

CHALLENGES TO RELIGIOUS HUMAN RIGHTS AND JURISPRUDENCE IN NIGERIA.

This address must start with a note of congratulation to the organizers of this symposium. At this stage in the evolution of the world, at particularly with Nigeria celebrating its 50th Independence anniversary just three days ago, this type of event will never lose moment in terms of the degree of importance it holds for us as individuals and for man-kind.

As you are all aware the topic of my intervention, "Challenges to Religious Human Rights and Jurisprudence in Nigeria", is quite intriguing, thought provoking and complex. Law and religion are two of the most common denominators of the relationships we maintain amongst ourselves as individuals and between ourselves as nations. In international law, human rights are facing quite a lot of challenges and advancements. It has moved from its social and political dimensions into economic rights.

The global problem however, being faced at the moment is what I may term a redefinition of International law itself. International law has moved with the determined stimulus of the civilized nations, from the philosophy of "might is right" to that of "right is might".

The concept of human rights began from the period when man started to consider his inter-relationship with others in the society, perhaps from Adam and Eve and as well as Kane and Abel. General opinion has it that human rights are not a new concept, but one that has been nursed over the Centuries and generally evolving into our present contemporary society.

In terms of our contemporary period, one could easily trace ideas human rights to the time of early great philosophers whereby they postulated that man's role in the World could be realized through the power of human reasoning regardless of the dictate of "gods or the state".

The development of this philosophy owed much to the writings and teachings of Socrates, Plato and Aristotle, the three great Greek philosophers. One cannot deny the tremendous Islamic influences on the European legal philosophy and human rights law even as far back as the time of the two great Islamic philosophers between the 10th and the 12th Century. The two great Islamic philosophers were Ali Abu Ibn Sina, otherwise known to Western World philosophers as Avicenna (980-1027 A.D) and Ahmed Ibn Ruschd (1126-1198 A.D) otherwise referred to as Averroes. These philosophers were part of the period of Islamic civilization that rose for over Six Centuries.

Mention must also be made of the efforts by Britain on developments of human rights. The Magna Carta was put in place in 1215, Petition of Rights in 1628, the Bill of Rights in 1689 and the Act of Settlement in 1701.

The Americans, during its revolution of 1776 developed the concept of guaranteed rights that were strongly influenced by John Locke's philosophy of the social contract. This was followed by a Bill of Rights of 1791 entrenching natural law treaties, which enshrined natural rights by conferring on individuals the status of legally enforceable guarantees.

The French also proclaimed during this period its grund norm of equality, liberty and fraternity, and they came out with their declaration of the rights of man and the citizen, in 1789. The theory of Rousseau on the "General Will" thus came to reality.

During the first half of the 20th Century, international community witnessed two World wars. After the First World War, many great nations of the World converged to address seriously the issue of human rights. There was a universal concern for human dignity and rights as reflected in the Covenant of the League of Nations which imposed on state members of the league the duty to secure, maintain and guarantee certain human rights.

After the Second World War the abysmal human tragedies, crises and unimaginable calamity that followed, caused many nations to re-think on how best to ensure and guarantee international human rights for individuals all over the World. Even as early as

1945, the Pemberton Oak Conference in the United States of America deliberated on how best to solve the problems.

Thereafter the World Organization moved towards establishing a Universal Declaration on Human Rights on 10 December 1948.¹

What is most remarkable on this issue of international human rights was the fact that the holy Prophet Mohammed (SAW) had postulated these rights some 1400 years ago². Inter alia he preached thus:

"All mankind is from Adam and Eve, an Arab has no superiority over a non Arab nor a non Arab has any superiority over an Arab, also a white has no superiority over black nor black has any superiority over white except by piety and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim, which belongs to a fellow Muslim unless it was given freely and willingly."

The Muslim community accepts the Shari'ah as divine law, unlike Common Law and Customary Law, which are modulated according to popular customs and desires of society. For the Muslim, the concept of justice is as enshrined in the Holy Qur'an and the Sunnah³. The secondary sources like Hadiths are the compiled and respected traditions that are used to fill in the gaps.

¹ Article 1. All human beings are born free and equal in and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2. (1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

Article 3. Everyone has the right to life, liberty and security of person."

² It was the last sermon of our Prophet Mohammed (SAW), which he delivered on the 9th of Dhul Hijjah. 10A.H (623 A.D) at the Uranah Valley of Mount Arafat in Makkah.

³ Sunnah is the term used to refer to the normative behavior, decisions, actions and tacit approvals and disapprovals of the Prophet Mohammad. The Sunnah was heard, witnessed, memorized, recorded and transmitted from generation to generation.

After the demise of the Holy Prophet, the practice of the companions was to first consult the Qur'an, and then the Sunna. If these two primary sources were not explicit on an issue, then they resorted to extrapolating and deducing from the principles gleaned from the other inspired sources.

Muslims would argue that only the Shari'ah legal system can adequately protect their human rights with the belief that the divine legislation brought by Islam is superior to any legislation⁴. They point out that international law has no protective mechanisms within its numerous and lofty declarations.

We cannot deny that international human rights protection has entailed two attempts.

1. An attempt to reach agreement on the general norms to be recognized amongst all States; and
2. An attempt to enact obligatory penalties for punishing the state that infringes human rights.

These however, are not sufficient as protective mechanisms, as they depend on the status of the relations between countries.

One of the main points of departure for Shari'ah from the Common Law legal systems, is that Shari'ah identifies the victim under its penal code. In Common Law, the State becomes the victim and it assumes the prosecution on behalf of the commonwealth of

⁴

- (a) Right to life (Sura VI151; v.35)
- (b) Right to respect (Sura XVH. 70)
- (c) Right to Justice (Sura v. 9; XVI.91; LIII.38; LIII, 39)
- (d) Right to freedom (Sura IV. 36; XXIV.33; IV. 92; XLII.21; XII.40; 11.256)
- (e) Right to Privacy (Sura XXVI. 27 - 28; XXXIII. 53; XXIV.58)
- (f) Right to protection from slander and ridicule (Sura XLIX. 11- 12; XXIV. 16-19)
- (g) Right to good life
- (h) Right to a place of residence (Sura 11.85)
- (i) Right to a means of living (Sura XI.6, VI. 156)
- (j) Right to seek knowledge (greatly emphasized in the Quran)
- (k) Right to enjoy the bounties created by God (Sura VZI.32)
- (l) Right to asylum (Sura IV. 97 -100)
- (m) Right to freedom of movement (Sura LXVII.15)

its citizenry. Shari'ah goes beyond that, and seeks for not only punitive measures **to**, but also compensation, **from** the perpetrator.

It goes without saying that when people of various cultures and beliefs come to live together as a community, there are bound to be arrangements of give and take for the community to have a harmonious relationship. There is no doubt that social activities will come into play, as well as intermarriages and commerce. To regulate these relationships, a legal and judicial system to moderate the harmonious relationships between the communities must be put in place.

The dispute settlement process of a particular society are normally the sum total of the peculiar circumstances of that particular community⁵. It is shaped by the fundamental necessities and habits of the whole people. Hence, an understanding of the differences in values between two communities may help dispel a common prevalent notion that the Shari'ah is an unsophisticated, obscure and defective system.

This has been the position in Nigeria even before Independence in 1960. The various communities had been involved in conflict resolution long before independence. A virile and functional system was already in place.

In the north, the Shari'ah law system was well established with functional judges, court staff and court houses, with a system of pleadings and evidence as well. The system allowed Emirs to be at the top. The Emirs appointed judges and senior court staff. They also controlled the police and the prisons. There were the Emir Courts and the Alkali courts.

At the onset, the British did not interfere with civil law at all. However, with respect to criminal law within the Shari'ah north, they substituted death by hanging for the offences of homicide and adultery, rather than beheading or stoning to death under the Shari'ah law. They also substituted imprisonment for theft, rather than amputation under the Shari'ah law.

⁵ Crenades, *Overcoming The Clash of Legal Cultures: The role of interactive arbitration*, *Arbitration International* 14 (1998), p. 164.

In the south, there were Customary Courts, presided over by elders, chosen by the communities. These two systems worked very well over the years. Somewhere in between, another system came on board: the Common Law system. The Common Law of England derives its origins from the Ecclesiastical Law, which in general sense means the law relating to any matter concerning the Church of England, administered and enforced in any court. The Ecclesiastical Law of England derives its origins largely from the Canon Law of Papal Rome and the Civil Law of Imperial Rome.

These three systems developed with each charting its own course, until they got the position of recognition within our constitution.

In present day Nigeria, the nature of our grund norm has remained enigmatic, evasive and perplexing to many scholars. Some postulate that such must manifest in our constitution.

The preamble to the 1999 Constitution reads

'We the people of the Federal Republic of Nigeria: HAVING firmly and solemnly resolved: To LIVE in Unity and harmony as one indivisible and indissoluble sovereign nation under God dedicated to the promotion of inter-African solidarity, world peace, international cooperation and understanding: AND TO PROVIDE for a constitution for the purpose of promoting the good governance and welfare of all persons in our country on the principles of Freedom, Equality and Justice and on the purpose of Consolidating the unity of our people: DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following constitution.'

The fundamental human rights provisions in our Constitution stands above the ordinary laws of the land as the guarantor of the liberty and freedom of the citizen⁶. These provisions are entrenched in Chapter IV of the 1999 Constitution and are itemized in Sections 30 – 44 thereof.⁷

⁶ Ransome Kuti & Others v. Attorney General of the Federation and Others (1985) Nigerian Weekly Law Report (NWLR), 211.

⁷ The Right to Life (Section 33-44), The Right to the Dignity of the Human Person (Section 34), The Right to Personal Liberty (Section 35), The Right to Fair Hearing (Section 36), The Right to Private and Family Life (Section 37), The Right to Freedom of thought, Conscience and Religion (Section 38), The Right to Freedom of Expression of the Press (Section 39), The Right to Peaceful Assembly and Association

The Islamic way of life is protected for a Muslim within the Nigerian Constitution. Section 38 (1) states that:

Every person shall be entitled to freedom of thought, conscience and religion, . . . and freedom (either alone or in community with others and in public or in private to manifest and propagate his religion or belief in worship, teaching practice and observance'

This provision covers the freedom of every person to manifest his or her faith. This thus covers the operation of Shari'ah within our legal system. In Islamic law, Shari'ah means the path established by Allah for men to follow in all their worldly and spiritual pursuits. Islam is not a religion in the limited sense of the word but a way of life and within its structure; the Shari'ah exists as its comprehensive legal framework.

The problem in Nigeria and perhaps that of many Nations, which lay claim to being secular, but yet may have parallel systems, is that of legal pluralism. There has been talk of 'unification', 'fusion' and 'harmonization' of all these different legal system into on singular 'Nigerian Common Law'. All these connote a search towards the peaceful co-existence of all three laws and legal systems within one comprehensive legal system.

Some jurists have stressed the importance and desirability of uniformity of laws in a multi-ethnic, multi-cultural, and multi-religious society. Non-Muslims generally want the use of Shari'ah law to be restricted in all events to personal law only. In this regard, Islamic criminal law will not be a viable proposition as the sole penal code in modern day Nigeria.

The antagonists of this issue have claimed that the Shari'ah system adopted by some States in Nigeria is a violation of Section 10 of the Constitution, which states:

The Government of the Federation or of a State shall not adopt any religion as a State Religion.

(Section 40), The Right to Freedom of Movement (Section 41), The Right to Freedom from Discrimination (Section 42) and The Right to Compensation for Property Compulsorily Acquired (Section 44).

This argument had been used to canvass against the involvement of the legislative or executive powers in aiding, promoting or supporting any particular religion to the detriment of others with different faiths and beliefs.

This problem is that Nigerian government is at all levels either directly or indirectly involved in numerous overt religious acts. It establishes pilgrim's boards for Christians and Muslims and sponsors pilgrimages.

Amongst other examples, it co-funded the National Mosque, in Abuja as well as the Ecumenical Centre. The new legal year in the country is commenced by worship services all over the states of the country.

There is indeed no secularity in the real sense of the word. Nigeria has adopted the two monotheists religions as the religions of the State whereas there are traditional religions which pre-date Christianity and Islam. The extent and the prominence gained by either over the other depends on the religion of the person who is in the seat of the particular arm or organ of government, acting at a particular time.

Hence Nigeria is a multi-religious nation which allows all religions to be practiced and has adopted two religions as State religions. What it has not done is to declare itself as being of 'a' religion (and by this I adopt the singular) and declaring itself to be either an Islamic State or a Christian State.

The argument of the application of Shari'ah law in some states, by which we mean the adoption of a Shari'ah legal code, which is clearly stated to apply only to Muslims, is an extension of the foregoing.

The Zamfara State Penal Code states that:

Every person who professes the Islamic faith and/or every other person who voluntarily consents to the exercise of the jurisdiction of any of the Shari'ah Courts (Administration of Justice and certain consequential changes) Law 1999, shall be liable to be punished under the Shari'ah Penal Code for every act or omission contrary to the provisions thereof of which he shall be guilty within the State.

Thus its application is limited to those who profess the faith. The question must be asked that, when the Constitution specifically created Shari'ah courts, how will the courts function without a Shari'ah legal system in place?

The common law which is applicable to everybody is clearly not detached from the religion of Christianity, hence it is only in consonance with the multi-religious nature of the country that Shari'ah law has to be allowed for those who profess the religion it seeks to govern, since the Constitution guarantees freedom of religion.

Justice Niki Tobi of the Supreme Court commented on this when he said

There is a general notion that Section 11. (of the 1989 Constitution, now the equivalent of Section 10 of the 1999 Constitution), makes Nigeria a secular nation. That is not correct. The word secular etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular, means the belief that the state's morals, education etc., should be independent of religion. What Section 11 is out to achieve is that Nigeria cannot for example adopt either Christianity or Islam as a State religion. But that is different from secularism.⁸

In Nigeria, what we have is pluralist legal system. This is not strange when we consider the fact that Britain, which gave Nigeria the Common Law, has the English Law as well as the Scots Law whose origins differ from English Law. Accordingly, Scotland has her own system of courts quite separate and independent from English courts, with the House of Lords at the final court of appellate jurisdiction.

If a unitary political system like that of the United Kingdom could make such adequate provisions for a multiple legal system, it must then be easier within a federal system which we claim to have in Nigeria. Whether we run true federalism however is an argument best suited for a separate paper.

It is also prime knowledge that Nigeria is not alone with respect to trying to embrace pluralism. There are three grades of Shari'ah courts in Kenya⁹. Shari'ah Courts are

⁸ Niki Tobi, Law religion and Justice, Fundamental Legal Issues in Nigeria, Essays in Honour of Andrew Obaseki JSC (Rtd.) Wole Owaboye, ed. (1995) p. 135.

⁹ Liwalis Courts, Qadis Courts and Mudirs Courts.

found in Tanzania,(both on the island of Zanzibar and on the mainland). They are found in Ethiopia¹⁰, Uganda and the Gambia. There are Shari'ah courts in Sri Lanka, even though the Muslim population is only about ten percent. This has not Islamized these countries, much in the same way that the Coptic Christians of Egypt, who account for less than ten percent of the population enjoy the facilities of the Coptic Communal Courts and a Coptic Communal Court of Appeal, has not made Egypt a Coptic State.

Since the euphoria of Shari'ah within specific states started, some have argued for the replacement of the Nigerian Penal Code. It is however clear from the Constitution that a person may not be convicted of any Shari'ah (or indeed any other) offences, unless the National or State House of Assembly enacts that offence and its punishment. Accordingly, the application of the Shari'ah criminal law without codification by the National or State House of Assembly will be unconstitutional.

The full application of Shari'ah law is clearly not possible under the Constitution. Section 38(1) of the Constitution enshrines the right to freedom of thought, conscience and religion, including the freedom to change religions, whereas under Shari'ah apostasy is a capital offence. That offence is clearly inconsistent with the freedoms recognized within our constitution today.

The protection of human rights and the rule of law are the best things that we can derive from Democracy in today's world. The rights guaranteed under Shari'ah are as old as mankind. Their provisions are immutable and not subject to curtailment in any given political system. No provisions of any enactment remains sacrosanct at all times and under the common law they are usually subject to the whims and caprices of the rulers of the state at that particular time.

Nevertheless all the benefits of a Shari'ah system must be evaluated. It will be erroneous to say that there are no aspects of Shari'ah that don't constantly require to be looked at along with the challenges of an ever dynamic society, civilization, and international commerce and human interactions. It must be understood that religions are a reflection of the time and the peoples to whom they were revealed and it is their essence that carries the real message given to us by God.

¹⁰ Qadi and Niyaba Courts

If Shari'ah is not positioned to meet the exigencies of time, it will erode its own claim to be a complete way of life and the best set of laws to regulate human affairs above any modern legal order. What would Shari'ah's position be in relation to Internet crimes or perhaps disputes in relation to space law and claims therefrom?

In Nigeria, Shari'ah should not be imposed on all persons. The right to freedom of thought, conscience and religion will be denied to persons of non-Muslim faith, if Shari'ah is imposed on them. So shall the Muslims equally be denied of the right to freedom of thought, conscience and religion – a violation of Section 38 of the Constitution – if the Muslims are denied the Shari'ah code.

There is an anecdote about a man who went around wielding a stick. He carried this on even in public places. Another man who was nearly hit by the stick cautioned this man by saying to him "Do you mind". The man with the stick retorted by reminding the gentleman of his fundamental human right in this world to fling the stick anywhere and in anyway he liked. The gentleman replied him. "Yes, you have the right to fling your stick the way you like and the way you want and even anywhere you want, but that right stops where my nose starts.

In conclusion, every person must be allowed to have unto himself the religion of his choice. It is a shame that religion as a subject has become more of an issue. It is the biggest divisive mechanism in earth. Discussions and debates focus more on differences, which are much fewer, than on their similarities, which are much more. What an antithesis! This is strange, as all religions profess peace, love and co-existence. It would appear thus, that in many respects religion is used to serve the opposite of its very purpose. I believe there are two facets of religion today, '**pure religion**' and the '**politics of religion**'. What most practice is the politics of religion. This is religion infused with a personal pre-determined agenda as held by its professor. This is religion beclouded by human prejudices and political objectives. I have always argued that you can find justification for whatever you seek within any religion, be it justification for evil or justification for good. Most stop once they find what they are seeking. Neglecting the truth, neglecting pure religion.

Honorable Judge Thomas Griffiths spoke yesterday of the case of a particular case recently decided by the US Supreme Courts where the issue was whether the rights of gay and lesbian students were infringed by a Christian Law Society created by students within a State funded university, where those gays and lesbians had been prevented from joining because of their preferences. This decision divided the Supreme Court 5:4.

At the end it was decided by the majority that there was indeed a constitutional breach by such a prevention thus allowing the gays and lesbians the right to join the society. One of the minority justices then looked at the issue of the burden that the Christian Law Society was subjected to since they could not practice their religion, as they desired. In my view the opinion of the minority was right. This was indeed an infringement on the fundamental religious rights of the Christian Law Society. The Supreme Courts should have (that is if this issue was a question before them) allowed the gays and lesbians to have their own 'Christian Gays and Lesbians Law Society' in full exercise of their own rights of freedom of expression, organization, religion and thought.