

# Human Rights and Sharia'h Justice in Nigeria

M. Ozonnia Ojielo

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## HUMAN RIGHTS AND SHARIA'H JUSTICE IN NIGERIA

M. OZONNIA OJIELO.

### I. INTRODUCTION

When the Holy Prophet Mohammed was the head of the state in Medina, he promulgated the Medina Charter, which was the constitution, with which he governed Medina at the time. Article 25 of the Charter reads:

to the Muslims their deen (religion)

to the Christians their deen (religion)

to the Jews their deen (religion)<sup>1</sup>

In effect, even Mohammed himself recognized and granted freedom of religion to all the citizens of Medina. This practice of the prophet was supported by the Holy Qur'an, which states thus "Lakun Dinikun, Wali Y Adinii", meaning, for you, your religion, and for me, my religion.<sup>2</sup> By implication, Prophet Mohammed accepted that there is no compulsion in religion.

If the foundation of Islam is therefore rooted in tolerance and the acceptance of diversity, it is then a challenge to understand why those who claim to act in the name of the prophet in countries such as Nigeria should be involved in violent religious conflicts, in particular over the rights of others to practice their religion, in a largely Islamic society. It is

\* B.A Hons. (Hist); M.A. (Hist); LLB Hons. (Law), B.L

1. Muri Okunola, Sharia'h in Nigeria to Whom Applicable, Address delivered at the First Sharia'h Session of the Court of Appeal (Dorin, Nigeria 2000).

2. *Jd.* at 1.

also important to understand the place of Islamic law within a wider constitutional order.

Indeed the conflicts over the use and application of Sharia'h law predate Nigeria's independence. There had been protests during colonial rule, against the misuse of Sharia'h courts (Alkali Courts) by traditional rulers and other local elite, who routinely used the courts to pervert the ends of justice for political purposes.

In reaction to protests against the application of Sharia'h law to non-Muslims, the then Premier of the Northern Region, Sir Ahmadu Bello, in 1959, convened an international panel of jurists drawn from India, Pakistan and Sudan (countries where pluralism was practiced and which had substantial Muslim populations), to assist the Region in reforming its legal system. The largely unwritten crimes and penalties known to Sharia'h were incorporated into a new penal code so as to create an integrated criminal justice system in the Region, and meet the standards of justice demanded by the fundamental rights provisions of the independence constitution of 1960.<sup>3</sup> Also the much criticized Emir and Alkali Courts were replaced with Area and Upper Area Courts. The Area and Upper Area Courts had only civil jurisdiction, and appeals lay from them to a Sharia'h Court of Appeal at the state level. Like the Area and Upper Area Courts, the Sharia'h Court of Appeal could only apply Islamic personal law.<sup>4</sup>

During the 1977-1978 Constituent Assembly to draw up a constitution for Nigeria's Second Republic, an attempt was made to create a federal Sharia'h Court of Appeal which would exercise parallel jurisdiction with the Court of Appeal or perhaps the Supreme Court. This led to a fullblown crisis, which nearly brought the assembly to an abrupt end. The compromise imposed by the then military government was to retain the Sharia'h Court of Appeal at the state level where it already existed. Furthermore, a Sharia'h Court of Appeal could be established by any state desiring one.<sup>5</sup> The 1979 Constitution therefore limited the application of Sharia'h law to Islamic personal law, just like previous constitutions.

3. Lateef Adegbite, Personal Reflections on the Sharia'h, Presentation at the Conference of the Sharia'h Law Crisis (Lagos 2000).

4. AKINTUNDE DLUSEGUN DBILADE, THE NIGERIAN LEGAL SYSTEM 34-35 (1979).

5. Adegbite, *supra* note 3.

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In the 1988-1989 Constituent Assembly to draw up another constitution for the Third Republic, the crisis resurfaced. The assembly was also restrained by the military government in power from further discussing

the issue. Even the 1994 Constitutional Conference was not spared the divisiveness attendant on the Sharia'h debate.

In 1993, during the dictatorship of the Abacha government, the military through Decree Number 107, deleted the word "personal" from Section 242(2) of the 1979 Constitution, which dealt with the application of Islamic personal law. The section therefore read as though Islamic law need not be confined to personal law. The section came up for interpretation before the Court of Appeal, which in the case of *Maidu v. Modu*,<sup>6</sup> held that no amendment had been effected by the deletion of the word, and that the jurisdiction of the Sharia'h Court of Appeal remained limited to Islamic personal law as set out in the constitution.

In the *Muninga, Gambo, Garba, Abuja and Usman* cases, the Court of Appeal similarly held that neither Decree 107 nor any other law had succeeded in extending the jurisdiction of the Sharia'h Court of Appeal. The Supreme Court also affirmed the subordination of Sharia'h law to the Constitution and its circumscription to Islamic personal law. This was in the case of *Usman v. Kareem*.<sup>7</sup>

The 1999 Constitution substantially copied the provisions of the 1979 Constitution limiting the application of Sharia'h law to Islamic personal law.

The current crisis began when Zamfara State, a state in Nigeria, enacted the Sharia'h Courts (Administration of Justice and Certain Consequential Changes) Law of 1999, which became operative in January 2000. Under this law, the application of Sharia'h law in Zamfara State was extended to cover certain Sharia'h crimes and punishments (such as amputation, stoning to death and flogging) that were not included in the current penal code as drafted after independence. New higher and upper courts were created by this law, which also expanded the jurisdiction of the courts to include civil as well as criminal matters.

Like wildfire, the introduction of this new version of Sharia'h law spread to the whole of northern Nigeria. State governments scrambled to

6. *Maidu v. Modu* (2000), 4 NWLR Pt. 651 at 99.

7. *Muninga v. Muninga* (1997), 11 NWLR Pt. 527; *Gambo v. Tukuyi* (1997) 10 NWLR Pt. 526; *Garba v. Dogon Yaro* (1997) 1 NWLR Pt. 165; *Abuja v. Bizi* (1989) 5 NWLR Pt. 119; *Usman v. Kareem* (1995) 2 NWLR Pt. 37.

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introduce Sharia'h law in their state, to the adulation of their largely Muslim populations. The Christian communities in these states were scandalized, as there was hardly any consultation before the introduction of the new law. Assurances by the state governments that the law would not be applied to non-Muslims have not been supported by the actions of zealous state and religious officials, who regularly haul non-Muslims before the new courts, close down their business premises, or impose heavy fines and penalties for violating the law. They also insist on

punitive license fees' to engage in businesses such as running hotels and selling alcohol in non-Muslim areas of the cities. In consequence, there were a number of Sharia'h-related riots in several parts of northern Nigeria. In particular, the Kaduna State riots in February and May 2000 resulted in the loss of thousands of lives and the destruction of property. Such occurrences have triggered a mass exodus of people from the north of Nigeria returning their home regions, leading to questions of whether the Nigerian project has collapsed.

This article examines the introduction of Sharia'h law in northern Nigeria, both in regard to the fundamental legal provisions of the Nigeria constitution and also as to the international rights conventions to which Nigeria is a signatory.

The relationship between the new Sharia'h laws enacted in all 19 northern Nigerian states and the human rights provisions in the 1999 Constitution will be examined under five parameters:

- The general constitutional provision
- Protection of freedom of religion
- The federal status of Nigeria
- The Islamic state issue, and
- The politics of the Sharia'h law debate.

The Zarnfara state law will be used as representative of the laws of other states, as it was the first state to introduce the new laws.

## II. THE GENERAL CONSTITUTIONAL PROVISION

According to the proponents of the new Sharia'h, the Nigerian constitution did not list the "sources of Nigerian law." Although courts operating in the country are listed, the list is not intended to be exhaustive. There is the Nigerian Supreme Court; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; the Sharia'h Court of Appeal of a state; the Customary Court of

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Appeal of a state; and the state High Courts.s By implication, the House of Assembly of a state may expand the sources of its laws or create other courts, as it may deem necessary. Indeed, both the national assembly and state houses of assembly are respectively empowered to establish courts to exercise jurisdiction in matters over which they are competent to make laws. In the case of a state, the new court created cannot be superior to a court of record (for example, a high court).

The 1999 Constitution provides that a state is competent to make laws in respect of matters not included in the exclusive legislative list, which is reserved for the national assembly, and in respect of matters in the concurrent legislative list. For matters in the concurrent legislative list, both the state and national assemblies are competent to make laws.

However, federal law would prevail whenever there is inconsistency in

the laws made by the respective assemblies. Adegbite<sup>9</sup> argues that in all other matters, which are not included in the exclusive or concurrent lists, the states retain residual powers and are therefore competent to exercise legislative power over those matters. Since the exclusive and concurrent legislative lists do not contain any provisions on religious law, the Zamfara state has relied this argument by Adegbite as a basis upon which to legislate on Sharia'h.

Adegbite argues further that states have not extended the jurisdiction of Sharia'h law. It is only the Sharia'h Court of Appeal that had its jurisdiction Constitutionally limited to Islamic personal law; state Sharia'h courts are not limited in their jurisdiction.<sup>10</sup> A state assembly is empowered to make laws for the peace, order and good governance of the state, as well as to create courts of first instance or appeal to exercise competent jurisdiction. Any limiting of the powers of a state Sharia'h court, therefore, can only be as conceived and legislated by the state assembly. In consequence, it was within the competence of the state assembly to enact the Sharia'h law in question and create the courts to enforce it.

It is further argued that the Constitution did not prevent a state assembly from creating criminal offenses. All that the Constitution requires is that a criminal offense be defined and the prescribed penalty be set out in a written law. The Zamfara state assembly has complied with the Constitutional requirements in regard to the new law.

8. NIG. CONST. ch, VII (1999).

9. Adegbite, *supra* note 3.

10. *Id.*

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Finally, the defenders of the new Sharia'h law argue that the trial of persons under the law is accusatorial and not inquisitorial. Furthermore, Sharia'h law as published falls within the fundamental rights provisions of the Constitution. Only persons professing the Islamic faith are subject to its jurisdiction. Non-Muslims may be subject to the law only when they voluntarily consent in writing.

Opponents of the new Sharia'h law argue that both the exclusive and concurrent legislative lists in the Constitution are exhaustive and comprehensive. This is apart from the omnibus provisions in Item 68 of the Exclusive Legislative List, and Sections 4 (4)(B) and 4 (7)(C) of the Constitution, which empower the national and state assemblies to make laws on any other matters with respect to which they are empowered to make laws in accordance with the provisions of the Constitution. Asuzu argues that neither plane of legislative authority is competent to legislate on any matter not included in the relevant list and column, and that these omnibus clauses are restricted and relate to their capacity to make law on

the relevant lists. At any rate he insists, the subject of religion is not included in either list. <sup>11</sup>

The boundaries of Sharia'h law applicable in any part of Nigeria were drawn reasonably early in the country's legal history. The sources of Nigerian law include customary law, which is interpreted to include Islamic law. Because of the special and pervasive position that Islam occupies in the lives of Muslims, Sharia'h jurisprudence is recognized and validated in the Nigerian legal system as customary law, but not as religious law.

If Sharia'h jurisprudence were recognized exclusively as religious law, then Sharia'h law would have no validity under the Nigerian legal system since neither Nigeria nor any of the states can adopt a religion. Further, adoption of religious law would violate Section 10 of the 1999 Constitution, which provides that the government, of the federation or of a state, shall not adopt any religion as state religion.

No system of customary law may be incorporated or imported wholesale into the Nigerian legal system as a source of Nigerian law. Rather, each rule of customary law proposed as such must pass certain validity tests before it can be enforced. These tests are, first, that the customary law

11. Emeka Asuzu, *Sharia'h and the Nigerian Constitution*, Presentation at the Conference on Nigeria's Sharia'h Law Crisis: The Impact of Recent Implementation of Sharia'h Law on Women's Rights and Constitutional Reform and the Rise of Nationwide Community Level Conflict, p. 10 (Lagos 2000).

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rule must not be repugnant to natural justice, equity, and good conscience. Second, it must not be incompatible with any law currently in force, and third, it should not be contrary to public policy. These tests are provided for in the High Court laws of the various states of the country, as well as in the Evidence Act and the evidence laws.

Where punishments such as amputation of limb, stoning and flogging are imposed under the Sharia'h law, they clearly fail to meet the tests outlined above to qualify as laws validly made. They also violate Section 34(1) of the Constitution, which guarantees every citizen respect for the dignity of his person and not to be subjected to torture or to inhuman or degrading treatment. Accordingly,

any punishment involving torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs, burning alive or at the stake, crucifixion, breaking on the wheel, emboweling alive, beheading, public dissection and the like, or involving mutilation or a lingering death, or the infliction of acute pain and suffering, either physical or mental is inherently inhuman and degrading. <sup>12</sup>

Sani Yakubu Rodi, a Nigerian citizen, was given the death sentence by the state Sharia'h court, and the method of Rodi's execution was to be by

knife, the same way he was alleged to have killed his victims. The trial court agreed that the evidence against Rodi was circumstantial, but under Sharia'h law, if the victims' next of kin swear collectively 50 times in a mosque that the accused committed the offense, the court will convict the accused. In the instant case, the next of kin swore as required by the law, and the accused was convicted. The trial procedure clearly did not meet the fair hearing provisions eloquently stated in both the Nigerian Constitution and the Universal Declaration of Human Rights (UDHR), to which Nigeria is a signatory. Article 10 of the UDHR entitles everyone in full equality to a fair and public hearing and an impartial tribunal in the determination of the rights and obligations of and any criminal charges against the accused. Article 11 further provides that a person charged with a penal offense has the right to be presumed innocent until proven guilty according to a law in a public trial at which he has had all the guarantees necessary for his defense. In the case under review, the victims' families were both the accuser and the judge, since the judge was bound to pronounce a sentence of death once the oath had been sworn.

12. Femi Falana, *Constitutional Deficiencies and the Sharia'h Crisis 5* (Lagos 2000) (unpublished paper).

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NewsWatch magazine, in a special edition on "Living with Sharia'h," published a list of persons who had been convicted by Sharia'h courts in some of the states. Offenses included: carrying a Muslim woman on a motor cycle (126 lashes of a cane); making love to one's mother-in-law (amputation); and stealing (amputation).

At the Abdu Gusau Polytechnic in Talata Mafara in Zamfara State, the school's management board banned private car owners and motorcycle operators from the hostels of female students, depriving the students of access to transport facilities. In addition, students were also being taught to dress in a "Sharia'h compliant style," classrooms were separated for males and females, and interaction between male and female students was forbidden without regard to their religious affiliation. Furthermore, women were not allowed to participate in sporting activities; women were separated from men in public places and in means of carriage; the sale of alcohol was prohibited. The fundamental rights of both Muslims and non-Muslims have been grossly violated in every material particular, including the freedom of association and assembly; respect for the dignity of the person; social and economic rights; and the right not to be subjected to the observance of Sharia'h laws.

Customary criminal law had been abolished by the Independence Constitution of 1960, section 21(10). This abolition was retained in the 1963 Republican Constitution and the 1999 Constitution. Section 36(12) of the 1999 Constitution protects a person from being convicted of a

criminal offense unless the offense is defined and the penalty prescribed in a written law. <sup>13</sup> Customary law is largely unwritten. Indeed, Section 3(2) of the Penal Code (North), prohibited punishing any person "under any native law and custom." Customary (including Sharia'h) law offences are preserved only in so far as they are contained in either the Penal Code (North) or the Criminal Code (South).<sup>14</sup>

In the celebrated case of Safiya Husseini Tungar Tudun. Safiya (a divorcee) became pregnant as the result of an alleged rape. Under the law, pregnancy outside of marriage is sufficient evidence to convict a woman of adultery (zina). Consequently, Safiya was charged with adultery, and the alleged rapist was joined in the proceeding. The Upper Sharia'h court in Sokoto state convicted Safiya of adultery, sentenced her to death by stoning, and set free the accused rapist. The court convicted the woman on the basis of a dubious confessional statement, and set free

13. NIG. CONST. ch.IV, pt. 36, § 12 (1999).

14. e.O. Okonkwo, OKONKWO AND NAISH ON CRIMINAL LAW IN NIGERIA to (3d ed. 1980).

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the accused rapist because there were not four male eyewitnesses, as required by Sharia'h law, to convict him.

The European Parliament described the sentence as "inhuman, barbaric and cruel punishment" and urged the Nigerian government to ensure that Safia received a reprieve. <sup>15</sup> An appeals court acquitted her on the grounds that the offense was committed before the law took effect. However, another Sharia'h court in Katsina state convicted a woman, Amina Lawal, of adultery and sentenced her to death by stoning.

The trial process under Sharia'h law is obviously inquisitorial, although the Constitution guarantees to each citizen a presumption of innocence until proven guilty. The onus of proof should be on the person making the allegation. In Safiya's case, the allegation was based on the assumptions of some men who reported Safiya to the police because she was pregnant and, therefore, had committed adultery.

Islamic jurisprudence confirms that anyone making an allegation of adultery must provide four witnesses. Adultery (or zina) requires in addition to proof of intercourse, proof of consent and knowledge, although practice has been to completely ignore the requirements of consent and knowledge. Islamic law also recognizes the doctrine of necessity as a defense to adultery, a doctrine which would have allowed Safiya to go free since she was raped. Under the doctrine, the Second Caliph Umar let a woman go who had to sleep with a shepherd before she could have water to quench her thirst. She was given a light punishment and set free.

Lamido argues that stoning to death in cases of zina is not mentioned in the Qur'an. Chapter 24 verse 2 states that a man and woman guilty of zina should be flogged with a "hundred lashes." Zina refers to sexual

intercourse between a man and a woman who are not married to each other.

Muslim jurists have tried to make a distinction between fornication (zina by one who has never been married), and adultery (zina by one who has passed through marriage and become a muhsan). Punishment for the latter is death by stoning, based on the traditions of the prophet.

However, Chapter 4 verse 25 of the Qur'an complicates the issue. It encourages Muslim men who cannot marry freeborn women to marry Muslim slaves with the consent of the families or owners. It then says

IS. Constance Ikokwu, *Safiya's Acquittal: Sharia Also Have a Human Face*, THISDAY (Nigeria), March 31, 2002.

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that if, after their ihsan, they are found guilty of zina, their punishment should be half of the punishment of the muhsan. If the punishment of the muhsan is death by stoning, how does one calculate the punishment of the ihsan, which should be half? (half death or half stoning?). It is therefore reasonable to conclude that the Quar' an never envisaged stoning as a punishment for zina. The punishment is therefore a social construction, perhaps suitable for an earlier era, but clearly anachronistic in the twenty-first century.

Under the Maliki School of Islamic jurisprudence, which is practiced in Nigeria, a person is presumed guilty until innocence is proved. During the time of the early scholars, there was no clear scientific process for determining paternity. It may have been understandable to use pregnancy as evidence of adultery. Also, the requirement of four witnesses to adultery may have been relevant in an era when everyone lived in tents in the desert. It was easy to know when people were committing the offence. However, in this era of DNA testing and other advances in medicine, it is inconceivable that someone could be convicted of adultery at the mere sight of a protruding stomach.

The Islamic world in Nigeria and in a number of other countries has been shackled with an epistemological constraint. 16 The Ulema (religious leaders) maintain that the revealed word of God has been received in the Qur' an as the authentic sayings of the Prophet, and that the ancient Ulema have through elucidation, derivation and deduction, built a corpus of Sharia'h, which represents the Divine Will for all generations to come. This constraint has been buttressed by certain beliefs, namely:

Islam rightly means submission to the will of God. Many have understood this to mean a total denial of worth to any human endeavour.

However, certain verses in the Qur'an challenge this conclusion:

- The laws of nature are an aspect of the will of God and their discovery and utilization is part of that will, "he

said, our Lord who gave every thing its essence and course" 17

- Human reasoning is willed by God, "surely in this are signs for those who reason"18

16. Al Sadiq EI Mahdi, Religion and National Integration, Lecture Presented at the Nigerian Institute of International Affairs (June 28, 2001).

17. The Holy Qur'an 20:50.

18. *Id.* at 13:4.

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- Man's free will is willed by God, "say the truth is from your Lord and you may accept or reject it"19

- Empirical deductions are willed by God, "and upon the earth are signs for those who would believe and in your own selves do you not see?"20

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This narrow-minded understanding of the Qur'an was enhanced by the interpretation given to the Qu'ranic verse, "we have not overlooked anything in the book" to mean that the Qur'an is an encyclopaedia of knowledge. Such attitudes have informed an understanding of Islam, which is averse to a positive response for change.

EI Mahdi<sup>21</sup> identifies six important areas in which an Islamic response to change has become imperative.

1. The Concept of Islam - The Qur'an says "religion in the eyes of God is Islam."<sup>22</sup> Many interpreters narrowly confine this to the *Mohammedan* message denying any religious worth to other religions. The text of the Qur'an, however, clearly describes the followers of other prophets as Muslims, that is, that they submitted their will to God. Several Qu'ranic verses make the point that the prophet of Islam did not bring a novel religion. Islam accepts religious plurality as a matter of right, not mere convenience.

2. Islam endorses all the vehicles of knowledge. It is epistemologically comprehensive endorsing the four vehicles of knowledge, namely, revelation, inspiration, reason and empirical knowledge.

3. Islam is axiologically comprehensive endorsing the three bases of morality namely, compatibility of response, universality or the common ethical sense, and altruism, that is, to put duty before self.

4. Jihad has been interpreted as holy war and widened to mean waging war as a religious purpose. Jihad means the application of utmost effort by all means to fulfill the purpose of God. It does not involve violence except in self defense, "those who have been attacked are permitted to respond in kind and God will support them."

19. *Id.* at 18:9.

20. *Id.*

21. EI Mahdi, *supra* note 23.

22. The Holy Qur'an 2:19.

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5. Islam and the state: There are general political principles in Islam, for example, justice, consultative participation, freedom, equality, etc. However, there is no specific state structure to be established as a matter of Islamic commitment. It is true that there are theoretical *Sunni* and *ShU* patterns of state, but they are man-made constructions to reflect upon, not obey.

6. An Islamic economy: The economic problem is universal and deals with the problem of scarcity and the insatiable demands for goods and services. Production is the means to supply necessary goods. It faces two problems: the alternative use for available resources and the distribution of returns between different means of production, i.e., capital, labour and raw materials. There is no agreement about how these could come about. There is also no Islamic economy, but principles with an economic content, namely development, private ownership and social justice. There are also certain Islamic regulations such as the prohibition of usury and Zakat.

The law as made in Zamfara State, as in other northern states in Nigeria, was an attempt to maintain the static nature of Islam as interpreted by the Maliki School. It was a poorly thought out response to the change that is sweeping through the whole world, Nigeria not excepted. Rather than bring change or even maintain a dubious status quo ante, however, the law complicated inter-group relations, and undermined the fundamental law regulating the relationship between the citizen, groups and the state. Islam therefore cannot afford to be static. Indeed, it is its static response to change that is breeding violent conflict in some parts of the world. The law is therefore unconstitutional. It sought to impose a higher level of compliance on Muslims relative to other Nigerians, and that is discriminatory. The various punishments prescribed have no basis under the constitution or the international rights instruments to which Nigeria has committed itself. The state government and all other northern state governments, which have enacted similar laws, will do well to amend them immediately and bring them into compliance with the constitution and the international instruments that are binding on Nigeria.

### III. THE PROTECTION OF THE FREEDOM OF RELIGION

Upon the enactment of the Sharia'h law, the Governor of Zamfara State assured Nigerians that the state government would not discriminate against any group, people or religion on religious or other ground; that

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the law applied only to Muslims; and that the state would ensure justice and fairness to all.<sup>23</sup>

Protagonists of the Sharia'h acknowledge that the constitution guarantees freedom of religion to all. They state however that Islam regulates the totality of the life of every adherent. Therefore the protection accorded to Islam must be to the religion as understood and practiced by Muslims and not as subjectively defined by non-Muslims. While Christianity accepts the separation of state and religion, Islam rejects that dichotomy.<sup>24</sup> The religion of Islam encompasses all aspects of life of a Muslim, hence its insistence on the application of its laws, civil and criminal, but only to its adherents and others who voluntarily submit to them.

The doctrinal foundation of the application of Sharia'h to the Muslims is to be found in numerous texts of the Qur'an and Hadith (sayings of the Prophet Muhammad):

O ye who believe

Obey Allah and obey the Messenger

And those charged with authority among you

If ye differ in anything among yourselves

Refer it to Allah and his Messenger.

If ye to believe in Allah and the Last Day;

That is best, and most suitable for final Determination<sup>25</sup>

"If any do fail to judge by (the light of) what Allah has revealed, they are (no better than) unbelievers."<sup>26</sup>

Also, "then we put thee on the (right) Way (Sharia'h) of Religion; so follow thou that (way) and follow not the desires of those who know not."<sup>27</sup>

It is therefore argued that Sharia'h is a religion-based law, just as every law is rooted in religion. African customary law is founded on principles derived from African traditional beliefs. Also a substantial portion of the corpus of common law is Christianity based.<sup>28</sup>

Abdullahi Ahmed An-Nairn, a leading Islamic scholar who describes himself as an Islamic modernist, argues that the Qur'an is a powerful

23. THISDAY (Nigeria), September 11, 2001.

24. Adegbite, *supra* note 3.

25. The Holy Qur'an 4:59.

26. *Id.* at 5:44.

27. *Id.* at 45:18.

28. *Bowman v. Secular Society Ud.*, 1917 AC 406 (H.L.).

According to the Republican Brothers, worship and political discourse cannot flourish without a clear separation of religion and state.

An-Nairn argues that religion is what we make of it.<sup>30</sup>

There is no such thing as Islam in the abstract sense, just as there is no such thing as Christianity or Judaism in the abstract. Islam, Christianity and Judaism are what the believers make of them. They are what the believers believe and do. [ ... ] Religion is a resource, a powerful, profound resource, that most people appreciate. But what they make of it - what moral, political and economic actions they take - is the responsibility of the believers as they struggle with the scriptural or theological discourse [ ... ] The question therefore is which interpretations or understandings of the religion are likely under what conditions? And how should we promote the conditions that are conducive to what we favor the religion to be used for?<sup>31</sup>

An-Nairn "challenges the possibility of an Islamic state. Sharia'h ceases to be Sharia'h by the very act of enacting it as state law, because then it becomes the political will of the state, not the religious law of Muslims. If it is the religious law of Muslims, it should remain a matter of free choice. [Every Muslim is] entitled to choose one opinion over the other, but if you make [Sharia'h] state law you deny [every Muslim] that right."<sup>32</sup>

The problem with the Sharia'h laws as enacted, is the great danger that they pose to religious freedom, even to the Muslim, as guaranteed by the Constitution. According to Henry Clay, "all religions united with government are more or less inimical to liberty. All separated from government are compatible with liberty."<sup>33</sup>

Freedom of religion, including the freedom to change one's religion, is an autonomous fundamental right guaranteed by all Nigerian

29. Christopher Reardon, *Islam and the Modern World*, 2002 FORD FOUND. REP. 19 (Winter).

30. *Id.* at 22.

31. *Id.*

32. *Id.*

33. Henry Clay, Speech in the House of Representatives (Mar. 24, 1818), in *POLITICAL QUOTATIONS* 190 (Daniel B. Baker ed., 1990).

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constitutions. We live in a pluralistic society, with people of widely divergent religious backgrounds or with none at all. The government cannot endorse the beliefs of one group without sending a clear message to non-adherents that they are outsiders<sup>34</sup>. The Universal Declaration of Human Rights (UDHR), in Article 18, also grants the right to freedom of thought, conscience and religion, including the right to change one's religion or belief, and to manifest the religion in public or private, teaching, or practice.

Chapter 1, Part 2, Section 10 of the 1999 Constitution prescribes a secular status for Nigeria and is similar to the first amendment of the

United States Constitution. In *Darvis v. Beason*, the U.S. Supreme Court held that the First Amendment of the U.S. Constitution was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. 35 Accordingly, Asuzu argues that a Nigerian citizen, in order to fully exercise his freedom of religion, needs to be assured that the state will neither interfere, intervene or meddle with religion generally, nor show preference to any religion particularly.<sup>36</sup> Freedom of religion will therefore include absolute governmental neutrality regarding religious beliefs and practices. "This does not mean treating all religions equally, but is closer to not treating or dealing with any or all the religions."<sup>37</sup> The concept of neutrality, which does not permit a state to require religious exercise even with the consent of the majority of those affected, does not collide with the majority's right to free exercise of religion. While the Free Exercise Clause prohibits the use of state action to deny the rights of free exercise to anyone, it also does not mean that a majority could use the machinery of the state to practice its beliefs.<sup>38</sup> Where the state uses its apparatus to enforce the observance of religious obligations, or restrict people's association or mode of dress on the basis of religion,

34. Sandra Day O'Connor, *The Supreme Court Battle: Preserving Civil Liberties in the Era of a Hostile Judiciary*, 11 FREE INQUIRY 4 (Fall 199\).

35. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

36. Asuzu, *supra* note II.

37. *Id.*

38. *School Dist. of Abington Township, PA v. Schempp*, 374 U.S. 203, 225-226 (1963).

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it infracts on rights of those citizens to practice their religion in private if

they choose, or not to practice it at all. Moreover, it is also discriminatory

when a state commits public funds for the purposes of such enforcement,

against the rights of other citizens who do not belong to the religion.

Freedom of religion is an individual right, not a group right. Every

person is free to profess, practice and adopt any religion, but no state or

government in Nigeria has such right. Most or even all citizens and/or

residents of a state may fervently follow one faith in their own way, but

this is an *individual* right to religion. Their practice and exercise of their

religious faith even when conducted en masse, amounts in legal analysis

to each individual member's exercise of his freedom of religion.

The individual's freedom of religion includes a freedom to practice his

chosen religion as he deems fit. He may practice it to a greater or lesser

extent, he may dilute it, he may respect or disdain its tenets, he may

follow or ignore its strict moral injunctions. He may freely prefer a variant, nuance, alternate school or denomination of the selected religion. He need not fit smugly into the religion or any variant; he may redefine the religion to suit himself. Consequently, the state cannot legislate any religion for the souls of men.<sup>39</sup>

Freedom of conscience means that a citizen's morals are basically his private affair. Following this constitutional right, the fact that the citizen belongs to, professes, or practices any religion does not oblige him to carefully observe the teachings or dogma of the religion. The extent to which he is a "good" or "bad" Christian, Muslim, Godian or African Traditional Religionist is entirely his private affair. The law cannot be an instrument for measuring his compliance profile with his religious obligations or moral law. "The free exercise of private judgment and the inalienable rights of conscience, are too high a rank and dignity to be submitted to the decrees of councils, or the imperfect laws of fallible legislators."<sup>40</sup>

Asuzu argues that the state should not only refrain from promoting any religion but should also desist from preaching 'good old nice and warm sonorous' religiousness. Preferably, the state should accommodate the interests of all including "atheists and agnostics who, though a minority, have a right in the exercise of their conscience, not to believe or to

39. Asuzu, *supra* note 11.

40. Isaac Backus *quoted* in Anson Phelps Stokes, *1 Church and State in the United States* 529-30 (1950).

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*Annual Survey of International & Comparative Law, Vol. 9 [2003], Iss. 1, Art. 7*

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disbelieve any religion, and are entitled to demand that the state should not show favoritism towards religionists or against them."<sup>41</sup>

While the idea that the state has a duty to see that its members are religious may be attractive to some, others consider it to be "the foundation of all religious persecution ever perpetrated" in the sinister "belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested."<sup>42</sup> "Religion therefore should be essentially distinct from civil government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breast, which insure the perpetuity of religion without the aid of the law."<sup>43</sup>

#### IV. THE FEDERAL STATUS OF NIGERIA

It is important to evaluate whether the Sharia'h laws as enacted in the northern states are in compliance with Nigeria's federal status. Those who support the Sharia'h laws argue that as a federal state, Nigerian law, institutions, and peoples must respect the cultural diversities intrinsic in the nation. These diversities are not just regional, ethnic or tribal. They also extend to religious beliefs and practices. Therefore, just as it is legitimate to protect common law and customary law, it is also proper to extend recognition and protection to Islamic law. Nigeria as a pluralist

society has indeed opted for a multiple legal system made up of common law, Islamic law and customary law. These systems must co-exist and receive fair treatment from the authorities.<sup>44</sup>

The argument of the pro-Sharia'h scholars is weakest when it comes to the issue of federalism. The basis of the nation as a federal state is the Constitution. Any law that derogates from the protections offered by the Constitution, therefore, is an attack on the federal state. Nigeria has only one legal system, which is a fusion of two legal traditions - common law and customary law. Religious law in Nigeria is not a distinct form of law, but a variant of customary law. It must satisfy the three tests prescribed for customary law before it can be applied as valid law. These principles have long been accepted as reflecting the correct appreciation of Nigeria's diversity as a nation. While it is recognized that the states may have distinct cultural peculiarities, these cannot be imposed on other persons within the state; neither can state funds be used to promote and

41. B.O. NWABUEZE, IDEAS AND FACTS IN CONSTITUTION MAKING 256-57 (1993).

42. JOHN STUART MILL, ON LIBERTY (1859) *reprinted in* UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 160 (Everyman Library 1910).

43. James Madison, *The Writings of James Madison* III.

44. Adegbite, *supra* note 3, at 6.

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sustain it to the exclusion of others who do not belong to the tradition.

Groups and associations within the state may promote their cultural or other traditions as they wish, so long as the rights of others to disagree or not belong are not eroded; neither should the state adopt the particular tradition or the tradition of the majority as the state tradition nor should those who belong to the majority tradition be compelled to show obeisance to that tradition. The state exists for all.

The debate on the rights of a state vis-a-vis the central government, in a federation such as Nigeria, raises two immediate questions: the extent of legal asymmetry to be accepted and the extent of cultural autonomy which is compatible with national unity.

The existence of a nation state is conditioned on the following guarantees, among others: that citizenship is the basis of constitutional rights and duties; that citizen equality is guaranteed; and that religious and cultural freedom is guaranteed to all groups provided that they fulfill three conditions:<sup>45</sup>

No religious or cultural group will seek any political advantage for the sake of its peculiar identity;

All religious and cultural groups will pursue their programmes by non-violent means, and in accordance with the rule of law; and

Political organizations, which seek to succeed to power, will be open to all citizens without discrimination.

There is no problem whatsoever with the civil jurisdiction of Islamic

courts. The problem arose because Zamfara, and subsequently other states, imported criminal jurisdictions to the courts in cases where some of the criminal offences are already provided for in the penal code. They also introduced punishments that derogate from protections offered the citizen by the Constitution. It is therefore not helpful to argue that these new laws make the states or the people in the states "more moral," or that they are designed to preserve the states' cultural or religious tradition. The extent of the legal asymmetry is therefore clear. The Constitution is the basis of the relationship between the citizen and the state, as well as among the states, or between a state and the national center. Where a state law clearly derogates from this fundamental agreement, it calls into

45. Mahdi, *supra* note 23. at 9.

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question the basis of the whole relationship. The solution is therefore to review the elements of the legislation that challenges the federal status of the country and the rights of the citizen within the state. The second question is much easier to answer. The extent of the cultural autonomy allowable is determined by the level of compliance with the guarantees identified, which guarantees are also contained in the constitution drawn up by the representatives of the people. The problem has never been the insufficiency of the guarantees, but the non-compliance of state officials. These lead to perceptions of discrimination, and to challenges of the basis of the nation-state.

#### V. THE ISLAMIC STATE ISSUE

The next consideration is whether the introduction of Sharia'h laws in the northern states amounts to creating Islamic states.

According to Adegbite<sup>46</sup> the Islamic condition involves three states, namely, the Islamic community, the Islamic society and the Islamic state. In the context of Nigeria, the generality of the Muslim Ummah is still at the stage of the Islamic community, except for Zamfara state, which appears to be moving to the stage of the Islamic society.

An Islamic community practices Islam, but its environment is not overwhelmingly Islamic. Non-Islamic institutions and practices are prevalent. On the other hand, an Islamic society has a dominant Islamic environment but still falls below the status of the Islamic state. In an Islamic state, the environment is wholly Islamic and the Sharia'h regulates all affairs, including the conduct of government.

Adegbite insists that Zamfara state has not adopted Islam as a state religion. It has therefore not fulfilled the requirements of an Islamic state, but it is close to an Islamic society. After all, high courts and magistrate courts still exist in the state, side by side with Sharia'h courts. He argues further that regulating Sharia'h per se cannot by a stretch of the imagination be taken as an adoption of Islam as a state religion; after all,

the constitution itself provided for a Sharia'h court of appeal. He contends that the constitution cannot prohibit a state from having anything to do with religion, yet goes ahead to establish religious courts such as the Sharia'h court of appeal. This argument will also apply to the other states that have proclaimed Sharia'h law.

46. Adegbite, *supra* note 3.

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To him, it is a misnomer to describe Nigeria as a secular state. The country observes work free Sundays in obedience to the Christian Sabbath injunction, declares religious public holidays, funds religious education, supports religious pilgrimages, and insists on public functionaries subscribing to an oath of office as well as providing religious courts. The correct characterization of Nigeria, therefore, should be that it is a liberal multi-religious state, where freedom of religion is safeguarded.

Justice Niki Tobi of the Nigerian Supreme Court concurs with the later argument:

There is the general notion that Section 11 (of the 1989 constitution, similar to section 10 of the 1999 constitution) makes Nigeria a secular nation. That is not correct. The word secular, etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular, means the belief that the state, morals, education etc. should be independent of religion. What Section 11 is out to achieve is that Nigeria cannot, for example, adopt either Christianity or Islam as a state religion. But that is quite different from secularism."<sup>47</sup>

The attempt to characterize what is happening in northern Nigeria as normal has promulgated by the Acting Governor of Sokoto state, Alhaji Aliyu Wamakko, who in a BBC interview was quoted as having said: "government supports whatever Allah says we should do. As you are aware, Sokoto state is an Islamic state and we are governed by what Allah says, and nobody can stop US."<sup>48</sup>

The Nobel laureate Wole Soyinka has described this challenge to the Nigerian state posed by the introduction of the new Sharia'h laws as a redefinition of the Nigerian state. "When one of the sections making up a nation opt out of the protocol binding the nation together, the nation unravels and that is what is happening."<sup>49</sup>

The contrary argument has been well-articulated by Asuzu. Nigeria is a secular state, as are numerous others. A secular state is not a godless, atheistic or non-religious state. Citizens and residents may be the most

47. Justice Niki Tobi, *Law, Religion and Justice*, in *FUNDAMENTAL LEGAL ISSUES IN NIGERIA: ESSAYS IN HONOUR OF ANDREWS OBASEKI* (Wole Owaboye ed., 1999).

48. Ikoku, *supra* note 17.

49. Bolaji Abdullahi, *Sharia: Obasanjo. Ige Were Inept. Says Soyinka*, THIS DAY (Lagos), May 27, 2001.

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religious zealots on earth, but in the absence of a state religion, a country is correctly described as a secular state, in terms of its constitutional, legal and political characterization. The society may be religious, but the state as a legal entity is not. Secularity of states is part of the jurisprudential apparatus for safeguarding religious harmony and securing freedom of religion.<sup>50</sup> Indeed, without secularity religious ideologies tend to become totalitarian, and the underpinnings of a normative tolerance are weakened.<sup>51</sup>

Secularity also connotes that governmental measures including statutes must have a clearly secular purpose and goal. The state's jurisdiction over the citizens is limited to their earthly, worldly, secular, material welfare and governance and does not extend to their spiritual lives. From the point of view of constitutional law, legal systems, and political organization, Nigeria ought to be one of the most secular legal and political systems in the world. Section 10 of the 1999 Constitution forbids any government at the federal or state level from adopting any religion as state religion. In fact, the mere absence from the constitution of provisions governing or regulating religion is sufficient declaration of secularity. There is therefore a want of power for any legislature in Nigeria to legislate on religion. Sections 10 and 38 (on freedom of religion and worship) of the Constitution are on all fours with the first amendment of the American constitution, that "Congress shall make no law respecting an establishment of religion or prohibiting the exercise thereof."<sup>52</sup>

Asuzu argues that Section 10 is the foundation of religious rights without which the enjoyment of the rights in Section 38 is meaningless. To be and to feel free to exercise and enjoy their fundamental right to freedom of religion (which includes freedom of irreligion, citizens need to be assured that the state will not interfere or meddle in any manner with religious matters or affairs. The state should not lend its awesome weight or support to any religion, or even to religion generally.

Section 10 is a clear, positive, and aggressive prohibition of state religion. In order to violate the provision, a state need not issue a declaration adopting any religion. It need not even acknowledge that it is adopting or has adopted a religion. It need not use the terms "adopt" or

50. Asuzu, *supra* note 11.

51. Mahmood Monshipouri, *Reform and the Human Rights Quandary: Islamists Vs Secularists*. 41 I. CHURCH & STATE 445 (1999).

52. NIG. CONST. (1999).

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"state religion." What is necessary is a measure or series of measures whose overall effect is the establishment of an official religion, or the official preference for one. The measure or measures may be administrative, social, political, legislative or a combination, but as long as it or they point(s) to any religion as the government religion or government favored or preferred religion, the result would be that a state religion has been adopted. In the context of Islam, which regulates both civil and spiritual affairs in the society, the adoption of a religion by any state amounts to the declaration of a religious state, in this case, an Islamic state.

The word "adopt" is defined in the New Oxford Dictionary of English as "to take up or start to use or follow something, especially an idea, method or course of action." The state cannot therefore favor, prefer, or lean towards any religion, or to religion as against irreligion. No authority in Nigeria can legitimately make special provisions for or set up a ministry or department for religious matters as presently obtains in these states, even if the interests of all religious groups are satisfactorily, sufficiently, adequately, and equitably taken into account.<sup>53</sup>

As former U.S. Senator Ervin has stated,

If any provision of the constitution can be said to be more precious than the others, it is the provision of the first amendment, which undertakes to separate church and state by keeping governments' hand out of religion and by denying to any and all religious denominations any advantage from getting control of public policy or the public purse. When religion controls the government, political freedom dies; and when government controls religion, religious freedom perishes."<sup>54</sup>

In most of the states being examined, based on new laws, it is difficult now to separate the state from religion.

Kaduna state has tried to deal with the issues a little differently. It set up Sharia'h and Customary Courts in the state. Magistrate Courts and High Courts have also been created in accordance with the Constitution.

According to the governor of the state, three legal systems have been created in the state because the Constitution forbids any state from adopting a state religion. "[T]he constitution of the Federal Republic of

53. Asuzu, *supra* note II.

54. Sam J. Ervin, Jr. (U.S. Senator), in *THE GREAT QUOTATIONS ON RELIGIOUS LIBERTY* 32 (Albert Menendez and Edd Doer eds., 1991).

Nigeria is supreme. The role of government is therefore limited to providing the framework ... that would ensure that our people get what they deserve, and that law and order is maintained at all times."<sup>55</sup>

The state, therefore, created Sharia'h free zones where non-Muslims could enjoy some of the liberties denied their Muslim counterparts. This in itself, even though well-intentioned, is still discriminatory and has contributed to the segregation of the state into Sharia'h and non-Sharia'h areas. During the violent conflicts that have erupted in the state, this segregation has made it easy to identify enemy areas and target them.

#### VI. THE POLITICS OF THE SHARIA LAW DEBATE

It was indeed a shock to most Nigerians when Zarnfara state enacted the Sharia'h law within seven months of the return to democratic rule. It was totally unexpected. Defenders of the state governor have claimed that this issue formed one of the main planks of his campaign. It is reasonable to expect that even if this were so, the governor ought to know or seek advice on the competence of the state to make legislation, since the issue bore directly on religion, which is not provided for in the constitution. It is also contentious, and therefore requires that wide consultation be had with all stakeholders before pushing the law through the state legislature. Whatever the case, the enactment fulfilled the age-long dreams of many a Muslim zealot. The politics of the First Republic (1960-1966) were defined by, among other things, the alleged pledge of the then premier of the Northern Region, Sir Ahmadu Bello, that he would work towards dipping the Qur'an in the sea. This is a reference to work towards Islamising the largely Christian communities in the south which abut the Atlantic Ocean.

The enactment of the law therefore made the Governor of Zarnfara state immensely popular and turned him into an icon overnight. People began to address him as the chief defender of Islam. The wearing of long beards popularized during the Iranian revolution became fashionable. Young men were exhorted through the media to start growing long beards. Nigerian politics has often been short on substance or quality and long on symbolism. Politicians are generally perceived as opportunistic and selfish persons, who do not serve the public good. The Sharia'h issue therefore presented them with an opportunity to cast themselves as defenders of the citizens' interests. The governors in the northern states

55. Agaju Madugba, *When Kaduna Hoists Sharia Flag*, THISDAY (Lagos), Nov. 4, 2001.

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engaged in a mad scramble to outdo each other in introducing the law, while those in the South sought every available opportunity to condemn the introduction and repeatedly threatened that retaliatory measures might be embarked upon in the South, such as declaring their respective states to be Christian states. Indeed, none of the thirty-six governors of the states in the country actually held consultations with their citizens on the desirability of Sharia'h in the North, or on the appropriate response to the Sharia'h issue by the South. Neither did they engage in dialogue,

with a view toward understanding and appreciating each other's concerns and needs, and articulating the way forward for the states respectively and the country generally.

It must also be stated that the place of Sharia'h law in Nigeria's legal system had been a thorny issue and was never satisfactorily resolved. The fact that at every constitutional conference or constitutional review process, the issue came up and always divided the participants into extreme groups, with the Muslims in support and the Christians opposing, poses a great danger to the unity and survival of the country. At each of the constitutional conferences during military rule, the military would impose a solution by adopting the 1960 constitutional provision on having a Sharia'h Court of Appeal to deal with Islamic personal law .

The fact that a significant percentage of the population has always been willing to drag the country to war or dismember it over such an issue meant that a fundamental need was at issue. The solution obviously would have been to accommodate the need. The challenge, however, is that either the need has not been well-articulated, or it has been difficult to understand or appreciate. Furthermore, it is apparent that there has not been any consensus on how to deal with the need.

Constitutional conferences since the 1946 Constitution have had more Muslim participants because of their numbers relative to the rest of the Nigerian population. Having participated in drafting and adopting a constitution, it is difficult for some to understand how the same people could champion instituting offenses and punishment that derogate from the rights granted the citizen by the Constitution. There is also no claim that freedom of religion or of conscience has been tampered with. There may, however, be an issue of the place of Islam in public policy. As a former British colony, the workweek and calendar followed the British pattern. Thus, Sunday is a rest day and this is the Christian Sabbath day, while Friday, on which Muslims go to the Mosque to pray, is a half-work day for Muslims only. Furthermore the calendar in use is the Gregorian calendar. These matters create resentment among Muslims.

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It is doubtful if the need is one of identity. This is because it is difficult to attribute one identity to the entire Northern region. During the first and second republics, it worked well to mobilize political support on the basis of "one north." Since 1983 however, the Middle Belt/North Central Zone has striven to create a separate identity from the rest of the North. It has more educated persons and is largely Christian. There are wide cultural differences between the Middle Belt and the rest of the North. Also, since 1966, political power has been in the hands of northerners.

They have used this effectively to give patronage and re-draw the political map of the country, as well as create new levers and centers of power. This challenge of locating where the need lies has conditioned responses to it and perhaps makes the rest of the country appear indifferent to the need.

It may also be argued that the Sharia'h law was needed to arrest some of the challenges of urbanization and development such as prostitution, alcoholism, and petty crimes. This would be disputable because these offenses were also criminalized in the existing penal code. Enforcement was lax, however. Laxity in official responses to breaches of the law is not peculiar to the North, but is a national malaise. At any rate it must be admitted that since the Sharia'h law was enacted, petty crime has decreased.

The problem, however, has never been with petty crime. The real developmental challenge is white-collar crime, committed by state officials. The state loses more than 20% of its annual revenues to white-collar criminals. At the time of writing, there has not been any reported case of a white-collar criminal being arrested or charged to any of the Sharia'h courts. Even those top officials of state who have infringed the Sharia'h laws have gotten off with lighter sentences than the poor people in their communities. "For instance, a traditional ruler in the state was accused of adultery and was given some strokes of the cane as punishment."<sup>56</sup> We are therefore left with the conclusion that the introduction of the law is a sop to the people, to create the impression of progress, while the massive looting of public funds that characterizes politics in Nigeria continues unabated.

The argument has been made, especially in official circles, that the Sharia'h law crisis is not a religious issue but a political one. The facts advanced in support of this view are that a substantial number of northern politicians who had built their careers by positioning themselves

56. Ikoku, *supra* note 17.

as defenders of northern interests but were merely bent on personal aggrandizement were responsible for the crisis. This group of politicians had grown fat from government patronage through being close to the corridors of power. When the Obasanjo government came into office it tried, through political and other appointments, to create new centers and levels of power in the North, thus marginalizing these politicians. Feeling that their relevance and influence were at stake, they fought back through sponsoring campaigns and rallies for the introduction of Sharia'h law in the North. Seeing through their plans, the government decided to ignore them in the belief that they would run out of steam. The government also

made the unspoken assumption that the people would see through the machinations of these politicians and ignore them as well.

Unfortunately, the campaigns caught on, becoming extremely popular in the North. It had also taken on an emotional hue. Any attempt to stop it would have been violently resisted. Caught unawares and flat-footed, the government could not apply any of the obvious options available to it, such as taking the issue before the Supreme Court for an interpretation of the powers of the state to enact the Sharia'h law. The government was afraid that this might be perceived as official bias against the Muslims and escalate, possibly in the short run. In the long run, however, such an interpretation would have delineated the powers of the state vis-a-vis the federal government, and if successful would have prevented the similar laws later enacted in the other states. Regrettably, the government chose to do nothing. Feeling themselves unprotected by the government, extremists in both camps exploited the issue and unleashed the orgy of violence that accompanied the attempt to introduce the law in Kaduna and other states, leading to the deaths of thousands of people.

Professor Soyinka has described the government's handling of the Sharia'h issue as "the most inept non-act by the government."<sup>57</sup>

According to him, people turn into virtual zombies when they are persuaded that their religion is under attack. The government lost a wonderful opportunity when the law was challenged in court by a civil society activist, when it opposed judicial determination, and thereby failed to defend the constitution as it is charged to do.

The inability of the federal government to deal with the issue led to various mutations of the crisis. When indigenes of some of the states in the South, particularly in the South East, saw evidence of the atrocities perpetrated against their people attacked in the north, reprisal attacks

<sup>57</sup>. Abdullahi. *supra* note 57.

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against northerners took place in several cities in the South East. All the state governors in the South warned their indigenes against going to Zamfara state for the mandatory one-year national youth service for graduates of tertiary institutions, as their security could not be guaranteed. As a result, thousands of young men and women missed mandatory service in 2000.

Indeed, never has the unity of the country been so threatened since the end of the civil war of 1967-1970. All over the south of Nigeria, the clamor is for a national conference to renegotiate the basis of the existence of the country. The East has actually called for Nigeria to be split into a confederation of autonomous units. Minor disagreement between different language speakers easily flare and escalate into ethnic hostilities. This accounts for the regular vulgar incidents of ethnic

clashes in Lagos, the former capital, now replicated on a regular basis in Jos, the unofficial capital of the middle belt states.

The states of the South are agitating for resource control, a euphemism for re-examining the practice of federalism and giving the states more powers in the management of their affairs. This is designed to consolidate their petroleum and other resources, and to minimize interdependency and interaction with the rest of the country.

## VII. CONCLUSION

It is obvious that Nigeria needs a national dialogue or consultation. This need has long existed. The conditions that gave rise to the civil war have not abated. However, the Sharia'h issue now makes the need for a dialogue compelling.

In response to this need, the federal government convoked a Constitution Review Committee. The first problem was that the government assumed that the problem was with the constitution, and so all that was needed was a constitutional amendment. This is far from the case. No constitution is perfect. If the operators of a constitution are willing and determined to work together, they can always circumvent any perceived weaknesses in their constitution. The second problem was that the members of the committee came from the three political parties in Nigeria. The political parties are clearly not representative of public opinion in Nigeria. Each of them has its own agenda, and it is difficult to agree that their combined agenda represent the interests of all Nigerians.

The third problem deals with the process for constitutional amendment in Nigeria. For a proposed amendment to become law, it must be approved

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by two-thirds of the members of the national assembly (the Senate and the House of Representatives), and by two-thirds of the members of at least two-thirds of the state assemblies (that is two-thirds in a minimum of twenty four states each). This is clearly impractical. A filibuster is very easy. A legislator in any state simply needs to tack on an amendment or two to the proposal. Then it becomes difficult to separate the issues and the amendments and vote on them separately. It is indeed impossible within the time remaining for the present government to conclude discussions on proposed amendments and have them adopted before the next elections in 2003.

The problem, therefore, is not the constitution. The problem is to redefine, re-assure, re-state or agree among Nigerians, on the fundamental basis of its existence together as a nation. Without agreement on this issue, the best constitution in the world becomes unworkable. With an agreement, a referendum would be the quickest way to re-state this. Unfortunately, the government feels that a process of national dialogue would lead to dismemberment. Its solution is therefore to parrot the need

for patriotism in the media. That alone does not make a nation. The challenge of the Sharia'h law crisis and the tragedy of the impotent reaction of the federal government mark the beginning of the erosion the Nigerian identity.

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*Annual Survey of International & Comparative Law, Vol. 9 [2003], Iss. 1, Art. 7*  
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