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Islamic Criminal Law and Constitutionalism in Nigeria: Any Lessons from Turkey?

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Abstract
Constitutionalism is generally marked by three essential features, namely, limited and accountable government, adherence to the rule of law, and protection of fundamental rights. Theoretically, these features are realized by strict adherence to the provisions of the constitution. In practice, however, history shows that constitutionalism is best realized in a liberal democratic regime wherein leaders govern within the limits of enumerated or widely accepted legal powers. This paper examines whether the adoption of the criminal aspect of sharia in Nigeria is in accord with constitutionalism and the rule of law. It seeks to determine which of the Constitution and sharia is the supreme law. The study approaches this task by discussing the jurisprudence of constitution and constitutionalism, and inquiring into wider theoretical perspectives on the relationship between national constitutions and Islamic law. It further studies what obtains in Turkey, a Muslim-majority but secular country, and compares it with Nigerian situation. The work finally seeks to draw for Nigeria lessons from the Turkish practice that is founded on the need for harmony. Discovering too that many principles of law taken as immutable and sacrosanct in Islam are not after all eternal and unchangeable, the paper recommends legal reform, openness to religious dialogue, development of patriotic sense, and avoidance of fundamentalism, among other factors, as the panacea.

1. Introduction

There has been a controversy in Nigeria as to between the national constitution and the sharia which one is the supreme law. This controversy is no doubt founded on two different and sometimes conflicting jurisprudential foundations, namely, legal positivism and divine legalism. The former, recognizing human imperfection even in divine worship, claims that the constitution envisages and resolves upfront the crises that may result from the multi-religious differences and attitudes in Nigeria by enthroning a neutral posture in religious affairs in view of harmonious and peaceful co-existence. The latter, on the other hand, is convinced of a hard core divine source which no human legislation should contravene. This later jurisprudence is such that most adherents would choose to obey the divine dictate rather than human law irrespective of consequences. Yet, given the pluralism in religious beliefs, it appears no particular religion together with its legal system enjoys exclusive monopoly of divine revelation even as one system can and does often conflict with another.

The adoption of Islamic criminal regime in greater part of northern Nigeria[2] at the dawn of the third millennium precipitated a constitutional crisis that threatened to tear the country apart. Although no court was invited, nor did any court *suo motu* invoke its powers of judicial review to consider the constitutionality or otherwise of adopting criminal sharia, yet the failure to do so might not be unconnected with the negative consequences that may result from such judicial determination. However, the *Boko Haram* insurgency that has claimed thousands of lives and destroyed property worth huge amount of money especially in the north-eastern part of Nigeria appears to form a continuum with the Muslim desire to enthrone total sharia in Nigeria. The effect is that constitutionalism and the rule of law as understood in civilized nations are subverted. More so, the supremacy of the Constitution of the Federal Republic of Nigeria 1999 (as amended) is worse off for it. Many a provision of Islamic criminal legal framework is at variance with many constitutional stipulations. Yet, section 1 (1) of the Constitution states that "this Constitution is supreme and its provisions *shall* have binding force on the authorities and persons throughout the Federal Republic of Nigeria". This provision agrees with section 1 (3) which holds that "if any other law is inconsistent with the provisions of this Constitution, this Constitution *shall* prevail, and that other law shall, to the extent of the inconsistency, be void." It is indisputable that at least in common law tradition, the word '*shall'* denotes obligation and compulsion.[3] Hence, it appears that, given the

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[2] This part covers Zamfara, Jigawa, Kaduna, Kano, Katsina, Sokoto, Kebbi, Niger, Bauchi, Bornu, Yobe, and Gombe states.

[3] See the cases of *Katto v Central Bank of Nigeria* (1991) 9 NWLR (pt. 214) 126 at 147; *Okpala v Director General of National Museum and Monuments & Ors* (1996) 4 NWLR (pt 444) 587. But see also *Burknor- Macleans v Inlaks* (1980) 8 –

supremacy and (in)consistency clauses above, the Constitution would frown at any attempt to derogate from its prevalence in cases of conflict.

This paper examines the constitutionality of introducing the criminal aspect of sharia in Nigeria with a view to determining which of the Constitution and sharia is the supreme law. The study approaches this task by discussing the nature of constitution and constitutionalism, and inquiring into wider theoretical perspectives on the relationship between national constitutions and Islamic law. It further studies what obtains in Turkey and compares it with Nigerian situation. The work finally seeks to draw for Nigeria lessons from the Turkish practice.

2. Constitution and Constitutionalism

The meaning of the word 'constitution' is not immediately evident. In spite of the fact that it tends to attract a universal understanding, it is still not given to a generally accepted definition. The fact that every member of any given society, association or group comes to learn about a framework referred to as the constitution of that body means that the idea of the constitution is commonplace. However, as Nwogu observes, "the definition of a constitution varies from one writer to the other"[1]. Phillips views the term 'constitution' in two different senses, abstract and concrete.

> The constitution of a state in the abstract sense is the system of laws, customs, and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizens. A Constitution in the concrete sense is the document in which the most important laws of the constitution are authoritatively ordained.[2]

On the other hand, Wade holds that "a constitution normally means a document having a special legal sanctity which sets out the framework and principal functions of the organs of government of the state and declares the principle governing the operation of those organs."[3] Oluyede observes that "a constitution can be described as an expression, whether in documentary form or unwritten, of legal principles, rules, laws and in some cases conventions or customs in accordance with which a country is governed and by which its citizens are bound.…A constitution is expected to set up various organs of government and their functions in a broad sense".[4] It is therefore understood that the constitution of any association, group, society or state provides the framework or structure for its organization or governance. The constitution sets out the organs and the function of those organs in that society or association. According to Bilal, "a constitution is essentially a regulatory framework for political interaction, co-operation and conflict resolution mechanism in an agreed governance structure"[5]. A constitution establishes a social contract between the citizens and the state and defines legal and institutional contours for both the rulers and the ruled. A similar observation is made by the Blacks' Law Dictionary for which a constitution is "the fundamental and organic law of a nation or state establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise"[6]. This definition is further corroborated by Bilal:

> It is the constitution of a country from which the country draws its sovereignty and it is simply the supreme law of the land. In a federation, it is the constitution that lays down, without any ambiguity the roles, functions and limits of the centre and federating units. It is not so much that a constitution of a country determines its nature and character; but rather more importantly, that a constitution reflects a country's nature and character. It is a method through which a state is constituted or organized, and by which its physical nature or character is determined, ultimately determining a country's healthiness, strength and vitality.[7]

It therefore goes without saying that the constitution is a system or body of fundamental principles according to which a nation, state or body politic is constituted and governed.

As a concept of political and legal instrument, Wheare, like Phillips, notes that the term "constitution" may be understood in a wider and theoretical sense or in a narrower and concrete sense.[8] In the former sense,

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11 SC 1 at 23. In all these cases, the general rule is that the word 'shall' imports obligation. But the courts also held in the above cases that, in some circumstances, obligation is not intended.

[1] K.C. Nwogu, "Constitution and Constitutionalism in Nigeria; Imperatives for a Sustained Democracy", *Capital Bar Journal*, Maiden Edition, 2010, p. 58.

[2] O.H. Phillips, *Constitutional and Administrative Law,* 7th Ed. (Oxford: Oxford University Press, 1977,) p.5. Phillips observes that United Kingdom has no constitution in the concrete sense since it has no written constitution.

[3] E.C.S.Wade, *Administrative Law* (London: Longmans, 1977,), p.5.

[4] Oluyede, P.A.O., *Constitutional law in Nigeria* (Ibadan: Evans Brothers (Nigerian Publishers) Ltd., 1992), p.1.

[5] G. Bilal, "Constitutional Fallacies of Pakistan" in *Liberal Times*, Vol. xi/No. 4, p. 26. 2003. pp. 25 – 30.

[6] B. A. Garner, (ed.) (1999). *Black's Law Dictionary* (7th Ed. Minnesota: West Group), p.306.

[7] Bilal, p.26.

[8] See generally K.C. Wheare, *Modern Constitutions,* (London: Oxford University Press, 1960), Chapter 1.

"Constitution" may be viewed as the whole scheme whereby the country is governed. In this sense, the concept includes much else than merely the principles of law written or unwritten by means of which the machinery of state governance is operated. In the latter sense, however, the term is better understood as the principal or fundamental legal rules collected into a document or documents called the Constitution. Obiagba summarizes the various dimensions of the concept of constitution:

> The term "constitution" in the fullest sense has three dimensions: considered in the abstract it comprises the fundamental principles, rules and practices whereby a state is governed, and which defines and delimits the form and organs of its administration; how these organs or agencies interrelate with each other and how they affect the inhabitants of the state. In the concrete, the "constitution" is a formal document having the force of law which delineates and establishes the political and legal framework for the governance of a state embodying the consensus of its people and providing the source of powers of the government and at the same time limiting and regulating the powers and the forms of their exercise.[1]

More still, case law has lent credence to this regulatory and fundamental nature of a constitution. The Supreme Court of Nigeria has stated in the case of *Federal Republic of Nigeria v Ifeagu*[2] that "it is the constitution which as the organic law of the country declares in a formal, emphatic and binding principles, the rights, liberties, powers and responsibilities of the people, both the government and the governed'. Hence, the constitution is the framework or the fundamental structure on which the governance of a country is hinged. In *Independent National Electoral Commission & Another v Musa & 4 others*[3] the Supreme Court of Nigeria holds that "all powers, legislative, executive and judicial must ultimately be traced to the constitution". Again, in rather more elaborate articulation of the nature of a constitution in a given polity, the same Supreme Court in the case of *Attorney General of Ondo State v Attorney General of Federation & 35 Ors*[4] states thus:

> The constitution is an organic instrument which confers powers and also creates rights and limitations. It is the supreme law in which certain first principles of fundamental nature are established. Once that powers, rights and limitations under the constitution are identified as having been created, their existence cannot be disputed in a court of law, but their extent and implications may be sought to be interpreted and explained by the court in cases properly brought before it. All agencies of government are organs of initiative whose powers are derived either directly from the constitution, or from laws enacted thereunder. They therefore stand in relationship to the constitution as it permits of their existence and functions….

The effect is that a constitution is a framework for governance that provides for a state or country, a composite system of laws, customs and or conventions, which streamlines and defines the compositions and powers of the respective organs of the government of the state and the citizens. But more importantly, a constitution is what a country is.[5] It reflects the aspirations and thought processes of the individuals that make up the country.

Furthermore, Bilal is particularly impressed by the sanctity of a constitution. Referring to a constitution as "a piece of paper" which nonetheless, "in civilized countries, is no less than the political and legal Bible/Quran/Gita of the country"[6], he observes that "every coma, sentence, word and alphabet of the constitution is sacred and simply cannot be changed by a single individual at a press conference".[7] Although called a piece of paper, if it is written, a constitution is not a *mere* piece of paper as suggested by Haq who declared "What is the constitution but a piece of paper?[8] A constitution is therefore considered sacred and changes and amendments can only be brought about by people who have been chosen as the representatives of citizens. It is by no means a mere reflection of the whims of a single individual or group. Essentially, the constitution of a state or country is endowed with a special legal sanctity.

In a nutshell, the constitution is more fundamental than any particular law, and contains the principles with which all legislation must be in harmony. It is in this sense that the constitution contains or is often called, rightly or wrongly, what Kelsen in his pure-theory search for the fountain of law refers to as the *grundnorm.* In

[1] N.C. Obiagba, *The Ideological Foundations of the Nigerian Presidential Constitution, 1979*, A Doctor of Juridical Science (JSD) Dissertation submitted to the University of Virginia, 1982, p.61.
[2] *Federal Republic of Nigeria v Ifeagu* (2003) 15 NWLR (pt. 842) p. 184.
[3] *Independent National Electoral Commission & Another v. Musa & 4 others* (2003) 3 NWLR (pt 806) p. 157.
[4] *Attorney General of Ondo State v Attorney General of Federation & 35 Ors* (2002) 9 NWLR (pt. 722) p. 418.
[5] Bilal, p.25.
[6] Bilal, p.25.
[7] Ibid.
[8] Ibid.

Nigeria, this *grundnormism* is expressed in the doctrine of the supremacy of the constitution and in the (in)consistency clause contained therein. Section 1 (1), (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) states thus:

> 1 (1) The Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
> (2)The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
> (3)If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

Certainly, this jurisprudence of constitutional supremacy has often received judicial blessings in the Nigerian courts. In *Adisa v Oyinwola*[1], the court held that "the constitution of Nigeria is the basic law of the land. It is the supreme law and its provisions have binding force on all authorities, institutions and persons throughout the country". This is reiterated in *Attorney General, Abia State & 35 Ors v Attorney General, Federation*[2]:

> By virtue of s. 1 (1) of the 1999 Constitution, the provisions of the Constitution are superior to every provision made in any Act or Law and are binding on, and must be observed and respected by all persons and authorities in Nigeria….The Constitution is the grundnorm and the fundamental law of the land.

More still, in another case involving the same parties, namely, *Attorney General, Abia State & 35 Ors v Attorney General, Federation*[3], the Supreme Court stated the supremacy of the constitution more elaborately:

> The Constitution of the Federal Republic of Nigeria, 1999 is the supreme law of Nigeria. Without it no law can independently exist. This is clear from S.1 (1) thereof where it is provided that "this Constitution is supreme and its provisions shall have binding force on all the authorities and throughout the Federal Republic of Nigeria." And to emphasize the supremacy, it is further provided in S. 1(3) thereof that, "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

Furthermore, in *Fasakin Foods Nigeria v Shosanya*[4], the court held that "the Constitution is supreme; it is the organic or fundamental law and it is the *grundnorm* of Nigeria. The Constitution is the *fons et origo* and the foundation of all laws." What is therefore evident from the supremacy status of the Nigerian constitution is that it contains the guiding regulatory principles for governance. It is also the first and last port of call as to the distribution of powers in Nigeria.

Be that as it may, the two concepts of 'constitution' and 'constitutionalism' though related do not coincide with each other. While the constitution is more concrete and material structure of fundamental legal framework, constitutionalism is more a spirit of being ruled by the constitution. It must, however, be stated *ab initio* that the meaning of constitutionalism is also not self-evident. Nasution observes that "the failure to catch the meaning of constitutionalism could generate a confusion that regards constitutionalism as the same as constitution-based governance".[5] Thus, the concept seems to have been mystified by a fog of myths that nevertheless needs to be broken through. Far from being a conundrum or a mystification, a lot can be said about constitutionalism. At least, the idea of constitutionalism is not a mere subjection to the articles of a constitution. According to Nasution, "constitutionalism aims at limiting the power of the state to prevent it from being arbitrary; guaranteeing the freedom of the citizens; providing the basis for every citizen to be treated equally before the law and to have a dignified life; as well as protecting every group in society however small, from the domination of other groups".[6] Hosen is well aware of this later objective when he notes that "one of the aims of constitutionalism is to protect minority rights".[7] The result is that constitutionalism is not just being governed or regulated by the constitution. It is much more than that. It includes the respect and loyalty to the constitution. Constitutionalism is more a spirit of obedience to the general will that created the constitution rather than merely a mechanical adherence to the letters of the constitutional provisions. Hence, rather than to the letters merely,

[1] *Adisa v Oyinwola* (2002) 10 NWLR (pt. 674) p.116 at p.191
[2] *Attorney General, Abia State & 35 Ors v Attorney General, Federation* (2002) 6 NWLR (pt. 763) p.264 at p.479.
[3] *Attorney General, Abia State & 35 Ors v Attorney General, Federation* (2003) 4 NWLR (pt. 809) p.124 at p.177.
[4] *Fasakin Foods Nigeria v Shosanya* (2006) 10NWLR (pt. 987), p.126, at p. 148.
[5] Nasution, A.B. (2009). "Opinion: Post-Constitutional Amendment in Indonesia" in *The Jakarta Post*.Retrieved from http://www.thejakartapost.com/news/2009/02/28/postconstitutional-amendments-indonesia.html.
[6] Ibid.
[7] N. Hosen, "Religion and the Indonesian Constitution: A Recent Debate", *Journal of Southeast Asian Studies,* 36 (3), 2005, p. 424, pp. 419 – 440. http:// country studies.us/sudan/65.htm. (12/05/13).

constitutionalism, as Nwogu thinks, "means and/or connotes adherence to the principles of the constitution".[1] It implies compliance with the law, but essentially the supreme law of the land, the constitution, from which other laws derive their validity. Constitutionalism involves the rule of law but more precisely the rule of and by the constitution.

Nevertheless, while the above spells out how the rule of constitution should affect a civilized nation, constitutionalism as a concept originates from within the confines of the relation of the arms of government with the constitution. Oraegbunam states that "constitutionalism is the theory that governmental powers are limited by the prior dictates of the constitution".[2] The theory therefore applies only in those enclaves where the constitution is strictly enforced regardless of the contrary wishes of the different arms of government. Yet in much more specific way, constitutionalism relates to the legislative arm of government where it implies a constitutional curtailment on the legislative power of the lawmaker. No doubt, this is to circumvent the possibility of the lawmaker legislating that henceforth the constitutional restraints on his powers no longer exist. This theory is surely a fall out of the English debate on the supremacy of the constitution and the sovereignty of the parliament, wherein from a number of decided cases, the constitution was held to maintain its supremacy over the parliament and other arms of government. Thus, in a nutshell, constitutionalism is the doctrine of respect and obedience to the constitution precisely as anterior to the legislature and superior to the government[3].

Moreover, there is no gainsaying that constitutionalism and the rule of law are demands before every genuine democracy or civilized governance. This is well articulated by the Commonwealth Secretariat thus:

> Despite the diversity, the legal systems of the member states share one common feature, namely, the fundamental principle that, in a democracy, all powers of government and administration must be conducted in accordance with the law and that every holder of public office is subject to the law. The principle of government according to law operates at two levels. First, at the level of constitutional law, in very many states, the constitution is placed in a position of supremacy over all other forms of law, including the laws made by parliament itself. If there is any conflict between the terms of the constitution and the contents of an Act or Ordinance, the courts must give priority to the constitution. The second level at which the principle of government according to law operates, is that of administrative law. This branch of law applies where powers have been granted by legislation to central or local government, or to other public bodies whether to provide services needed for the benefit of the whole community or to place under public control (by means of regulation) the economic activities of private persons or companies[4]

It is against the above backdrop of the sanctity and supremacy of the constitution on the one hand and the importance of constitutionalism on the other hand, that this study undertakes to critically examine the implications of introducing criminal aspect of sharia in Nigerian legal system.

3. Sharia and National Constitutions: Theoretical Framework

Discussions on the attitude of Islam and its sharia to national constitutions and laws are myriad. Studies show that while some of these discourses demonstrate the supremacy of Sharia over and against national constitutions, others see the need for constitutionalism which Islamic ethos and pathos should respect. It may be apt to consider these views one after the other. There is no gainsaying that scholars who take the former view as observed above hinge their arguments on the sovereignty of Allah who is believed to have made and promulgated sharia for human beings to follow willy-nilly. According to this position, sharia is seen as supreme over all man-made laws including the constitution. Fadl associates this opinion with what he refers to as the *hakimiyya* (dominion or sovereignty) debates which are attributed to the puritans for whom in Islam dominion properly belongs to God alone, who is the sole legislator and law maker.[5] Therefore, any normative position that is derived from human reason or socio-historical experience is fundamentally considered illegitimate. The only permissible positions are those derived from the comprehension of the divine commands, as found in divinely inspired texts. Hence, all moral norms and laws ought to be derived from a sole source: the intent or will of the Divine.

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[1] Nwogu, p.68.
[2] I.K.E Oraegbunam, "Separation of Powers in Nigeria Democracy: Need for Constitutional Reform ", *Legislative Practice Review*, Vol. 2 No. 1, 2010, p. 17.
[3] Ibid.
[4] Cited in P. Nnaemeka Agu, "The Position and Role of a Judge in a Democratic State" in C.C.Nweze (ed.), *Justice in the Judicial Process (Essays in Honour of Honourable Justice Eugene Ubaezuonu, JCA),* (Enugu: Fourth Dimension Publishers, 2002), p.218.
[5] K. A. Fadl, (2010). *The Human Rights Commitment in Modern Islam*. Retrieved on 12-08-10 from http://www.musawah.org/docs/pubs/wanted/wanted-KAEF-EWpdf, 2010, p.121-122.

It is further noted that "in the imaginary constructs of Muslim jurists, shariah was seen as the bulwark against whimsical government and as a precondition for a just society".[1] Hence, "sharia law is not the law of the state but the law that limits the society".[2] On the powers of the state in relation to Sharia, it is argued that "the state or the ruler cannot make or formulate shariah law".[3] Fadl puts it succinctly:

> The state could pass and adopt rules and regulations, as might be necessary in order to serve the public interest, but only as long as such rules and regulations did not violate shariah law. Any rules or regulations enacted by the state did not constitute a part of shariah law, but were treated as merely administrative in nature. Administrative laws, or what might be called executive laws, were unlike shariah law, considered temporal and mundane; they were a legitimate means for achieving specific contextual ends, but such laws had no claim to divinity and had no presidential value beyond their specific context and time.[4]

The domino effect of Fadl's observation is that placed side by side, shariah law would overrun the provisions of the constitution of any nation.

In the same vein, in his discussion on Islam in relation to the idea of state law, Abdillah reports the Muslim claim to the effect that "Muslims should first obey God, then the prophet, and then those who have authority (ulu-al-amr), to the degree that their decisions and policies are in accordance with God's injunction (koran) and his prophet's tradition (hadith) as stipulated in Koran (4: 59)".[5] The implication is that Muslims believe that ultimate authority or sovereignty does not lie with human authorities, but in God's law, known as sharia.[6] Similarly, Khadduri and Liesbesny while observing that sovereignty is based on the laws derived from God (Allah) refer to this state of affairs as "divine normocracy".[7] This view is corroborated by Maududi who uses the expression, "theo-democracy" to explain the limited popular sovereignty of Muslims under the suzerainty of God.[8] Abikan (2003: 166) in disapproving of the supremacy of the Nigerian constitution arrogates primacy to sharia:

> The position under the shariah is entirely different from the above presentation (that is, the supremacy of the constitution). Under the shariah, the Ultimate Norm is Allah (SWT) who gives validity to all other norms governing the affairs of not only a particular nation but the universe at large. He created Adam and all generations of men and women spanning from Him (Quran 4:1; 2:21. 55:3 etc) He created heavens and earth and all other creatures and regulates their affairs by His laws.[9]

Abikan observes that "these commands and laws have been from the same source since the first generation of men and women on earth through the ages, to the time of prophet Muhammad who brought the seal of the message and Divine legislation vide the Holy Quran"(sic).[10] It is equally tenaciously held that "Allah does blot out or confirm what He pleases: With Him is the mother of the Books".[11] Comparing the Quran as the main primary source of sharia with the Nigerian constitution and international laws, Abikan notes thus:

> Quran takes the lead in the hierarchy of the sources of shariah and attained the position of De jure Grundnorm with other sources of Islamic law taking validity from it. Just like any other constitution the Nigerian constitution is curtailed by territorial jurisdictional limit and this is understandable from the fact that it derived its validity from the "will" of Nigerians only. This also means that it cannot have a universal focus, much as the effort of the world and regional bodies like the United Nations and Organization of African Unity, to provide a global or regional legislative regime cannot. The recent activities of world's powers especially America pursuing her will despite the disapproval of the UN and the whole world is a pointer in this direction. This divergence of peoples' will calls for a universal norm especially on matters that affect the right of the creator of the universe – Allah.

[1] Ibid, p.129.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] M. Abdillah, "Ways of Constitution Building in Muslim Countries" in Krawietz, B. & Reifeld, H. *Islam and the Rule of Law: Between Sharia and Secularization*. Berlin: Konrad-Adenauer-stiftung, 2008, p.53.
[6] Ibid.
[7] Khadduri & Liesbesny, *Law in the Middle East*. Washington.1955, p.16.
[8] S.A. Maududi, S.A. (1960). *Islamic Law and Constitution*. Lahore: Islamic Publications, 1960, pp. 147-148.
[9] A.I. Abikan, "Constitutional Impediments to the Total Enthronement of Sharia in Nigeria" in Z.I.Oseni, (ed.), *A Digest of Islamic Law and Jurisprudence in Nigeria*, 2003, p. 166.
[10] Ibid.
[11] Ibid.

> Quran as interpreted by the prophetic sunnah did set down a universal principle as affecting the right of God, self, other people and of all creatures….[1]

Maududi corroborates this opinion:

> The laws within the prerogative of Allah and His prophet and even Ijma are universal and permanent. They are made for the general good, peace, morality and decency of the whole world and are as such immutable. Such laws are found in the acts of worship and punishments for grievous crimes – Hudud. The legislator's role has to do with making laws for the welfare of the people ensuring that all the God given resources kept in the trust of the Government are harnessed to better the lot of the citizenry fulfilling the aim and purpose of man's existence.[2]

No doubt, the above views have enormous implications for the entire idea of nation-state. Hence, what attitude does Islam have about the concept of state-hood and national consciousness since it claims that the jurisdiction of sharia is universal and cuts across nations? Abdillah defines a nation state as that which "developed within the frame of a certain population, territory, government, and sovereignty".[3] In turn, Sills describes a state as "a geographically delimited segment of human society united by common obedience to a single sovereign".[4] Certainly, this issue constitutes a point of difference between the classical and contemporary Islamic scholars. While the former believe Islam to be one united family that cuts across the entire global nation (the *ummah*), the latter accept "the concept of the nation-state, which all Muslim countries have implemented, while maintaining the unified Muslim *ummah* (nation)".[5]

Be that as it may, it seems that the idea of primacy of sharia vis- a-vis national constitutions is not compromised by many Islamic scholars. Abikan observes:

> The sanctity of the shariah is attributable to its divinity and where human reasoning is called to bear as in Ijma, Qiyas and Ijtihad it is required to be under the bearing light of Quran and Sunna. A full application can only thrive under this atmosphere and the situation of placing its application under the supremacy of any "people's will", desire, or constitution is bound to result in trivialization or complications.[6]

Hence, emphasizing the limitations of human laws, it is observed that "the legislators at every given time and age only have their reasoning, experience and sometimes people's will as working tool in the determination of the laws for good governance and the fallibility of these put together results in the several condemnation and instability that trail such their laws".[7] On the other hand, it is held that "under the shariah, Allah in His sovereignty is the ultimate law giver --his attribute of knowledge of his creatures qualifies Him to make laws affecting them generally. His laws were revealed through Prophet Muhammad who possessed the accurate knowledge of their interpretation.[8] In the same vein, Zubair argues that "proscription of certain acts as offences and prescription of the punishment for them are perfect rights of Allah under the shariah. They accommodate no remission, emendation nor relaxation of their rules".[9] This is perhaps what explains the absence of the doctrines of *nolle prosequi*, prerogative of mercy, and executive immunity under sharia[10], which provisions are clearly contained in sections 174,211,175,308 of Nigerian constitution. Particularly, on executive immunity, Majid notes that "under the sharia the Khalifah (caliph) did not think of himself as an extra-ordinary person, independent of the law".[11] A Qadi "was free to give decision against them as he was free to give it against any common man". Although Majid's opinion does not exactly represent the idea of executive immunity under the Nigerian constitution which pivots only around arrest, summon, detention and prosecution for criminal offences and for certain specified office holders, yet Majid's position exposes the concept of equality under the law in relation to sharia. More so, Ibrahim is of the view that supports the supremacy of sharia. According to him, "the sharia in an Islamic state is the supreme law of the land. It is to be the constitution of the Islamic state; this means that the government, the people in the state, Muslims and non-Muslims alike would be subject to the

[1] Ibid, p.167.
[2] S.A. Maududi, *Human Rights in Islam*. London: The Islamic foundation, 1983, p.32
[3] Abdillah, p.54.
[4] D.L. Sills, (ed.) *International Encyclopedia of the Social Sciences, 15*. London: Macmillan, 1981, p. 150.
[5] Abdillah, p.54.
[6] Abikan, p. 168.
[7] Ibid, p. 172.
[8] Ibid.
[9] A. Zubair, "Re-introduction of Sharia courts in Nigeria: Some Perspectives". In Ezeilo, J. N., Ladan, M. T. & Afolabi – Akiyode, A.(eds.) *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*. Enugu: Women's Aid Collective & others, pp. 228-246.
[10] Abikan, pp. 175-178.
[11] K. Majid, *The Islamic Conception of Justice*. Baltimore: The John Hopkins University Press, 1984, p. 35.

supreme law of the sharia".[1] No wonder Schacht writes that:

> …Islamic law is the totality of God's commands that regulate the life of every Muslim in all its aspects; it comprises on an equal footing ordinances regarding worship and ritual, as well as political and legal rules, details of toilets, formulas of greeting, table manners, and sick room conversation. Islamic law is the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself.[2]

Surely, the above position that takes sharia as the *gundnorm* from which all other laws take their validity forms a direct affront to legal positivism which constitutes, as it were, the legislative mainstay of modern statehood. Perhaps it is the reality of the problems that is engendered by the above mindset that gave rise to constitutionalism in Islamic enclaves. This brings us to the consideration of the second group of scholars in relation to their attitudes to national constitutions.

Abdillah remarks that "the modernization of law has partly or fully adapted the legal and political system of the majority of Muslim countries to the western political and legal system".[3] Hence, it is observed that "the majority of Muslim countries introduced a constitution (*dustur*); some introduced basic rules (*nizam asazi*) and some had no basis at all".[4] Abdillah notes that this practice is not new. According to him, "the prophet himself established the Medinah State in 627 by issuing the "Medinah constitution"[5] (*mithaq al-Madinah*, considered by observers to be the first written constitution in the world)". Hence, "the prophet was entrusted with a mandate from God to guide his people (*ummah*) in their life so that he is not only an executive of God's orders but also a legislator (*al-shari*)".[6] It is further observed that "although Islam legitimates the necessity of a constitution as basic rules in the life of the state, as practised by the prophet in the form of "Madinah Constitution", yet almost all Muslim countries in fact enacted their constitutions only after independence after the end of World War II, and not all of them even enacted a constitution".[7] Saudi Arabia, for instance, had no constitution in the modern sense until the early 1990s.[8] Although, Abdillah sees "the idea of constitutionalism as identified with secular thought", he affirms that "in most Muslim countries, it has been adjusted to or even based on Islamic principles".[9] Hence, "most constitutions in the Muslim countries stipulate the position of Islam in the state, but they promote popular sovereignty rather than the sovereignty of God".[10] Thus, constitutions in Muslim countries are classified into six groups:

1. Those that stipulate that Islam is the state religion, the head of state should be Muslim, and that the Sharia is national law, such as Saudi Arabia, Iran, Pakistan, Sudan, and Libya.
2. Those that stipulate that Islam is the state religion, the head of state should be Muslim, and the Sharia is the major source of legislation, such as Syria.
3. Those that stipulate that Islam is the state religion, and the Sharia is the major source of legislation, such as Egypt, Kuwait, Qatar, and the United Arab Emirates.
4. Those that stipulate that Islam is the state religion and the head of state should be Muslim, such as Tunisia, Algeria, and others.
5. Those that stipulate that Islam is the state religion such as Jordan, Malaysia, and others.
6. Those that do not mention Islam in their constitution, as in the case of Turkey and Indonesia.[11]

It is shown from the above classification that the majority of Muslim countries did not fully enact the sharia, and most of them have even developed their national law in the mold of western law. Only the first group can be called "Islamic states" or Islamic countries", while the others are called "Muslim states" or "Muslim countries". All of them however enacted Islamic family law except Turkey, which enacted fully secular family

[1] B.Y. Ibrahim, "Application of the Sharia Penal Law and Justice System in Northern Nigeria: Constitutional Issues and Implications" in Ezeilo, J. N., Ladan, M. T. & Afolabi - Akiyode, A. (Eds) (2003). *Sharia Implementation in Nigeria*…2003, p.135.
[2] J. Schacht, *An Introduction to Islamic Law*. Oxford: Oxford University Press, 1964, p.392.
[3] Abdillah, p. 52.
[4] Ibid.
[5] Ibid, p.53.
[6] Ibid.
[7] Ibid, p.56.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.

law.[1]

On a further development, Naeem identifies three sets of facts that play a crucial role in "making and shaping constitutional law in countries with an Islamic character". These are:

(1) a state normally shapes its constitution by constitutional law making, transferring itself into a constitutional state in the process. Thus, the constitutional system of a state incorporates three aspects: constitutional law, constitutional policy and constitutional reality…..

(2) As a religion, Islam prescribes certain principles that its adherents must obey absolutely. From the constitutional-law point of view, however, its different schools of law and its interpretations of governmental issues make it less a faith, and more of an ideology that mainly or partially serves to control the constitutional law of a state. Thus, Islam is transmuted into a constitutional principle that is not merely formal in nature but actually exerts a substantive influence on constitutional law.

(3) By definition, countries with an Islamic character are those in which the reality of constitutional law in some way or another either reflects Islam as a holistic concept or the principles of the Islamic faith in general or, alternatively, in the interpretation of one of the Islamic schools of law….[2]

Again, instead of outright classification of constitutions in Islamic states like Abdillah, Naeem holds that "reference to Islam is made in the constitution of these states in a variety of forms"[3]:

> …the state may be designated as "Islamic", Islam may be named as "the religion of the state", and / or the Islamic shariah may be identified as "the main source" or merely as "one of the main sources" of legislation. Some constitutions, especially the more recent ones, contain more stringent legal formulations that forbid the legislature to make any laws that conflict with the principles of the Islamic faith.

With reference to the codification of human rights, Naeem affirms that "the constitutions of Islamic countries contain lengthy enumerations of human rights that, apart from few peculiarities cannot be distinguished from those named in occidental constitutions".[4] Naeem, however, adds that "these fundamental rights are incorporated in the constitutions of Islamic countries only within the framework of a basic Islamic order that is formally established either by a religious clause, and / or by a codification of civic duties of a religious nature or with a religious background".[5] The effect is that the authorities and especially the judiciary will regard fundamental rights as second class constitutional provisions wherever one of the Islamic principles is involved.[6] It is observed that "the incorporation of a religious clause in the relatively modern constitutions of the Islamic countries constitutes a break with the development of constitutional concept"[7], and advocates for the abolition of religious clauses "so that they do not substantively affect any fundamental right".[8] Naeem concludes that "as long as this is not the case, any such order must be denied recognition as a constitution".[9]

Be that as it may, Maududi holds that "what we term as Islamic constitution is in reality an unwritten constitution. It is contained in certain specified sources, and it is from that we have to evolve a written constitution in keeping with the present day requirements…."[10] It seems that the term "unwritten" as used by Maududi has exactly the same meaning it has in England which constitution is described as unwritten. It certainly does not mean that the governing laws are not written anywhere. Rather, it means that they are scattered in different sources some of which are written, some not. In the same manner, Islamic constitution derives from the contents of the Koran, the Sunnah, the conventions of the right-guided caliphs, and the rulings of Great Jurists.[11] What is further remarkable with Islamic constitution is that in deciding to put the constitution in writing, the Muslim state will simply gather the laws from these sources and then codify them article-wise

[1] Ibid, pp. 56-57.
[2] N. Naeem, "The Influence of Religious Clauses on Constitutional Law in Countries with an Islamic Character" in Krawietz, B. & Reifeld, H. (Eds.). *Islam and the Rule of Law: Between Sharia and Secularization*. Berlin: Konrad, Adenauer, Stiftung, 2008, p. 71.
[3] Ibid, p. 73.
[4] Ibid, p.75.
[5] Ibid, p. 75.
[6] Ibid, p. 76.
[7] Ibid, p. 77.
[8] Ibid.
[9] Ibid.
[10] Maududi, 1960, p. 16.
[11] Ibid, pp. 3-5.

without bordering to re-enact them to suit modern circumstances.[1] Oraegbunam observes that "this is exactly what happened in the case of Zamfara State of Nigeria".[2]

Nonetheless, in relation to Islamic attitude to Nigerian constitution, Babajo states that "the constitutional provision on the supremacy of the constitution over any other law in the country can only be tolerated by a true Muslim under the principle of necessity and not on personal conviction and belief".[3] He however suggests that "since Muslims in Nigeria have agreed to be in the Federal Republic of Nigeria, they must be prepared to implement sharia within the constitutional limits".[4]

4. Sharia and Nigerian Constitution 1999

The introduction of Islamic Penal Codes is one of the many controversies confronting Nigerian democracy. Since its inception, adoption of full Sharia law has been criticized as unconstitutional. The political stage has witnessed varying passionate arguments for and against its continued existence in a multi-cultural and diverse nation like Nigeria. The inability of the government to tactfully resolve the issue has led to many violent clashes between adherents of rival religions. Thousands of lives have been lost as a result, and huge amount of property have been destroyed. Against this backdrop, many have continued to ask the questions. Is there any legal or constitutional foundation for the enactment of Sharia law in Nigeria? Does the House of Assembly of any state in the federation have the legislative competence to make such a law? And if the answer to the latter is no, then what ought to become of a law so passed? This paper argues that the sharia codes enacted in these northern states are unconstitutional and should, by their very nature, be null and void.

So much has been debated on the constitutional justification for the legal enforcement of the Islamic Legal code in Nigeria. On the one hand, proponents of the Sharia claim that the 1999 Constitution of the Federal Republic of Nigeria provides the legal foundation for its introduction. They aver that such inference complies with the wordings of Section 38 (1) & Section 275 (1) regarding the right and freedom to "manifest and propagate one's religious beliefs, teachings, practices, and observances." They further argue that these sections of the constitution grant any state of the federation exclusive discretion in establishing a Sharia Court of Appeal. Most of their critics strongly disagree, albeit with little recourse to the constitution, the ground norm of our legal system.

Because this issue borders on the legitimacy of a law passed by the House of assembly of a state, it is important to explore the subject of the supremacy of the Constitution, the document from which all 36 states of the Federation derive their powers. Section 1(1) of the Constitution declares the supremacy of the 1999 Federal Constitution, stating, in no equivocal terms, that its supremacy is over and above all persons and authorities. In subsection (3) of the same section, the Constitution emphasizes the effect of any law found to be inconsistent with the provisions of the Constitution, warning that: "…that other law shall, to the extent of the inconsitency, be void." Therefore, the joint effect of Section 1(1) and Section 1(3) is to render void and of no legal effect, any law that contradicts the spirit and intent of the Constitution. But when, and how can a law like the Sharia code which was passed by a competent legislature, be annulled to keep with the spirit of the constitution?

A law can be *ultra vires* (literally, beyond the law) and also a nullity by virtue of either its content or by the procedure of its passage. In the case of the former, it is called substantive *ultra vires* while in the latter case, it is procedural *ultra vires*. Procedural *ultra vires* occurs when a bill being deliberated upon by the National Assembly or by the House of Assembly of a state is declared null and void by the court because the procedure stipulated for the successful passage of the bill is ignored. The court could also take such actions even after the bill has been passed into law and the court is satisfied that the procedure of its passage is not in accordance with the law. In the same vein, a bill already passed into law may be impugned based on its content. In that case, the court, after finding that such a law is *in pari materia* with relevant provisions of the Constitution or other enabling law, declares it null and void (substantive ultra vires). It therefore behooves the legislative arm, which under a democratic milieu is responsible for making laws, to discharge that function with the utmost diligence and care without recourse to any ancillary considerations.

On the question of the constitutionality of the Sharia, it should be pointed out that Sharia is given some recognition in the Constitution. Section 6 which defines judicial powers also establishes Sharia Courts of Appeal among other courts of the federation. By this provision, it bares mention that there cannot be a Sharia Court of Appeal (an appellate court) without Sharia courts, at the state level from which appeals might rise to the former. Following this logic, therefore, it is safe to say that the Constitution, by creating the Sharia Court of Appeal, has, though not explicitly, reserved a discretion for states to create their own Sharia courts since the appellate court

[1] Ibid, p.2.
[2] I.K.E.Oraegbunam, *An Examination of the Full Application of Sharia Law and Nigerian Constitutional Democracy*. Master of Arts Dissertation in Religious Studies, Nnamdi Azikiwe University, Awka, 2006, p. 59.
[3] B. Babajo, "Constitutionalism, Democratic Governance and Sharia in Nigeria". In *Ahmadu Bello University Zaria Journal of Islamic Law*, Vol. IV – V, 2007, p. 120.
[4] Ibid.

lacks original jurisdiction to hear most of the cases to be brought before it, and also because the cases are of such a nature that they cannot be entertained in a regular court (Magistrate or High Courts). Thus on the face, the Constitution upholds the application of the Islamic legal Code. But to what extent?

Section 6(5) (f) & (g) (replicated in section 260, 275, 262, and 277) of the Constitution states in clear and unambiguous terms the jurisdiction of the Sharia Court of Appeal, which by implication applies to all state Sharia Courts. A close study of Section 277(2) (a) – (e) reveals that Sharia courts shall be competent to decide only questions of Islamic personal law which cases were extensively enumerated in paragraphs (a) through (e) to include, among other things, marriage, guardianship of infants and persons of unsound mind, founding, wakf, gift, will, and succession. However, Section 277 (2) (e) requires that for that provision to apply, the parties must be Muslims and they must have requested the court at first instance to determine their case in accordance with Islamic personal law. The inference to be drawn from this is that the ultimate question of jurisdiction and application rests with the parties who must first determine whether or not they intend their trial to be by Sharia. Interestingly, nothing in the above section or the accompanying subsections suggests that members of other faiths are mandated to appear before a Sharia court (the only exception is when such a party, in spite of his religious beliefs, voluntarily opts to be tried under Sharia law). Nor is a Muslim so obligated if he or she indicated to the contrary.

Furthermore, the constitution provides for the creation of a Customary Court of Appeal for any state that so desires (the definition of "states" here also includes the Federal Capital Territory). The effect of this is to equate Sharia Courts of Appeal with Customary Courts of Appeal. Since the jurisdiction of the Sharia Court of Appeal is limited to Islamic personal law – religious and moral laws which guide the social relations of Muslims – it becomes clear that Sharia courts are to Muslims what customary courts are to non-Muslims. Their jurisdictions are limited to civil matters, to the social and customary aspects of the lives of the disputing parties.

It is contestable, therefore, for the House of Assembly of a state to ascribe criminal jurisdictions to its Sharia courts. This is a clear act of affront to the Federal Constitution and cannot even be justified by the opening words of Section 277 (1): "The Sharia Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it by the law of the state….exercise such appellate and supervisory jurisdiction in civil procedures….." It is submitted that it is false to assert that the constitution empowers the states to expand the jurisdiction of their respective Sharia Courts beyond and above that ascribed to them in civil matters to include criminal matters. It also bares mention that the "other jurisdiction" to be so conferred must be such that could be exercised in proceedings regarding Islamic personal law which the court is competent to adjudicate in the first place in accordance with subsection (2) of Section 277. Evidently, subsection (1) does not extend the jurisdiction of the Sharia courts beyond the limits of subsection (2). The wording of Section 277 is clear, unequivocal, and ought to be given a literal interpretation. An important rule of constitutional interpretation states that wherever particular words are accompanied by general words, the general words (in this case "*in addition to")* must be limited to the same kind as the particular or enumerated words. The legal maxim for this principle is *ejusdem generis* (of the same kind or nature). Thus when the constitution says, "…in addition to such other jurisdiction", it refers to the particular, original jurisdiction conferred on the Sharia courts in matters enumerated in subsection (2). Since all the enumerated cases are civil in nature, by implication Sharia courts are exempt from criminal proceedings and incompetent to hear any criminal suit.

The legality of Sharia courts to adjudicate over criminal matters could also be evaluated from the stand-point of the principle of federalism. Federalism is a system that upholds and recognizes the legislative supremacy of the National Assembly over the House of Assembly of the respective states, ensuring the smooth running of the various governments in the polity and also preventing conflicts that may arise between federal and state legislatures. The latter is achieved through the provision of two legislative lists known under the constitution as the *exclusive* and *concurrent legislative lists*. The position of the constitution on a law that may be the subject of conflict between the two legislative bodies is very clear. Section 4(5) provides: "If any law enacted by the House of Assembly of a state is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency by void. "Such a law therefore, will have the same effect as one made contrary to Section 4 (7) (c), that is to say, matters with respect to which a House of Assembly is not empowered to legislate in accordance with the provisions of the constitution.

Additionally, under federalism, legislative practice is guided by the doctrine of *covering the field*. Under this doctrine, where the federal legislature makes a law whose wording is so wide as to be construed as covering an entire subject, it should be understood that the legislative body intends to "cover the whole field", that is extending its power to all matters incidental and supplemental to the subject in question, and this precludes any state House of Assembly from legislating on the same subject. It is thus important to note that where this is breached, Section 4(5) will apply, rendering such a law null and void. However, if the law by a state House of Assembly is merely repeating the provision of an earlier law passed by the National Assembly, the former shall be suspended and will cease to be of any legal effect as both laws cannot operate concurrently.

In the states that the Sharia Code is being enforced today, there appears to be an obvious conflict between the Penal Code and the Sharia Penal Code. Since the Sharia Code acknowledges the free will of non-Muslim parties to resent the application of Sharia in the course of their trial, it goes without saying that the Penal Code, which was in operation long before the Sharia came into force, is still applicable. As a result, there are two separate sets of laws for the residents of those states. While it is applauded that non-Muslims can exercise their free will in this regard, it would be better appreciated if the same right is extended to Muslims who are, by virtue of their religious affiliations, compelled to trials by Sharia. This obvious discrimination runs contrary to both the intent and spirit of the constitution and certainly in contradistinction with a major tenet of federalism – *equality before the law*.

Additionally, many have argued that Section 38 (1) which provides for freedom of thought, conscience, and religion clearly justifies the enactment of the Sharia Penal Code. According to those supporting this claim, since the constitution gives some latitude to an individual to freely practise his religion, it is right for the same individual to elect to be guided by the Sharia code because true Islamic virtues can only be attained through the Sharia. This reasoning has led them to criticize section 10 which they say contradicts Section 38 (1). The present researcher humbly disagrees with this view.

Section (10) which prohibits state religion is designed to prevent the imposition of one religion or religious belief on the adherents of other religions. A breach of this section would necessarily deny the spirit and intent of section 38 (1). Additionally, section 38 (1) seeks to promote freedom of worship, and this includes the freedom to change one's religion or belief, either alone or in community with others. This is the true meaning of section 38 (1) and no contradiction should be read into section 10 as a result.

Based on the above inconsistencies with the Constitution, it is safe to conclude that the Sharia legal code is, by virtue of section 1 (3) of the Constitution, null and void. A kindred matter to the issue of constitutionality is that of jurisdiction. Jurisdiction is the authority that a court has to exercise judicial powers. While the judicial powers within the scheme of the doctrine of separation of powers are vested on the courts generally, the authority to exercise such powers by an individual court is a matter of jurisdiction. Not all courts are vested with jurisdiction on all matters. Different courts have jurisdiction on different subject matters, different persons, and within different geographical confines. Jurisdiction of a court is vested either by the constitution or by the law that established the court to the extent allowed by the constitution. Jurisdiction is so fundamental that if a court assumes jurisdiction on a matter in which it lacks jurisdiction then no matter how well conducted, its proceedings would come to naught[1], and which issue can be raised for the first time even at the Supreme Court.

Despite several recent Islamic attempts to widen the scope of Sharia application and consequently the jurisdiction of Sharia Courts in Nigeria, the 1999 constitution has confined it only to limited aspects. Outlining the constitutional courts, section 6 (5) of the constitution mentions, *inter alia,* the Sharia Court of Appeal of the Federal Capital Territory, Abuja[2] and Sharia Court of Appeal of a State[3] respectively. Again, sections 260 and 275 of the constitution provides for the establishment of the above respective Sharia Courts of Appeal. The constitution is equally explicit in delineating the jurisdiction of the Sharia Courts of Appeal. Hence, in very similar wording, both sections 262 (2) and 277 (2) provide for the jurisdiction thus:

> …the Sharia Court of Appeal shall be competent to decide –
>
> (a) any question of Islamic personal law regarding marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant ;
>
> (b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
>
> (c) any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim,
>
> (d) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

This jurisdiction is however set out for the purpose of subjection 1 of section 262 and 277 respectively. The

[1] *Benue State v Umar* (2008) 1 NWLR (pt 1068) 311; O. F. Ogbuinya, *Understanding the Concept of Jurisdiction in the Nigeria Legal System*. Enugu: Snaap Press Ltd , 2008
[2] Paragraph f.
[3] Paragraph g.

subsection states:

> ***The Sharia Court of Appeal of the Federal Capital Territory (or of a state) shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly (or a law of the state), exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.***[1]

The implication of the above provisions is that the jurisdiction granted to the Sharia Courts of Appeal by the constitution is restricted not only to civil justice but further to its personal aspects such as matters of marriage, divorce, inheritance, gift, custody of infants, etc. The whole realm of criminal and penal justice is therefore excluded.

It is again needless to argue that the entire gamut of the provisions must be read together with section 10 which provides that "the Government of the Federation or of a state shall not adopt any religion as state religion". Hence, the clause, "in addition to such other jurisdiction as may be conferred upon by Act of the National Assembly or law of a state", as the case may be, must be so read. Otherwise, as Nwabueze argues, 'if the meaning is such that the state can at random add to the jurisdiction of the Sharia Courts of Appeal without any restriction, then the provision in section 10 would virtually be rendered nugatory".[2]

Moreover, it seems that the words in subjection 2 of both sections 262 and 277 to the effect that "for the purpose of subjection 1 of the sections the Sharia Court of Appeal shall be competent to decide" only those matters from (a) to (e) constitutes a further limitation of jurisdiction.[3] However, it has been argued that pursuant to the doctrine of *existing laws* as provided for under section 315 (3) of the constitution, other aspects of Islamic civil law may be entertained by the Sharia Courts of Appeal, but certainly not criminal justice which practice have long since been abolished in Nigeria in relation to Sharia and Customary jurisprudence.[4] This means that any legislative body that adds the criminal and penal aspects to the jurisdiction of the Sharia Court of Appeal of its enclave is clearly acting *ultra vires*, and that legislative act is bound to be unconstitutional, and consequently null and void.

There is no doubt that state legislatures can establish courts and vest them with jurisdiction via the establishment laws.[5] Hence, Zamfara and other northern states are constitutionally empowered to establish Sharia courts and clothe them with jurisdictions. But the real point of controversy is whether the power to give or add jurisdictions can be exercised in a manner that would be contrary to the secular spirit and philosophy of the constitution. The constitution limits the jurisdiction of Sharia Court of Appeal to "questions of Islamic personal law" within civil proceedings. It states:

> The Sharia Court of Appeal of a state shall, in addition to such other jurisdiction as may be conferred upon it 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 according with the provisions of subsection (2) of this section.[6]

Subsection (2) contains issues on validity or dissolution of marriage, guardianship of infants, family relationship, gift, will, succession, matters concerning infants, prodigal or person of unsound mind who is a Muslim, and so on. However, Zamfara State, for instance, depended on the expression"… in addition to such other jurisdiction as may be conferred upon it by the law of the state…" to add criminal jurisdiction to the jurisdiction of her Sharia Court of Appeal and vest same among other things to her newly created Sharia courts.[7] It is this singular factor that continues to raise dust over the recent practice of Islam in Nigeria today. It is argued that if the state's power to add or invest jurisdiction to courts include the investment or addition of criminal jurisdiction, then the principle of state secularity in section 10 of the constitution in rendered nugatory.[8] This is all the more reinforced by the fact that crime unlike civil wrong is an offence against and punishable by the state.[9] So the enforcement of Sharia criminal justice would invariably mean enforcement of an Islamic offence against the state whose citizenry is comprised of not only Muslims but also Christians and members of other religions no matter their percentage. It is surely the need to avoid this anomaly that informs the jurisprudence of

[1]Constitution of the Federal Republic of Nigeria, 1999 (as amended), sections 262(1) &277(1).
[2]B.O. Nwabueze, "Freedom of Religion: the Religious Neutrality of the State under the Constitution and the Sharia Controversy" in *Bulletin of Ecumenical Theology*, vol 13, 200, p.110.
[3] Ibid.
[4]C. O. Okonkwo, C. O. (2002). *Criminal Law in Nigeria*, 2nd Ed. Ibadan: Spectrum Books Ltd, 2002, p. 25; section 36 (12) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
[5]Constitution of the Federal Republic of Nigeria1999 (as amended), sections 4 (7), 6(4), 277.
[6]Ibid., section 277 (1).
[7]Zamfara State Sharia Courts (Administration of Justice and Certain Consequential Changes) Law No. 5, 1999, sections 42 & 43.
[8]Nwabueze, 200, p. 109.
[9] A.O. Obilade, *The Nigerian Legal System*. Ibadan: Spectrum Books Ltd, 2008, p.5.

the 1999 Constitution in restricting the jurisdiction of Sharia Court of Appeal and Customary Court of Appeal to questions of civil proceedings. We are sure this would also apply to Christian canonical courts if they were enshrined in the constitution. It would thus be needless to clothe the courts of first instance with criminal jurisdiction if the immediate appellate courts lack jurisdiction to entertain the appeal.

There is no doubt that the above controversy over the validity or constitutionality of the adoption of Sharia criminal law is partly based on the time-honoured fight between natural law and positivism. In spite of all the rapport between naturalism and religious ethos and mores, positivism is still relevant in pluralistic societies like ours in which there are not only multi-ethnic but also multi-religious sensibilities and opinions. It is therefore to engender harmony, peaceful co-existence and peace that the constitution is couched the way it is.

Yet in 1999, Zamfara State of Nigeria in contravention of this constitutional provision extended the jurisdiction of its Sharia Courts and Sharia Court of Appeal to include criminal proceedings.[1] And by virtue of section 1 (3) of the 1999 constitution, the *Sharia Courts Law of Zamfara State 1999* ought to be declared unconstitutional, null and void to the extent of its inconsistency with the constitution. Instead, the courts have declined their function of judicial review in this regard, which irresponsibility has led to many other Northern Nigerian States joining the Sharia chorus. The *domino* effect is that such penal practices as amputation of hands, *haddi* lashes, stoning to death, often meted to Muslim women, as a consequence of criminal proceedings in Zamfara and some other Northern States constitute a menace to Nigerian constitutionalism.

5. Sharia in Turkish Constitutionalism

Turkey is a nation with population of over 70 million, of which more that 90 percent are Muslims.[2] Yet Turkey's constitutionalism and state affairs are built on secularity principles. Unlike Egypt, Pakistan, Jordan, and Bangladesh where the majority of the population wants sharia as the only source of legislation, Turkey like Indonesia and Korea insists that sharia should not be a source of any legislation.[3] Turkish constitution does not mention the word "Islam". In fact, Otherman includes Turkey as one of the few Muslim-majoritarian states that are democracies.[4] Certainly, the founders of the Turkish Republic, who were inspired by Western constitutionalism and its philosophy, aimed at establishing a modern state based on secularity. Freedom of religion was recognized in Turkey by Article 75 of 1924 constitution in order to meet up with one of the basic requirements of secularity principle. The Article provides that "no one shall be criticized because of his / her philosophical belief, religion and sect. all religious ceremonies are free provided that they are not in conflict with security, moral traditions and norms of laws". Yet, the constitution contains some other provisions that contradict the secularity principle. Article 2 states that "the religion of the state of Turkey is the religion of Islam". Article 26 referred to the implementation of sharia laws among the powers of Turkish Grand National Assembly. Again, article 75 regulating the oath of the President contained religious terms. While these provisions were abolished in 1928, secularity was in 1937 adopted as one of the basic characteristics of Turkish Republic. The constitutional order of the Republic was thus entirely secularized.

Subsequent constitutions maintained this secular posture. Article 2 of 1961 constitution mentioned secularity among the basic principles of the Republic. Article 19 of same provides for freedom of religion and defined its scope in detail:

> All individual shall have freedom of conscience, religious beliefs and conviction. All worships, religious rituals and ceremonies, which are not in conflict with public order, general morals or laws adopted for these purposes are free. No one shall be forced to worship, participate in religious rituals and ceremonies and to declare his / her religious beliefs and convictions. No one shall be criticized because of his / her religious beliefs or convictions. Religious education and instruction are subject to individual's own desire, and, in the case of minors, to the request of their legal representatives. No one shall abuse or exploit religion or religious feelings or things held sacred by religion for the purpose of even the partial establishment of the fundamental social, economic, political or legal order of the state upon religious

[1]Zamfara State Sharia Courts (Administration of Justice and Certain Consequential Changes) Law No. 5, 1999, sections 5 (1) (b), 42 & 43.

[2] B. Krawietz, "Justice as a Pervasive Principle in Islamic Law" in B. Krawietz, & H. Reifeld, *Islam and the Rule of Law: Between Sharia and Secularization*, Berlin: Konrad-Adenauer-stiftung , p. 37.

[3]D.Mogahed, *Islam and Democracy: Muslim World Residerts See No Conflict Between Religious Principles and Democratic Values*, Retrieved on 31-05-14 from http://www.muslimhestfacts.com/mwf/105643/islam-democracy.aspx; S. Ryu, *Limits on Secularism in Korean Constitution*. Korea: Pusan University of Foreign Studies, 2009. (pdf).

[4]S. Otterman, *Middle East: Islam and Democracy,* 2003. Retrieved on 23-12-13 from http://www.cfr.org/publication/7708/.

> principles, or obtaining political or personal benefit in any manner whatsoever. The persons who violate this prohibition or encourage others for this purpose shall be punished in accordance with criminal law. Associations shall be closed down by competent courts, and political parties shall be closed down by the constitutional court.

In addition, Article 57 of the constitution on the restrictions over the activities of political parties provided an effective safeguard for the secular character of the Republic:

> The statutes, programs and activities of political parties shall be in accordance with the principles of democratic and secular republic which is based on human rights and basic principle of indivisibility of the state with its territory and nation. Parties that violate this provision shall be permanently closed down.

Furthermore, Article 153 of the constitution shields with judicial immunity the revolutionary laws establishing secularity in the social life of Turkey:

> No provision of the constitution shall be construed or interpreted as rendering unconstitutional the Reform laws… which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic, and which were in force on the date of the adoption by referendum of the constitution of Turkey.

It is noteworthy that although the most significant innovation of the 1961 constitution was to establish a pluralist democracy including the strengthening of the supremacy of the constitution through the establishment of constitutional court, the reform laws were excepted from the review of constitutionality due to their historical and political import.

More still, the 1982 constitution did not differ from its predecessor in relation to freedom of religion and secularity. Articles 2 and 24 thereof which provide for secularity and freedom of religion respectively are almost a verbatim copy of Articles 2 and 19 of 1961 *grundnorm* which contained the same subject matters. Similarly, though more elaborately, Articles 68 and 69 of the 1982 constitution protected the secularist nature of Turkey. These articles regulate the freedom to establish political parties and restrictions over their activities. In fact, paragraph 4 of article 68 which was amended in 2001 states:

> The statutes, programs and activities of political parties shall not be in conflict with the independence of the state, its indivisibility with its territory and nation, human rights, the principle of equality and the rule of law, national sovereignty, the principles of democratic and secular Republic; and shall not aim at establishing or degrading a class or group dictatorship of any kind; shall not encourage the commitment of crimes.

Thus, the democratic and secular principles are so important to Turkey that there is a constitutional penalty stipulated in cases of violation by any political party. The fifth paragraph of Article 69 as amended in 2001 provides that "if the statutes and program of a political party are found in conflict with the fourth paragraph of article 68, a prohibition ruling shall be made". Depending on the gravity of unconstitutionality of the activity or program, the amended Article 69 authorizes the court to deprive that political party partially or entirely of state funding. Further still, the 1982 constitution in its Article 173 reiterates the special protection for the Reform laws, which shall not be subject to the judicial review of the constitutional court.

Presently, with the above provisions, Turkey has undoubtedly a secular constitutional and legal order. Freedom of religion is guaranteed and protected. This does not mean that such religious freedom is absolute and unlimited. Like in Nigeria, security, public order, public morality, public health and public safety constitute reasonable derogations from religious freedom in Turkey. Hence, in Turkey unlike in Northern Nigeria, freedom of religion is not abused to create a theocratic political order or to violate the fundamental rights and freedoms of people who belong to different religious creeds or hold no religious beliefs.

The net effect of the secularity posture is that sharia and Islamization are not an issue in Turkey. Taspinar has adumbrated four major structural reasons why Turkey would not succumb to political Islam.[1] First and foremost, Turkey has a tradition of state supremacy over Islam that predates the modern republic. For Taspinar, even in the Ottoman Empire, the body of laws (*Kanuns*) promulgated by the sultans was enacted outside the realm of sharia and had no direct Islamic justification. These laws were made based on rational rather than religious principles in the spheres of public, administrative and criminal laws as well as state finances. It is observed that "this strong state tradition is what differentiates Turkey from Arab Middle East".[2] This difference is further expatiated:

[1]O. Taspinar, "Islamization is not the Issue in Turkey", 2011. Retrieved from http://www.brookings-edu/opinion/2010/0301-Turkey-Islamization-Taspinar.aspx. Accessed 21/04/2014.
[2] Ibid.

> In the Arab world, the state is a product of Islam. In Turkey, the state predates Islam. One should also add that while the modern Arab state is an artificial product of post-colonialism, the modern Turkish state is an organic formation with a strong imperial legacy. As a result, Arab states desperately need religion for political supremacy. The Turkish state, however, needs religion only for social harmony.[1]

Secondly, the country's long history of democratization which goes back to 19th century constitutionalism is another reason why Islam and its sharia would not overrun Turkey. Taspinar holds that "democracy is the best antidote to political Islam".[2] He believes that "in the absence of freedom of expression, freedom of the press, free political parties and free elections, Islam and the mosques become the only outlets for dissent". It is noted that in such an authoritarian context, Islam becomes only language of resistance against tyranny, and "the solution to everything "that unsurprisingly, is the motto of the Muslim Brotherhood which is the most powerful Islamic movement in the Arab world. But this situation seems to be a vicious cycle as practical Islam may not be the best thing that happens to human rights. Taspinar thanks God "that Turkey managed to avoid this vicious cycle with the beginning of multi-party democracy in 1946".[3]

The third reason why Turkey will not witness the regime of sharia laws is the existence of a vibrant middle class that benefits from globalization, capitalism and democratic stability. Turkey is blessed by the fact that it does not have vast oil and gas resources. For Taspinar, energy abundance in the Arab world is a curse that paralyses the growth of democracy and capitalism. Thus, "instead of oil and gas, the Turkish economy is fueled by its highly productive and export-oriented "Anatolian tigers". This point is succinctly put:

> This upwardly mobile, devout Anatolian bourgeoisie has a vested interest in political stability and economic growth. Turkey's entrepreneurs dream about the EU and maximizing their profits, not about an Islamic revolution that will bring shariah.[4]

The fourth reason why fundamentalism will not take root in Turkey is paradoxically religious: Turkish Islam is a healthy dose of Sufism. Nicholson defines Sufism as "the apprehension of divine realities".[5] Sufism is therefore mysticism in Islam which "brings a social, cultural and mystical dimension to Turkish Islam at the expense of a radical political agenda".[6] Hence, it seems Turkish Islam is more interested in education, media and civilizational dialogue than pure politics.

Yet in spite of the foregoing arguments and constitutional frameworks, Lupp observes that "Turkey clearly represents a society where democratic forces, Islamic forces and a military committed to upholding the secular state through draconian suppression of Islamic elements have all been competing to determine the destiny of the country".[7] Hence, while religious forces have campaigned largely for greater freedom to express their Islamic beliefs, the military has curtailed democracy largely to prevent Islamic fundamentalism from gaining the upper hand. These are antithetical to democratic forces in Turkey that have argued for full democracy.[8] All the turmoil in this predominantly Muslim nation goes to show that there is still significant debate within Turkish Islam about its proper role in government. This is corroborated by the fact that Turkish people have increasingly supported the Islamic oriented parties, especially the Justice and Welfare Party (AKP) that is today becoming thrilling party".[9] Yet it is noted that the existence of democratic culture and government's political will in Turkey as in Indonesia is the source of its being one of the most democratic countries in the Muslim world as demonstrated by the effective electoral control of the government as well as the free elections and more freedom.[10] In fact, conclusively, Reifeld maintains that "Turkey offers the best-developed model of religious freedom being assured in a state that is democratic and basically neutral in terms of religion".[11]

6. Can Nigeria Learn From Turkey?

Turkey is clearly a secular state which idea does not aim at inaugurating a religionless or anti-religious society. Turkish secularity's principal aim is the enhancement of peaceful co-existence of its citizens who respectively

[1] Ibid.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] R.A.Nicholson, *The Mystics of Islam*. London: Rontledge & Kegan Paul Ltd, 1979, p.1.
[6] Taspinar, Op. cit.
[7] J.S. Lupp, *Human Rights and Islam*, 2004. Retrieved on 09-08-14 from http://www.crvp.org/book/series04/IVA.
[8] Ibid.
[9] Abdillah, p.58.
[10] Ibid.
[11] H. Reifeld, "Developing Democracy and the Rule of Law in Islamic countries" in Krawiets, B. & Reifeld, H. *Islam and the Rule of Law: Between Sharia and Secularization*. Berlin: Konrad-Adenauer-Stiftung, 2008, p. 132.

profess various religions. *Secularity* is distinct from *secularism*. Scholars such as Ryu[1], Omotola[2], Li-ann[3], Haruna[4], Chukwumaeze[5], Jamo[6] and others who use the terms *secularism* and s*ecularity* as if they are synonymous with each other, must check their semantics. Secularity is simply a safeguard against anarchy and conflict in a pluralistic society.[7] It does not matter how much percentage of a population that practise a particular religion. The freedom and conscience of the minorities are as important as those of the majority[8]. No doubt, part of the argument of those who hail the adoption of Sharia criminal law in the North is that the Muslims constitute the overwhelming majority of the population of the respective Sharia states. Assuming without conceding this to be true, yet evidence abounds that some secular states remain so in spite of the teamingness of the population of particular religious adherents, Muslim or Christian' in those states. Illustrations gathered from Statemaster Encyclopedia[9] may be helpful. Tunisia harbours 98 percent of its population as followers of Sunni Islam, and yet it maintains its secularity. In the Americas, such countries as Bolivia, Ecuador, Brazil, Honduras, Venezuela in which well over 90 percent of the respective populations are Catholics, neutrality in religious matters remains the practice. This is equally true in some European countries. Over 95 percent of the population of Armenia constitutes adherents of the Armenian Apostolic church, and 98 percent of Moldova's population makes up members of Eastern Orthodox Church, and yet the constitutions of Armenia and Moldova respectively provide for their secularity. Similarly, article 2 of Turkey's constitution insists on the country's neutrality to religious matters even as more than 99 percent of the population is Muslim. Therefore, the fact that there may be over 90 percent Muslims in Zamfara or Sokoto state is surely not sufficient reason to Islamize the state. An eye must be had to how any practice would affect the about 10 percent non-Muslims whose freedom of thought, religion and conscience is guaranteed by the constitution.

Besides, life experience teaches that state enforcement of sharia in all the plenitude of its injunctions under the Koran, cannot in the multi-religious society of Nigeria co-exist with a truly federal form of political association. A federal union, such as is established by the Constitution of Nigeria gives every citizen of the country an interest and a stake, not only in the government of his state, but also in the government of every other state in the federal union, notwithstanding that he is not a voter in the latter state. But it is clear that state enforcement of sharia would certainly impinge on the citizenship rights conferred by membership in the federal union: the right to move about freely throughout the territory of the union and to live wherever he chooses without molestation based on his religious application[10], to earn a livelihood in his chosen place of residence by means permitted by law, and the right to be treated alike by the state with other citizens, especially in a matter like religion, so fundamentally important to his life. Thus, the judicial dictum of Justice Douglas of United States Congress is quite germane:

> … freedom of movement is important for jobs and business opportunities- for cultural, political and social activities- for all the commingling which gregarious man enjoys…. It is the very essence of our true society, setting us apart. Like the right of assembly and right of association, it often makes all the other rights meaningful- knowing, studying, exploring, conversing, observing and even thinking[11].

There is therefore no doubt that any action by a state government impinging on these citizenship rights through the enforcement of the sharia under the Koran would have the practical effect of excluding from the state a non-Muslim Nigerian citizen who, for religious or other reasons, cannot live under the strict injunctions of,

[1] S.Ryu, *Limits on Secularism in Korean Constitution*. Korea: Pusan University of Foreign Studies, 2009. (pdf).
[2] J. S. Omotola, *Secularism and the Politics of Religious Balancing in Nigeria*. Mowe: Redeemer's University Redemption City.2009. (pdf).
[3]T.Li-ann, *Religion & the Secular State*. Retrieved on 07-10-13 from http://www.we-are-aware.sg/2009/05/28/religion-the-secular-state/. 2009.
[4]B. A. Haruna, 'The Application of the Sharia Penal System: Constitutional and Other Related Issues' in J. N.Ezeilo, , M. T. Ladan, & A. Afolabi – Akiyode, (eds.) , *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice* (Enugu: Women's Aid Collective & others, 2003) p.154.
[5] U.U. Chukwumaeze, "The Legality of the Shariah Courts: Analytical Study of the Recent Actions of Zamfara State Government" in *UDUS Law Journal*, vol. 1 No 2. 2000, pp. 3-8.
[6] N.M.Jamo, 'The Nature and Scope of the Freedom of Thought, Conscience and Religion under the Section 38 of 1999 Nigerian Constitution', (2007-2009) 2&3 *Ahmadu Bello University Zaria Journal of Private and Comparative Law*, p.8-11.
[7] See generally Ikenga K.E. Oraegbunam, 'Sharia Criminal Law and State Secularity Principle in Nigeria: Implications of Section 10 of 1999 Constitution (as Amended)', *Journal of Law, Policy and Globalization,* Vol 28 (2014), 39-52. <http://www.iiste.org/Journals/index.php/JLPG/article/view/14978> accessed on 21/1/15.
[8] I. Zarifis, "Rights of Religious Minorities in Nigeria" in *Human Rights Brief*, vol. 10 Issue 1. Retrieved on 7th April, 2014 from *http:* //www.sttemaster.com/encyclopedia/secular-state, 2010, n.p.
[9] http://www.statemaster.com/encyclopedia/seularstate.
[10]Section.41 of 1999 Constitution.
[11]*Aptherker v. Secretary of State* (1963) U.S. Supreme Court Judgement.

and punishments prescribed by the Koran, such as the injunctions against operating a hotel or a drinking place, the consumption of alcoholic drinks, certain modes of dressing, and the punishments it prescribes therefor.

Hardly can it convince anybody that these prohibitions and punishments apply only to Muslims without affecting the non-Muslims. For it hardly makes any sense to prohibit a Muslim from operating a drinking place while leaving a non-Muslim free to do so in the same area or street or to punish a Muslim cow thief by chopping off his arm, but not to do the same to a non-Muslim cow thief. The argument that non-Muslims are exempt from the application of sharia law under the Koran may to some extent be sustained as concerns Islamic personal law or sharia civil law generally but certainly not as concerns sharia criminal law. Therefore, a political arrangement in which Muslims and non –Muslims in the same state are governed by different criminal justice systems is simply inconceivable, and would be undesirable even if workable at all.

Yet the above is happening in a country in which all of its federating units, including the sharia enclaves, are maintained and sustained by oil revenue from the predominantly non-Muslim part, revenue that constitutes over 90 percent of the nation's earnings. Thus, such practice frontally and violently assaults the spirit of the multi-religious federal union whereby some states adopt as part of the laws of the states, the holy book of a particular religion, with its legal prescriptions and injunctions as well as punishments it prescribes for their infringement. This is particularly pathetic in a country where a large number of citizens resident in the states, even if in the minority, are not adherents of that religion.

It may now be *apropos* to discuss this issue in relation to Nigeria. Surely, none of the Sharia Penal Codes of any of the relevant states in Nigeria criminalizes apostasy.[1] This legislative omission is perhaps due to the constitutional guarantee of religious freedom in Nigeria. Section 38 (1) of the 1999 constitution states that "every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief…" Hence, to explicitly create an offence of apostasy in the Sharia Penal Codes would be in direct collision with the clear constitutional provision. Yet, that does not mean that apostasy enjoys acceptability in Nigerian Islam. Implicitly, apostasy is still punished extra-judicially. First and foremost, it must be noted that the version of Islamic Jurisprudence, namely, the Maliki School, prevalent in Nigeria is a strict type. Hence, Ibn Malik, the founder of the school, lays the foundation that execution of apostates is legal. He relates that the Messenger of Allah said, "If someone changes his religion, then strike off his head".[2] This is also recorded in Bukhari[3] wherein the Prophet Muhammad is cited to have said: "if a Muslim discards his religion, kill him"[4]. Therefore, it is unlikely that Nigerian Islam would fold its hands and watch its adherents leave the fold. Secondly, it is doubtful that the omnibus provision enshrined in paragraph E (ii) of the Introduction to the Sharia Penal Code Law 2000 of Zamfara state does not habour within itself the extra-codified sharia causes and offences such as apostasy. The paragraph states:

> Except as aforesaid, the provisions of this law shall not affect any right of action which any person would have had against another, if this law had not been passed: *nor shall the omission from the Shariah Penal Code of any Penal provision in respect of any act or omission which before the time of the coming into operation of the Penal Code constituted any actionable wrong affect any right of action in respect thereof* (emphasis mine).

This provision can thus be construed to mean that the Shariah Penal Code is not exhaustive with regard to the offences that can be prosecuted in Zamfara State and other sharia enclaves that copied *ipsissima verba* the Zamfara Code. One obvious implication of the extra-territorial effect of the above provision is that offences such as apostasy though not created in the relevant codes, may be prosecuted by whatever means. Thus, the bid to do so may not be unconnected with the incessant religious crimes especially in the northern part of Nigeria, and in which mainly non-Muslims and their property are on the receiving end. For instance, in September 2004, a female Christian student at Ahmadu Bello University Zaria was accused of blasphemy which led to lethal classes between Muslims and Christian students. In 2002, two men were brought to trial in Zamfara State for converting from Islam to Christianity[5]

Other instances where the Islamic law on apostasy is indirectly enforced include the fact that public school students in many parts of northern Nigeria are subjected to mandatory Islamic religious instructions. This is carefully ensured by the executive refusal to employ teachers of Christian religious knowledge in many northern schools. As if these are not enough, there are reports by Christians in Zamfara State that the State

[1] A. B. Ahmed, "Administration of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospects" in Ezeilo, J. N., Ladan, M. T. & Afolabi-Akiyode, A. (eds.), *Sharia Implementation in Nigeria: Issues & Challenges on Women's Rights and Access to Justice*. Enugu: Women's Aid Collective & others, 2003, p. 169.

[2] J.M.Arlandson, Apostasy in the Quran, Traditional and Islamic Law, 2010. Retrieved from http://www.answering_Islam.org/Authors/Arlandson/apostasy.htm. Accessed on 25/03/114.

[3] V4 B52 N260.

[4] Wikipedia, the free encyclopedia, 2009.

[5] http://www.ncbuy.com/reference/ country/humanrights.html? Code = ni & sec – 2c. Accessed on 13-05-14.

government restricted the distribution of Christian religious literature.[1] Furthermore, although it is claimed that sharia laws do not apply to non-Muslims, yet some non-Muslims have been affected by the implications of the social provisions of the laws. Separation of sexes on public transportation and institutions, the enforcement of the *hijab* rules (dress code), religious discrimination in matters of employment and admissions, the unnecessary harassment by state-sanctioned private and local vigilante sharia enforcement groups known as *Hisbah* who were vested with full powers of arrest and prosecution[2] are some other evidences to the fact that one must be punished for not adhering to Islam.

Surprisingly, however, the above measures are taken by Muslims in Nigeria who claim that by doing so, they are exercising their right to religious freedom.[3] Arguing that Sharia is a total package guiding the life of a Muslim from cradle to grave, adherents hold that any attempt to deny them the enforcement of any of the above practices and more would tantamount to denying them their right to religious freedom. Ahmad is a protagonist of this view:

> Few non-Muslims realize that shariah is not a matter of choice for believing Muslims. Islam is a total package; and a community cannot be Muslim by choosing between the three aspects of Islam: a monotheistic faith, practical rituals (prayer, fasting, charity, etc), and law or shariah (marriage, inheritance, contract, crime, etc). By accepting the Islamic faith, one is obliged to submit and let all the three categories apply to his entire life. Salvation, according to Islam, depends on the three jointly.[4]

Yet this Islamic conviction and attitude does not augur well with both the constitutional guarantee of religious freedom that includes the right to change one's religion or to be irreligious, on the one hand, and the constitutional claw back or restriction to exercise of rights including right to exercise religious freedom, on the other hand. Hence, section 45 (1) of the Constitution of the Federal Republic of Nigeria 1999 states thus: "Nothing in section 37, 38, 39, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society, in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons".

Therefore, according to this provision, the Muslims' enforcement of fundamental right to religious freedom which is claimed as founded on section 38 would readily be curtailed by the rights and freedoms of non-Muslims. Hence, it is a cardinal principle of common sense that one's exercise of right ends at the point another's begins. One must therefore endeavour not to infringe on the rights of another in the bid to enforce one's own. It goes without saying that the right to religious freedom is quite basic. Khan argues that "freedom of faith and religion is meaningless without the freedom to charge one's faith".[5] Thus, it is a pristine principle of religious freedom that it does not mean merely the freedom to have a faith but also the freedom to change one's religion or belief.[6] While it is correct to observe with Shafaat that "a person cannot be compelled to enter Islam"[7], it is strange for him to argue that "a person who is a Muslim is subject to laws of Islam that include those that require death for leaving Islam" [8]or any punishment whatsoever on account of that. This study is equally not in sympathy with Ahmad's perception of freedom of worship according to which "once one accepts Islam or decides to become a Muslim, one is subject to all the rules prescribed by the religion"[9] including those governing apostasy. It is ever valid to say that belief in any religion should be voluntary and a private matter. One may therefore ask the question of how strong a religion is if it has to force its adherents to stay under penalty of

[1] J. Harnischfeger, *Democratization and Islamic Law: The Sharia Conflict in Nigeria.* Chicago: University of Chicago Press, 2008.

[2] http:www.ncbuy.com/referenc/country/humanright-html?codeni&seem2c. Accessed on 13-05-14.

[3] This is partly what led to division in the Sudan. See generally IK.E. Oraegbunam, 'Nigeria, Sharia Praxis and National Integration: Any Lessons from the Sudan Experience?', *Journal of Politics and Law Research*, vol. 2 no. 4, pp. 6-25. <http://www.eajournals.org/journals/global-journal-of-politics-and-law-research-gjplr/vol-2issue4october-2014/nigeria-sharia-praxis-national-integration-lessons-sudan-experience> accessed on 21/1/15.

[4] A. Ahmad, *Living with Conflict: Shariah and One Nigeria.* Address at Sawyer-Mellon Seminar on Sharia and Conflict in Nigeria, Emory University, Nov. 7, 2002.

[5] M.H.Khan, *How Divine are Shariah Laws?* Retrieved on 13-06-14 from http://www.muktomona.com/Articles/mozammel/devine_sharia060206.htm

[6] International Humanist and Ethical Union (IHEU) (2003). *Freedom of Religion and Belief in Islam*. Retrieved from http://www.iheu.org/trackback/2885. Accessed on 25/03/14.

[7] A. Shafaat, *The Punishment of Apostasy in Islam*, 2006. Retrieved from http://www.islamicperspectives.com/Apostasy1.htm. Accessed on 20/03/14.

[8] Ibid.

[9] W.A.W. Ahmad, *Islam on Freedom of Religion*, 2006. Retrieved from http://www.bismikaallahuma.org/articles/2006/islam-on-freedom-of-religion/. Accessed on 20/03/14.

death[1] or under any penalty for that matter. Again, the mitigated Islamic approach of "respecting' other monotheistic faith, Judaism and Christianity, and recognizing them as "protected minorities" that are not equal with Islam[2] is not even acceptable. Such a view that regards other religions as inferior is no doubt antithetical to religious pluralism which undergirds the principle of religious freedom.

7. Conclusion

This paper had carried out a study on the relationship between Islamic law and constitutionalism with particular reference to Nigeria. Its particular concern is about which one of the legal regimes should enjoy the pride of place. The results of the study appear to culminate to irreconcilability. This is perhaps due to the existence of two parallel mindsets. Hence, although there may be admixture of the natural and divine in both legal systems, yet the existential ratios of the mixture are disproportionate. Constitutionalism posits the existence of a higher law that is however grounded on human reason in which notion there is a robust idea of natural law, on the one hand, and a relatively weak idea of divine law. Thus, there is a preponderance of the human. The effect is that in constitutionalism, legal naturalism and positivism agree for at least once.[3] In contrast, the Islamic law is founded on a relatively weak idea of natural law, on the one hand, and a robust notion of divine law, on the other. The higher law of the man-made constitution thus has the potential to clash with the higher law of God, the sharia. And insofar as the sharia is understood to contain specific and immutable legal rulings, this clash seriously limits the ability of Muslim reformers to revise the sharia according to their understanding of what good government and human rights require.[4]

Yet the Arab Spring has ushered in a new round of constitution making in Muslim states. Whether this will also bring a new era of constitutionalism is a different question. However, many a Muslim-majority state has embraced the idea that a man-made constitution is an essential feature of modern governance. Nearly all have promulgated formal constitutions, and most began drafting a constitution as one of their first tasks immediately after independence. Although it is one thing to promulgate a constitution and quite another to inculcate constitutionalism for which one can observe that constitutionalism in Muslim countries is rather bleak, yet there are certainly some encouraging signs that perhaps constitutionalism is developing in states such as Indonesia and Turkey. Both nations are overwhelmingly Muslim but have long pursued officially secular politics. This paper has just compared Nigerian Islamic practice with the Turkish experience.

The emergence of the above state of affair may be upon the understanding that in human activities including religion, nothing is completely divine or perhaps totally human. Studies show that Sharia as a legal system had a long process of development in which input of man cannot be gainsaid or jettisoned. In fact, for Ozigbo, Sharia would rather be referred to as 'a sacred law' than as a divine law. He argues that "Islam has no formal commandments corresponding to the Judeo-Christian precepts".[5] The Sharia "is not a code since it was never codified in the strict sense"[6]. In order to further buttress the preponderance of the human participation in the making of Sharia, it is noted that "the Quranic law and other injunctions laid down by the prophet were in no way comprehensive. With time, it became necessary that a full system of law be evolved to supplement the rudimentary guidelines of the Quran and the hadith for the daily needs of the faithful… Muslim laws at the time were being formulated by judges eager to fit the legal system into the precepts and spirits of Islam".[7] In its systematized form, Ozigbo argues that sharia is largely a human product, having been put together by a long process of theologizing and screening by eminent Muslim theologians and jurists of the 8th and 9th centuries A.D. It seems it was not until the 11th century that the outlines of the law were fully set and formalized. In the same vein, Fadl is convinced that "although it is claimed that Shariah comprised a set of objectively determinable divine commands the fact is that the divine law was the by-product of a thoroughly human and fallible interpretative process".[8] Accordingly, it is affirmed that "whatever qualified as a part of Shariah law, even if

[1] International Humanist and Ethical Union (IHEU) (2003). *Freedom of Religion and Belief in Islam*. Retrieved from http://www.iheu.org/trackback/2885. Accessed on 25/03/14.

[2]Retrieved on 13-06-14 from http://www.nytimes.com/2005/09/16/opinion/16iht-edtibi.html?_r=I

[3]The theoretical foundation of constitutionalism is the natural law tradition of the ancient Greeks and Romans, particularly the Stoics. The natural law tradition flowed from the Romans into the works of the great philosophers. Enlightenment philosophers, particularly Locke, Montesquieu, and Rousseau, shifted the emphasis in natural law thinking from duties to rights.

[4] This clash has ancient roots in the Islamic intellectual tradition. Perhaps from the time of the prophet Muhammad himself, the Qur'an was viewed in part as an expression of divine law. The Qur'anic text may not explicate a constitution for the Islamic state, but it does contain verses on a variety of subjects, ranging from marriage and inheritance to war and peace, that have legal import. Some injunctions are preceded by the words *kutiba 'alaykum* ("it is written for you"), suggesting that God is directly legislating for humanity.

[5] I.R.A. Ozigbo, *An Introduction to the Religion and History of Islam*. Enugu: Fourth Dimension Publishers, 1988, p.47.

[6] Ibid.

[7] Ibid, p.48.

[8] K.A. Fadl, *The Human Rights Commitment in Modern Islam*. Retrieved on 12-08-14 from

inspired by exhortations found in religious texts, was the product of human efforts and determinations that reflected subjective socio-historical circumstances".[1] More still, it is noted that even as "the perfection of Shariah is in the mind of God", it is nonetheless observed that "anything that is channeled through human agency is necessarily marred by human imperfection".[2] As such Fadl finds out that "sharia as conceived by God is flawless, but as understood by human beings it is imperfect and contingent".[3]

Moreover, given the idea of constitutionalism, there ought not to be obvious or inherent incompatibility between a truly democratic constitution and Islamic political theory. It is doubtful that there is a full-blown notion of an Islamic state in Islamic political theory; in reality there is nothing of the sort, in either classical or modern Islamic thought. The primary source of all Islamic thought, the Qur'an, is conspicuously lacking in any specifics about the structures of an Islamic state or about government in general. Similarly, the *hadiths*, or collected traditions of the prophet Muhammad, provide little detailed guidance on politics. More details about the Prophet's political views and behaviour are found in the early biographical literature, including intriguing references to an agreement that Muhammad concluded with Muslim and Jewish groups shortly after his migration from Mecca to Medina.

In Nigeria, therefore, there is need for Islamic praxis to discourage religious fundamentalism, preach against fanaticism and literalism, promote Islamo-legal reform, inculcate spirit of patriotism, and subject itself to the rule of law. It is been suggested that notwithstanding the provision of section 10 of the 1999 Constitution which provides for religious neutrality in national affairs, the enactment of sharia penal codes is within the legislative competence of the States even though these codes contain some provisions which are in direct conflict with some provisions of the Constitution. A constitutional review is therefore urgent so as to reflect the multi-religious and multinational nature of the country in such a way as to confer clear and unambiguous power on any State in Nigeria to promulgate any law to further the rights of the people to pursue their religious beliefs without infringing on the rights of others. After all, constitutionalism is the idea that the political order is subject to a *grundnorm* that is beyond arbitrary or capricious human changes, whether they are suggested by an autocrat, an oligarchy, a democratic mob, or even a duly constituted legislature.

http://www.musawah.org/docs/pubs/wanted/wanted-KAEF-EWpdf. 2010Pp. 122-123.
[1] Ibid.
[2] Ibid, p.139.
[3] Ibid.

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