ALL NIGERIA JUDGES' CONFERENCE OF THE SUPERIOR COURTS, 18TH – 22ND NOV, 2019.

THEME OF THE CONFERENCE:

SUSTAINING DEMOCRACY THROUGH EFFECTIVE AND EFFICIENT ADMINISTRATION OF JUSTICE

A PAPER TITLED:

THE SHARIA AND CUSTOMARY COURTS IN OUR JUDICIAL SYSTEM: ISLAMIC PERSPECTIVE

PRESENTED BY:

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AT THE ANDREW OTUTU OBASEKI AUDITORIUM

ORGANIZED BY:

THE NATIONAL JUDICIAL INSTITUTE, ABUJA.

WEDNESDAY, THE 20TH DAY OF DEC, 2019.

The Administrator National Judicial Institute, Hon. Justice R.P.I Bozimo, (OFR) wrote to me a letter dated 31st July, 2019 informing me that I have been nominated and directed by the Education Committee of the Board of Governors of the Institute to write and present a paper titled The Sharia and Customary Courts in Our Judicial System: Islamic Perspective.

My first and foremost gratitude is to Allah (S.W.T) who in his infinite mercy allowed me an opportunity to carry out the job.

In the same way and manner I extend my sincere gratitude and appreciation to His Lordship the Hon. The Chief Justice of Nigeria Hon. Dr. Justice Ibrahim Tanko Muhammad, CFR, FNJI.

I also offer my sincere gratitude to the Education Committee of the Board of Governors and the vibrant Administrator of the Institute.

Our discourse in-sha Allah is aimed to cover:

1- General Introduction;
2- Historical Perspective;
3- Civil/Criminal Procedure and Evidence in the Sharia Court;
4- Sustaining Democracy through effective and efficient Administration of Justice.
5- Conclusion.

If at all there is any credit in this service it must go to the National Judicial Institute (NJI), while all short comings found in the Course of this discussion is entirely mine and I beg your pardon.

HISTORICAL PERSPECTIVE:

Islamic Law has a very long history in Nigeria, dating back to about one thousand years ago when Borno Empire became Islamic and Sharia became its Supreme Law. Five hundred years ago Kano, then a Center of Commerce and Learning submitted to the rule of the Sharia. Two hundred years ago an Islamic revolution took place in what is now the nucleus of Nigeria, Creating a state and civilization based entirely on Sharia. Indeed Africa was the Home of Hijra when Prophet Muhammad (S.A.W) sent his early companions to Abyssinia (Habasha) or Ethiopia and since then Islam and Africa have become synonymous to each other.

Colonization came and wrested sovereignty away from Muslims, and took their land too. It did the same to other communities and nations all over Africa. In Muslim Communities in the part of Africa under discussion, the Europeans discovered to their surprise that they have not invaded a virgin land as far as faith; Statehood, culture and Civilization were concerned. One of their scholars remarked that the Islamic State the British Empire Conquered had evolved the society more advanced than any other in Black Africa.

He wrote:

> "Their Government was based on principle and not on mere power. No man, however mighty was above the law. No man, however lowly, was not beneath it. Every man had rights that the law defined, and protected".

The Scholar went ahead to suggest that if the standard of Justice in the Caliphate were to be weighed against the prevailing situation in Europe and America, "which had greater pretentions to be civilized" the Caliphate stood on a higher and firmer ground. Peace, Justice, Defined and protected rights and beneficent government were the hallmark of the Caliphate, few of the many fruits of Sharia.

See: The Fulani Empire of Sokoto,

London, 1976. Pp.257 – 258.

By: Sir H.A.S Johnston.

See also: The Nationality Question, Sharia and Corporate Nigeria.

By: Richard Akinjide in this day October 11, 2000.

The Borders of present –day Nigeria were defined during the late 19th and early 20th Centuries, in the course of imperialist competition among Britain, France and Germany to colonies in West Africa. Nigeria a British colony emerged as such in 1900.

Nigeria was governed by the British until 1960, when it became an independent nation. It became a federation of its Northern, Eastern and Western Regions. Its population in 2006, according to the Census then taken was about 140 million, the largest in Africa by far. Its ethnic diversity is extreme: "The World Fact book says there are more than 250 ethnic groups" the linguist list over five hundred living languages. There are however three regional lingua franca, corresponding to the three largest ethnic groups: Hausa in the North, Igbo in the East, Yoruba in the West. Muslims predominate in the North, Christian in the East and West, although again there has been a substantial dispersion of people of all religious persuasions throughout the Country.

The Period until 1920:

The early years of the 19th Century, Nigeria was occupied by heterogeneous assortment of people at many different stages of culture and political development. Some – for instance the Yoruba and Benin Kingdoms in the South West and The Muslim Emirates in the North who had strong Central authorities whose writs ran far; most others were much more loosely and locally organized.

There were some thirty Emirates in all. Islamic Law was near its highest degree of practical application. Custom if not, entirely eradicated, had been pushed into the background; and the only existing tribunals were

those of the Qadis (Alkalis: Hausa) who were competent in all matters, including penal Law. Only the Customary Land Law remained valid and was enforced by the Council of the Sultan and of the Emirs.

The North was administered separately until, in 1914, the Protectorates of Northern and Southern Nigeria were amalgamated with the colony of Lagos under the name of the colony and Protectorate of Nigeria. Lord Lugard was the first Governor General of the amalgamated Nigeria (1914 – 1919) as he had been the first High Commissioner of its Northern Region (1900 – 1906). The British Policy then was indirect rule.

As to the Law and its administration, indirect rule implied two systems (broadly Speaking) of Law, administered by two systems of Courts. On the one hand there was native law and custom – wrongly defined to include Islamic Law – applied in most cases involving natives, in Native Courts staffed by native Judges, according to native rules of procedure and evidence.

Most Native Courts were Emir's or Alkali's Courts and the applicable Law was and still Islamic Law of the Maliki School. On the other hand there was "English" Law. Public Law, including Orders in Council of the Government of Britain. The British also enacted various other laws specific to Nigeria, including penal Laws, and imported their statutes of general application, their doctrine of equity and their common law.

English law was applied in English Courts staffed by British Judges, according to British rules of procedure and Evidence.

English law was originally intended for application primarily to non-natives and most by far of all cases coming before Nigerian Courts – up wards of 90 percent, including, for a long-time, Criminal Cases were handled in the Native Courts according to native laws and custom. The provision was that no native law or custom should e enforced which was repugnant to natural justice, equity and good conscience(as determined by the British) or incompatible either directly or by necessary implication with any (English) law for the time being in force. Under this rule the British brought Native Courts under control and the penalties of "hudud" and "qisas" abolished.

In fact various means were used to enforce the repugnancy test, including supervision of the Native Courts by British administrative authorities and finally, in 1933, rights of appeal lie from the Native to the English Courts.

THE PERIOD FROM 1929 UNTIL 1965

Much of the story of this period has to do with the constitutional change, culminating in Nigerian independence in 1960. This brought about a major change in the administration of Islamic Law in the Northern Region that also took effect in 1960.

Few changes were made in the system of Native Courts between 1920 and 1954. There were various grades of courts each with its own jurisdiction and powers had already been established by statutes of 1906 and 1914.

From 1906 appeals were allowed from the Emirs and Chiefs Courts of lower grades to the grade A Courts. There were no appeals outside the native Courts system, until the year 1933. The development in essence limited the British control to supervisory and quasi-appellate jurisdiction of the British administrative officers. The only other form of control exercised by the British was over the power of emirs Courts to pass death sentence, which were made subject to review by the Governor.

This also changed in 1933, when for the first time appeals were allowed from the Native Courts to the British Magistrates and High Courts with the view to integrate the native and British Courts. This was done with an important exception, which says: only Native Court of Appeal could hear an appeal from a native court in matters relating to marriage, family status, and guardianship of children, inheritance, testamentary disposition or administration of estate.

The Native Courts had exclusive control of these “Personal Law” matters. All other matters including Criminal cases decided under Islamic Law, could and often did go on appeal to the British Courts.

In 1954 “Moslem Court of Appeal” was established with appellate jurisdiction extended to all cases, civil and criminal decided under Islamic Law in the Native Courts. Appeals from the Native Courts in other cases went to the Regional High Court. This was after the establishment of Moslem Court of Appeal by the Northern House of Assembly after regions were empowered in 1954. But there was another problem, because the court had no permanent judges, was merely constituted as needed from panels of Alkali’s and assessors learned in Islamic Law.

This was because a right of further appeal from the Moslem Court of Appeal to the High Court was rendered inevitable since the Jurisdiction of the Moslem Court of Appeal extended to Criminal matters.

The period 1920 – 1960 witnessed the formation of many Constitutions that set the basic pattern of Government which Nigeria was to take into independence. They include:

1- The Richards Constitution – 1947;
2- The Macpherson Constitution – 1951;
3- The Littleton Constitution – 1954;

In 1960 Northern Nigeria decided to reform the Legal and Judicial systems of the region, most notably by abrogating all the then – Prevailing systems of Criminal Law, including Islamic Criminal Law, in favor of new Panel and Criminal Procedure Codes applicable in all Courts

of the region to all persons without regard to religious or ethnic affiliation.

Islamic Personal law and other Islamic Civil Law, Continued in force for application in the Native Courts as appropriate , but parted company at the appellate level. Sharia Court of Appeal was established, all cases involving Islamic personal Law went to it, whose jurisdiction was limited essentially to such questions. Cases involving other Islamic Civil Law went to the new Native Courts Appellate Division of the High Court.

Thereafter, the Moslem Court of Appeal was abolished. The Judicial Powers of the Emirs were curtailed; in subsequent years these powers were abolished completely. These concession were balanced to some extent, by the new prestige and privileges accorded to the Sharia Court of Appeal. It was made a permanent Court with a standing membership and given a status equivalent to the Regional High Court. In the beginning, its judgments, on matters within its jurisdiction, were made final and un appealable to any other Court. Its jurisdiction was subject to extension beyond personal Law matters, to questions of other Islamic Civil Law, at the instance of the parties to particular cases.

1979 CONSTITUTION

Another constitution was officially enacted by a decree of Sept, 21, 1978 and took effect on October,1, 1979.

State Sharia Court of Appeal were indeed Provided for any state that requires it, (sec.240(i)); this was balanced by also allowing new Customary Courts of Appeal for any state that requires it, (sec 245(i)). Their judgments were made appealable to the Court of Appeal and thence to the Supreme Court.

The existence of Sharia Court of Appeal necessitates the existence of Courts inferior to them in which Islamic Law applied and from appeals maybe taken. These were the native Courts, which in 1967/1968 were reconstituted as “Area Courts”

In 1999/2000, most of the Area Courts in the Sharia States, they have been abolished and replaced by “ Sharia Courts” changed to apply the full range of Islamic Law, Civil and Criminal to Muslims. Appeals from the Sharia Courts in all types of cases have been directed to the Sharia Courts of Appeal.

SHARIA COURT OF APPEAL:

1- Establishment;
2- Appointment;
3- Jurisdiction;
4- Constitution; and
5- Practice and Procedure.

In respect of the Sharia Court of Appeal of the Federal Capital Territory. Abuja. See. Sections: 260, 261, 262, 263; and 264of the Constitution of the Federal Republic of Nigeria, 1999 as amended and altered.

In respect of Sharia Court of Appeal of a State. See. Sections: 275, 276, 277, 278; and 279 of the Constitution of the Federal Republic of Nigeria, 1999 as amended and altered.

Here, we will only direct our discourse analysis as relate to the jurisdiction of Sharia Court of Appeal. That is to say sections 262 and sec, 277 of the Constitution of the Federal Republic of Nigeria, 1999 as amended in respect of Sharia Court of Appeal of the Federal Capital Territory, Abuja and State Sharia Court of Appeal respectively.

Sec, 262 and sec, 277 they are wearing identical clothes which provide as follows:

> "The Sharia Court of Appeal (FCT/State as the case may be) shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly,(or by the Law of the State) exercise such appellate and supervisory jurisdiction in Civil proceedings involving questions of Islamic personal law which the Court is competent to decide in accordance with the provisions of Sub-Section (2) of this Section.

Sub-Section (2) provides Sub(a) – (e). The Issue here which needs to be settled is weather subsection (2) lays down the MAXIMUM jurisdiction any Sharia Court of Appeal can have, or whether it lays down the MINIMUM only.

With due respect let me be absolutely candid with you: since the states being free, under the clause of subsection (1), of the same Constitution which says:

> "…… in addition to such other jurisdiction as may conferred upon it by the Law of the State,….."

Then the Constitution with all intent and purport lays down the minimum Jurisdiction, and thus allows states to expand the Jurisdiction to any requisite Maximum.

CIVIL/CRIMINAL PROCEDURE AND EVIDENCE IN THE SHARIA COURTS

Today all Courts in Nigeria (Sharia Courts'), inclusive are either a creation of the Constitution of Nigeria, the Act of the National Assembly or the Laws of the various states of the Federation.

Sequence to the above, the constitution vests in the Kaduna State House of Assembly Legislative Powers to make laws for the peace, order and good governance of the state or any part thereof.

(1) Indeed the House of Assembly of Kaduna Sate as well as other Sharia Complaint State are not precluded from establishing Courts with Subordinate jurisdiction to the High Court.

(2) The Kaduna State House of Assembly in the exercise of this enabling constitutional power established among other Courts, the Sharia Courts with both Civil and Criminal jurisdictions and to administer such causes/matters and actions brought before them in accordance with the Maliki School of Law subject to and extent of the warrants creating them.

The Kaduna State Law No. XI, 2001 was enacted to provide for the establishment of Sharia Courts in Kaduna State.

Under the Provision of Section 60, Kaduna State Law No. XI, 2001, Sharia Courts Civil Procedure Rules, 2010 was made an took off on July 12, 2010 to serve as lower Sharia Courts' Rules for Civil litigations. From the commencement of litigation to the time when the judgment is given and up to the enforcement of same.

By virtue of Sec. 36(12) CFRN, 1999, as amended which says:

> "Subject as provided by this constitution, a person shall not be convicted of a criminal offence unless the offence is defined and the penalty therefore prescribed in a written Law; and in this subsection, a written Law

> refers to an Act of the National Assembly or a Law of a State or any subsidiary legislation or instrument under the provision of a Law".

In satisfaction of this provision criminal acts or omissions as they relate to sharia in Kaduna State are as prescribed in the Kaduna State SHARIA PENAL CODE LAW, containing 401 Sections; and the instrument for their practical implementation Contained in the SHARIA CRIMINAL PROCEDURE LAW (SPC)(SCPC) LAW.

It is of importance to NOTE the provisions of sections 3, 4 and 6 (1), (2), (3) of the SCPC Law which provide as follows:

> Section 3 "The provisions contained in the schedule to this law SHALL be the law of the State with respect to the several matters therein dealt with and the said schedule may be cited as, and is hereinafter called, the Sharia Criminal Procedure Code (SCPC)"

Section 4 "The (SCPC) Law of the State SHALL apply only to persons of Muslim faith or Persons who voluntarily subject themselves to the Jurisdiction of the Sharia Courts established by the Sharia Courts Law"

> "Section 6(I) "All offences under the Sharia Penal Code SHALL be investigated inquired into and otherwise dealt

with according to the provisions contained in the Sharia Criminal Procedure Code Law (SCPC)"

Section 6(2) "All offences against any other Law (e.g Kaduna State Administration of Criminal Justice Law, 2017) (ACJ LAW) SHALL be investigated inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any law for the time being in force regulating the manner or place of investigation, inquiry into, trying, or otherwise dealing with such offences"

"Section 6 (3) in any matter of criminal nature a Sharia Court SHALL be bound by the provisions of this (SCPC)"

LAW OF EVIDENCE: مرا فعا ت

The adjectival law which is the subject matter of our discourse is in turn divided into the law of procedure and the law of evidence. As it is said earlier on that the law of procedure regulates the steps which must be taken by parties in litigation from the commencement of the proceedings to the enforcement against the unsuccessful party. While the law of evidence concern the proof of facts in Court.

Contrary however, to the position of English Law, where the rules of procedure and evidence are distinct that, one could apply in a given case without reference to the other.

The Islamic law rules of procedure and law of evidence though ultimately serve the same objective are so intimately mixed up, that they are inseparable in both interpretation and application in court. Further there is difference between what exists distinctly, in English law as Civil and Criminal Procedures.

The processes in Islamic Law have no dividing line. It is the same rule of procedure that are applicable in both civil, known as **حقوق الآدمى** and Criminal offences known as **حدود.**

However, the position in Sharia is that it is a matter of:

(a) Duty/Burden of proof:

The plaintiff/Prosecutor is under a duty to adduce evidence in proof of his case or allegation against the defendant or accused person.

This means that, the duty of proof lies on he who asserts. Based on the famous Hadith of the Prophet (SAW) which says:

"البينة على المدعى واليمين على من أنكر"

Meaning: The claimant, plaintiff, complainant/Prosecutor shall adduce evidence and for the defendant an oath, is the classical authority.

Sharia Court would look into the preponderance of evidence in cases where both parties in a civil matter adduced evidence.

In cases like this the least preponderance in either party will unbalance his scale. While in criminal cases, the basis according to the Hadith is, the presumption of innocence; per the MAXIM: **الاصل فى الذمة البراءة**

(b) Admission/Confession: is another form of evidence

الا قرار أ ولى من الشهود

Iqrar in Both Civil/Criminal cases is the best form of evidence.

There may be a situation whereby the standard of proof is by adducing:

(c) Evidence of two unimpeachable male witnesses ;

(d) One unimpeachable male and two unimpeachable female witnesses;

(e) One unimpeachable male witness with an Oath;

(f) Two unimpeachable female witness together with Oath;

(g) In the case of adultery or fornication, there is an exception to this general rule. The prosecutor or complainant must adduce the

evidence of four unimpeachable MALE witnesses, failing which he shall be liable for the offence of defamation of character.

(h) Parties are not competent witness in their own case;

(i) The evidence of blood relation are not ordinarily acceptable, but if it is against, is generally acceptable and not for.

(j) Hearsay evidence is to some extent relevant and admissible in some Civil Causes and matters but not in Sharia Criminal cases.

SUSTAINING DEMOCRACY THROUGH EFFECTIVE AND EFFICIENT ADMINISTRATION OF JUSTICE:

Nigeria is a plural Society. It is convergence of various historical experiences, religions, cultures, civilizations and systems of law. There exist differences of experience and perception of worldview and ways of life and attachment. Therefore it is neither feasible nor desirable to impose one set of system for all.

A most desirable course will be to permit the Co-existence of multiplicity of laws and economic and social systems each in creative and fair competition with the other. There will thus be wider variety of possibilities and choices and ideas. The Nation will be all the more wiser, all the more richer as the competing elements strive for excellence.

I am happy to say that the plain and unequivocal language of the Nigeria's Judiciary under the able and noble leadership of His lordship

the Hon. The Chief Justice of Nigeria Hon. Justice Ibrahim Tanko Muhammad is education gives direction.

We appreciate and ready to compliment the efforts of His lordship in his vision of having a dynamic Judiciary manned by officers with various backgrounds, disciplines, experience and competence.

The first and foremost steps in sustaining Democracy through effective and efficient Administration of Justice is continuing Judicial Education and Training at all levels and sectors of the Judicial System.

CONCLUSION

In conclusion and before I rest my paper, I would like to humbly state that, the Sharia has well defined objectives مقاصد الشرعى as stated by Imam Al-Ghazali Hujjatul-Islam in so simple and yet to timeless word.

He said:

> "The very objective of the Sharia is to promote the welfare of the people which lies in safeguarding their Faith, their Life, their Intellect, their Posterity and their Wealth".
>
> حفظ الدين، حفظ النفس، حفظ العقل، حفظ النسل، حفظ المال.

The Sharia may not have altered its objectives so drastically, but it has to employ new Methods, new Approaches and new Strategies in order to realize those objectives more efficiently and more appropriately.

Thanking you so much for listening.

Justice Dr. Shehu Ibrahim Ahmad
Grand Kadi, Kaduna State.

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