

# LAWYERS, LEGAL EDUCATION AND THE SHARI'AH COURTS IN NIGERIA<sup>1</sup>

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## Introduction

Legal pluralism is perhaps the most prominent feature of law in Nigeria. There are laws indigenous to Nigeria. These are the laws of hundreds of tribes and ethnic groupings each with their own law and legal system. There are also imported laws and legal systems represented by the English common law and Islamic law. Islamic law has been in Nigeria since the 15th Century. The common law made its appearance in Nigeria after the advent of British colonialism in the middle of the 19th Century. However, colonialism has established the superiority of the common law over Islamic law and the indigenous customary laws. Colonialism established the common law as the basic law, the standard by which all other laws are assessed. The practitioners of common law are the only organised and statutorily recognised law practitioners in Nigeria.

Shari'ah is undoubtedly the most controversial matter in Nigeria today. This is due in the main to the current wave of Islamic revivalism occurring across the world, and in particular to the adoption of the Shari'ah as the basic law in some states of the Federation. The Shari'ah controversy has been very disappointing, not because some oppose or others support the Shari'ah, but because of the low level of intellectual quality of the debates. Emotions, speculations, prejudices and ignorance are the recurring factors in the debates. Little or no effort is made to engage in factual and legal analysis of the actual contents of the Shari'ah. Lawyers

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should have a special interest in the issue of Shari'ah, since ultimately all the aspects of Shari'ah translate into legal questions, and Shari'ah is one of the sources of law in Nigeria.

This study is essentially multi-disciplinary. It examines the issue of Shari'ah education in Nigeria in its traditional and modern garbs, the role of lawyers in the administration of Shari'ah, the differences between Islamic and common law systems, and Shari'ah's perspective on the role of legal practitioners and tries to look at the future of lawyers in Shari'ah courts in Nigeria. An attempt is made to examine the issues from common law and Shari'ah viewpoints. The religious judgements of Islamic law on the issues are also examined. Given the comparative nature of this study, it is necessary as a preliminary matter to define some of the terms used herein.

#### *Definition of terms*

The term 'lawyers' in this paper refers primarily to those trained in the common law, that is, legal practitioners who have been duly called to the Nigerian Bar and who are entitled to practise as lawyers in Nigeria under the terms of the Legal Practitioners' Act, 1975.<sup>2</sup> I have used 'Shari'ah practitioners' or 'Islamic law practitioners' to denote those whose education and training consist only of Islamic law. 'Legal education' in relation to the common law refers to both the academic training in the Universities and the professional training in the Nigerian Law School. Legal education with respect to the Shari'ah includes all the forms of training in Islamic law whether traditional or modern, formal or informal.

In this paper 'Shari'ah Courts' refers to all those courts administering Islamic law in Nigeria, whether exclusively or concurrently with jurisdiction in common law and customary law matters. Thus, this definition includes courts that are essentially Shari'ah such as the Area Courts, Sharia Courts and the Sharia Court of Appeal, and whenever the context so admits, courts that have wider jurisdictions such as the High Court, the Court of Appeal and the Supreme Court.

It is also necessary to point out here that the synonymous terms 'Islamic law' and 'the Shari'ah' in the context of this paper are capable of two meaning. The terms may refer to that part of the Shari'ah that is permitted to operate as 'customary

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<sup>2</sup> Decree No 15 of 1975, now Cap. 207, *Laws of the Federation of Nigeria*, 1990.

law' in Nigeria (as explained below). That refers to the residue of law applicable after the plethora of tests of applicability such as the constitutional, repugnancy and public policy tests which exclude the enforcement of various rules of customary law (Tabi'u 1997: 57-67). In other words, this is what is referred to in the Indian sub-continent as the Anglo-Mohammedan law. The terms have another meaning, namely, Islamic law in its pristine form. This is Islamic law as an independent body of laws, supreme and free from subordination to any other law or legal system. This is the definition of Islamic law acceptable to the proponents of Islamic law and to which States such as Zamfara and other States in northern Nigeria wish to give effect in the post-1999 era. The former definition is considered an aberration imposed on Islamic law by the colonialists. Since the former definition was the only definition legally applicable in Nigeria until quite recently, it will be useful to keep both definitions in mind for the purpose of this paper.

It is also important to keep in mind from the outset, that the common law and Islamic law systems are very different systems of laws, which have little in common. There is a fundamental difference in their conception of law. Islamic law is based on divine revelation. In this context, according to Dhokalia (1986: 109), the proponents of the Shari'ah see society as having an integrated normative system, where law and religion is part of the same cultural complex. To them, religion and law are inseparable from each other. That is why Islam is described not only as a religion but also as a complete way of life (Ruxton 1916: 1). On the other hand, although the common law has an unmistakably Christian origin and has been subject to much Christian influence, reason has replaced religious ideas as the main means of ascertaining the common law (Muslehuddin 1986: 265).<sup>3</sup> Another difference is that the common law is based on the accusatorial method, while the Shari'ah operates a distinct method of its own which cannot be categorised as either an accusatorial or an inquisitorial system. The differences in the law, practice and procedure between the Shari'ah and common law are examined later in this paper.

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<sup>3</sup> According to Coke, "Reason is the life of the law; nay, the Common Law is nothing but reason" cited *ibid*. See also Wooton 1981: 22 – 23.

## Shari'ah and Legal Education in Nigeria

The substance of legal education in Nigeria consists of academic training resulting in a law degree from a university, and a one-year professional training in the Nigerian Law School followed by Call to Bar and Enrolment at the Supreme Court.

Shari'ah does not have any official or non-official body regulating its practice. Shari'ah education may be classified into traditional and modern. The history of this educational system is crucial to understanding of its position in Nigeria today.

### *History of Shari'ah education in Nigeria*

Islam came into Nigeria in the 11th century (Lavers 1971: 28) and Shari'ah has been in force in Nigeria since as far back as 1468 (Orire 1988a: 19, 1988b: 23). By the time the colonialists arrived, Shari'ah was already a flourishing system in Northern Nigeria (Sodiq 1989: 110–111). Okonkwo and Naish writing on the history of criminal law in Nigeria, described the Shari'ah system thus:

In much of the North there was the highly systematised and sophisticated Moslem law of crime – so systematised in fact that there were several 'schools' of jurists, and even differences within them, though the dominant one was the Maliki School (Okonkwo 1980: 4).

There were flourishing traditional systems of Shari'ah education in the Sokoto (Shagari and Boyd 1978: 28–39; Ado-Kurawa 2000: 218–231) and Bornu Caliphates (Lavers 1971). So advanced were these systems that they produced leading scholars such as Al-Tazakhti<sup>4</sup> and the Katsinawi scholars who are world famous Islamic law jurists (Kani 1997; Katsina 1997; Bugaje 1997; Ingawa, 1997).<sup>5</sup>

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<sup>4</sup> The Alkali of Katsina who wrote a leading commentary on Khalil's *Mukhtasar*, a major Maliki law textbook, see Ruxton: 1916:12, n. 1. Last (1977: 237 – 257) has a list of works by the leaders of Sokoto Jihad.

<sup>5</sup> In the 13th Century, the famous jurist Sheikh Abdullahi Al-Maghali wrote a book *The Obligation of Princes* at the request of Sultan Rumfa (1463–99) the King of Kano (Gwandu 1989: 23).

In the South, although the Shari'ah is observed among the populace, it was not institutionalised as it was in the North. However, in addition to widespread individual practice and study of the Shari'ah (Doi 1972: 5-6), there were also attempts to institutionalise Shari'ah in the South (El-Miskin 1985: 76; Okunola 1993: 24-25; Ado-Kurawa 2000: 223-228, 282-285). Mention must be made of the efforts of Oba Olagunju who applied Shari'ah in Ede (Orire 1988b: 23), and of Oba Momodu Lamyé in Iwo (Abubakre 1992: 128). The colonial masters deliberately down played Shari'ah and Shari'ah education in the West (El-Miskin 1988:77; Noibi 1987:12 – 14). They refused to create Shari'ah courts for Muslims in Yorubaland notwithstanding that they formed a sizeable proportion if not the majority of the population in the region. Persistent Muslim requests were rejected (Anderson 1978: 222-223). It was also the deliberate policy of the colonial masters to frustrate the Yoruba Muslims generally.<sup>6</sup> The formal educational system did not accommodate Arabic and Islamic studies. On the contrary, the educational system was used to lure Muslim children away from Islam into Christianity (Abubakre 1992: 126-127; Noibi 1987; Sulaiman 1988: 14.). The discrimination in policy against Islamic studies, which started during the colonial era, has continued to the present.<sup>7</sup> Shari'ah Education in Yoruba suffered accordingly. In spite of the vicissitudes, traditional Shari'ah education has survived in both Northern and Western Nigeria. Its survival is evident in schools such as *Markaz at-Talim al-Arabi*, Agege and other schools which are exclusively for Arabic and Islamic Studies (Sodiq 1989: 113).

The advent of the British marked a gradual eclipse of the traditional Shari'ah system of education. This was due to many factors.

First, although the British adopted indirect rule, they established the supremacy of their common law and took control, albeit gradually, of the Shari'ah courts. The appointment, discipline and control of Shari'ah judges were taken out of the Emir's jurisdiction and left in the hands of colonial administrators.

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<sup>6</sup> Yoruba Muslims were not as a matter of policy recruited into the then colonial army for fear that they may collude with their Muslim brothers from the North!

<sup>7</sup> For the position in Western Nigeria see Noibi 1987: 19-22; Agbetola 1980: 11-19. Even in Kwara State, many government assisted Christian Schools in Ilorin still refuse today to allow Muslim students in their schools to study Islamic Religious Studies. Arabic too is virtually non-existent in these schools.

Secondly, Arabic, which is the language of Islamic law in which all the authoritative sources of Islamic law are written, was changed in the North to Hausa written with *ajami*<sup>8</sup> script, English alphabets and finally to English language (Mahmud 1988: 6-9). English language which was not part of the curriculum of the traditional system became the lingua franca in Nigeria.

The third was that the courts were faced with a gradual abrogation of Shari'ah and its replacement with common law (Mahmud 1988: 9-24). They were forced to administer an admixture of Islamic law, the common law and the vague notions of equity, natural justice and good conscience. This discouraged many learned persons who opted out of the 'system' rather than partake of such polluted Shari'ah.

The fourth was that products of the Shari'ah education were not well treated within the civil service structure. Their certificates were practically worthless for purpose of securing employment within the civil service (Doi 1972: 9; Mahmud, 1988: 8; Sulaiman, 1988: 14). The English type of education was the only way to white collar jobs (Noibi 1987: 12 - 14). Naturally, people drifted to it.

The adverse effect of colonialism was not lost on the colonialists themselves. They attempted to provide an alternative educational system to replace the local system they had more or less destroyed. This was why in 1934 the Northern Provinces Law School was established at Kano.<sup>9</sup> The School was renamed the College of

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<sup>8</sup> *Ajami*: Non-Arabic language written in Arabic script. Murray Last writing on the Sokoto Caliphate states that:

All letters without exception are written in Arabic. The use of Hausa in Arabic script for administrative correspondence was introduced by the British, who were ignorant of Arabic. Arabic was the lingua franca of the learned; not merely a literary but also a spoken language (admittedly in the classical form) throughout Muslim West Africa, it is often the only means of communication between communities of Tuareg, Kanuri, Hausa, Fulani, Nupe or Yoruba. Further, the religious and scholastic character of the Sokoto Caliphate ensured that Arabic was the language of state. (Last 1977: 191-192)

<sup>9</sup> For history of this College see Doi 1972: 10; Sodiq 1989: 112; Mustapha, 2001.

Arabic Studies in 1947. However, the establishment of this school was not based on pure motives. As Mustapha (2001) pointed out, the colonial authority established the school in order to prevent the tide of Islamic fundamentalism in North Africa from gaining ground in Northern Nigeria and to anglicise Islamic law and its personnel in Nigeria by making the prospective judges more well-disposed to colonial rule. Non-Muslim British lecturers were recruited to assist in the design and implementation of the school's curriculum. In 1947, the Northern Region House of Chiefs felt compelled to raise serious objections to the colonial authorities on the Anglicisation process going on in the school (Mustapha 2001: 6–8; Raji: 2002: 21–22).

#### *Academic legal training*

##### *(a) Traditional Shari'ah education*

The main sources of Islamic law are the *Quran* and *Hadith*, i.e., the Sayings and Practice of the Prophet Muhammed (SAW, Peace and Blessings of Allah be on him) (Doi 1990: 21–84). Consensus of the Islamic jurists (*Ijma*), analogical deductions (*Qiyas*), and others constitute secondary sources. There are slight differences among the Schools of *Fiqh* (the science of law, *Madhahib*) (Doi 1990: 85–112). Traditional legal education in the pre-colonial era (Masud 1989: 148; Sodiq 1989: 111–113) was directed at mastering these sources of law. Traditional Islamic education in Nigeria<sup>10</sup> (and in most other parts of the Islamic world) consists of study of Arabic language, Quran, *hadith* and *Fiqh* textbooks of the relevant school of law (*Madhab*). The primary sources consist of fixed and unchangeable texts. Education is directed towards memorisation and understanding of these texts. Arabic is emphasised because the primary sources of Islamic law are written in the language (Ambali 1998: 84; Olagunju 1997: 165–175; Zubair 1989: 203–209).

The secondary sources are really no more than the application of the primary sources to changing social, economic and political conditions. The excellence of an Islamic scholar is in his ability to do this effectively. He exists as a guide to his community in their anxiety to make sure that they live and conduct their affairs in

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<sup>10</sup> For an account of the traditional education in the Sokoto Caliphate see Shagari and Boyd 1978: 32 – 39.

line with the injunctions of Allah (SWT).<sup>11</sup>

The traditional Islamic law education system in Nigeria has many problems. The first is the blind alley nature of education in the traditional Islamic schools (*Madrassah*) in Nigeria. Education here does not go beyond *Idaadi* and *Thanawi*, which are roughly equivalent to junior and senior secondary schools respectively. Graduates of these schools do not usually progress further in learning unless they have the luck to secure scholarships to study abroad, usually in North Africa and the Middle East, or, if they also have western education, they go to a College of Arabic and Islamic Studies for a diploma or certificate course in Arabic and Islamic studies. Especially lucky ones eventually proceed to university to study the same or similar subjects. The various Colleges of Arabic and Islamic studies were established mainly to provide an avenue for educational advancement for the products of the traditional Islamic educational system.<sup>12</sup>

However, they have problems in gaining admission for Combined Law degree programs because of the admissions requirements of many faculties of law. These insist that entrants possess credits in at least five subjects at Ordinary level, which subjects should include Arabic and Islamic Religious knowledge as requirements for the Shari'ah aspect, and English Language, English Literature, and Mathematics which are required for the regular common law program.<sup>13</sup>

Today traditional Shari'ah education is facing a crisis of relevance. The curriculum does not adequately prepare the students for actual life. Since western education is usually neglected completely in the *Madrassahs*, their products may find it difficult if not impossible to apply the original sources of Islamic law to changing modern conditions. Hence, stagnation, unsound judicial pronouncements, baseless

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<sup>11</sup> The Prophet (SAW) was quoted as saying: "Learned persons are the inheritors of Prophets" (Khan 1974: 233).

<sup>12</sup> The establishment of the Kwara State College of Arabic and Islamic Legal Studies in the early 1990s was vehemently opposed by the Christian Association of Nigeria (CAN) which instituted a case against the Kwara State government challenging the government over the establishment of the College.

<sup>13</sup> For example, very few diploma graduates of the Kwara State College of Arabic and Islamic Legal Studies, Ilorin (which was established in 1992) have succeeded in gaining admission to read Combine Law in the Faculty of Law of the University of Ilorin.

opinions, and irrelevancies may be the main features of their subsequent professional life.

Another grave weakness in the traditional Shari'ah education in Nigeria is that it is not well regulated and standardised. The various *Madrassahs* offer more or less the same education based on similar curricula, and award the same certificates. Each school conducts its own examination locally. The credibility and acceptance of the certificates depends on the reputation of the school. The prospects of further study abroad (mainly in North Africa and the Middle East) depend essentially on the personal contacts of the proprietor of the School.

There is also an issue of intellectual stagnation in the Islamic world. According to the Sunnis, the gate of *Ijtihad* was closed after the major Imams. Impossible qualifications are laid down for would be al-*Mujtahid fil Shari'ah* (one qualified to do *Ijtihad* at the highest level) (Mutahari 1986–987: 26–27; Doi 1990: 78–81; Philips 1990: 105–116).<sup>14</sup> No one has attained that status since then. This has resulted in intellectual stagnation which the Islamic world is still trying to free itself from. The issue of stagnation is a very sore one. The effect on traditional education is that emphasis is not usually placed on the mastery of the secondary sources of Islamic law. Rather reliance is placed on authoritative texts written by distinguished scholars of earlier eras. These textbooks were based on the primary sources of Islamic law. However, most were written several centuries ago. While a substantial part of what they contain is still valid today, some aspects require modification, amplification, and outright amendment. This is because the books represented the efforts of their authors to apply Islamic law in the circumstances of their era.

Those engaged in traditional Shari'ah education should seriously consider the issues of curriculum and standardisation. Relevant and result-oriented Shari'ah education today must include substantial western educational learning in the fields of the humanities, the social sciences, and pure science. A sound grasp of history, economics, philosophy, sociology, international law and politics are also indispensable to would-be Shari'ah practitioners. So also is knowledge of medicine and astronomy. Shari'ah practitioners must be properly equipped to deal with the

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<sup>14</sup> See discussions of the various grades of the *Mujtahidin* in Idris 1992: 189–190; Doi 1990: 78–80.

crucial issues of our time.<sup>15</sup> These include issues of secularism, legal pluralism, human rights, rights of minorities and non-Muslims living in Islamic States, and gender issues. In an ideal situation, Islamic law expects every judge to be a *Mujtahid* of the highest grade.<sup>16</sup> Where such a person is not available, *Mujtahids* of lesser grades are acceptable, but if these are not available then a non-*Mujtahid* who is conversant with the verdicts of the applicable *madhab* may be appointed a judge. In contemporary times, a higher minimum standard is necessary. Mastery of the classical text books should no longer be enough. An Islamic law expert in the modern era should not only know the rulings of the *madhab*, he must know the proofs or basis (*hujjah*) of the rulings. He should also be well versed in the legal reasoning in Islamic law (*usul al-fiqh*) so that he will be able to appreciate a situation that calls for *Ijtihad*. A judge must be well educated as to be able to distinguish between the *Ijtihad* of other generations of Islamic law Scholars from the actual text (*nass*) of the primary sources of Islamic law. However, judges of the highest appellate courts should possess the requisite knowledge for *Ijtihad*.<sup>17</sup> Such judges must be able to offer solutions to the peculiar problems of the contemporary era.

*(b) Modern Shari'ah education*

Modern legal education culminates at various law degree programs. These are essentially three, that is, Bachelor's Degree in Shari'ah law, Bachelor's degree in civil law and Bachelor's degree in combined law.

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<sup>15</sup> The excellence of the leaders of the Sokoto Jihad and the Iranian Islamic Revolution consists of their sound knowledge of Islamic law and other branches of contemporary knowledge of their era.

<sup>16</sup> Thus it has been said:

The law expects a Muslim judge to be a *Mujtahid*, i.e. a person who possesses and exercises capacity to make research and relate it to the current event with a view to solving the problems of the day which never confronted the Muslim Community before (Ambali 1998: 87).

<sup>17</sup> See the minimum qualifications stated in Khalaf 1996: 218–220.

*(i) LL.B. (Shari'ah)*

This is the principal Shari'ah education in countries where Islamic law is practised as the basic law. Universities in North Africa and the Middle East award this degree. The program focuses essentially on Shari'ah. There was an attempt by Ahmadu Bello University, Zaria, and Maiduguri University to introduce a similar degree program in Shari'ah. It appears that the project died prematurely. This program would have produced the best prepared graduates for handling Islamic law matters in Nigeria. However, the environment is hostile to Shari'ah. Graduates of this program from universities outside Nigeria usually have problems finding employment. It is so difficult for them to get suitable jobs that many teach in secondary schools and even in primary schools. Others with post-graduate degrees teach in institutions of higher learning. A few are lucky to secure judicial appointment if they come from states where there are Area courts and Sharia Courts of Appeal. Those from the southern States do not have this opportunity. The problem for these law graduates to secure admission to the Nigerian Law School is discussed later.

*(ii) LL.B. (Civil Law)*

There is no doubt that Shari'ah has been neglected within the legal educational system in Nigeria. The curricula of faculties of law in Nigeria do not contain compulsory Shari'ah courses. A person can study law at a Nigerian university and at the Law School without learning a thing about Shari'ah. The poverty of legal education in Nigeria is frightening, and it is not limited to ignorance in Shari'ah alone. The Nigerian lawyer by his training has become a one-way man. He does not know that the common law is not the only legal system in the world today. To him the common law represents a universal standard by which all values are measured. It will be useful if legal training in Nigeria includes an element of comparative legal systems. Prospective lawyers could then learn that the common law is just one of the legal systems in the world and that there are other systems such as the civil law system (which is the dominant system in Europe and the francophone countries) and the Shari'ah, and that these are the oldest surviving

legal systems in the world today.<sup>18</sup>

(iii) *LL.B. (Combined Law)*

When faculties of law were established in Nigerian universities in the early 1960s, expatriate officers discouraged the idea of including Islamic law as a separate part of the law curricula but advocated that it should be merged into two existing common law courses, family law and jurisprudence (Coulson 1965: 5). It was in the mid-1970s that the combined common and Islamic law degree program was first introduced in Ahmadu Bello University, Zaria, from where the other universities in the north borrowed the idea.

Notwithstanding that a few faculties offer combined common and Islamic law degree programs, Shari'ah has been virtually ignored by policy makers. For example, in *Approved Minimum Academic Standard in Law for all Nigerian Universities* (AMAS) (Nigerian Universities Commission 1989) the Nigerian Universities Commission spelt out the minimum academic standard for the LL.B. Civil Law degree program, but no provision at all was made for combined law (Oloyede 2001: 119).

It has been pointed out earlier that the admission requirements of some of the faculties actively discourage products of *Madrasahs*. Those who are likely to possess the requirements are those who have attended regular secondary schools.

An examination of the curriculum of the combined degree programs reveals a bias in favour of common law. Even the Shari'ah courses are patterned after the common law system in terms of courses and course content.<sup>19</sup> The combined program is deficient from the Shari'ah point of view in that the language of

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<sup>18</sup> Civil law (the Romano-Germanic family of law) dates from the time of Augustus (63 BC – AD 14) or Justinian (AD 483–565) (David and Brierly 1985: 33). Islamic law dates from AD 609 (Philips 1990: 3) while the common law dates from the Norman Conquest in 1066 (David and Brierly 1985: 311).

<sup>19</sup> For the content of combine law education in some Nigerian universities, see Ajetunmobi 1988: 317–326; Rashid 1989: 285–288. Note the vast difference between these and the curriculum of the Islamic University, Medina, and other universities in North Africa (Rashid 1989: 283–284; Zubair 2003: 23–29).

instruction is English. Students are not exposed directly to the primary or even secondary sources of Islamic law. As pointed out by many scholars (Masud 1989: 148; Abdullahi 1989: 123–128; Doi 1989: 129–141; Sodiq 1989: 115), these students relied mainly on textbooks written by prejudiced Orientalists. The program in its present mode has not produced and cannot produce competent Islamic law practitioners (Yadudu 1992: 128). The products of the old Kano Law School are certainly better Islamic law scholars and practitioners than the combined law graduates (Ajetunmobi 1988: 314-315). The overwhelming majority of graduates of the combined law program are in fact engaged in full common law practice with little or no Islamic law practice.

*(c) Professional legal education*

Legal Education in Nigeria is regulated by the Council of Legal Education<sup>20</sup> which is in charge of the Nigerian Law School. The membership of the Council is limited to lawyers.<sup>21</sup> It does not have within its membership any person officially representing the Shari'ah.

In order to qualify for admission to the Law School, one must have obtained a law degree from an approved university. In considering approval for universities, the Council of Legal Education “considers the content of the law degree course with a view to ascertaining that the course gives the minimum basic knowledge of the law against which background the Nigerian Law School course is designed” (Obilade, 1998: 273.). It is clear that the Nigerian Law School is patterned after the English system. The common law is the only law that the designers of legal education in Nigeria had in mind.

There is a special program in the Law School for law graduates of universities from other common law countries seeking to be called to the Bar. It is not clear whether graduates from non common law countries (such as law graduates in civil law, Islamic law and Soviet type law) can benefit from the arrangement. There is no non-common law graduate who, to the knowledge of this author, has been called to Nigerian Bar.

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<sup>20</sup> Established by the Legal Education (Consolidation etc.) Decree, 1976, now Cap. 206, *Laws of the Federation of Nigeria*, 1990.

<sup>21</sup> Section 2. Membership should now be as many as 60.

It is clear from the present arrangement that Shari'ah whether as a customary law in Nigeria or as an internationally established legal system, was not within the contemplation of the Legal Practitioners Act (Masud 1989: 142). The Act was based on English style law alone. It was meant to provide a framework for the practice of English style law in Nigeria. Although legal education in Nigeria has been criticised and many suggestions advanced for its improvement, such suggestions do not usually consider the Shari'ah matter at all (Nwogugu 1985; Ojo 1997; Akinjide 1997; Ayua and Guobadia 2000).

Mention should be made here of the commendable suggestions made by Professor Nwogugu in respect of admission of non-common law graduates into the Nigerian Law School (Nwogugu 1985: 16-17). The Professor suggested that a broad and standard policy decision should be formulated regarding the admission of law graduates of European countries including the Soviet Union into the Law School. The best way, according to him, is for the Council of Legal Education to enter into special arrangements with Nigerian universities whereby such law graduates can study prescribed law subjects in the universities for a period of at least one year. They can thereafter be admitted to the Law School upon passing the necessary examinations set by the universities. This suggestion is also relevant and applicable to law graduates from North Africa and the Middle East. It is a suggestion that the Council of Legal Education should consider seriously.

## Lawyers and the Administration of Shari'ah in Nigeria

### *Lawyers as advocates in Shari'ah courts*

Lawyers were introduced by the colonialists into the Nigerian legal system. Hitherto, the concept of professional pleaders was virtually unknown in traditional legal systems in Nigeria (Adewoye 1977: 1-8). Such pleaders are not part of the Islamic law system. Throughout the colonial era, a rigid barrier was enacted against legal practitioners appearing in customary and Islamic courts. Lawyers were statutorily prevented from appearing in Area Courts<sup>22</sup> and Sharia Courts of

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<sup>22</sup> S. 28 (1), Area Courts Edict (No. 2, 1976, Kwara State). There are similar laws in the other states in the north.

Appeal.<sup>23</sup> This has always been so since the creation and throughout the various evolutions of the two courts. These provisions have not been statutorily repealed. Yet today, lawyers appear in both courts with such regularity that their right of audience may seem settled and beyond question.

The lawyer's right of audience in civil cases in the Area Court and the Sharia Court of Appeal is directly the outcome of *Karimatu Yakubu and Anor v Yakubu Paiko and Anor.*,<sup>24</sup> decided by the Court of Appeal in 1985. It has been argued elsewhere that the appeal, with all due respect to the learned judges of the Court of Appeal, was wrongly decided (Tabi'u 1985–1987; Oba 2002a).<sup>25</sup> The decision in the appeal may be said, without making a value judgement, to have had a serious effect on the Nigerian legal system. Nevertheless, in spite of the importance of the issue raised in the appeal, the issue was not adequately contested before the court, nor had the judgment been subjected to strict scrutiny. Rather, it has been accepted and applied in Area Courts and Sharia Courts of Appeal without much critical examination. Given its importance, the *ratio decidendi* of the case needs further consideration for a number of reasons.<sup>26</sup> It is therefore humbly submitted here that

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<sup>23</sup> S. 20(1), Sharia Court of Appeal Law, Cap 122, *Laws of Northern Nigeria*, 1963.

<sup>24</sup> (1961–1989) 1 Sh.L.R.N. 126.

<sup>25</sup> The substance of my argument is that the decision was based on a misreading of the relevant provisions of the 1979 Constitution. Justice Mohammed JCA, who delivered the lead judgment in the appeal, read the proviso to subsection (1) to section 33 as if it was also a proviso to subsection (4). This oversight, in our humble opinion, was responsible for the erroneous decision.

<sup>26</sup> These reasons are, in summary:

- 1 There was an erroneous reading of the relevant constitutional provisions.
- 2 Full arguments were not taken on the point before the Court of Appeal as counsel for the respondent conceded the point without argument.
- 3 The other two judges in the case did not write judgments of their own but merely concurred with the lead judgment.
- 4 There was no further appeal to the Supreme Court in the case.

the issue of appearance of lawyers in Sharia Courts of Appeal and Area Courts on the present state of the law is still open and can be tested in the Supreme Court in the future. If my position is correct, it will require legislative intervention to give a right of audience to lawyers in those courts.

A more fundamental question, however, relates to the role of lawyers within an Islamic law system. I should perhaps start here with this bold statement: There is no doubt that, whilst the Shari'ah allows for legal representation, lawyers in the common law mould are completely unknown in the Shari'ah system (Zubair 1996: 63-64; Zubair 1999: 57-66; Schacht 1964: 209). There is clear tradition of the Prophet Muhammad (SAW), which cast aspersions on eloquent advocacy in a litigant. The tradition states thus:

I am but a human, and I give judgment according to what I hear [from parties], but should I decide in favour of a party because that party is better in tendering their own case, when in fact the other party to the dispute is the one in the right, then the party in whose favour judgement was erroneously rendered has reserved for himself a place in hell (Doi 1990: 14).

Two features of the Shari'ah system, namely, the concept of legal representation and the role of muftis are commonly confused with lawyers. This confusion is not limited to non-Shari'ah practitioners (Ambali 1998: 22, 75, 79).

Legal representation under Islamic law is merely a form of agency (*Wikalah*). The agent (*Wakili*) is not a professional pleader. There is no such recognised guild or profession in Islamic law. The *Wakili* has no special status in court. He need not be an expert in law. He appears in court in place of and at the place of a party. It is as if he is the party himself. This is different from the common law arrangement where advocacy is a professional calling and the lawyer being an officer of the court has distinct status and privileges in court. The nearest equivalent of a *Wakili* in the common law system is probably a non-lawyer who is authorised by a party to represent him in a case.

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5 The judgment of the Court of Appeal was not widely circulated and thus could not be subjected to critical analysis. The only 'report' of the appeal to my knowledge is Mahmood 1993, published eight years after the judgment.

The *Mufti* is similar to the lawyer in the fact that he is an expert learned in law. He can be consulted by judges and litigants alike for his legal opinion. He is different from lawyers in the sense that he does not fight partisan causes in court. He only discharges the religious duty incumbent on him to make available his knowledge for the guidance of his community. Adewoye aptly summarised the role of Muftis in the pre-colonial Sokoto Caliphate thus:

In the performance of their judicial duties, the *alkalai* usually bore much of the judicial burden, holding the scale of justice evenly between the parties. But in such centres of Islam as Sokoto, Kano, Zaria, they sometimes sought the assistance of the *mufti*, learned Mallams who were deeply knowledgeable about the *Shari'ah'a*. Their duty was to expound the law. They were like the juriconsults of the Roman times, except that their judicial opinion was invariably based on actual cases and precedents. They gave their opinions in the open court upon questions submitted to them by the *alkali*. Although they were the expounders of the Shari'ah law, they differ from professional advocates in the European sense in that they could not be engaged to fight partisan causes in open court. Privately, of course, they could be consulted on any legal question. Usually important figures in the state performing other functions, they did not derive their livelihood from their role as expounders of the law (Adewoye 1977: 2-3).

Under the Shari'ah, the judge plays a dynamic role that eliminates the need for lawyers. Again, Adewoye rightly commented thus:

It would appear that in many parts of Sokoto Caliphate, the *alkalai* themselves obviated the necessity for professional intermediaries between themselves and litigants. The point was made earlier that, as judges, they bore much of the judicial burden in the discharge of their duties. They cross-examined parties and their witnesses, sifted the evidence before them, and decided on the law applicable to particular cases (Adewoye 1977: 3).

Whilst the concept of legal representation permitted under the Shari'ah can be extended to accommodate lawyers, as has been done in some countries in the

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Muslim world where advocates called *Muhamum* (sing. *Muhami*) appear for litigants before Shari'ah courts (Ajetunmobi 1988: 193), the role of such 'lawyers' is different from their role in common law courts.

The introduction of lawyers into Sharia courts has not improved the administration of Islamic law in those courts. Yadudu rightly pointed out that though a few lawyers possess "a smattering of fragmented knowledge of Islamic law", the overwhelming majority lack any expertise in Islamic law (Yadudu 1992: 130). The main contributions of lawyers to those courts have been increased cost, delays, and technicalities (Ajetunmobi: 1988: 194, 352-356; Yadudu 1992: 129; Belgore 2000: 46).

*Lawyers as judges in Shari'ah courts*

Before the advent of colonialism, Islamic law was administered in northern Nigeria by highly trained Qadis (Keay and Richardson 1966: 20; Yadudu 1993: 110). When the colonialists gained full control of the area, they allowed the continued existence of these courts but gradually modified and patterned them along lines consistent with their own notions of justice (Ubah 1982; Yadudu 1988: 4-7).

Today Area Courts (and lately Sharia Courts) are the generally the courts of first instance for Shari'ah cases.<sup>27</sup> Appeals from Area Courts go to the Sharia Court of Appeal in matters of Islamic personal law.<sup>28</sup> In other matters appeals go to the High Court.<sup>29</sup> Appeals from the Sharia Court of Appeal and the High Court go to the Court of Appeal.<sup>30</sup> From the Court of Appeal they go to the Supreme Court.<sup>31</sup> Apart from the Area Courts and the Sharia Court of Appeal, all the courts mentioned here are manned exclusively by common law trained lawyers. Lawyers have even made their presence felt at the Area Courts and Sharia Courts of

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<sup>27</sup> Ss. 15, 18, 20 and 21, Area Courts Edict, 1967.

<sup>28</sup> *Id.*, s. 54(1) (as amended by Edict No. 5 of 1986).

<sup>29</sup> *Id.*, s. 54(3) (as amended).

<sup>30</sup> Ss. 241, 242 and 244, 1999 Constitution.

<sup>31</sup> S. 233(1), 1999 Constitution.

Appeal.<sup>32</sup>

The problems inherent in this arrangement are many. First, it appears that there is a plan to make all judicial positions in Nigeria the exclusive preserve of common law practitioners. The second problem is that the training of lawyers does not adequately prepare them for the task since their training is focused exclusively on common law.

The third is that it is difficult to understand the rationale between the appellate jurisdiction of the High Court vis-à-vis that of the Sharia Court of Appeal. Why should the High Court have a wider jurisdiction in Shari'ah matters than the Sharia Court of Appeal? Why should the High Court have any jurisdiction in Islamic law matters at all? Kadis used to sit with High Court judges during the appellate sessions of the High Court for the purposes of hearing appeals in Islamic law matters. This was until it was held by the Court of Appeal in 1982 in *Mallam Ado v Hajia Dija*<sup>33</sup> that the provisions of the High Court Law that made this possible was inconsistent with the provisions of the 1979 Constitution. Since then appeals in Islamic law matters in the High Court have been heard exclusively by High Court judges. This has not gone down well with Shari'ah proponents. Justice Bappa Mahmud commenting on this case aptly expressed the disappointment of most Muslims at the development. His Lordship said:

Islamic law was put to such a humiliation, the like of which it has never experienced even in the hands of colonial masters who defeated and conquered the country. For the first time, they put the determination of appeals or cases decided under Islamic law in the hands of judges who are not conversant with Islamic law and most of whom are non-Muslims from the South (Mahmud 1988: 45).

The point was also taken up in the Court of Appeal in *Maida v Modu*<sup>34</sup> by Justice

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<sup>32</sup> Legal Practitioners from both LL.B. Civil Law and LL.B. Combined Law programs are appointed in many states as Area Court judges. The Constitutional qualification for appointment as Kadi of the Sharia Court of Appeal allows common law practitioners to be appointed: s. 276(3)(a), 1999 Constitution.

<sup>33</sup> (1983) 2 F.N.R. 213.

<sup>34</sup> (2000) 4 NWLR (Pt. 659) 99.

Muntaka–Comassie thus:

It seems to me settled that the new 1999 Constitution of the Federal Republic of Nigeria does not in any way improve the jurisdiction of the Sharia Court in this country. It does not enhance the jurisdiction of those courts. This in my view, with all sense of responsibility, is unfair. In most cases, this appeal inclusive, one discovered that the land in dispute is situated in such a way that the rule of *lex situs* applies. The parties are both Moslems and consented to be governed by Islamic Law in Islamic Courts and lastly that the subject matters and issues involved called for intensive application of Islamic law and procedure which are not available in common law system. Moreover, the law to be applied in the High Court is quite alien to the parties and Shari'ah Court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter.<sup>35</sup>

The jurisdiction of the Court of Appeal in Islamic law matters might appear excusable because the Constitution makes it compulsory that the Court of Appeal have on Islamic law appeal panels at least three justices who are learned in Islamic Law.<sup>36</sup> However, this is not satisfactory to many Shari'ah proponents because those justices are merely common law practitioners with generally no more than a smattering of knowledge of the Shari'ah. The Constitution merely requires that the justices who are experts in Islamic personal law have in addition to the regular qualification for appointment into the court, "a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council".<sup>37</sup>

The position at the Supreme Court is most unsatisfactory. The Constitution does not provide for any minimum number justices of the court who should be learned in Shari'ah. The Constitution merely states that the President in making appointments to the Court should have regard to the need to have justices in the court learned in Shari'ah.<sup>38</sup> The court is duly constituted to hear any appeal by at

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<sup>35</sup> *Id.*, 112.

<sup>36</sup> S. 247 (1)(a), 1999 Constitution.

<sup>37</sup> S. 288(2)(a), 1999 Constitution.

<sup>38</sup> S. 288(1), 1999 Constitution.

least five justices of the court.<sup>39</sup> The result is that Islamic law appeals are heard at the final appellate stage by a Supreme Court manned by persons who need not have any knowledge of Islamic law. This arrangement does not augur well for the development of Islamic Law nor can it earn the respect and confidence of litigants and Shari'ah proponents alike. As Ajetunmobi (1988: 193) rightly suggested, the Supreme Court should have at least five justices learned in Islamic law so that a special panel can be constituted to hear Islamic law cases as is being done in the Court of Appeal.

The problem of lack of appropriate qualifications in Islamic law is not limited to judges with a common law background alone. Even some of those appointed to the Shari'ah Courts as learned in Islamic personal law have grave defects in qualifications. In Islamic law, judges “must be not only men of deep insight, profound knowledge of the Shari'ah but also be Allah-fearing, forthright, honest sincere men of integrity” (Doi 1990: 11). The issue of “profound knowledge of Islamic law” has been neglected. The Constitution left it to the discretion of the National Judicial Council.<sup>40</sup> The Constitution and other relevant laws relating to the appointment of judges for Shari'ah courts do not make the crucial and necessary distinction between Arabists (who have studied Arabic), Islamists (who have engaged in Islamic Studies) and Shari'ah practitioners (who have studied Shari'ah) (Ajetunmobi 1988: 337; Ambali 1998: 84). In North Africa and the Middle East this distinction is widely known and jealously guarded. The laxity in the Nigerian approach has flooded the Shari'ah courts with Arabists and Islamists. The adverse effect of this is that such judges are apt to be weak in *Ijtihad* (legal deductions), since they lack in some cases even the most elementary knowledge of *Usul al-Fiqh* (the science of Islamic law).

The common law qualification of ten years' post qualification experience have also been imported into the qualification of Islamic law judges. What is the relevance of this arbitrary time requirement to Islamic law? The confusion is made even worse by the introduction of the hierarchy based on the common law system. This hierarchy divides courts into superior and inferior courts, with the Area Court

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<sup>39</sup> S. 234, 1999 Constitution.

<sup>40</sup> Ss 261, 276 and 288, 1999 Constitution. The Council cannot be an appropriate body to decide this since, out of its 21 members, only one (a Grand Kadi appointed by the Chief Justice) represents the Shari'ah. 18 others are judges or lawyers, while two are non lawyers: Item 20, Part I, Third Schedule, 1999 Constitution.

being an inferior court while the Sharia Court of Appeal is a superior court.<sup>41</sup> Judges of superior courts may now tend to place themselves in the position of *Mujtahid* solely by virtue of the appointment. Shari'ah insists that judges should be male and Muslim (Doi 1990: 11–12; Ambali 1998: 85; Ruxton 1916: 273).<sup>42</sup> These requirements can no longer be insisted upon in view of the constitutional provisions forbidding discrimination on grounds of religion and sex.<sup>43</sup>

Shari'ah proponents complain about the colonial subjugation of Islamic law to common law principles and English notions of justice (Yadudu 1993: 57–58; Sulaiman 1989: 73). They complain about the equating of common law and Islamic law courts and the application of the same principles to both as if they form part of the same legal system. Yadudu articulates this objection thus:

The Islamic law, as other customary laws in the country, exists as an appendage of the English common law. It does not exist as an autonomous and self-regulating legal system. It is defined in terms of the common law. It applies subject to the standard of the common law. Its courts are established and its personnel trained and appointed in the same way and using virtually the same criteria as those of the common law courts and justice. (Yadudu 1988: 5)

The fourth problem is that the influx of common law practitioners into Shari'ah Courts entails the danger of pollution of Shari'ah with common law ideas. We have pointed out earlier that the common law and the Shari'ah are two very different systems. This needs some elaboration which will be done presently.

### Differences Between Common Law and Islamic Law Systems

The differences between the Shari'ah and Common law are many. Some of these are well illustrated in the majority (Jones CJ and Kalgo J) and minority (Gwarzo,

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<sup>41</sup> S. 6(3), 1999 Constitution.

<sup>42</sup> It is significant that s. 5(a), Sharia Court of Appeal Law, includes the religion qualification.

<sup>43</sup> S. 42(1), 1999 Constitution.

Grand Kadi) judgments in *Chamberlain v Abdullahi Dan Fulani*.<sup>44</sup> These relate to evidence and procedure, adherence to the principle of *stare decisis*, and discretion in evaluating evidence.

#### *Evidence and procedure*

Jones CJ aptly enunciated the role of judges under the Shari'ah thus:

The substantial procedural difference between English law and Islamic law is, therefore, that in the former the judge exercises a judicial discretion in deciding the credibility of witnesses and in the latter he does not. In English law the discretion cannot be exercised judicially unless the judge has heard all the witnesses of both parties. In Islamic law, once the party asserting has perfected the proof of his case there is no further discretion left to the judge. From this it follows that, if in the appeal before us the defendant and his witnesses gave evidence such evidence would not be relevant.<sup>45</sup>

Although Justice Gwarzo dissented on the relevant facts here in the appeal, His lordship agreed with this exposition of Islamic law by pointing out the “illegality of allowing any evidence for the defence to be entertained after the asserting party has perfected the proof of his case in accordance with Islamic Law procedure which insists on the provision of *izar*.”<sup>46</sup>

#### *Stare decisis*

The doctrine of *stare decisis* which forms the basis of judicial precedent – the very foundation upon which the common law rests, is unknown in Islamic law (Yadudu 1992: 131-134). Justice Gwarzo expounded the Islamic law position on judicial precedents thus:

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<sup>44</sup> (1961–1989) 1 Sh.L.R.N. 54.

<sup>45</sup> *Id.* at 57, quoting *Shittu v Biu* (1973) NNLR 193 and citing with approval *Biye v Maicatta* 1974 NNLR 70.

<sup>46</sup> *Id.* at 60.

There is no question of relying on higher or lower court's interpretation when the prescription of law is vividly clear.

In Islamic law a judge is not bound by a precedent in a case which is similar. See commentary *Mukhtasar Khalil*, vol. 2 entitled '*Jawahir al-Iklil*' page 30. Thus, if a judge gave a judgment in a case, then a similar case came, his judgment in a similar case will not extend to a case which is similar to the one in which he gave judgment in the first instance because trying a case is non-integral, but if a similar case arose after the first judgement between same litigants or others, independent examination is required by law from the first judge or another judge.<sup>47</sup>

Justice Kalgo agreed but declined to follow this Shari'ah principle. His Lordship explained thus:

In deciding this issue this court will be guided by established authorities on this point. I am not unaware of the fact that in Islamic Law, there is no binding principle of precedents as we have in English type of courts.<sup>48</sup>

The issue of precedents has been a recurring problem in the Sharia Court of Appeal. In recent times, some Kadis have blatantly refused to abide by the doctrine while others have devised subtle methods of evading it.<sup>49</sup> There are

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<sup>47</sup> *Id.* at 60-61.

<sup>48</sup> *Id.* at 59.

<sup>49</sup> In *Karimatu Yakubu and Anor v Yakubu Paiko and Anor* (supra), at 137-138, the Court of Appeal disapproved of the silence of the Sharia Court of Appeal on a relevant decision cited by counsel: see the criticism of the attitude of the Court of Appeal in Ladan (1993). The Sharia Court of Appeal routinely distinguish decisions of Supreme Court on the ground that the cases were "not arrived at through the procedure of Islamic law": *Ndagunu Sha'aba v Nda Mohammed*, 2000 *Kwara State Sharia Court of Appeal Annual Report* 81 at 86; *Isiaka Lawal Ajia v Alhaja Adijat Oloduowo and ors*, 2001 *Kwara State Sharia Court of Appeal Annual Report* 100 at 102; and *Alhaji Issa Alabi v Alhaji Salihu Kareem*, 2002 *Kwara State Sharia Court of Appeal Annual Report* 54 at 59. The Court also distinguishes its own judgments:

nonetheless, instances where the court cites and relies on previous cases although these have been mostly on elementary points of law and never in opposition to Islamic principles.<sup>50</sup>

*Evaluation of evidence.*

Under the Shari'ah, the judge is entitled to use all relevant facts and apply all relevant laws whether or not these were canvassed by the parties.<sup>51</sup> This is because the judge has a duty to ensure that justice is done and that the appropriate laws are applied. Justice Gwarzo gave effect to this principle of Islamic law thus:

Notwithstanding that the appellant's counsel did not argue ground 2, but I observe in the proceedings of the trial court that certain questions which should have attracted the attention of learned Upper Area Court Judge.<sup>52</sup>

His Lordship then proceeded to look into the matter. Kalgo J, complained of the action of the Grand Kadi thus:

The learned Grand Kadi has also delved into the record of appeal and discussed points in his judgement, which have neither been raised nor argued on appeal before us. Decisions of the Supreme Court and other Courts of Appeal in this country have shown that this cannot be validly done. I also disagree with the learned

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*Fatimoh Asabi v Alhaji Abdulkadir Oba, 2001 Kwara State Sharia Court of Appeal Annual Report 10 at 22 – 23.*

<sup>50</sup> For example in *Alhaji Sulu and anor v Hamdallah Abike, 2002 Kwara State Sharia Court of Appeal Annual Report 27 at 36–37*, the Sharia Court of Appeal relied on a Court of Appeal decision which stated that in appeals from area courts, the appellate court should not be “too strict in regard to matters of procedure”.

<sup>51</sup> This contrasts with the common law position where it is a judicial virtue for a court not to go beyond matters canvassed by the parties: *Alhaji Umar v Bayero University, Kano* (1988) 7 S.C.N.J. 380.

<sup>52</sup> *Chamberlain v Abdullahi Dan Fulani* (1961–1989) 1 Sh.L.R.N. 54 at 61.

Grand Kadi on this.<sup>53</sup>

Justice Gwarzo justified his action by citing Islamic law procedure:

With the greatest respect the difference between the view of my learned brother and mine is probably the difference between two systems of law. In Islamic law, a judge is prohibited to make use of his knowledge of a case which has not come before him, but once evidence is before him he is bound by it. He has to consider it according to the law. If he discovers a default it is obligatory upon him to put it right with what authority he has. The Prophet (SAW) is reported as saying:

Whosoever observes evil he should remove it with might, if he cannot he must do that with the weapon of the tongue, if he could not then he must hate it at heart.<sup>54</sup>

I have quoted *in extenso* from the judgments so as to illustrate very important fundamental differences between the common law and Islamic law and the confusion in which common law practitioners find themselves when grappling with Islamic law matters. Justices Gwarzo and Kalgo are both Muslims. The difference in their opinions illustrates where their allegiances lie. Justice Kalgo is common law trained while Justice Gwarzo is Shari'ah trained and was in fact the then Grand Kadi of Kano State. The role of judges is fundamentally different in the two systems (Schacht 1964: 198; Shagari and Boyd 1978: 28–31). There are other crucial differences between the two systems. Some of these relate to the role of oaths,<sup>55</sup> *ex parte* applications,<sup>56</sup> laches<sup>57</sup> and *res judicata*.<sup>58</sup> The valley of mutual

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<sup>53</sup> *Id.* at 59.

<sup>54</sup> *Chamberlain v Abdullahi Dan Fulani* (1961–1989) 1 Sh.L.R.N. 54 at 62.

<sup>55</sup> On the role and types of judicial oath in Islamic law, see Schacht 1964: 190. The introduction of the common law type of oath into Shariah courts by the colonialists has resulted in the perversion of oaths in those courts (Yusuf 1982: 40–41).

ignorance between Shari'ah and common law practitioners in Nigeria is very deep. It is necessary for the development of law in Nigeria that seminars, workshops and conferences are organised for the comparative study of aspects of both laws.

### Shariah's Perspective on Legal Practice

There are many objections in Islamic law to the sort of role lawyers play in the common law system. These objections are legal and spiritual. Legally, as pointed out earlier, Islamic law is so simple and straight forward that all one needs to do to prove or defend a case can be explained to litigants by the judge in a matter of minutes. Technicalities are very rare under Islamic law. Secondly, Shari'ah does not allow for opinions and arguments where the law is clear, and the law is virtually clear on almost everything. In the rare instances permitted, only opinions of unbiased, disinterested, pious and learned *Mujtahids* are relevant. Divine injunctions cannot be subjected to partisan distortions or arguments. Islamic law does not admit arguments *bi'l ray* (sheer reasoning and rationalism) in matters of law.<sup>59</sup> Most matters of law are very clear. It is *makruh* (reprehensible) for a non-

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<sup>56</sup> *Ex parte* applications are not tolerated or allowed in Islamic law. A judge is forbidden from hearing a case in the absence of the other party. The Islamic law attitude is based on the prophetic tradition which says: "When two persons come before you for judgment, do not give judgment until you have heard what the other party will say, for judgment becomes clear upon hearing what the two parties say" (al-Asqalani 1994: 289). Thus, *ex parte* applications and judgments are considered only in rare and exceptional circumstances: Ajetunmobi 1988: 196–199. The routine use of *ex parte* motions is one of the matters introduced into Area Courts by legal practitioners in spite of Order 5, Area Court (Civil Procedure) Rules, 1971 which prohibited it.

<sup>57</sup> Except in rare circumstances, time lapse cannot defeat a valid claim: *Iya Maiwauna v Mamman Captain* (1961–1989) 1 Sh.L.R.N. 8.

<sup>58</sup> A judge can re-hear and review his own judgment if he discovers for example that it was erroneously made (Ruxton 1916: 287-288). See also *Anafi Aremu v Alhaji Ayuba Akanni and anor*, 2002 *Kwara State Sharia Court of Appeal Annual Report* 1 at 10–13.

<sup>59</sup> Legal arguments based on personal opinion without reference to the sources of Islamic law are not permitted. Total submission to the injunctions of Allah (*SWT*) is compulsory (Quran: 4: 65, 115 and 59: 7).

litigant to visit courts persistently (Ruxton 1916: 298). Thirdly, it is not permitted to charge money for legal advice, it being a spiritual service to the community (Zubair 1999: 63–65).

Spiritually, it is not permitted in Islam to advance arguments contrary to one's actual belief. If one says what is different from what is one's real opinion or what is in one's mind that is *Nifaq* (hypocrisy). *Nifaq* is *Kaba'ir* (one of the great sins) in Islam. This is a major departure from the common law position. Under Islam, a submission by counsel which differs from what he believes to be the correct position may fall into the realm of *Nifaq* whereas the common law is only interested in the arguments submitted by counsel and not in his personal opinion. Thus, in the common law, it is perfectly proper to advance arguments which one does not believe in so long as one does not mislead the court on facts.

Furthermore, there are cultural conflicts between common law and Islamic law. The common law is a Christian law (Oba 1997: 30–32). It is the Anglo-Christian attempt to find legal solutions to the problems of life. It is therefore not surprising that there are cultural aspects of the profession that baffle articulate Muslims. Take the wig and gown for example. The wig is made of horsehair. It is forbidden in Islam to use artificial hair. The symbolism of the dual crosses at back of the wig is clear (Orire 1985: 10). Yet every lawyer must wear wigs when appearing before superior courts in the country.

Again, there is the question of female dressing. Muslims females have a mode of dressing (the *hijab*) prescribed by the Shari'ah. It does not matter that many westernised Muslims do not adhere to this code of dressing. The *hijab* remains the code of dressing for Muslim women. Female Muslim lawyers have to appear in court in wig with their heads uncovered in gross violation of the Islamic code of dressing. I understand that female Muslim students in the Law School have to appear bareheaded for the three compulsory dinners. This is a very sore matter for Muslims (Bayero 1998: 92–109). The attitude of the Law School authorities and the leaders of the profession have been very uncompromising. I once asked one of the leading judges of the Court of Appeal (now a justice of the Supreme Court) about the issue of *hijab*.<sup>60</sup> I was shocked by the vehemence with which His Lordship (a Christian) opposed any concession to female Muslim lawyers in this regard. His

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<sup>60</sup> This was at the National Conference on the 1999 Constitution and the Shariah organised by and at the Kwara State College of Arabic and Islamic Legal Studies, Ilorin between 16<sup>th</sup> and 18<sup>th</sup> February 2000.

lordship based his opposition on the need to maintain ‘standards in the profession’. If this is the case, then are Nigerians more standard-conscious than even their former colonial masters? This may be asked because in England Sikh barristers are now permitted to appear in court wearing their religious/ethnic turbans instead of the barrister’s wig.<sup>61</sup> The attitude in Nigeria shows a total disrespect for the religious rights of the female law students and lawyers and utter disregard for the sensibilities of Muslims.

Muslims operating under the common law whether as litigants, lawyers or judges also face dire spiritual consequences. It is too easily forgotten that secularism is a man-made ideology and not part of religious law. This means that a man is still subject to judged on the basis of his religion. For the Muslim, this means that, whether one wants it or not, it is the standard of Islamic law that will be used to assess a Muslim’s actions by his Creator (Mahmud 1988: 54–61). The spiritual cost of the common law to the Muslim can be looked at from three perspectives, namely, Muslims generally, and Muslims in the legal profession as lawyers and as judges.

For Muslims generally there is an incumbent religious obligation to follow the Shari’ah at all times. It is not permissible for a Muslim to ignore the Shari’ah. Allah (*SWT*) says:

Whoso judgeth not by that which Allah hath revealed: such are disbelievers,...wrongdoers....[and] evil-livers (Quran 5: 44, 45, 47)

Justice Bappa Mahmud commenting on these verses of the Quran says:

Learned scholars have further interpreted those verses to mean that those who fail to judge by the provision of Shari’ah on the ground that they doubt its revelation are unbelievers. And those who fail to do so not because they doubt its revelation, but because they wilfully want to go against the injunction of Allah, and the right of the individual are wrongdoers. But those who avoided the application of Shari’ah and fail to judge accordingly

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<sup>61</sup> “... [A]lthough it is the custom for all barristers and judges to wear wigs in court, the Sikhs do not follow that custom. They wear their turbans. No one objects.” (Denning 1983: 78 and generally 76–87).

are rebellious. In short these verses mean that failing to apply and adjudicate by Shari'ah can render one an infidel (Mahmud 1988: 56).

That was why Justice Orire, the Hon. Former Grand Khadi of Kwara State in his contribution to the 1988 Shari'ah debate, lamented: "Muslims have made a lot of sacrifice and in the process offended God" (Orire 1988b: 23).

#### *Muslims in the legal profession*

Muslims in the legal profession face additional spiritual problems. Some of their special problems as lawyers and judges are examined here.

##### *(a) Lawyers*

Some, upon a superficial consideration of the matter and without citing any Islamic law authorities, have argued that there is nothing wrong with the practice of law by Muslims (Ambali 1998: 22, 75, 79). This view, with all due respect, betrays a lack of knowledge of common law and inability to make *Ijtihad*. Lawyers are subject to rules of professional ethics. The rules were neither made in contemplation of nor with regard to Islamic ethics. However, it is the Shari'ah that Allah (*SWT*) will use to judge the actions of the Muslim lawyer. It is no excuse that the lawyer's actions which fall under *haram* (forbidden) under the Shari'ah are allowed under the rules of professional ethics. For example, it is *nifaq* to say what is different from what is in one's mind. It does not matter whether it is called a 'submission', 'argument', 'point' or 'case'. Again, it is not permitted to side against a Muslim in a quarrel between a Muslim and a non-Muslim except when one corrects or prevents a Muslim from wrongdoing (Quran, 3:28; see generally al-Jazairiy 1993:168-171). Even in cases of disagreement between two Muslims, one is enjoined to make peace between them. It is only when one of them refuses to abide by legitimate arbitration that every one fights him to submission (Quran, 49: 9-10).

##### *(b) Judges*

Muslims who are judges face ominous warnings from the Quran and the Hadith.

For example, the Prophet (*SAW*) was reported to have warned thus:

Judges are of three types, two of these are in Hell-fire while the third is in Paradise: the judge who knows the Truth (*Haqq*) and judges by it, is in Paradise; the judge who knows the truth but judges not by it and thus transgress in his judgment is in Hell-Fire; and the judge who does not know the truth and judges by this ignorance is in Hell Fire (al-Asqalani 1994: 289) (translation mine)

It is difficult to say that the common law is “what has been sent by Allah” or that it is the Truth (*Haqq*). Thus, let all Muslim judges who judge by the common law prepare what they will say when they face their Creator on the Day of Judgement (Mahmud 1998: 58–59).

Under the Shari’ah, Muslims can only partake of the common law under the excuse of necessity (*durur*). This however has rules. A Muslim cannot enthusiastically defend the common law and oppose the Shari’ah (Doi 1990: 449–454). He must cease to continue under the common law as soon as the Shari’ah option is available. These are very difficult conditions. Muslims now forget themselves in the mindless pursuit of the ‘honours’ and material wealth derivable from the practice of the common law. Many Muslims have incurred the displeasure of their Muslim communities as a result of their role either as litigants, counsel or judges in cases where Shari’ah was placed at a disadvantaged position.<sup>62</sup>

### Future of Lawyers in Shari’ah Courts

Nigeria’s legal pluralism is multifarious. There are two particularly important types of legal pluralism. The first is brought about by the many customary laws in the country. There are over 250 ethnic groups with each having its own customary laws (Oba 1998: 27). The second type of pluralism arises from the enforcement of these customary law in the modern state side by side with state law. This has led to the type of legal pluralism which Woodman (1996: 157-159) has described as state

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<sup>62</sup> Such cases include *Mallam Ado v Hajia Dija* and *Karimatu Yakubu and Anor v Yakubu Paiko and Anor* cited above.

law pluralism, that is, a situation where customary law is recognised and incorporated into the state's legal system within the same field of the jurisdiction claimed by the state. All these customary laws and state laws exist together in a state of conflicts and tensions (Salamone 1983). Federalism has added another type of pluralism in the presence of federal and state laws. States have wide powers of creating courts of subordinate jurisdiction to the High Court.<sup>63</sup> Since 1999 many states in the north have utilised this power by creating Sharia Courts which have exclusive first instance jurisdiction in Islamic law. Thus, all the facets of legal pluralism have potential effects on legal education and on the appearance of lawyers in Shari'ah courts.

The fact of conflict between Islamic law and common law in terms of the administration of justice has been apparent since the advent of colonialism. The colonial approach was that common law procedure would eventually triumph over the Islamic procedure. Thus, they decided ways by which this can be achieved. At the outset they termed Islamic law 'customary law'.<sup>64</sup> This had two important consequences. Islamic law could be administered by persons who did not have any learning or knowledge of Islamic law since customary laws were matters of fact which must be proved before the courts could act on them. The second consequence was that there began a gradual anglicisation of the administration of Islamic law in terms of both procedure and substantive law. What emerged therefrom was no longer Islamic law but 'lawyer's Islamic law'.<sup>65</sup> Lawyers could not appear in native courts but they did appear in superior courts which heard appeals from these courts. This brought about a gradual reformulation of Islamic legal education. The independent Nigeria inherited the judicial machinery which the colonial authorities had put in place, where pre-eminence is given to the common law and its practitioners over customary and Islamic laws.

There have been many suggestions on the future of the administration of law in Nigeria. The colonial legacy has remained a crucial factor in determining the

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<sup>63</sup> See s. 6(6), 1999 Constitution.

<sup>64</sup> See for example s. 2, High Court Law, Northern Region (No. 8 of 1955, subsequently Cap. 49, *Laws of Northern Nigeria*, 1963) which provided that 'native law and custom' included 'Moslem law'. See also the extensive discussion of the issue in Oba (2002c).

<sup>65</sup> This argument was canvassed in respect of customary law in Woodman (1965: 146, 169). See the similar experience in Senegal noted in Snyder (1981).

future of lawyers in Shari'ah courts. Some have argued for the retention of the colonial legacy of a unified judicial arrangement. They base their arguments on cost effectiveness, convenience and unity of the diverse elements of law in the country.

Proponents of this school of thought can be divided into two. The first is those who want the continuation of the colonial arrangement *in toto* (Agbede 1989a, 1989b; Ijaodola 1970; Aihe 1988). This group have very few supporters for there is a near consensus amongst Islamic and customary law proponents and even legal practitioners that this colonial legacy, which is inconsistent with Nigeria's status as an independent democratic country, cannot continue for much longer.

The second group also accept a unified court system but want a modification of the country's legal education so that all legal practitioners would be learned in all the three laws – common law, Islamic law and customary law – applicable in the country and therefore able to apply all of them effectively (Aguda 1988, 1989). To this group also belong some Islamic law proponents who accept the current position as a *de facto* reality. Justice Ambali, a Kadi (now a Grand Kadi) sees nothing wrong with the appearance of lawyers in the Sharia Court of Appeal although his lordship did not cite a single authority from Islamic law in support of his view. His Lordship's articulation of the issue deserves to be quoted *in extenso* because it represents the most liberal of the views on the matter and because too of the important conditions that his lordship attaches to the appearance of lawyers in Shari'ah courts. His Lordship puts his view thus:

The appearance of legal practitioners in courts applying Shari'ah has its merits as well as adverse effect and attendant challenges. The most serious problem is the assumption of legal practitioners that English legal system is the standard after which other legal systems have to follow. Their appearance can only be meaningful if they take pains to be conversant with the Shari'ah substantive and procedural laws. Unless this is done, their appearance will continue to mean attempts to use the negatives of Common law to print the photographs of Islamic justice. The lawyers as well as the institutions of higher learning offering Shari'ah need to rise up to the challenge. This will not only popularise Shari'ah but will also generate good basis for comparison leading to the benefits of Nigeria sifting and choosing which suits our society best in a given circumstance. It goes without saying that the

appearance of legal practitioners will enhance the quality of the judgments in courts applying Shari'ah as it has positive part to play to improve the practice of Islamic Law (Ambali 1998: 22).

The appearance of lawyers in the Sharia Court of Appeal has not *ipso facto* generated more controversy. Rather, as can be seen from Justice Ambali's statement, Islamic law proponents have difficulties in accepting the present situation because of most lawyers' ignorance of Islamic law, their introduction of common law doctrines into Islamic courts, and their lack of respect for Islamic law. As Ajetunmobi rightly pointed out, if lawyers want to continue appearing in Shari'ah courts, it is only proper that they are adequately prepared for the task (Ajetunmobi 1988: 194). Legal education both at the academic and professional stages should include compulsory Shari'ah courses. Such courses should include core Shari'ah courses such as the Islamic law of evidence and procedure and Islamic family law. This may entail a radical reform of legal education in Nigeria. The result should be that all lawyers in Nigeria are properly equipped to tackle both common law and Shari'ah cases.

However, the problem with the proposed reform of legal education is that both common law and Islamic law are laws which require many years of study before they can be mastered by anyone. Thus, the question is whether it is possible to attain and combine effectively expertise in both laws? The experience with the combined law program has shown that most of the products are fairly capable as regards common law but are woefully deficient in Islamic law. Again, the proposed arrangement will apply to all those training to be lawyers in Nigeria, whether they are interested in practising the Shari'ah or not. There is also a question of the willingness of lawyers and would-be lawyers to undergo such training. It may be unfair to saddle those who are not interested in the Shari'ah with this additional burden. This is more so as to Christians, particularly those who have an aversion to anything Islamic. The counter argument is that the total fusion of the study of Islamic law with common law is not really necessary (Ajetunmobi 1988: 316), and that Muslims who are not interested in the common law (which they believe to be a Christian law) have had to study that. Thus, it may be part of the high price the country has to pay for national integration.

The Kadis of the Sharia Court of Appeal have strenuously defended Islamic law and its procedure from the encroachment of common law doctrines. We have discussed above the Kadis' rejection of the doctrine of judicial precedent. The Kadis have also maintained that Islamic law cases are to be tried using only the

Islamic law procedure without any intrusion of common law rules. According to the court, “[a]ll matters that fall within the jurisdiction of Islamic law should be processed from the beginning to the end through the applicable law, which is Shari’ah”.<sup>66</sup> The Kadis have also rejected the common law doctrine of *res judicata* as “having no place in Islamic law”.<sup>67</sup> However, some common law principles have sneaked into the practice of the court. For example, the court rejected in a case an application to file additional grounds of appeal because there was “no original ground of appeal upon which the additional grounds will rest”.<sup>68</sup>

The question of respect for Islamic law and its courts is also central to the success of a unified courts system. Lawyers trained in common law should have respect for the Shari’ah system and should be willing to make concessions to Islamic law and procedure. These are particularly difficult to achieve. For one thing, lawyers tend to think of Islamic law as backward and primitive. (For examples and comments see Sulaiman 1989: 63–65). The centuries of negative and distorted presentation of Islam and its Law by the Western press is responsible for this. So also is the educational system (Sulaiman 1988: 52–74). Lawyers tend to assume the superiority of common law values (Nwabueze 1973: 83–85). In this regard, they should heed the warnings made by Alexander Solzhenitsyn the Nobel Laureate in his speech at Harvard in 1978 (Solzhenitsyn 1978). He repeated similar views on another occasion thus:

The mistake of the West and that was how I started my Harvard Speech is that everyone measures other civilization by the degree to which they approximate Western civilization. If they do not approximate it, they are hopeless, dumb reactionary and don’t have to be taken into account. This is dangerous (Solzhenitsyn 1989: 58).

Those who have studied Islamic law have respect for it even if they are not Muslims. Schacht, an orientalist who is not known for any sympathy to Islamic law confessed that:

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<sup>66</sup> *Alhaji Sulu and anor v Hamdallah Abike*, 2002 *Kwara State Sharia Court of Appeal Annual Report* 27 at 35.

<sup>67</sup> *Anafi Aremu v Alhaji Ayuba Akanni* (as cited above), 10–12.

<sup>68</sup> *Fatima Babi Baba v Jibril Gana*, 2001 *Kwara State Sharia Court of Appeal Annual Report* 130 at 133.

One of the most important bequests which Islam has transmitted to the civilised world is its religious law, the Shari'ah. It is a phenomenon so different from all other forms of law that its study is indispensable in order to appreciate adequately the full range of possible legal phenomenon...The influence which Islamic law has exerted on other laws cannot compare in importance with the very fact of its existence... Several of its institutions were transmitted across the Mediterranean to medieval Europe, and became incorporated in the law merchant...Another significant...influence occurred in Spain....At the opposite end of the Mediterranean, Islamic law has exerted a deep influence on all branches of Law of Georgia...There is finally the effect of Islamic law on the laws of the tolerated religions, the Jewish and the Christian....It is certain that the two great branches of the oriental Christian Church, the Monophysites and the Nestorians, did not hesitate to draw freely on the rules of Islamic Law. (Quoted in Rashid 1989: 89-90).

It is sincerely hoped that lawyers will adjust. It is not realistic to expect that Islamic law will continue to be subject to the common law values and parameters.

It should be noted that some of those who want a unified judicial system see it as a step towards unification of laws. Elias (1969: 18-19) and Aguda (1988, 1989) have advocated the evolution of a 'common law in Nigeria' and a 'Nigerian common law' respectively. But Doi (1990: 26) spoke the mind of Muslims when he said: "The Shari'ah and the Western Common Law cannot be fused together completely nor will it be allowed by the *Ulama* of Islam and well-meaning Muslims". Dinakin (1988) suggests a second option whereby the High Court and the Court of Appeal have specialised divisions, which will include *inter alia* Islamic law, and customary law divisions. However, he is silent about legal education.

Directly opposed to those who want a unified system are those who advocate a parallel system of courts. The core proponents of this view are Muslim scholars. They want the administration of Islamic law to be separated from the other two laws and administered by separate courts and separate personnel by way of a parallel system of courts from the lowest courts to the highest court culminating either at a newly established Federal Shari'ah Supreme Court or at a Federal

Shari'ah Court of Appeal. It is noteworthy that the All Nigerian Judges' Conference in 1972 recommended the latter alternative, but the assassination of the then Head of State General Murtala Mohammed in 1976 scuttled the proposal (Doi 1989a: 46-48; Belgore 1999-2003: 24-25). In 1976 the Constitution Drafting Committee also made the same recommendation but it was rejected by the Constituent Assembly which deliberated on the reports of the committee (Constitution Drafting Committee 1976: 110, 113, 124-125). The issue of a Federal Shari'ah Court of Appeal became at the Constituent Assembly a very volatile issue which polarized the country along religious lines and threatened the very foundation of the Nigerian state (Kukah 1993: 115-144). This scenario was repeated at the Constituent Assembly of 1988/89 (Aniagolu 1993: 93-147 and Yadudu 1993: 47-54).

Those who want a parallel system of courts base their arguments on the specialised and highly technical nature of Islamic law and the lack of knowledge of Islamic law by legal practitioners, the availability of Islamic law experts who are not common law practitioners, and the hostility of legal practitioners to Islamic law. There is no doubt that these are cogent grounds. The parallel system need not be tripartite. Customary law can be administered by English style courts. A dual system that takes care of Islamic law and the other two laws respectively suffices as the recent developments in northern Nigeria have shown.

Since the advent of civilian regime in 1999 and the revival of Islamic law that followed it in some states in the north, the idea of parallel courts system has found fuller expression. This has occurred in the States that have adopted Islamic law as the basic source of their laws and have either established Sharia Courts, or have reorganised their Area Courts so that these courts have exclusive jurisdiction in Islamic law matters while Magistrate courts have exclusive jurisdiction in customary law and English style laws (Ruud 2003; Oba 2003). At the High Court level, the jurisdiction of the High Court is limited to customary law and English style laws and appeals from Magistrate courts. The Sharia Courts of Appeal in those states now have exclusive appellate jurisdiction from the Sharia Courts in Islamic civil and criminal matters. The position at the Court of Appeal and the Supreme Court remains unaltered as the States do not have legislative jurisdiction over these two courts. Other reforms in these States include the introduction of a Shari'ah Penal Code based on Islamic law and the transfer of the supervisory powers over the Sharia Courts and Area Courts from the Chief Judge to the Grand Kadi.

The revival of Islamic law (particularly the criminal aspects) in northern Nigeria has made more urgent the need for professionalisation of the practice of Islamic law in the country. Since the Shari'ah Penal Codes<sup>69</sup> provide some particularly stiff punishments (Ruud 2003: 18-29), they need to be administered by competent judges. Experience has given rise to doubts as to the competence of some of the judges in the Sharia and Area Courts. For example, in *Saffiyatu's case* the Sharia Court convicted the accused of *zina* (unlawful sexual intercourse) and sentenced her to death by stoning (WACOL 2003). The conviction was set aside by the Sharia Court of Appeal on points so elementary that any competent trial court should have seen them.

The problem of these judges lies in their deficient legal education. At best they are familiar with a few Maliki Law textbooks which they apply in a rote manner, whereas the *application* of Islamic Criminal law is highly technical and dynamic (Ruud 2003; Oba 2003; Uthman 2003; Zubair 2003). All possible defences in favour of the accused person must be explored by the judge even if the defences have not been raised by the accused. This is more so in respect of the canonical punishments (*huduud*; see Doi 1990: 218-269) which carry stiff penalties. The prophetic direction for such cases is: "Prevent the application of *Hadd* punishment as much as you can whenever any doubt persists" (Doi 1990: 224). There is a need to safeguard the rights of accused persons. Islamic law provides comprehensive lines of defence to the canonical crimes (Ambali 1992).

Lawyers retain their right of audience in the new Sharia courts and the reformed Area Courts, but their usefulness is limited by their lack of expertise in the technical details of Islamic law. The idea of legal representation consistent with Islamic norms in Shari'ah Courts has attracted the attention of proponents of the parallel school. Many have no objection to lawyers appearing in Shari'ah courts if they are learned in Islamic law and they appear in a manner consistent with Islamic rules governing legal representation. The first official step in this direction was taken by the Area Courts Reform Committee (1976: 38) that recommended the establishment of a Shari'ah 'College of Advocates' which would be run by a committee of experts in the Shari'ah who would serve as 'Benchers' for this class of advocates. The Federal Government (1977: 11) noted this recommendation and directed the Attorneys-General of the States concerned "to consider the issue and recommended appropriately, as early as possible". The Attorneys-General never responded (Ajetunmobi 1988: 193) and the matter fell into abeyance with the

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<sup>69</sup> An example is the Shari'ah Penal Code Law, No. 10, 2000 (Zamfara State).

enactment of the 1979 Constitution. For many, the implementation of the recommendation is the only answer (Ajetunmobi 1988: 335).

This writer supports this stand and suggests further that a comprehensive full-fledged professionalised ‘Shari’ah Bar’ be established parallel to the common law bar. This Bar should be independently regulated to cater only for those who want to practice in Shari’ah courts. The academic and professional training for this suggested Shari’ah Bar would be exclusively Shari’ah. This training would borrow much from what has been discussed here and would focus essentially on developing in Islamic law experts the ability to do *Ijtihad* competently in the modern age, instead of blindly following of the *Ijtihad* of the middle ages documented in the classical textbooks. This will as of necessity include core ‘law’ courses such as Constitutional Law, Nigerian Legal System, and General Principles of Common Law. The parallel courts option will separate the common law and Islamic law both in matters of law and administration of law. This option together with a fully professionalised Islamic bar will allow for an orderly development of Islamic law in the country, will give full effect to the legal pluralism which is the basic nature of the Nigerian legal system and will provide a basis for a harmonious co-existence of the Muslim and non-Muslim peoples in the country.

## Conclusion

This paper has demonstrated that Shari’ah legal education has not been adequately taken care of within the official framework of legal education. The traditional system of Shari’ah education which continues till now, is also far from the ideal. It needs urgent reforms so that irrelevant and poorly educated ‘Islamic scholars’ are not foisted on society.

It has also been demonstrated that Islamic law cases are being heard by judges who may not be adequately educated for this purpose. Urgent reforms are necessary here too. These words of Tabi'u are instructive:

It is highly desirable therefore to evolve a new policy towards application of Islamic law: a policy based on a fuller understanding of Islamic law and its place in the life of Muslims. It should entail an enlarged application of Islamic law and its implementation by the judges who are well trained in it and who are not subordinate to judges with a different training (Tabi'u

1989: 84).

The appearance of lawyers in Shari'ah courts has been shown to be of doubtful legal validity. It is not certain beyond doubt that lawyers have a right of audience in these courts. The fundamental question of the relevance of lawyers in Shari'ah courts has also been raised. The Shari'ah can and should accommodate lawyers, but not lawyers of the common law type who are strangers in Shari'ah courts. Stranger still are Kadis to these type of lawyers.

When lawyers started appearing in the Sharia Court of Appeal the differences between the Common law and the Islamic law systems and their incompatibilities confronted them immediately. The Kadis resented the 'intrusion' of lawyers. They complained bitterly of the lawyers' almost total ignorance of Shari'ah law and procedure. Lawyers too had misgivings. They were angry that the Kadis did not seem to 'appreciate' the 'points', 'issues', and 'arguments' canvassed before them. An immediate source of controversy was the mode of dressing of lawyers before the Court. Lawyers declined to appear before the Sharia Court of Appeal in wig and gown. They preferred to appear in suit and tie as they do in inferior courts such as Magistrate courts. The Kadis insisted that they appear fully robed. After a long drawn-out controversy, the Kadis won. The Sharia Court of Appeal is a superior court by virtue of the Constitution. The Kadis are to be addressed as 'my Lords' not as 'Your Honours' and lawyers have to appear before them fully robed. It remains today a spectacular, if not out-right ridiculous sight when fully robed common law trained lawyers argue Islamic law cases, citing the Quran in translation (Yusuf Ali's) and bow before turbaned, *abiya* (traditional robe)-clad Islamic law trained Kadis who quote from authoritative Islamic law texts in fluent Arabic. It is a sight that symbolises the uneasy and unnecessary schizophrenic confusion of the Nigerian legal system.

This paper has also shown what is not frequently heard in lawyers' gatherings: an Islamic evaluation of their activities. This is good. It makes humility compulsory, and the food for thought, richer. In spite of the various view points expressed here it is an undeniable fact that all the proponents and opponents of the Shari'ah and common law systems must live together in the same Nigeria. The wide gulf of ignorance of the Islamic law among legal practitioners is frightening and does not augur well for the future of the nation. It is necessary that avenues for frank and honest discussion of the issues should be organised. For the Nigerian lawyer of today, ignorance of the Islamic law is no longer excusable.

This paper has also shown the reasons for the resilience of Islamic law and the continuous revival movements despite over one and half centuries of colonial and postcolonial suppression. Islamic law is a divine imperative on Muslims. It is indispensable in their lives. So long as there are Muslims, many of them will want to enforce Islamic law as the legal code governing their lives.

In the final analysis, the only sensible conclusion is that the present arrangement for administration of Islamic law does not allow for orderly development of Islamic law in Nigeria. It is sincerely hoped that all persons concerned with the issues raised in this paper will exercise more patience in understanding each other's viewpoints, and more tolerance of each other's views. Peace and harmony do not necessarily mean uniformity. Peace can be found also in harmonious diversity.

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