitudes, and patterns of behavior espousing the political framework from which the authority of government is

¹⁰³ See al-Suyuti al-Jami al-Saghir Ibn al-Hajib Mukhtasar.

¹⁰⁴ Coulson, N.J., *Conflicts and Tensions in Islamic Jurisprudence*, University of Chicago Press, (1969), pp. 1-2.

derived and is limited by basic legal principles.¹⁰⁵ David Fellman thus provides a descriptive nature of constitutionalism when he says that:

*"Constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment or mere fiat of public officials ... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law."*¹⁰⁶

Islamic Concept of Sovereignty and Constitutionalism

The concept of constitutionalism in Islamic Law and jurisprudence begins with the notion of 'sovereignty'. The word 'sovereignty' which is derived from the Latin word '*Superanus*' literally means the supremacy of one over the other. In Islam, sovereignty belongs to Allah (God) absolutely. Thus, Allah, is described in the Qur'an, the first primary source of law as *Al-Malik* meaning sovereign and *Al-Malik-ul-Mulk* the eternal possessor of sovereignty.¹⁰⁷ Several references in the Qur'an attest to this position. For example, it stated that: "To Allah belongs the sovereignty of the heavens and the earth,"¹⁰⁸ "It is He who gives life and death and he has power over all things;"¹⁰⁹ and, "He is the first and the last the Evident and the Immanent"¹¹⁰

It follows that the concept of sovereignty belongs to Allah and it is universal, absolute, indivisible and inalienable. And to that extent, Allah the sovereign is the Law-giver. He delegates his authority for administering justice and peace to His agents such as the Islamic

¹⁰⁵ Fehrenbacher, D.E., *Constitutions and Constitutionalism in the Slaveholding South*, University of Georgia Press, (1989), p. 1.

¹⁰⁶ Fellman, D., *Constitutionalism*, Madison, University of Wisconsin, (1973-74), Vol. 1, pp. 485, 491–92.

¹⁰⁶ Sabarashid, *Concept of Sovereignty in Islam*; (2014);

<https://islamicencyclopedia.wordpress.com/author/sabarashid/> (accessed 10 Nov., 2017).

¹⁰⁸ Qur'an 42: 48.

¹⁰⁹ Qur'an 42: 48.

¹¹⁰ Qur'an 47: 3.

state and the khalifa. They only enjoy marginal autonomy necessary to implement and enforce the laws of their sovereign.¹¹¹

It is argued that the Islamic theory of sovereignty is radically different from the western theories of sovereignty. Islam teaches that the sovereignty belongs to Allah alone and no human being can be the lord of other human beings. The Western notion is the effect that, the sovereignty belongs to the state and sovereign is some determinate human being with unlimited powers. Thus, it is stated in the Austinian theory that: "If a determinate human superior not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society; and the society (including superior) is a society political and independent."¹¹²

It is also argued that the Islamic notion of sovereignty differs from the Western principles of international custom and law established by the Treaty of Westphalia in that an important element of this is the *Ummah* - the community of Muslims as a whole. To that extent, there is no division between religion and politics and so government should be based upon the *Qur'an* and *Sunnah* of the Prophet.¹¹³ Thus, Muslim political theorists including Maulana Maududi, Syed Qutb, Ayatollah Khomeini and Ali Shariati have argued that the basic distinction between Western polity and Islamic polity is that while the former places sovereignty in either the state or in Man through the notion of popular sovereignty, the latter places it absolutely in God. Thus a simple explanation of the Islamic polity would be that God is sovereign and he is the source of all legislation in the form *Al-Qur'an*.¹¹⁴

From the above, the Islamic concept of sovereignty is universal, that is non-territorial, transcendental, meaning beyond human agency, indivisible, inalienable and truly absolute.¹¹⁵ Thus, under this notion, Allah - the sovereign is the Law-giver while the Islamic state and the *Khalifa* act as agents and enjoy marginal autonomy necessary for the implementation and enforcement of the laws of their sovereign.¹¹⁶

¹¹¹ Sabarashid, supra.

¹¹² Austin's theory of sovereignty (monistic view), (2013);

<https://lawnotes.wordpress.com/2013/10/07/austins-theory-of-sovereignty-monistic-view/>

¹¹³ Saikal, A., "Westphalian and Islamic Concepts of Sovereignty in the Middle East", *Re-envisioning sovereignty*, (2008),

¹¹⁴ Khan, M., 'Sovereignty in Islam and Human Agency, (1999), <http://www.ijihad.org/sovt.htm> (accessed 10 Nov., 2017)

¹¹⁵ Ibid.

¹¹⁶ Ibid.

As could be seen from the above analysis, the linguistic terminology of Western concept of constitutionalism may not be rightly available in the Islamic concept of constitutionalism. This is because, there is a world of difference in the dynamics of the two systems. The Western notion of constitutionalism are discoverable through the use of reason. Under Islamic legal and political thoughts, it is discovered through revelation and reason. Nevertheless, it does not mean that the Islamic political thought does not know what constitutionalism is, or that it is not conceptually equipped to deal with matters that are discussed under the Western linguistic rubric. On the contrary, themes such as ruling in accordance with the law, the right which people have to oppose unjust rule, liberties which rulers are not permitted to infringe on, and other similar concerns, have existed in Islamic political thought since the earliest times.¹¹⁷ This is adequately demonstrated in the Islamic concept of nation-state which emerged at the advent of the Prophethood of Muhammad (PBUH) where the Western world was of no significance in the geographical terrain of the globe. This culture had continued to be replicated in the subsequent generations of Muslim states before the collapse of the Islamic Caliphate.

Islamic Perspective of Modern Nation-State

Western writers and historian usually cite the Treaties of Westphalia of 1648 as the document that marked the beginning of the era of modern nation-state. However, Muslim scholars and jurists argue that The Medina Charter, written and promulgated by Prophet Muhammad for the multi-religious ten thousand-strong citizens of the city-state of Medina in 622 A.D is truly a remarkable political-constitutional document.¹¹⁸

For example, Professor M. Hamidullah contends that this Medina Charter was the first written constitution in the world. This contention is not without basis. According to him, Aristotle's Constitution of Athens, written on papyrus, discovered by an American missionary in Egypt in 1890 and published in 1891, was not a constitution. It was an account of the constitution of the city-state of Athens. Other legal documents on the conduct of ancient societies have been found, but none can be described as a constitution.¹¹⁹ He maintains that

¹¹⁷ Bahlul, R., *Islamic Perspective of Constitutionalism*, (2005)

<http://www.juragentium.org/topics/islam/law/en/bahlul.htm> (accessed 09 Nov., 2017).

¹¹⁸ Ahmad, K., 'A Short Note on Medina Charter', <http://www.constitution.org/cons/medina/kassim2.htm> (accessed 09 Nov., 2017)

¹¹⁹ Ibid.

the Medina Charter is the first, and in this it preceded the American Constitution of 1787, considered by Western authorities as "a landmark document of the Western world ... the oldest written national constitution in operation" by more than a thousand years! It also preceded the English feudal bill of rights, the Magna Carter of 1215, by almost six centuries.¹²⁰

Historically, the Islamic State of Medina was the first political entity established by the Prophet in the year 622 CE. The state's administration was guided by the Divine revelation of the *Qur'an* and the *Sunnah* (saying and practices of the Prophet) on one hand, and the Constitutional Charter of Medina on the other hand. It was this Charter that depicted the true pluralistic and multi-cultural characteristics of this nascent State. The Islamic State of Medina represented the political unity of the Muslim *Ummah* (nation) which was later in history transformed into the Caliphate by the subsequent generations of the Muslims beginning with the Prophet's disciples, who were known as the Rightly Guided (*Khulafa al-Rashidun*) Caliphs (632–661 CE).

The Charter of Medina, which, as also observed, pre-dated the English Magna Carta by almost six centuries was implemented within a period of 10 years (622-632 A.D.).¹²¹ There were about 10,000 citizens living in Medina at that time. Remarkably 45% of the total population in Medina consisted of non-Muslim Arabs, 40% consisted of Jews, and only 15% consisted of Muslims, at the start of this treaty.¹²² The objective of the Charter was *inter alia*, to govern a multi-religious pluralistic society, with a view to guarantee religious freedom and rights for all. It contains 47 clauses which set out the formation of a sovereign nation-state with a common citizenship for all communities.¹²³ It protects fundamental human rights for all citizens, including equality, cooperation, freedom of conscience and freedom of religion. It further grants the citizens participatory rights in the government.¹²⁴ Clause 25 specifically states that Jews and non-Muslim Arabs are entitled to practice their own faith without any

¹²⁰ Ibid.

¹²¹ Shah, Z. H., "The Constitution of Medina: A Symbol of Pluralism in Islam, (2012), <https://themuslimtimes.info/2012/11/09/the-constitution-of-medina-a-symbol-of-pluralism-in-islam/> (accessed 09 Nov., 2017)

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ahmad, K., *supra*.

restrictions. In short, the Charter of Medina was the first document in history to establish religious freedom as a fundamental constitutional right.¹²⁵

Al-Shoura (Consultative Assembly): A Component of Medina Charter

From the Medina Charter a number of principles of government and administration emerged. In the first instance, it was the concept of Al-Shura (Consultative Assembly). From this concept emerged a number of other principles that had remained relevant up till the present time. These include, majority rule, freedom of expression and opinion, and government policy for the interest of the people. Al-Shura is an important component and guiding principle of the Islamic state right from the time of the Prophet. Scholars and writers have done extensive works in analyzing this concept. There appears to be a unanimity among them that Islamic consultative body should be based on the following characteristics namely:

- i. There should be a consultative forum that operates within the guidelines of the Qur'an and Sunnah;
- ii. The consultative forum must operate under a leader consensually elected or appointed among members of this forum;
- iii. The deliberation of the forum must be based on *Mushawarah and Mudhakarrah*;
- iv. There should be freedom of expression and opinion among the members of the forum;
- v. The deliberations of the forum must aim at achieving public interest (*Maslahah Ammah*) rather than narrow interest of few;
- vi. Majority position should prevail as long as such position does not run counter to the guiding principles of the *Qur'an* and *Sunnah*.¹²⁶

As stated above, this concept evolved right from the spirit of Medina Charter. The Prophet was said to have not only favored this concept but, also championed it. This was demonstrated in many historical events that took place at this time. For example, in the episode of the Battle of Khandaq (Battle of the Trench), the Muslims were faced with two options in fighting the invading enemies. Either to fight them outside of Medina or wait until they enter the city. It was during a consultation among the Companions that Salman al-Farsi suggested the idea of fighting the enemies within Medina by building a big ditch on the northern periphery of Medina to prevent them from entering the city. This suggestion was

¹²⁵Ibid.

¹²⁶ Jeong, C. H., in Ibrahim, & Nor Fadzlina Nawi, *Principles of Public Administration: An Introduction*, Kuala Lumpur: Karisma Publications, (2007),

unanimously supported by the majority of the Companions, and thus, the Prophet endorsed it. It was this war strategy suggested by a Companion supported by majority and approved by the Prophet that led to the frustration of the enemies and eventual victory for the Muslims.

Appraisal of Medina Charter

Clauses 1, 2 and 39 state the formation of a sovereign nation-state with a common citizenship, consisting of various communities, principally Muslim Arabs from Mecca (the Muhajirin or Immigrants), Muslim Arabs from Yathrib (the Ansar or Helpers), other monotheists from Yathrib (i.e. the Jews) and others who must be at that time still pagans. These constitute a unified citizenry (Arabic term, ummah), having equal rights and responsibilities, as distinct from other peoples.¹²⁷

According to the provisions of the Charter particularly, in the spirit and letter of Clauses 3, 11 and 26, a federal structure was adopted with the various tribes in districts constituting federating units. These districts had residual powers in social, cultural and religious matters, and practically, many matters were left in the hands of the autonomous units. These were covered under the provisions of Clauses 17, 36 (a) and 47 of the Charter. There was a centralized authority as the apex of federal system with exclusive power in matters such as state security and national defense. These are provided for under Clauses 13, 15, 17 and 44. Only in cases of disputes the units could not resolve, recourse for their decisions had to be made to the Prophet, whose decision was final. This was provided for under Clauses 23 and 41.

The Charter also introduced a revolutionary system of justice, It established a centralized public institution for seeking justice as opposed to the archaic and crude system where everyone seeking justice had to use the power of his hand or, at best, that of his family. According to Professor Hamiddullah, this epoch-making innovation ... brought an end for all times to the chaos of tribalism and which laid the basis for a wider institution, viz a State."¹²⁸

In a nutshell, despite the absence of human rights culture across the globe at that particular point in time, the Medina Charter, contained provisions that gave the non-Muslims their due rights even though the authority was under the control of the Muslims. The following were

¹²⁷ Ahmad, K., supra.

¹²⁸ Ibid.

part of rights accorded the non-Muslims in Medina:¹²⁹ Equal rights to God's protection and security;¹³⁰ equal political and cultural rights as well as autonomy and freedom of religion;¹³¹ collecting participation in taking up arms against the enemy of the community and sharing the cost of war. No group should connive with the enemy;¹³² and, Non-Muslims will not be asked or forced to take part in religious wars of the Muslims.¹³³

It is significant to note that the Medina Charter succeeded in redefining the ties between the Muslims, namely, the *Muhajirun* (the Emigrants) and the *Ansar* (the Helpers). Contrary to the norms of pre-Islamic Arabia, which was a thoroughly tribal society, the Charter ranked the faith relationship over and above blood-ties with emphasis on individual rights and responsibilities.¹³⁴ Group and tribal identities are acknowledged and are used as reference points but religion remains the fundamental binding tie.¹³⁵ The Medina social and constitutional development, is a landmark in human history as this small group of Muslims in this historic city was going to metamorphose to larger community and empire later in the course of time.¹³⁶

From the above analysis, the need arose to answer the question, to whom belong the sovereignty - God or human? Thus, the concept of Islamic Constitutionalism developed and the first Islamic State of Medina and its Charter serves as template. Constitutionalism with all its derivatives such as rules of law, fundamental human rights, freedom of expression, rights of religion and association, equality before the law, principles of justice and fairness, participatory governance, plurality and multi-culturalism are all inherent in the Islamic system right from inception. What makes a world of difference is that while others like the Western system are based on human reason and idea, Islamic system is based on revelation and reason.

¹²⁹ Barakat, A., *Muhammad and the Jew*, Vikas Publishing House, (1979), pp . 46-7.

¹³⁰ Article 15, as quoted in Barakat, A., *ibid.*

¹³¹ Article 25, as quoted in Barakat, A., *ibid.*

¹³² Article 37, as quoted in Barakat, A., *ibid.*

¹³³ Article 45, as quoted in Barakat, A., *ibid.*

¹³⁴ Alden, W.J., *Themes of Islamic Civilization*, p. 12.

¹³⁵ Frederick, D., "Umma in the Constitution of Medina", *Journal of Near Eastern Studies*, 36, The University of Chicago Press, (1977), p. 44.

¹³⁶ Serjeant, R.B., "Sunnah Jāmi'ah, pacts with the Yathrib Jews, and the Tahrīm of Yathrib: analysis and translation of the documents comprised in the so-called 'Constitution of Medina'", *Bulletin of the School of Oriental and African Studies* (1978), 41: 1-42; particularly at p. 4.

Part III

Nigeria Political and Constitutional Development

A Brief Historical Analysis

The Federal Republic of Nigeria attained independence in 1960 after a period of British colonial rule spanning about a century and beginning with the formal annexation of Lagos in 1861.¹³⁷ Nigeria's constitutional development history can be divided into two phases, namely, the colonial or pre-independence and post independence eras. In the colonial or pre-independence constitutional era, 6 constitutional instruments (1914, 1922, 1946, 1951, 1954 and 1960) were enacted. In the post-independence constitutional period, 3 constitutional instruments (1963, 1979 and 1999) were enacted.

While each successive pre-independence constitutional instrument was enacted through an order-in-council of the British monarch, their post-independence counterparts were enacted in two ways: an Act of parliament (1963 Constitution) and military decree (1979 and 1999).¹³⁸

The Nigeria as it is known today, began its history in 1914 with the Frederick Lugard Constitution. In that year, the Colony and Protectorate of Southern Nigeria was merged with the Protectorate of Northern Nigeria and they were referred to as the Colony and protectorate of Nigeria. The legislative council was this time allowed to make law for only the colony. The governor made laws for the protectorates. The reason, according to Lord Lugard was "until communications by railway are greatly extended, the proposition is physically impossible". This was due to the large geographical size of the country.¹³⁹

Shortly afterwards, the 1914 Constitution was replaced by the 1922 Sir Clifford Constitution which significantly established a 46 member Legislative Council and which was given law making responsibilities for the Colony of Lagos and the southern provinces. The Council had 27 members including the Governor, the Lieutenant-Governors, other elected and nominated members including three representing Lagos as the administrative and commercial capital and one representing Calabar as a big commercial centre. Notably, the 1922 Constitution

¹³⁷ Nigeria: Constitutional Development History; <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html> (accessed 10 Nov., 2017).

¹³⁸ Nigeria: Constitutional Development History; <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html> (accessed 10 Nov., 2017)

¹³⁹ Olamide, O., 'History of Nigeria Constitutional Development, <http://www.djetlawyer.com/history-nigerian-constitutional-development/> (accessed 11 Nov., 2017).

introduced, for the first time in any British African territory, the elective principle with Lagos and Calabar being granted the franchise to elect their representatives to the Legislative Council.¹⁴⁰

When the Arthur Richard Constitution was enacted in 1946, it defined Nigeria, for the first time, in terms of regions - thus dividing the country into three main regions: the Northern, Western and Eastern regions. This constitution came into effect after the Second World War¹⁴¹ - the global event, had a significant impact on constitutional reforms in Africa generally and Nigeria in particular. This was evidenced as the return of African war veteran who were conscripted to fight on the side of the British came back with spirit of nationalism and desire to achieve freedom and international sovereignty. It was at the same time, that the Charter of the United Nations which made strong case for freedom and self-determination came on board.¹⁴² This development served as impetus for the emergence of nationalists agitating for political independence and self determination. Thus, the 1946 Constitution was introduced as a compromise from the British authority to pacify and to establish a constitutional framework representative enough allowing all sections of Nigeria to be present on the Legislative Council and which guarantees an unofficial majority both in the House of Assembly and in the legislative council for indigenous Nigerians.¹⁴³

Later in 1946 the Richards Constitution was again abandoned for the 1951 Sir John Macpherson Constitution. It was a shift from British imposition without any input from the indigenous people of Nigeria. The 1951 Macpherson Constitution was enacted after an unprecedented process of consultation with the peoples of Nigeria.

The constitution was made through the process of consultations based on five levels, namely, Village, District, Divisional, Provincial and Regional levels. This was followed by a national conference. The regional conferences were held at Ibadan, Enugu and Kaduna, respectively and produced a general consensus in favor of a federal system of government with a few differences as to its format. The emergent Constitution represented a landmark improvement on the old constitutional order by incorporating African elected majorities in the Central Legislature and in the Regional Houses of Assembly; giving the legislative houses

¹⁴⁰Nigeria: Constitutional Development History; <http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html> (accessed 10 Nov., 2017).

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid.

independent legislative power in many area of state activity; and establishing a federal system for Nigeria for the first time.¹⁴⁴

Three years after the John Macpherson Constitution became operational, it became clear that the necessary institutional framework that might make it workable were not on ground. As the constitution was inherently vulnerable for engendering conflict and tension at the national and regional levels. As there were wide-spread violence in the northern city of Kano which pitched northerners against southerners leading to massive loss of lives and property, the then British Secretary of State for the Colonies, Oliver Lyttleton invited the leaders of various political parties in Nigeria to attend a conference in London, in 1953. The outcome of that conference and another cycle of conference and consultations which followed led to the emergence of the 1954 Lyttleton Constitution.¹⁴⁵

The Lyttleton Constitution made regional governments independent of the central government in respect of subjects and legislative powers allocated to them. It also established a unicameral legislature for the federal government and each of the 3 regional governments. In similar vein, Lagos was removed from the control of any regional government and made the Federal Capital Territory. Under this constitution, regional public services were established for each of the 3 regions; the judiciary was re-organized with a view to establish regional judiciaries while autonomy was granted to the Southern Cameroons which was up till that time part of a larger Nigeria and Northern Cameroons. It was also significant that the Ministers were given specific portfolios at this point in time. In Lyttleton Constitution served as harbinger for much expected Nigeria's independence which came to fruition in 1960 under a federal structure with democratically elected federal and regional legislature.¹⁴⁶

In 1960, Nigeria was granted independence and thus assumed a status of a sovereign state under the 1960 Constitution. This constitution provided for a parliamentary system of government, 3 regions namely, Northern, Eastern and Western Regions, a bicameral legislative framework at the federal (Senate and House of Representatives) and regional levels (House of Assembly and House of Chiefs) with the legislative powers of government delineated into three categories or lists - exclusive, concurrent and residual. The parliamentary system designed under the 1960 constitution recognized the British monarch as

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

the Head of State with powers to appoint a resident agent- the Governor-General- to exercise executive powers on her behalf while a Prime Minister elected by the federal parliament acted as the Head of the federal Executive Council. The Constitution also took steps to define ‘Nigerian citizenship’ while outlining constitutionally protected rights for citizens and persons in Nigeria.¹⁴⁷

It should be noted however, that the implication of designating the Governor-General as a representative and agent of the British Queen or Monarch – instead of the People of the independent and sovereign state of Nigeria, was to render the country to a dominion territory – a status which contradicted the very nature and basis of the independence ostensibly granted in 1960. Similarly, the 1960 Constitution denied Nigeria an effective and true right of self-determination as well as dominion over its judicial powers. This was because, it gave final appellate jurisdiction over Nigeria to the Privy Council established by the British Queen instead of the Federal Supreme Court and its judges. Those fundamental derogations from Nigeria’s sovereignty and other observed challenges in implementing the Independence Constitution led to the enactment of the 1963 Constitution.¹⁴⁸

Be that as it may, the significant characteristics of the 1963 Constitution included the establishment of Nigeria’s 1st republic under a parliamentary system of government by replacing the Governor-General appointed by the British monarch with a President elected directly by members of the Nigerian federal legislature. In addition, in place of the Privy Council, the Federal Supreme Court became designated as the final appellate judicial authority over any person or matter in Nigeria while steps were taken to strengthen the independence of the judiciary even further.

As a carry-over of the pogrom that engendered violence and killing in the Northern part of Nigeria three years after the John Macpherson Constitution became operational a bloody military coup d’état occurred in 1966, and the 1963 Constitution was suspended by the military junta. Thus, Nigeria opened another chapter in its political and constitutional development history which led to supplanting the 1st Republic with military dictatorship and which was to last for about 13 years –including the civil war period (1966-1969). During this period, 4 military Heads of State administered the country, ending only in 1979 when the

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

General Olusegun Obasanjo military administration ushered in the 2nd Republic with the promulgation of a new Constitution.¹⁴⁹

It was the 1979 Constitution that introduced a presidential system of government into the Nigeria constitutional landscape with a federal government, 19 state governments, a federal capital territory, 3 arms and 3 levels of government.¹⁵⁰ However, on 31st December, 1983, the military junta struck again. Thus, the life-span of the 1979 constitution was abruptly brought to an end like the 1963 Constitution. The military junta toppled the civilian administration of President Shehu Shagari and Vice President Alex Ekwueme replaced by the military administration of Generals Muhammad Buhari and Tunde Idiagbon.

The Buhari military regime opened flood-gate for 3 other extra-constitutional governments, namely, the General Ibrahim Babangida military regime (1985-1993), Mr. Ernest Shonekan interim civilian-led regime, General Sani Abacha military regime (1993-1998) and General Abdulsalami Abubakar military administration. It was this latter military regime that successfully brought about the 3rd Republic on the 27th of May, 1999 with the introduction of the 1999 Constitution.

As could be seen from this brief historical analysis of the Nigerian political and constitutional development, and as noted in the objective of this conference, immediately after her independence, Nigeria has continually faced existential problem.¹⁵¹ This problem had led to a civil war barely seven years after. As would be expected, a lesson must have been learnt from the civil war. Unfortunately however, the disunity which engendered the war has continued and has even taken alarming dimensions as it has now permeated virtually every segment of society.¹⁵² It is also noted that the common political elite contention has always been that 'Nigeria's unity is not negotiable'. Despite this contentious claim, everyone is apprehensive of an unexpected disintegration that can result from agitations from militants and nationalist movements as well as arguments and counter-arguments that had continued to hit up the politics.¹⁵³

In an editorial comment of a Nigerian Newspaper online, it was stated that:

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ IWF's 2017 Conference on Islam in Nigeria (2017); <http://www.iwf.com.ng/> (accessed 08 Nov., 2017).

¹⁵² Ibid.

¹⁵³ Ibid.

"Through the years, almost, if not, all the regions, nationalities and groups comprising the state have felt the nature of the Nigerian union has not served them well enough by taking their welfare and need for progress into account, leading to attitudes of alienation from and rebellion against the Nigerian state. The ensuing feeling of marginalization – which many have equally seen as evolving from the class character of the state – has ensured that calls for a renegotiated union have attained strident dimensions."¹⁵⁴

Thus, different groups are clamoring for a restructured Nigeria. For example a group of leaders from the Middle-belt region, stated *inter alia*, in a communiqué issued after their meeting that:

“After intensive deliberations on factors, structures, systems and forces behind Nigeria’s chronic instability, the Conference considered and passed the following Resolutions: “In a multi-ethnic, multi-cultural and multi-religious country like Nigeria, the federal system makes enormous sense, because it allows the federating units to fully look after their local affairs and to develop at their own pace.” “...we are resolutely of the view that the current federal structure is unbalanced, unfair, over-centralized and therefore unstable. “Accordingly, we firmly support the demand to re-structure the federation, together with appropriate devolution of powers to the federating units, and a commensurate revenue allocation formula.”¹⁵⁵

Nationalist and Separatist Movements: Symptom of Clash of Civilizations

In his celebrated book, Samuel P. Huntington observes that the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural . He further argues that nation states will remain the most powerful actor in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations.¹⁵⁶

¹⁵⁴ Premium Times, Time To Heed Nigeria’s Perennial Clamor for Restructuring (September 14, 2016); <https://www.premiumtimesng.com/news/headlines/210384-editorial-time-heed-nigerias-perennial-clamour-restructuring.html> (accessed 11 Nov., 2017).

¹⁵⁵ Jude, I., & Ibrahim, L., 'Clamor for restructuring divides Nigerians', *The Daily Times online* (June 23, 2017); <https://dailytimes.ng/news/clamour-restructuring-divides-nigerians/> and strong support for the Federal Republic of Nigeria.

¹⁵⁶ Huntington, S. P., *The Clash of Civilizations? Foreign Affairs*, (1993); <https://www.foreignaffairs.com/articles/united-states/1993-06-01/clash-civilizations> (accessed 11 Nov., 2017).

This observation perhaps explains the upsurge of nationalists and separatists movements for self-determination across the globe including, Nigeria in the recent time. In response to these symptoms of clash of civilization, notable intellectuals local and international organizations and institutions have been exploring way to adequately response to these agitations.

It is in this regard that Sean William White observes that:

"The clash of civilizations, cultures, tribes, and religions seems to be prevalent throughout all of history. At the same time, history reveals simultaneous conflict and efforts to resolve tensions and division feeding animosity through mediation, diplomacy, and dialogue. Many conflicts seem too complicated for an agreement to be established on just one point, whether or not the conflict revolves around territory, religion, or ethnic discrimination. So what approach is best to mediate issues in a contemporary world that seems to be driven by economics, natural resources, and ethnic or religious ideologies? The Medina Charter serves as an example of finding resolve in a dispute where peace and pluralism were achieved not through military successes or ulterior motives but rather through respect, acceptance, and denunciation of war – aspects that reflect some of the basic tenets of the religion Prophet Muhammad, peace be upon him, was guiding and promoting. Through an examination of the Medina Charter, I will show how pluralism was advanced and instated in Medina and the reasons reflecting on such a document could help avoid the divide and misunderstanding plaguing much thought, rhetoric, and media today between Muslims, Christians, and Jews all over the world."¹⁵⁷

Internationalism Approach

Nationalism challenges the international norms in two respects. First, it was the important political factor that led to the creation of sovereign nation-states that constitute the political block of international system. It is the same nationalism that puts those nation-states at a risk of destruction.¹⁵⁸

To check the threat of nationalism, international law formulated the doctrine of self-determination. The principle of self-determination was first enunciated in the 1860s and later gained popularity and wide acceptance.¹⁵⁹ It was propounded and promoted by the duo of Vladimir Lenin and particularly, US President Woodrow Wilson who articulated it in the deliberation that led to the emergence of the League of Nations.¹⁶⁰ The underlined philosophy

¹⁵⁷ White, S.W., Medina Charter and Pluralism', *The Fountain*,

<http://www.fountainmagazine.com/Issue/detail/Medina-Charter-and-Pluralism> (accessed 09 Nov., 2017)

¹⁵⁸ Anghie, A., 'Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations', *Texas International Law Journal*, Vol 4, (2006), at p. 448.

¹⁵⁹ Fisch, J., *A History of the Self-Determination of Peoples: The Domestication of an Illusion*, Cambridge University Press, (2015). p. 118.

¹⁶⁰ Ibid.

of this principle was to introduce a mechanism that could enable a particular group of people to attain sovereignty and become recognized nation-states under the norms of the international system.¹⁶¹ Thus, experts have evolved principles to meet the aspirations of various minority nationalist groups according to their cultural backgrounds and belief. Some of those modalities include, non-territorial autonomy; territorial autonomy; and, devolution of power.¹⁶²

Non-territorial Autonomy

Offering cultural rights, or autonomy over certain functions that are important to the minority group with a view to respect their different cultures and identity is the most popular modality. This modality is known in the political science as "cultural autonomy," "segmental autonomy" "functional autonomy," "corporate autonomy," and "corporate federalism."¹⁶³ The Ottoman Empire adopted this modality by which it was able to administer the religious diversity in its territory.¹⁶⁴ It was the same modality that was applied at the outbreak of inter-war Estonia which led to the promulgation of Cultural Autonomy Law in 1925. Under this law, the ethnic groups in this territory were allowed to establish cultural councils capable of taxing the groups' members and exercising jurisdiction over a wide range of cultural activities, including education, culture, libraries, theatres, museums, and sports.¹⁶⁵ For example, the non-territorial autonomy modality has enabled the Canadian Franco-phones outside Quebec to maintain some control over their own schools.¹⁶⁶ It is noted however, that non-territorial autonomy may not address adequately the vital natural attachment which most nations have with their homeland or "national territory."¹⁶⁷

Territorial Autonomy (Federalism)

Territorial autonomy or Federalism is a typical modality of giving territorial independence to a national group. It requires a territorial reconfiguration of the state concerned by drawing internal boundaries of the federation such that a national or ethnic group controls at least

¹⁶¹ Ibid.

¹⁶² Moore, M., 'Sub-States Nationalism and International Law', *Michigan Journal of International Law*, Vol. 25, Issue 4, (2004), at p. 1329.

¹⁶³ Lijphart, A., *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries*, Yale University Press, (1984), pp. 183-85 as quoted by Moore, M., *ibid.*

¹⁶⁴ Coakley, J., 'Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-Territorial Autonomy', *15 International Political Science Review*, (1994), pp. 297, 299.

¹⁶⁵ Ibid at p. 307 as quoted by Moore, M., *supra* at p. 1330.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid at p. 1333.

some of the state that make the federation.¹⁶⁸ It must be noted that federalism, by its very nature, implies a codified or written constitution, a supreme court, and a bicameral legislature as the federal government cannot unilaterally change the horizontal division of powers, and as the minority group enjoys some security in the exercise of collective self-government and self-determination.¹⁶⁹

A typical example of this was Switzerland. It was founded, in its current form, in 1848. Others include Canada, which was established in 1867. There was also the Indian subcontinent, which was divided after decolonization into the two multiethnic federations of India and Pakistan. Federal system was also adopted for the Communist Soviet Union, Yugoslavia, and Czechoslovakia.¹⁷⁰ Federal system has also been introduced in Belgium recently. Federalism has also been recommended for some states including Afghanistan , Cyprus, Iraq and Indonesia.¹⁷¹

Devolution of Power

Devolution of power is a second type of territorial autonomy modality which involves the granting or devolving power only to the region in which the minority is demographically strongest, without altering the constitutional structure of the State as a whole.¹⁷² In this arrangement, granting autonomy does not affect the federalization of the State as an entity. However, there is typically less security for the minority in "federacy" or "partial federalization" arrangements.¹⁷³ A good example is United Kingdom where power was devolved to Scotland, Wales and Northern Ireland.¹⁷⁴ As to the concern expressed in some quarters that territorial autonomy might lead to secession, some scholars have argued that federal structures are better modality in dealing with multi-nationality, and it is this (multi-nationality or diversity) that poses a challenge to the state.¹⁷⁵

Part III of this paper has shown that Nigeria, as a nation has passed through turbulent political and constitutional developments. This is normal. However, the leadership should not shy

¹⁶⁸ Moore, M., supra at p. 1337.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Moore, M., supra at p. 1337.

¹⁷³ McGarry, J., 'Autonomy' (unpublished manuscript, on file with the Michigan Journal of International Law/author) (2003) as quoted by Moore, M., ibid.

¹⁷⁴ Ibid.

¹⁷⁵ See generally, McGarry, J., 'Must Pluri-National Federations Fail?', (unpublished manuscript, on file with the Michigan Journal of International Law/author), (2004) at p. 6; also, Hechter, M., *Containing Nationalism*, (2000); Moore, M., ibid.

away from facing the challenges facing the country. Thus, Nigeria can learn some lessons from the history of Islamic legislative and constitutional development.

Research Appraisal

From the analysis of this paper, a number of points had been established, namely that:

1. Islamic law has two major sources: divine revelation (*wahy*) and human reason (*aql*). This dual identity of Islamic law is reflected in its two Arabic designations, *Shari'ah* and *Usul al-fiqh*. *Shari'ah* bears a stronger affinity with revelation, whereas *Usul al-fiqh* is mainly the product of human reason.
2. The unique characteristics of Islamic law as a combination of revelation and reason account for its greater stability and continuity of values, thought and institutions when compared to some other legal systems. Thus, *Shari'ah* has often been known to be 'a diversity within unity'. Meaning that there is unity in the essentials and in the broad outlines of the *ahkam*. However, the same cannot be said of the detailed rulings of scholars and jurists.
3. *Ijtihad* as noted by *Imam Al-Shafi'i* represents the intellectual process whereby a finite body of revealed texts may be rendered relevant to the infinite complexity of human events. Therefore, the notion of closure of the door of *Ijtihad* is arguably, a mere intellectual exercise. As *Wael, B. Hallaq*, has argued, the contentions that the gate of *Ijtihad* was closed are baseless and inaccurate. The gate of *Ijtihad* was not closed in theory nor in practice as it is indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God.
4. The five objectives of the *Shari'ah* as identified and expatiated by the Jurists include *din* (religion), *dunyawi* (life, progeny, intellect, and wealth or property) should be paramount in the legislative policies of the Muslim communities. Conscious efforts should be made to achieve those objectives.
5. The Islamic constitutionalism begins with the concept of absolute sovereignty of Allah. Unlike the Western concept that the sovereignty belongs to the state and sovereign is some determinate human being with unlimited powers; Allah sovereignty is universal, absolute, indivisible and inalienable. Thus, Allah is the Law-giver. He delegates his authority for administering justice and peace to His agents such as the Islamic state and the khalifa. They only enjoy marginal autonomy necessary to implement and enforce the laws of their sovereign.

6. Muslim jurists and scholars argue that the Medina Charter was the first written constitution in the world. It was written and promulgated by Prophet Muhammad (PBUH) for the multi-religious ten thousand-strong citizens of the Islamic State of Medina which was the first political entity established by the Prophet. Despite the denial of human rights which was globally prevalent at that point in time, the Medina Charter guaranteed and preserved certain human rights including freedom of religion, freedom of association, freedom of expression, consultative and participatory government, majority rule, rule of law, and independent of judiciary.
7. Nigeria political and constitutional history began and was shaped by the colonialism. It was characterized by intrigue and dirty 'divide and rule' policy. Thus, the country has continually faced existential problem. The colonial policy has implanted culture of nepotism, suspicion, disunity, and domineering tendencies among various ethnic and religious groups in the country. These had continued to engender mistrust, corruption, and agitation. Despite the political elite contention that 'Nigeria's unity is not negotiable', there is pervading apprehension about potential turmoil and disintegration.
8. The rising of militants and nationalist movements calling for restructuring of the country are manifestation of the potential dangers that the Nigerian leadership should address as a matter of priority.

Recommendations

- The Nigerian Muslims community is very weak politically and economically, and thus, vulnerable to manipulations. The underlined reason for this situation might not be unconnected with disunity among them. This unity is rooted in differences of opinions mostly in matters of jurisprudential details. For the Muslims, as a community, to make impact, they must unite and eschew stubborn and hard-line position on issues of secondary value that mostly serve as the causes of their disunity. They should learn to leave final judgment to Allah. They should also eschew issues of primordial nature such ethnicity, tribalism and superiority complexes.
- The Federal Republic of Nigerians should borrow a leaf from the Medina Charter and accept that Nigeria is not a secular state, but a multi-religious, multi-ethnic and multi-cultural society. Thus, it must fashion out a constitution that recognize this reality and guarantee the rights of all.

- The Federal Government of Nigeria should, as a matter of priority, embark on restructuring the Nigeria State. A further delay may precipitate into unpredictable consequences.
- A new and people Constitution should be enacted by following the process that produced the 1951 Macpherson Constitution through the process of consultations based on five levels, namely, Village, District, Divisional, Provincial and Regional levels. This will be followed by a national conference. The regional conferences should be held in principal cities of the Nigerian 6 geo-political zones or regions.
- In restructuring Nigeria, consideration should be given to territorial autonomy (federalism) model whereby there should be 6 geo-political zones or regions independent of the Central Government. Secondly, non-territorial autonomy model should be applicable within each geo-political zones. Here cultural and religious rights of different ethnic and religious groups within each zones will be recognized, respected and constitutionally guaranteed. It is my humble opinion that these models conform to the Medina Charter.
- Corruption in Nigeria is endemic. I humbly believe that corruption began in Nigeria from nepotism. It was nepotism that led to culture of impunity. It was impunity that made corruption wide-spread such that it has become norms - vices had turned virtues and virtues had turned vices. Thus, an average Nigerian, especially the elites, feel that he or she is above the law. The issues of corruption should be tackled holistically and in this regard, specific attention should be placed on a number of sectors, including the primary, secondary and tertiary education institutions, the police, the armed forces, the state security and the judiciary.

Conclusion

Laws are made to regulate behavior with a view to achieve communal cohesion, integration and unity and guarantees the rights and equality among the people. But to achieve an egalitarian and balance society, the law must be based on divine guidance and deliberate and sincere human intellectual efforts. Above all, respect for the rules of law must be duly observed - everybody must be under the law. These are some of the fundamental facts that are lacking in the Nigerian system. As soon as these facts and addressed, Nigeria will arrive at the promised land.