



## **Nigerian Muslims and the Intrigues of the 1999 Constitution as Amended: An Examination of Its Principles in the Context of Islamic Law.**

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### **Abstract**

The sovereignty of the Nigerian 1999 Constitution as amended over its citizens is absolute and binding. These citizenries include Muslims and non-Muslims who are also adherents of some professed religions with their distinct religious texts and practices. In this regard and despite the absolute power ascribed to this Constitution, Nigerian Muslims like other Muslims are also expected to adhere strictly to all Islamic precepts as enjoined in the Qur'ān and Sunnah amidst the imposition of British-inclined legal system on which the 1999 Constitution was codified. Though, the present Constitution was enthroned on the Country's nascent democracy by the Military Junta, its constitutionality and appropriateness to Nigerian diverse religious and cultural identities has become a lingering debate for over two decades. To this end, this paper through an analytical method examines some of the principles of the 1999 Constitution such as Sharī'ah application in Nigeria and the syndrome of secularism in the context of Islamic law as they affect Nigerian Muslims in both public and private lives. It was then revealed that despite the recognition of Sharī'ah as a source of law by the Constitution, its applicability and enforcement has been demeaned for decades while the Country under its various leadership has failed to defined the concept of secularism through which the nation's activities should be operated. The paper then suggested that to overturn this incongruity, Nigerian Muslims should renew their concerted agitation for total application of Sharī'ah and enforcement of its jurisdictions from lower to apex Courts of the land.

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

### **1. Introduction**

The infamous British colonization of Nigeria began in 1850<sup>1</sup> while in both colonial and post-colonial eras of the country, the super-imposed Constitutions based on the imperial English legal system have reigned supreme over the citizenries for over a century now with the existence of native or customary laws. This in all spheres shows that the legal system of Nigeria is a hybrid of English common and statutory law, customary law, and Islamic law (*Sharī'ah*). Therefore, total application of *Sharī'ah*, the Islamic law which has been firmly rooted and applied in Northern Nigeria<sup>2</sup> and part of Yorubaland in Southern part of the country<sup>3</sup> before the British colonization has been an herculean task; simply put, *Sharī'ah* is demeaned and categorized as a customary law.<sup>4</sup> The existence of English law, *Sharī'ah* and other indigenous laws has also bred the problems of legal pluralism within the context of Nigeria legal system. According to Niki Tobi, legal pluralism means the existence of variance but interwoven laws in a legal system acceptable and enforceable within a geographical entity at a particular period. These laws according to him usually emanated from different sources, and this glaringly usually breed existence of multi-legal system under a single jurisdiction.<sup>5</sup>

In legal and constitutional spheres, all Nigerians are expected to be submissive to the Constitution irrespective of their religious, ethnic or political affiliations. However, there are fundamental questions that are often asked as regards the fate of Nigerian Muslims: Does the Constitution supersede the Muslims' religious text, Al-Qur'ān? Who wrote or drafted the Constitution and how Constitutional is the Nigerian



1999 Constitution itself? What is the future of *Sharī'ah* application in Nigeria judging from both colonial and post colonials intricacies and the happenings of the last two decades? Is Nigeria a secular nation and does secularism as a notion affect Muslims? What are the effects of the 1999 Constitution on Nigerian Muslims in the area of *Sharī'ah* application and plague of secularism? All these are some of the apposite questions this article tends to analyse within the context of Islamic law, the only universally sacred law of Muslims.

## **2. *Sharī'ah* in Colonial and Post-Colonial Nigeria: A Concise Retrospect**

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

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

However, English law according to Jadesola Lokulo-Sodipe *et al* thus has an unassailable influence on the Nigerian legal system with the enactment of section 45(1) of the Interpretation Act which were in force in England from 1<sup>st</sup> January, 1900.<sup>8</sup> This assertion was corroborated by Obilade when he stated that:

*One of the most notable characteristics of the Nigerian legal system is the tremendous influence of English law upon its growth. The historical link of the country with England has left a seemingly indelible mark upon the system.”*<sup>9</sup>

In pre-colonial Northern<sup>10</sup> and Southern<sup>11</sup> Nigeria, there were records of *Sharī'ah* applications among Muslims on several cases of inheritance (*mīrāth*), custody of children (*ḥadānah*), divorce (*Talāq*), punishment for theft (*Sarqah*), adultery (*Zinah*) and so on among Muslims from Kano to Sokoto, Maiduguri to Ilorin, Ede to Epe and Ikirun and other places where their Emirs and Kings had adopted *Sharī'ah* as the State law upon their subjects.

Furthermore, in colonial Nigeria, *Sharī'ah* is categorized as customary law by the British imperialists. In the North, with the introduction of indirect rule, *Sharī'ah* jurisdiction was limited to the execution of Islamic personal law (*Aḥwāl al-Shakhsiyyah*) such as divorce, inheritance or succession and custody of children while enforcement of penal or criminal code (*'uqubāt*) either for *ḥudūd* (punishable crimes), *Qisas* (retribution) or Ta'zīr (chastisement) as prescribed under Islamic law was demeaned under the scrutiny, supervision and approval of the colonial rule before its execution.<sup>12</sup> However, this leverage, even amidst several protests and agitations against the misrules of the colonialists especially in Muslims' educational and religious rights as chronicled by Gbadamosi failed to be replicated in Southern Nigeria especially in Yorubaland where the majority are arguably Muslims.<sup>13</sup>



According to Oloyede, several Islamic societies in Nigeria for over a century have struggled unremittingly in affirming the Muslim fundamental human and religious rights against the forces of British colonialism and successive indigenous administrations of post-colonial era especially in the area of education and Islamic law application.<sup>14</sup> To Nigerian Muslims, as embedded in Islam, religion means totality of human deeds, submission and servitude to the Supreme Being (Allah) and entrenchment of peace and harmony as regulated by the Creator. This is a contradiction of what is obtainable in other religions where people such as Goldenberg Naomi believes that “*religion is an invention, a strategy, a technology, a tactic of management and so on*”.<sup>15</sup>

However, in post-colonial Nigeria as obtainable in colonial era, amidst several refutations and clarifications, *Shari’ah* is repeatedly recognized as a customary law in Nigeria despite the avalanche of write ups by several legal luminaries and academia.<sup>16</sup> For example, in exonerating *Shari’ah* from being a customary law, Justice Niki Tobi, a non-Muslim legal giant states that:

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

It is then apposite to mention that *Shari’ah* issue has become an inevitable recurrent decimal in all political and religious discourse in Nigeria even though, the Constitution recognized the Islamic law as one of the sources of law under Nigerian legal system.

### **3. The 1999 Nigerian Constitution as Amended: Formation and Constitutionality.**

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

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

It must then be noted at this juncture to mention in reference to the above that the codification and making of Nigerian Constitutions according to Amah is classified into four (4) phases; namely, the period of colonial administration, the period of internal self-government, the period of independence and the period



of military rule.<sup>23</sup> Therefore, since the inception of the colonial rules, Nigeria has been governed with one constitution or the other.

However, the origin of the 1999 constitution could be traced to the aftermath of aborted second and third republics of 1979-83 and 1991-1993 respectively. With the annulment of the 1993 presidential elections which was widely believed to have been won by Chief MKO Abiola and the subsequent introduction of the defunct Interim National Government headed by Chief Earnest Shonekan, the country kickstarted the process of returning to democratic rules. In 1998, after the sudden death of the then head of military junta in Nigeria, General Sanni Abacha who had initiated the drafting of a new constitution between 1995 and 1998, the military government of General Abdulsalam Abubakar inaugurated a 24-member constitutional debate Committee (CDC) headed by Justice Niki Tobi to prepare a constitution on which the anticipated democratically elected government will take off in 1999. The committee was aimed at adopting the 1995 drafted constitution but later adopted the template of the 1979 constitution due to the public complains and stigma of illegitimacy.<sup>24</sup> Today, it is widely believed that the present 1999 Constitution is a bye-product of the 1979 constitution through which the CDC absolutely lifted the 1979 constitution and amended some provisions such as the number of federating units (States) in 1979 which were then nineteen (19) to thirty-six (36) as at 1999 and other area of national concerns.

On the issue of legitimacy and constitutionality of the 1999 constitution, there have been many agitations in fora and symposia for its review and absolute amendment.<sup>25</sup> According to some analysts, many factors necessitated the calls for the constitutional review of the 1999 constitution ranging from its legitimacy, issues of *Sharī'ah* and so on. For example, the preamble of the constitution reads *inter alia*:

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

The question then continues to be, who are the “WE”? because the word as expressed in the content of the constitution indicates the principles of sovereignty, inclusion and unity of all Nigerians in enacting the constitution for national goals. This statement in all senses suggests that the constitution was drafted through a participatory process of all citizens especially through their representatives. However, how true the terms of this preamble are based on the way the constitution was drafted and authored. The Constitution was passed on to the 1999 civilian government of Chief Olusegun Obasanjo by the military government of General Abdulsalam Abubakar with 8 Chapters, 320 sections and 7 schedules. The 1999 Constitution of the Federal Republic of Nigeria acquired the force of law through the Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999, Decree No. 24. The Constitution was gifted to Nigeria by the military in compliance with the Transition to Civil Rule (Political Programme) Decree 1998. Due to its non-inclusiveness from Nigerians before it attained the force of law under civilian rule, the 1999 constitution has undergone alterations since its promulgation in 2010, 2012 and currently in 2021. These alterations have clearly call into question the legitimacy and constitutionality of the 1999 constitution even with its adoption, usages and enforcement by the successive democratically elected governments of Nigeria since 1999 to date.



#### **4. Concept of Secularism and the 1999 Constitution: Is Nigeria a Secular State?**

Secularism as a concept according to Chaturvedi is the giving up of religious thought and feeling in the normal day to day interaction in the society.<sup>26</sup> Accordingly, Kehinde Adegbite reported the views of Omotola who defined secularism as ‘*an ideology that holds that religious issues should not be the basis of Politics, or (in the extreme) that religion has no place in public life*’. *Essentially, secularism seeks to preserve the religious neutrality of government and cultures.*”<sup>27</sup> Furthermore, Ogloma avers a secular state as a state where citizens are not discriminated in any form or manner on the basis of their religions.<sup>27</sup> In essence, a secular state views the individuals as a citizen and not as a member of a particular religious group.<sup>28</sup> A secular state claims to treat all its citizens equally regardless of religion, and claims to avoid preferential treatment for a citizen from a particular religion over the other and it does not profess a state religion or equivalent, though, the absence of a state religion does not guarantee that a state is secular”. The salient question then in reference to 1999 constitution is: Is Nigeria a secular state?

By the provisions of Section 2 (1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria, Nigeria is one indivisible and indissoluble Sovereign State to be known by the name of the Federal Republic of Nigeria why formalized secularism could only be traced to 1979 constitution as no previous Nigerian constitutions contained a secular clause. The section 10 of the Nigerian Constitution provides that: *"The Government of the Federation or of a State shall not adopt any religion as State Religion."* This provision propels some analysts to believe that Nigeria is a secular state. However, the phrase “secular state” is not used anywhere in the Constitution and there is no reported Nigerian case so far where Section 10 of the Constitution has been given judicial interpretation. Nigeria, according to Ibrahim Uthman is a highly multicultural and religious colonial creation of the British imperialists over a century ago.<sup>29</sup>

In his words, he (Ibrahim) concisely narrates the state of secularism in Nigeria *inter alia*:

*For most Christians, Nigeria is a secular state and therefore religion should figure less in the political sphere while the overwhelming majority of Muslims see Islam as "the lodestar" of politics and see Nigeria as a multicultural and religious country where religion does figures prominently in politics.*<sup>30</sup>

However, in dissecting the views of Nigerians as regards the status of the country being a secular state, we can evaluate thoughts of some individuals as reported by Adegbite:<sup>31</sup>

- i. *“Constitutionally, Nigeria is not a secular country. No part of the 1999 constitution declares Nigeria secular. It suffices to repeat Dr. Abdulateef Adegbite’s 12-year-old challenge to proponents of the Secular Nigeria Myth to present exact statement(s) in the constitution supporting their position.” Muideen Adesokan*
- ii. *“Nigeria has a substantial Moslem population but it is not an Islamic state. It is a secular state in accordance with the provisions of our Constitution. It cannot be otherwise unless there is a forcible imposition of the religion of Islam on the non-Muslims of this country.” F.R.A Williams*
- iii. *“Nigeria is a secular nation not a multi-religious one. And it is precisely because of its secularism that makes its multi-religious character possible.” Damola Awoyokun*
- iv. *“...every effort must be made not to abandon the concept of a secular state because Nigeria cannot survive a religious conflict and we do not need to re-invent the wheels in this particular case of a secular state because the history of Western Civilization has proved conclusively that secularity works and is the best way in a religiously plural country.” Jide Osuntokun.*



In reality, the Federal Constitution of Nigerian does not declare the country a secular state but provisioned that Nigeria shall not profess a religion as the state religion but surprisingly, the same constitution guarantees the citizenries freedom of religious expression and association as enshrined in section 38 subsection 1 of the constitution. It is on record that the constitution despite being neutral about a state religion had mentioned the word “religion” more than seventy times. This simply shows how delicate the issue of religion and secularism are. Therefore, by the provision of Section 10 and assuming the inferences to be drawn from its clear wordings, Nigeria can be regarded as a secular state. But, alas, from experience, it appears Nigeria is secular only in the constitution and not at all in practice. Surmising thereafter, we can say Nigeria is not a secular state but a quasi-religious state which has not adopted any religion as state’s creed. There are myriad of activities which portrayed Nigeria as a quasi-religious state, supports secularism but not secular state; these include observance of public holidays on Saturdays and Sundays, declaration of public holidays during the Islamic, Christians and traditional religious festivities, taking oaths of office with religious holy books, subventions on pilgrimage to Makkah and Madinah., state sponsors of inter-denominational services, Nigerian membership of Organization of Islamic conference (OIC), imposition of Gregorian calendar on the citizenries and so on.

From the foregoing, it must be stated here that in Islam, secularism has no base and as affirmed by Ajani, the philosophy behind secularism is to separate religion from all walks of life.<sup>32</sup> This notion contradicts *Shari’ah* provision because the entire sojourn of Muslim on this earth is guided by the principle of Allah’s commandment as entails in the Qur’ān and the exemplary teachings (*Sunnah*) of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him).

## **5. 1999 Constitution within the Context of Islamic Law: An Examination of Its Principles on the Faiths of Nigerian Muslims**

Nigeria is believed to be a multi-ethnic, multi-lingual and multi-religious society where Muslims who constitute more than half of the entire population of over 200 million inhabitants as at 2022 are important stakeholders who can never be sidelined. The imposition of the current 1999 constitution upon Nigerians especially the Muslims amidst its recent amendment has bestowed on the Islamic adherents some loopholes which are viewed sinful, irreligious and inconsistent with Islamic provisions. In this section, we intend to examine the effects of this constitution on the faiths of Muslims within the context of *Shari’ah* from three perspectives; namely, issue of sovereignty and supremacy of the constitution, classification and application of shariah as customary law and the implementation of *Shari’ah* in both northern and southern regions of the country.

### **5.1 Sovereignty and Supremacy of the Constitution**

Sovereignty according to Bakht Munir *et al* is derived from the Latin word ‘*Supremes*’ that referred to supreme power over all others.<sup>33</sup> Also, according to Emilia and Steven, as conceptualized in the Peace of Westphalia in 1648, sovereignty denotes ultimate political authority within a given territory.<sup>34</sup> Sovereignty therefore entails power to do everything in a state without accountability; to make laws and to enforce them. Under Islamic instructions, sovereignty which is known as *hākimiyyah* refers to the notion that only Allah possesses the prerogative to make laws, rewards the obedient and punishes the offenders through His divine mechanisms. This, without prejudice to human free wills which could be derived from democracy affirms that Muslims must recognize the authority of Allah and the supremacy of Islamic law. This is because unlike man-made sovereignty in which mankind gives laws to themselves and enforce them, Islam on the other hand requires Muslims to be submissive to divine sovereignty because rulership belongs to God.

From the foregoing, it can be inferred that in Islam, Muslims subsumed themselves under the sovereignty of Allah while in constitutional democracy such as Nigeria, the citizens are subjects of man-



made constitution which derives its supremacy and sovereignty from people themselves. The 1999 constitution while expressing its sovereignty as given to it by the authors (the citizens) in Section 1 subsections 1 and 3 says that:

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

*“If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”*

The above provisions which empowered the constitution to be absolute and supreme over other existing laws is inconsistent with Islamic tenets in which Muslims are obliged to obey the rules of Allah as enshrined in the Qur’ān and *Sunnah* of Prophet Muhammad. This simply denotes that the constitution is more supreme than Allah and His commandment. Thus, Muslims in the length and breadth of Nigeria are expected as other Muslims world over to possess pure *aqīdah* (faith) which entails all forms of faith and belief in Allah, engage in prescribed worships (*‘ibādāt*), perfect good relationship between them and other beings (*mu’āmalāt*) and exhibits good characters (*akhlāq*) in both public and private functions. Almighty Allah says in Q. 2, verse 208: “O you who believe! Enter into *Islam whole-heartedly*; and follow not the footsteps of Satan; for he is to you an avowed enemy”

## **5.2 Classification and Application of *Sharī‘ah* as Customary law.**

Islamic law is categorized as one of the customary laws in Nigeria as enshrined in the 1999 Constitution as amended. This has generated repudiations from Muslims and legal experts who viewed the categorisation as gross misinterpretation of *Sharī‘ah*.

As emphasised by Muneer and Muhammad Mumtaz, *Sharī‘ah* cannot be understood as a set of civil, criminal, personal or public law alone as erroneously conceived by many in modern age; rather, it is a conglomeration of comprehensive set of fundamental truths, socio-ethical legal precepts and higher principles and a practical way of life.<sup>35</sup> In religious jurisdiction, Abdul Rahman Doi sees *Sharī‘ah* as “a path to be followed as laid down by Allah to liberate man from servitude to other than Him”.<sup>36</sup> In his own submission, Yadudu sees *Sharī‘ah* as “a totality of the content, method and juristic heritage which Muslims considered to be their distinct law”.<sup>37</sup>

As could be inferred from the above definitions and submissions, it is now crystal clear that *Sharī‘ah* is not just a legal framework but an embodiment of divine law which deals with ‘*aqīdah* (faith), *ihsān* (goodness), ‘*ibādah* (act of worship) and *mu’āmalah* (social and communal interactions). This, without mincing words is in concomitant with the revealed order given to Prophet Muhammad as enshrined in the Qur’ān *inter alia*:

*We made for you a law (Sharī‘ah), so follow it, and not the fancies of those who have no knowledge. (Q45:18)*

As previously noted, Nigerian Constitution recognises *Sharī‘ah* as “Moslem Law” either in usage or as “Islamic law” or “Islamic Personal Law”, and as a branch of customary law practiced in Nigeria; and this was succinctly put by Yadudu when he says:

*The Islamic law as other customary law in the country exists as an appendage of the English Common law. It does not exist as an autonomous*



*and self-regulating legal system. It is defined in terms of Common law. It applies subject to the standard of the Common law. Its Courts are established and its personnel trained and appointed in the same way and using virtually the same criteria as those of the Common law Courts and justice.*<sup>38</sup>

It has been affirmed that the British colonialists met *Sharī'ah* and its impacts in both the Southern and Northern parts of Nigeria to the extent that Lord Lugard attested to this in his Supreme Court Ordinance, Section 20 of 1900 when he proclaimed that the Court shall always apply “*Sharī'ah Customary Laws*” in all Muslim matters relating to marriage and succession.<sup>39</sup> Though, as enunciated by AbdulMumini Oba, the Constitution has stylishly demeaned the power of *Sharī'ah* adjudication in many ways. For example, as he lamented, the Constitution in Section 288(1) of 1999 Constitution as amended makes it compulsory that the Court of Appeal have on Islamic law appeal panels at least three justices who are learned in Islamic law among others.<sup>40</sup> This according to him is purely a judicial impropriety because majority of these judges are common law practitioners with generally no more than a modicum of the knowledge of *Sharī'ah*; and ironically, these judges as he concluded in many instances are not conversant with Islamic law and sometimes are non-Muslims.<sup>41</sup>

Therefore, as Justice Bello noticed,<sup>42</sup> there are obstacles emanated from the Nigerian Constitution against the enforcement of *Sharī'ah* in Nigeria and made it to be seen as a customary law. These include:

- i. The provision of Section 1 of the 1999 Constitution as amended which states that the “Constitution” is supreme and its provision is binding on all authorities and that if any law is inconsistent with the provision of the Constitution, the law is void and the Constitution shall prevail.
- ii. Provision of Section 36 (12) of the 1999 Constitution as amended which stipulates that a person shall not be convicted of criminal offences except it is prescribed in a written law approved by an Act of the National Assembly or the Law of a State and,
- iii. Section 38(1) of the same Constitution which ensures right of freedom of thoughts, conscience and religion negates the *Sharī'ah* provision of capital offences of *al-Riddah* (apostasy) as unconstitutional.

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

Also, according to Badaiki, the categorisation of Islamic law as a customary law is a “fallacy”, and succinctly, he traced the origin of such inappropriate pronouncement to the provision of Section 2, Cap. 42 of the High Court Law of Northern Nigeria of 1963 which provided that “native law and custom include *Moslem law*”.<sup>43</sup>

However, there are pronouncements which negated the classification of *Sharī'ah* as a customary law and upheld its sacredness; these include:

- i. According to Yusuf and Sheriff, in the case of *Ila Alkamawa v. Alhaji Hassan Bello and Another*,<sup>44</sup> Honourable Justice Bashir Wali JSC pronounced that:





*The Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English common law.*<sup>45</sup>

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

*One other issue we would like to take by way of introduction is whether Islamic law is customary law. Colonial legislation generally regarded and treated Islamic law as "native law and custom" which had no separate and distinct existence. For example, Section 2 of the Native Courts Ordinance 1914 provided that "Native Law and Custom includes Islamic Law". This resulted from their negative and uncompromising approach to Islamic law particularly as a distinct and separate religion from Christianity, based on the Qur'an and not the Bible. The Colonial approach merely reflected their Christian background.*<sup>46</sup>

iii. Accordingly, Justice Kolajo argued that by the virtue of pronouncement in the case of **Lewis v. Bankole**<sup>47</sup> in which customary law was defined as an "*unwritten law of an ethnic group*", the Islamic law can never be called a customary law because the Muslim law is written in the Holy Qur'an and other sources.<sup>48</sup>

iv. Also, the universality of Islamic law as reported by Ambali was acclaimed by non-Muslim legal practitioners including Chief F.R.A Williams who pronounced *Shari'ah* law as "*a law without territorial boundaries*".<sup>49</sup>

v. In the same vein, Justice Karibi-Whyte<sup>50</sup> as reported by Oba Abdul Mumini emphatically said:

*It is important to point out for our purposes that this equation of Mohamadan law with customary law is demonstrably wrong and clearly misleading. It is submitted that the two systems of law are not indistinguishably similar. And the fact that the Maliki School of Sharia has taken local customs into consideration and consequently modified some aspects of strict Islamic law is not sufficient justification for the assertion. Admittedly, native law and customs has been statutorily defined to include "Moslem Law", their distinguishing features nevertheless remains.*<sup>51</sup>

vi. According to Olatoye and Yekini, in **Usman v Umaru**,<sup>52</sup> Justice Bello expressed his concern on the conflation of Islamic and customary laws. He queried the statutory of definition of customary law in Section 2 of the Court of Appeal Act, which defines customary law to include Islamic law. The jurist distinguished the two laws based on their incongruous characteristics. The court then concluded that, it is clear from the foregoing that in its ordinary meaning and within the meaning of Section 2, customary law does not include 'Moslem Law'. It is only by virtue of specific provision in a Law, such as Section 2 of the High Court Law, Cap 49, the Laws of Northern Nigeria 1963 which provided that native law and custom includes Moslem Law', that Moslem Law is regarded as native law and custom.<sup>53</sup>



- vii. Lastly, classifying *Sharī'ah* as a customary law denies Muslims their fundamental human rights of practicing their religious and mundane lives according to the dictates of Islam. This, as upheld by Muslims is in violation of their right to practice their religious duties as enshrined in section 38 (1) of the 1999 Constitution as amended which guaranteed freedom of thought, conscience and religion.<sup>54</sup>

### 5.3 Implementation of *Sharī'ah* in Northern and Southern Nigeria.

Having being recognized as a source of law under Nigerian Constitutions, *Sharī'ah* is expected to be enforced throughout the country without any hinderance upon all Muslims. However, its limitation as customary law, repeals of penal codes and non-obligation of its enforcement upon all Nigerian Muslims have created dichotomy between *Sharī'ah* application and implementation in the northern and southern parts of the country. Prior to 1999, *Sharī'ah* has been applied in the northern Nigeria in various categories of *Sharī'ah* courts<sup>55</sup> before the Zamafara *Sharī'ah* declaration of 2000 which spurred over ten Northern States to officially pronounce *Sharī'ah* as State law.<sup>56</sup> However, in contrast, none of the Southern States has been able to introduce, implement and applied *Sharī'ah* in matters concerning Muslims till date.<sup>57</sup>

Furthermore, in the area of *Sharī'ah* application in the North, the 1999 constitution has not holistically favoured the Muslims and this could be inferred from the views of Justice Muntaka-Comassie who expressed his disappointment of *Sharī'ah* demeaning in *Maida v Modu*<sup>58</sup> when he says:

*"It seems to me settled that the new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Sharia Court in this country. It does not enhance the jurisdiction of those courts. This in my view, with all sense of responsibility, is unfair. In most cases, this appeal inclusive, one discovered that the land in dispute is situated in such a way that the rule of lex situs applies. The parties are both Moslems and consented to be governed by Islamic Law in Sharī'ah Courts and lastly that the subject matters and issues involved called for intensive application of Islamic law and procedure which are not available in common law system. Moreover, the law to be applied in the High Court is quite alien to the parties and the Sharī'ah Court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter."*<sup>59</sup>

However, despite these inequalities, *Sharī'ah* is still applied to some extent in the northern part of Nigeria.<sup>60</sup> In the southern part, with the agitation for its implementation and application in both colonial and post-colonial Nigeria,<sup>61</sup> no succor has been in sight. The constitution in Section 275, subsection 1 allows any state that wishes to establish the *Sharī'ah* courts and implements Islamic law to do so through legislative means, but, these provisions have not seen the light of the day due to anti *Sharī'ah* forces in the political arena of southern governments especially in Yorubaland, southwest Nigeria.

Nonetheless, in the absence of this, the southwestern Yoruba Muslims have adopted the ideas of institutionalizing non-statutorily courts known as Independent *Sharī'ah* Panels (ISP) which have been waxing stronger in Lagos, Oyo and Osun States respectively over two decades.<sup>62</sup> With qualified jurists and Islamic scholars, the panels which have been operating as advisory and dispute resolution centers had adjudicated hundreds of cases which involves divorce, inheritance and societal disputes. Therefore, the dynamism of these ISPs in the face of all impediments especially from the non-Muslim antagonists was wholesomely summed-up by Adetona when he said:

*The judgement given by ISP besides being adhered to, without any agent of enforcement, has neither attracted any*



*opposition from known authorities of law-Islamic or civil- in Nigeria nor any litigation in any government Court”.*<sup>63</sup>

## 6. The Way Forward

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

- i. Muslims should join the forces who are agitating for the total review of the 1999 constitution in order to amend all the debatable provisions.
- ii. They should also agitate for the total application of *Sharī'ah* as a distinct law applicable to only Muslims at all States and at federal level.
- iii. The jurisdiction of *Sharī'ah* courts should traverse beyond appeal courts; hence, the establishment of Federal *Sharī'ah* Court through constitutional amendment adorned with legislative backing.
- iv. Muslims living in northern Nigeria should empower the existing *Sharī'ah* courts and *Sharī'ah* courts of appeal by putting forward their cases before the provisioned Islamic judges (*Qādi*, pl. *Qudāt*) of Islamic courts, while those in the southern part should enhance the dispute resolution process and peaceful adjudications of the ISPs instead of patronizing the statutory courts
- v. Muslims in Nigeria should embark on enlightenment programs enunciating the jurisdiction and benefits of *Sharī'ah* to Muslims and non-Muslims alike. This, if properly executed would clear dozens of misconceptions about Islamic law and lessen the forces of anti-*Sharī'ah* advocates among the politicians, religionists and the media houses which have been used as potent tools against *Sharī'ah* acceptability for decades.

## 7. Conclusion

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

It is then crystal clear that the 1999 constitution which is currently operational in Nigeria cannot be equated with the provision of Islamic law as a referred Book which is given credence by Muslims because of its origin and codification as a man-made law despite its ephemeral supremacy within the territory of Nigeria. Therefore, to avoid altercations with the constituted authority in a non- *Sharī'ah* State such as Nigeria, Muslims are enjoined to renew uncompromising concerted efforts towards the total application of *Sharī'ah* in Nigeria independently of the existing legal system which was built on the template of English common law specifically for Muslims. If this could be achieved through peaceful process and with legislative and judicial backing, the incessant crises of *Sharī'ah* application and self-induced secularism will become things of the past.



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