



The King's Student Law Review

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Source: *The King's Student Law Review*, Vol. 8, No. 2 (2017) pp. 18-36

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

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The Shifting Tide (Once Again) of Shari'a Law in Northern Nigeria

Justin Su-Wan Yang

1. Introduction

The historical struggle of Shari'a law in Nigeria has repeatedly demonstrated the resilience of the Muslim communities in the northern states, as well as a fundamental (although not unintentional) misunderstanding of Shari'a law's role within the Nigerian common-law framework. The Shari'a has been, and still is, the focus of many intense debates along ethnic, religious, and cultural lines in Nigeria. Its origins in Nigeria significantly predate British colonialism. The British encountered a comprehensive Shari'a system that was in operation, which resulted in the policy of indirect rule to facilitate easier local administration and reduce resistance. The Shari'a had continued to apply to varying degrees over Islamic matters, in both the civil and criminal context. The colonialist experience witnessed a gradual and intentional marginalisation of Islamic law to establish the supremacy of the imported common-law. Sharia criminal law was effectively abrogated upon Nigerian Independence, save for certain ceremonial offences. Its civil jurisdiction was delimited to a finite number of matters deemed by the post-colonial Nigerian government as constituting 'Islamic personal law'. These matters were essentially questions of marriage-related issues, inheritance, gifts, and custody of children.¹ The Shari'a had effectively transitioned from being a comprehensive state law to a narrow set laws designed to accommodate local customs and practices.

The end of military rule 1999 ushered in Nigeria's Fourth Republic. This transition simultaneously witnessed the resurgence of 'wholesale' Sharia law in the northern 'Shari'a states'.² Its populist momentum reflected decades of suppressed desires of the Muslim communities to be represented on the legal landscape. It was no longer acceptable for Muslim matters between Muslim parties to be adjudicated by a common-law judiciary using common-law statutes. In the criminal context, the restoration of the Shari'a was the desired solution for prevalent corruption, rising crime rates, and curbing social vices. The state governments utilised their constitutional prerogatives to confer full civil and criminal jurisdiction to their Shari'a courts over consenting Muslim parties, which means there are effectively parallel court systems within these states. The core conundrum is whether the Shari'a states' interpretation of 'in addition to' within section 277 of the Constitution permits conferring additional jurisdiction to the Shari'a courts beyond Islamic personal law. In the initial years, neither the federal government nor the federal judiciaries (the Federal Court of Appeal (FCA) and the Nigerian Supreme Court), acknowledged the increased Shari'a jurisdiction. Conversely, no cases were appealed to the FCA from the state-level Shari'a Court of Appeal (SCA).³ As such, there was no conclusive judicial ruling on this interpretation, which has not been unintentional. The

¹ 1999 Constitution, s277(2).

² Bauchi State, Borno State, Gombe State, Jigawa State, Kano State, Katsina State, Kebbi State, Kaduna State, Niger State, Sokoto State, Yobe State, and Zamfara State will hereafter be referred to as the 'Shari'a states'; they will be distinguished individually when necessary.

³ As explored below in the case of Yahaya Kakale, there have been attempts to bring the issue of Shari'a constitutionality before the FCA, but they have been averted through political pressure.

uneasy atmosphere was shaped by mutually convenient desires to avoid direct confrontation between the Shari'a system and the federal courts. The judicial ambiguity was purposely sustained to facilitate co-existence, as the Shari'a was effectively confined to the northern states. Further, the Shari'a debates have been a highly incendiary topic, which has resulted in significant protests and mass violence.⁴ Therefore, it was more politically desirable to leave the Shari'a situation alone.

The initial test cases⁵ within Shari'a courts showcased the harsh sentencing practices of Shari'a criminal law, which attracted significant national and international criticism. The adultery cases were overturned by the SCA, and there have not been any amputations since 2001. What is remarkable is that judicial practice has demonstrated that the lack of federal antagonization has resulted in the Shari'a conforming to the Constitutional boundaries. Safeguard mechanisms and the appellate procedure have virtually removed capital and corporal punishments from the Shari'a jurisdiction. Furthermore, in allowing the Shari'a system to operate, it has encouraged internal criticism, Muslim civic movements, and changing judicial practices to improve the Shari'a system. This process is far more complex and interesting than earlier polar arguments of simply whether the Shari'a should apply or not. In other words, the maturation of Shari'a law in Nigeria was beginning to demonstrate how a Shari'a system can organically evolve to functionally co-exist within a common-law Constitution.

This fragile yet productive balance was maintained until *Abubakar Faransi v Habsatu Noma*⁶ in 2007, where a SCA judgment of a matter beyond Islamic personal law pursuant to their newly expanded jurisdiction was appealed to the FCA. The FCA simply dismissed the Shari'a expansion, and upheld the old restriction without much consideration of extraneous factors such as the new arguments for Shari'a expansion and the evolving judicial practice within the Shari'a system. Subsequent cases⁷ at the FCA have upheld this narrow view. However, this simple dismissal does not acknowledge the significant changes that the Shari'a community has made since then. The Shari'a judiciary, state infrastructures, and social expectations are firmly entrenched within the Shari'a states. The FCA's restrictive approach is very unlikely to result in the simple reversal of the Sharia system back to the narrow parameters set by the common-law institutions. The situation has therefore become much more complex. The existing legal scholarship has not explored the ramifications of this development, and a wider exploration is needed on whether these revived efforts in legal subjugation is necessarily progressive in maintaining a functional and harmonious Nigeria.

In this pursuit, this study employs an analytical framework that identifies the relationship of power between the colonial and post-colonial common-law institutions and the Shari'a community. Section I will trace the historical experience of Shari'a law in Nigeria to illustrate its increasing repression and marginalisation. This understanding is vital to appreciate the

⁴ See 2000 Kaduna Riots, 2001 Jos Riots, 2002 'Miss World' Riots, 2004 Yelwa Massacre, 2008 Jos Riots, and 2010 Jos Riots.

⁵ The famous adultery cases of Safiya Hussaini and Amina Lawal, whose convictions were both overturned by the Shari'a Court of Appeal.

⁶ (2007) 10 NWLR (Pt. 1041).

⁷ *Maishanu v Manu* (2007) CA/J/240S/2002; *Dare v Goma* (2016) LPELR-41280 (CA); and *Tudu v Hakimi* (2016) LPELR-40115 (CA).

context of the Shari'a resurgence. Section II will analyse and distinguish the Shari'a implementation in 2000 from previous attempts. It identifies novel constitutional and legal arguments that the FCA had not considered in depth in its recent cases. Further, it clarifies how the Shari'a was permitted to flourish through the intentional lack of federal opposition. Section III will evaluate the new implications of *Abubakar Faransi v Habsatu Noma* on Shari'a law. It will question whether the Shari'a system has indeed come too far to now accept this pre-1999 position. Even in the negative, it will explore whether the Shari'a community should accept such a restriction. Section IV will conclude with a commentary on this emerging form of functional legal pluralism, where the plurality *prima facie* appears to be incompatible, unresolved, and contradictory. However, a functional relationship is interestingly realised by the lack of federal state abstaining from subjugating parallel systems. This is interestingly reciprocated by the secondary non-state system conforming to the state law parameters.

2. Section I – A Brief History of the Repression of the Shari'a in Northern Nigeria

For analytical clarity, this section differentiates the trajectory of Sharia criminal and civil law, through three temporal periods – colonial, post-Independence to the Fourth Republic (1999), and post-Fourth Republic.

2.1 Colonial

The territory that now constitutes Nigeria has been the home of more than 250 ethnic groups and 400 linguo-cultural groups.⁸ Within this heterogenous community, Islam has been documented as early as the 11th century in Borno in the northeast.⁹ It existed under various kings alongside the indigenous and customary systems. Islam received a significant revival following the 19th century jihad by Uthman dan Fodio in Hausaland, where it became the official state law of the resulting Sokoto and Bornu Caliphates. The term Shari'a is often used interchangeably with legal, religious, and social meanings, which reflects the ubiquitous role and supra-legal role that it plays within the Islamic theology.¹⁰ The first British venture was the creation of Lagos Colony in 1861. In 1900, the Southern and Northern Protectorates were established as separate administrative entities.¹¹ In 1914, the Southern and Northern Protectorates were combined to create the current territory of Nigeria. However, they were still maintained as separate entities for administrative purposes, which partially reflected the vast religious and cultural differences between the north and the south.¹² Lord Frederick Lugard was the High Commissioner of the Protectorate of Northern Nigeria in 1900, and later the first Governor-General of Nigeria. During his tenure, he governed through the policy of indirect

⁸ J. Elaigwu, H. Galadima, 'The Shadow of Sharia over Nigerian Federalism', (2003) 33 *Publius: Journal of Federalism* 3, 125.

⁹ 'Islam in Nigeria', African Studies Centre Leiden, www.ascleiden.nl/content/webdossiers/islam-nigeria.

¹⁰ For further discussion on the various usages of the Shari'a, see M. Baderin, 'Understanding Islamic Law in Theory and Practice', (2009) 9 *Legal Information Management* 186.

¹¹ Lagos Colony was amalgamated into the Southern Protectorate in 1906.

¹² The British found Islam to be firmly rooted in the north as state law and state religion, while the southerners followed diverse tribal and customary laws. See A. Oba, 'Islamic Law as Customary Law: The Changing Perspectives in Nigeria', (2002) 51 *ICLQ* 823-824.

rule,¹³ which permitted local systems to continue to operate, albeit within the new boundaries and polices of the colonial authorities. This promise of non-intervention shaped many of the interactions between colonial common-law and Shari'a law up to Nigerian Independence. Shari'a law could not simply be abrogated due to this promise, and therefore, other measures were employed to gradually paralyse and marginalise the Shari'a.

Indirect rule had initially permitted Shari'a civil and criminal law to apply within the traditional judicial courts of the Emirs and alkalis. However, even from the outset, the British repugnancy clause¹⁴ and public policy tests¹⁵, limited the scope of Shari'a sanctions and awards. Shari'a criminal law was truncated to exclude the harsh fixed penalties for *hudud* offences,¹⁶ such as amputation, stoning, and crucifixion. The 1904 Criminal Code enacted for the Northern Region permitted the Islamic courts to continue applying the moderated Shari'a provisions. Section 4 of the Code read,

No person shall be liable to be tried or punished in any court in Nigeria, *other than a native tribunal*, for any offence except under the express provision of the code or some other ordinance or some law or some order-in-council made by his majesty for Nigeria.¹⁷

This permission was additionally regulated by the series of Native Courts Ordinances, which stipulated, *inter alia*, that while criminal cases could be heard by native law and custom, its resulting punishments could not exceed those prescribed by common-law.¹⁸ This standardisation in sentencing is significant, as it explicitly ignores the symbolic relationship between Islamic offences and their related punishments. Shari'a punishments, especially the *hudud* category, call for harsh sentences, but are equally withheld from casual execution by very strict evidentiary standards.¹⁹ The *hudud* penalties are better understood as projecting moral guidelines and societal parameters rather than constituting common practice. In separating the offences from their designated punishments, the internal significance and purpose of Sharia offences are distorted.²⁰ This standardisation has also taken place within the laws of evidence, where common-law evidentiary standards are employed to adjudicate the Sharia offences. Although this is not within the parameters of this paper, this approach has made *hudud* offences easier to convict, which is not only contrary to the intention of *hudud* offences, but also disproportionately emphasises the punitive aspects of Shari'a criminal law.

¹³ This policy was granted by the Royal Charter of the Royal Niger Company in its administration of northern Nigeria. The lasting effect of this commitment is also evidence in the Royal Instruction of 1946 on behalf of the British Monarchy, which provided that nothing in any Ordinance shall take away or affect any interests secured by natives through any treaty or agreement made on behalf of or with the sanction of the Queen.

¹⁴ Native Courts Proclamation (1900) – “Native law and custom can adjudicate cases, and award any type of punishment except mutilation, torture, or any other type repugnant to natural justice and humanity.”

¹⁵ Evidence Act 1943, s14(3).

¹⁶ *Hudud* offences are crimes committed against God (*haqqullah*). Fixed penalties are prescribed for these offences.

¹⁷ Emphasis added.

¹⁸ Native Courts Ordinance 1914, s10(a).

¹⁹ For example, the crime of adultery (*zina*) requires four male Muslim witnesses of good reputation to have directly witnessed the moment of penetration. Their testimonies must be identical, even to immaterial details, and failure to meet this standard can lead to a separate offence of giving false testimony. This is, however, partially negated in the Maliki doctrine, where pregnancy is accepted as sufficient evidence.

²⁰ This analysis is explored further in V. Essien, ‘The Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation’, (1983) 5 *NYLS Journal of Int'l & Comp. L.* 87, 100.

Notwithstanding the restrictions, Shari'a criminal practices were generally upheld at first. In *Katsina Native Authority v Abdullahi Kogo*²¹, the West African Court of Appeal ("WACA")²² upheld the Islamic practice of *qasama*, which through the swearing of oaths 'completed' inadequate evidence based on circumstantial facts. However, the British increasingly resented the parallel application of the Shari'a alongside the imported common-law. The continuing survival of the Shari'a was not conducive for colonial administration; in this period, Shari'a criminal law was said to be "more widely, and in some respects more rigidly, applied in Northern Nigeria than anywhere else outside Arabia."²³ This resulted in an increased impetus for restriction. The 1904 Criminal Code was amended in 1933, which specifically removed the "...other than a native tribunal" exception from section 4. Native Courts no longer had recourse to the uncodified body of law, which included Shari'a law. However, section 4 still included reference to 'some other ordinance'. The Native Courts relied on the Native Courts Ordinance 1933, which permitted the qualified application of native law and customs, limited by common-law punishments. Therefore, the Criminal Code amendment was ineffective in practice.

In *Tsofo Gubba Gwandu Native Authority*²⁴, the WACA reversed its earlier accommodation of Shari'a criminal law. The defendant was sentenced to death by the Native Court for murdering his wife's lover. Shari'a law does not recognise the defence of provocation. Trial under common-law would have resulted in a conviction of manslaughter, which was not a capital crime. The WACA quashed the decision and held that customary courts could only apply customary laws in situations that were not covered by the Criminal Code. As the Criminal Code encompassed a very wide spectrum of crimes, this effectively meant that the Shari'a criminal law could no longer apply in practice. Subsequent cases resisted this decision and pushed to preserve the parallel operation of the Shari'a and the Criminal Code.²⁵ The settled position in 1957 *Maizabo v Sokoto Native Authority* restored the balance to the Native Courts Ordinance, where the Shari'a could apply independently of the Criminal Code, but its sanctions could not exceed those of the Criminal Code. This tension became irrelevant leading up to Nigerian Independence in 1960, as the policy of indirect rule and non-intervention became less relevant. At the 1958 London Constitution Conference, the British tabled a motion to completely abrogate the parallel criminal laws in northern Nigeria in favour of a single codified code. This led to the 1960 Penal Code for Northern Nigeria, which officially eliminated Shari'a criminal law.²⁶ Modelled on the 1860 Indian Penal Code and the 1899 Sudanese Penal Code, this Code included Islamic offences, such as adultery²⁷, alcohol consumption²⁸, and insulting the modesty

²¹ (1930) 14 NLR 49.

²² This court served as the highest appellate court for British colonies in West Africa.

²³ J. Anderson, *Islamic Law in Africa* (1955), 219.

²⁴ (1947) WACA 141.

²⁵ *Jalo Tsamiya v Bauchi Native Authority* (1957) NRNLR 73; *Kano Native Authority v Fagoji* (1957) NRNLR 84; and *Maizabo v Sokoto Native Authority* (1957) FSC 5/1957.

²⁶ Penal Code Law for Northern Nigeria 1960, s3(2) – "After the commencement of this Law no person shall be liable to punishment under any native law or custom."

²⁷ Penal Code, s387-388.

²⁸ Penal Code, s403.

of a woman²⁹. However, they were left practically inoperable through the careful use of criminal procedure rules.³⁰

Shari'a civil law similarly underwent gradual subjugation. Muslim affairs between Muslim parties being judged by non-Muslims through non-Islamic laws have generated a significant, if not primary, impetus to establish judicial representation. Native Courts were permitted to hear Muslims matters, but appeals were heard by the High Court, which did not have any judges versed in Islamic law. Islamic matters were therefore decided entirely at the discretion and understanding of the High Court judge in a particular case. The growing resistance to this situation led to the creation of the Muslim Court of Appeal in 1956³¹, which sat as an intermediary court between the Native Courts and the High Court. It was competent to hear appeals involving questions of Islamic personal law, which generally encompassed questions of marriage law, inheritance, guardianship, gifts.³² While it was intended to assuage the Muslim community, it did not bring about actual change. The court had no standing membership; the judges and assessors were appointed on an *ad-hoc* basis by the Governor, and became *functus officio* once the case ended. What is interesting for the current analysis is that a 'Muslim High Court' was not established, but rather a specialist customary court for Muslim matters. This decision was not unintentional.³³ This quintessentially embodies the colonialist approach in engaging the Sharia as a mere part of the indigenous customary law.³⁴ However, unlike many customary laws pertaining to particular interests, the Sharia is a comprehensive system designed to apply as state law. The Sharia therefore presented a challenge to the common-law system that other customary laws did not. This resulted in additional antagonization and unfavourable treatment of the Shari'a. For example, in *Abba v Baikie*³⁵, a Christian daughter was barred from inheriting her Muslim father's property under Islamic law of inheritance. The Supreme Court on appeal overruled this question of Islamic personal law on grounds of repugnancy. However, in *Dawudu v Danmole*³⁶, a testator from the Yoruba group left behind 9 sons and 4 daughters. His estate was divided pursuant to the Yoruba practice of *idi igi*, where the property was split equally between the wives. Therefore, the child who did not have a mother received nothing. On final appeal the Privy Council, that court did not trigger the repugnancy clause, as it merely held that customs had were to be followed. This systematic repression continued into Independence.

²⁹ Penal Code, s400.

³⁰ This is explored further by A. Mahmud, the former Grand Kadi of Bauchi State, in A. Mahmud, *A Brief History of Sharia in the Defunct Northern Nigeria* (1988), 25.

³¹ Muslim Court of Appeal Law, Northern Region Law, No. 10 of 1956.

³² This limited approach has been reproduced in the subsequent Constitutions of 1979 and 1999.

³³ For a detailed account of the careful suppression of the Shari'a in this period, see A. Oba, 'The Shari'a Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction', (2004) 52 AJIL 859.

³⁴ Native Courts Ordinance 1913, section 2 provides, "Native law and custom includes Islamic law". This places the Shari'a beneath customary law, as it forms a part of customary law.

³⁵ K/20A/1943.

³⁶ (1962) 1 WLR 1053.

2.2 Post-Independence / First Republic up to 1999

With the 1960 Penal Code, Shari'a criminal law was effectively abolished³⁷, and did not experience developments during this period.

In the civil context, the tensions between the Shari'a community and the post-colonial Nigerian government persisted. The inadequacies of the Muslim Court of Appeal were rectified through its repeal and replacement by the Shari'a Court of Appeal in 1960 as the highest court in the state. There was now a permanent membership of Qadis (Islamic judges) on the SCA bench, and the Court was equal to the High Court. Its decisions were final and not subject to appeal, which strengthened the appearance of Muslims matters being resolved wholly by Muslim jurists in a Muslim forum. This was balanced by the Court's narrow jurisdiction over questions of Islamic personal law, which remained unaltered. Civil matters beyond this scope were therefore heard by the High Court. Instead of expanding the jurisdiction of the SCA to encourage parallel justice, the common-law system was modified to handle Islamic cases. A Qadi was required to be on the High Court bench for issues involving Muslim parties. As the Qadi sat alongside two High Court judges, the common-law position almost always prevailed.

In 1967 during the Nigerian Civil War, the Northern Region was dissolved into six separate states. Six separate SCAs were established within these states, all of which had final authority. This provided the context for the Federal Shari'a Court of Appeal proposal, which was discussed in the lead-up to the 1979 Constitution to mark the democratic transition into Nigeria's Second Republic. This proposed court would have resolved the issue of hierarchy between the equal SCAs, and given federal recognition of the Shari'a.³⁸ This special moment in Nigerian history, referred to as 'The Shari'a Controversy', was ultimately resolved without the establishment of the Federal Shari'a Court of Appeal. Instead, the existing SCAs were kept, but brought within the common-law judicial hierarchy. Cases from SCAs were now appealable to the FCA. The FCA was to have Islamic trained judges to hear these appeals.³⁹ Further appeals went to the Supreme Court, which interestingly did not have any similar requirements of Islamic knowledge in the appointment of justices.

This restructuring invited a much closer scrutiny of the SCA. For example, prior to the 1979 Constitution, the SCA operated as the final authority in a closed-loop system. As its jurisdiction pertained exclusively to Muslims, it did not draw much attention from common-law authorities. Sections 11(e) of the Shari'a Court of Appeal Law⁴⁰ stipulated that if the parties (Muslims and non-Muslims) consented in writing, the Court was competent to hear whatever the parties presented. Therefore, in practice, the restriction on Islamic personal law was circumvented through consent. This was identified and stopped in *Fannami v Sarki*.⁴¹ In this case, the FCA held that the SCA was no longer a court of final authority, and therefore could only hear

³⁷ Except for the several Islamic offences included to appease the Muslim community, *see* Penal Code (n 26-28), *supra*.

³⁸ Reports of the Constitution Drafting Committee Vol. II, 110, 113, and 124 (1976).

³⁹ This is in the 1979 Constitution, s226(a), and now in 1999 Constitution, s247(1).

⁴⁰ Northern Region, 1963.

⁴¹ CA/3/165/84.

matters that were appealable to the FCA. Under the Constitution, the FCA can only hear SCA appeals on questions of Islamic personal law.⁴²

In addition to this restriction, the previously honoured arrangement of requiring a Qadi on the High Court bench in Islamic matters not falling within Islamic personal law was challenged. Originally in *J.S. Olawoyin v Commissioner of Police*⁴³ in 1961, it was contended that there was an unacceptable discrepancy in the standards required for judgeship between the High Court and the SCA. High Court judges are required to have practiced law for at least ten years,⁴⁴ whereas a person qualifies to be a Qadi if he is a Muslim.⁴⁵ The Court therefore held that Qadis were “wholly unqualified” to sit on the High Court bench.⁴⁶ This led to an amendment in the 1963 Constitution of Northern Nigeria, which explicitly preserved this arrangement notwithstanding the discrepancy.⁴⁷ This was only made possible as the Nigerian regions had their own Constitution at this point in history. Following the conclusion of the Civil War, the 1979 Constitution was enacted for the whole of Nigeria. This federal Constitution did not import this specific exclusionary provision. Therefore, in *Ado and Rabi v Diye*⁴⁸, the FCA reiterated the previous judgment, and held that the section 63 of the High Court Law of the Northern Region, which permitted Qadis to sit on the High Court bench, was inconsistent with the Constitutional qualifications requirements. Since this decision in 1983, Qadis have not been able to oversee Islamic matters at the High Court. The little solace that the Muslim community was afforded in placing their matters before the High Court had been completely eroded. Justice Mahmud, the Grand Qadi of Bauchi State, commented,

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.⁴⁹

Democratic governance of Nigeria’s Second Republic in 1979 ended with a *coup d’etat* in 1983, ushering in a string of military juntas and failed democratisation attempts until 1999. These military governments were mostly under northern Nigerian leadership, notably by General Ibrahim Babangida. The administration made three attempts to rectify the Shari’a grievances in Nigeria. In 1986, the Babangida Administration announced a military decree to remove the word “personal” from all instances of “Islamic personal law” within the 1979 Constitution.⁵⁰ This was designed to extricate the SCA from its historically narrow confines. It was tested in *Abuja v Bizi*⁵¹, where the FCA held that the deletion of ‘personal’ could not be taken to mean that the SCA was now competent to hear all questions of Islamic law in civil matters. The

⁴² 1979 Constitution, s223(1); reproduced in 1999 Constitution, s244(1).

⁴³ (1961) 1 All NLR (Pt.2) 203.

⁴⁴ 1979 Constitution, s229(2).

⁴⁵ Shari’a Court of Appeal Law, Northern Region, 1960, s5(a).

⁴⁶ *J.S. Olawoyin v Commissioner of Police*, *supra* note 43, 215.

⁴⁷ 1963 Constitution of Northern Nigeria, s53(4).

⁴⁸ (1983) 2 FNLR 213.

⁴⁹ See A. Mahmud, *supra* note 30, 45.

⁵⁰ Promulgation of Constitution (Suspension and Modification) Amendment Decree, No. 26 of 1986.

⁵¹ (1989) 5 NWLR (P.119) 120.

deletion failed to modify the specific examples of 'Islamic personal law' within s242(2)⁵², which were the boundaries of the SCA. However, the FCA in *Usman v Umaru*⁵³, reversed its previous decision, by distinguishing Muslim law from Muslim personal law. It held, "... there is a difference between "Moslem personal law" and "Moslem law" [...] the latter is the totality of Islamic Law which includes, but is wider in scope than, the limited area of Islamic Law defined above as "Moslem personal law".⁵⁴ Therefore, this case seemed to have finally liberated the SCA, settling the Shari'a issue. However, prior to this landmark judgment, the Babangida Administration was preparing to transition to democracy for Nigeria's Third Republic set for 1990. The 1989 Constitution was prepared and promulgated for this transition. The relevant provisions on the Shari'a Court of Appeal read,

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred on it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving *questions of Islamic law where all the parties are Muslims*.⁵⁵

The 1983 Constitution would therefore have conferred a much greater scope of civil jurisdiction to the Shari'a Court of Appeal. This was balanced by the new requirement that all parties had to be Muslims, which was not required in the previous 1979 Constitution. The transition was postponed to 1993 following political unrest around the presidential elections. A 1993 Constitution was drafted, which essentially preserved the SCA freedom designed in the 1989 version. However, Nigeria's Third Republic was ultimately aborted as the elections were annulled. Because of this series of events, neither the 1989 nor the 1993 Constitution came into effect. In lieu of a new Constitution, there was a second military decree to revive the position of the first decree on assigning full civil jurisdiction to the Shari'a Court of Appeal.⁵⁶ Notwithstanding the reasoned judgment in *Usman v Umaru*, the SCA jurisdiction was firmly resisted. There are numerous undercurrents that may have contributed to this resistance. These include the southerners' resentment and fears of the consistent leadership by the northern Hausa-Fulani Muslim groups. Social and cultural tensions have significantly contributed to overly simplifying the discussion into a zero-sum game of power and representation.⁵⁷ The FCA in *Muninga v Muninga*⁵⁸ ignored *Usman*, and responded to the second military decree in holding that, "notwithstanding all the amendments introduced by various decrees and acts, the provision of the said section 242(2) of the 1979 Constitution is still the law."⁵⁹ This position was affirmed the FCA in *Korau v Karau*⁶⁰, where land contestations between Muslims were

⁵² 1979 Constitution, now contained in s277 of the 1999 Constitution.

⁵³ (1992) 7 NWLR (Pt.254) 377.

⁵⁴ *ibid.*, 407

⁵⁵ 1989 Constitution, s261, emphasis added.

⁵⁶ Constitution (Suspension and Modification) (Amendment) Decree, No. 107 of 1993.

⁵⁷ For a deeper account of the ramification of cultural tensions in Nigeria, see E. Okpanachi, 'Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria's Kaduna and Kebbi State', (2011) 25 *Emory International Law Review* 2.

⁵⁸ (1997) 11 NWLR (Pt. 527) 1.

⁵⁹ *ibid.*, 9.

⁶⁰ (1998) 4 NWLR (Pt.545) 212.

deemed to not fall within Islamic personal law, and the military decrees did not “increase or enlarge the jurisdiction of the Shari’a Court of Appeal...”⁶¹

In the lead-up to Nigeria’s Fourth Republic scheduled for 1999, a new Constitution was sought. However, the Shari’a issue had increasingly become such a politically sensitive topic, that no concessions could be made by either the pro-Shari’a or the anti-Shari’a community.⁶² The 1999 Constitution therefore reverted to the 1979 position, which simply dismissed all the advancements and expectations that the Shari’a had underwent in the interim. Nevertheless, unlike the 1979 predecessor, the 1999 Constitution further restricted the SCA as being applicable to Muslims only. It may be recalled that the Muslim-only restriction was introduced by the 1989 Constitution to justify assigning the SCA full civil jurisdiction. Even though the progressive allowances were dismissed, its accompanying restriction was adopted nonetheless by the 1999 Constitution. As such, the Nigerian Muslim community faced the onset of the strictest conditions for the Shari’a in Nigerian history, including its colonial administration under the British.

3. Section II – Shari’a Reintroduction in Nigeria’s Fourth Republic

It was inconceivable for the Shari’a community to embrace the 1979 position, and surrender their Islamic affairs to adjudication by non-Islamic judges. In the first elections of the Fourth Republic, a certain Ahmad Sani Yerima was seeking for the governorship of Zamfara State in the north. His populist campaign platform revolved around the restoration of ‘wholesale’ Shari’a, which specifically appealed to the repressed and nostalgic Muslim community. The reimplementing of Shari’a law was promised to usher in an era of, among others, economic redistribution, social welfare, purist values, and lower crime rates.⁶³ A committee was established to ascertain whether and to what extent the Shari’a could be implemented within the boundaries of the 1999 Constitution. As analysed below, what distinguishes this Shari’a expansion from the previous attempts is its foundation in democracy, legality, and constitutionality. Yerima easily won the election, and expediently enacted the Shari’a Courts (Administration of Justice and Certain Consequential Changes) Law, No. 5 of 1999. Pursuant to this legislation, numerous Shari’a courts, with lower and upper courts, were established within Zamfara State with full civil and criminal jurisdiction. Existing Area Courts were also transformed into Shari’a Courts. Appeals went from the lower Shari’a Courts to the upper courts, and then to the Shari’a Court of Appeal.⁶⁴ To satisfy the Constitutional requirement for

⁶¹ *ibid.*, 222; see also *Maida v Modu* (2000) 4 NWLR (Pt.659) 99, where the Court of Appeal specifically emphasised that the deletion of the word ‘personal’ did not affect the jurisdiction of the Shari’a Court of Appeal. See also *Magaji v Matari* (2000) 8 NWLR (Pt.670) 722, where the Supreme Court upheld *Korau v Karau*’s restriction of the Shari’a Court of Appeal.

⁶² The drafting of the 1989 Constitution had generated greater tensions along religious lines than the previous 1979 version. Justice Aniagolu, the then Chairman of the Constituent Assembly, recalls, “for eight weeks ... Members were talking about Shari’a as if Shari’a was the only subject in the Constitution.” See A. Aniagolu, *The Making of the 1989 Constitution of Nigeria* (1993), 146.

⁶³ For a detailed account of Governor Yerima’s ascension, see O. Kalu, ‘Safiyya and Adamah: Punishing Adultery with Shari’a Stones in Twenty-First-Century Nigeria’, (2003) *African Affairs* 102.

⁶⁴ Shari’a Courts Law 2000, s6(2).

codified laws⁶⁵, Shari'a Penal Code and the Shari'a Criminal Procedure Code were quickly legislated, instating Shari'a law under the Maliki doctrine. Finally, the Shari'a Court of Appeal (Amendment) Law conferred additional jurisdiction to the SCA of Zamfara State beyond Islamic personal law. Eleven other states in the north with strong Muslim communities were soon under pressure to follow Zamfara State's example, and similarly implemented the Shari'a within 12 months.⁶⁶ Oba reflects, "It is ironic that the criminal jurisdiction of the Shari'a Court of Appeals is in a way the result of unreasonable opposition to the Shari'a Court of Appeal."⁶⁷ It is likely that had the SCA been given full civil jurisdiction over Muslim matters relating to Muslim parties, the equilibrium would have been set without inviting Shari'a criminal jurisdiction.

These twelve states have defended their legal and constitutional right to reimplement the Shari'a, which should be distinguished from the earlier unilateral approaches of the military governments. Section 277(1) of the 1999 Constitution almost identically reproduces section 242(1) of the 1979 version.⁶⁸ The clause that the Shari'a community relied upon is not a novel addition, and has existed since the 1979 version.

The Shari'a Court of Appeal of a State shall, *in addition to such other jurisdiction as may be conferred upon it by the law of the State*, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law...⁶⁹

Section 277(2), as section 242(2) of the 1979 Constitution, then enumerates the areas of law that qualify as Islamic personal law. The key issue turns on the interpretation of 'in addition to such other jurisdiction as may be conferred upon it by the law of the State'. The Shari'a states have interpreted this provision in conjunction with their constitutional prerogatives to "make laws for the peace, order, and good government of the State".⁷⁰ The Constitution reserves certain subject matters as being exclusively federal,⁷¹ jointly federal and state,⁷² or only the state.⁷³ Notably, penal codes are left to the individual state legislatures.⁷⁴ Therefore, the Shari'a

⁶⁵ 1999 Constitution, s36(12).

⁶⁶ The exact method of implementation varies from state to state, which is beyond the scope of this paper. The three general modes have been the Zamfara State style, where the entire corpus of Shari'a law was legislated parallel to the existing Penal Code and Procedure Code, Niger State style, where amendments were made to the existing Penal Code and Procedure Code to conform with the Shari'a, and Kano State style, where the old Codes were repealed and replaced by new Codes that were compliant with the Shari'a.

⁶⁷ See Oba, *supra* note 33, 891.

⁶⁸ As noted above, the 1999 Constitution imposes a further restriction as only Muslim parties can appeal to the SCA.

⁶⁹ 1999 Constitution, s277(1), (Emphasis added).

⁷⁰ 1999 Constitution, s4(7).

⁷¹ 1999 Constitution, Sch. 2, Part 1, Exclusive Legislative List.

⁷² 1999 Constitution, Sch. 2, Part 1, Concurrent Legislative List.

⁷³ Any matter that is not mentioned in the previous Lists are within the exclusive competencies of the individual state.

⁷⁴ Curiously, the laws of evidence are within the exclusive federal competency, which creates challenges in the correct application of Shari'a criminal law. However, this is somewhat negated by a peculiar arrangement of the 'guidance' principle, which was originally intended as an interim tool for Native Courts to adjust to the common-law system in 1960. This principle is still technically in effect today, and further obscures the clear legal position of evidence in Shari'a trials; see Report of the Panel of Jurists, Second Session, 4 June 1962, in P. Ostien, *Shari'a Implementation in Northern Nigeria 1999-2006: A Sourcebook* (2007), Vol. I, 140.

states have enacted “religiously inspired”⁷⁵ legislations for the good governance of their state, as decided by the democratic will of the people. It was made clear that the laws were not direct Islamic laws, but inspired by the Shari’a sources. This addressed the fact that Nigeria is not an Islamic state. Section 10 of the Constitution states: “The Government of the Federation or of a State shall not adopt any religion as State Religion.” While this seemingly reinforces Nigeria’s secularism, there have been debates otherwise.⁷⁶ It has been argued that while no religion can be propagated or sponsored by any government and state institutions, it does not necessarily mean that Nigeria is secular. This is supported by the reality that Nigeria is roughly divided between Christians and Muslims.⁷⁷ Thus, the ‘wholesale’ Shari’a remained truncated in certain aspects to facilitate co-existence. For example, the Constitution protects religious freedom, which includes the freedom to change one’s religion.⁷⁸ This directly contravenes the *hudud* offence of apostasy (renouncing Islam), which is a capital offence.⁷⁹ As such, the Shari’a states excluded apostasy from the Shari’a legislations. Justice Orire, the Former Grand Qadi of Kwara State, stated, “Muslims are forced to accept the foreign notion of secularity which is a very great concession and could amount to blasphemy...Muslims have made a lot of sacrifice and in the process offended God.”⁸⁰ He emphasised the consistent efforts that the Muslim community had made for peaceful co-existence in Nigeria, and found it profoundly unjust that their affairs were not able to be judged pursuant to their internal rules.

The Shari’a became fully operative in twelve northern Nigerian states following the legislations. The first criminal cases under Shari’a law began to emerge, leading to amputations for theft,⁸¹ stoning sentences for adultery,⁸² and one death penalty for homicide.⁸³ However, to date, there has only been 3 amputations and 1 death penalty by hanging in Nigeria, all executed within the

⁷⁵ R. Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria – A Study Conducted on Behalf of the European Commission', (2011) *European Commission*, 32.

⁷⁶ See E. Nwauche, 'Law, Religion and Human Rights in Nigeria', (2008) 8 *African Human Rights Law Journal* 568; R Peters, *Islamic Criminal Law in Nigeria* (2003), at 33; and V. Nmehielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question', (2004) 26 *Human Rights Quarterly* 730, 742.

⁷⁷ Nwauche makes the claim that religion does have place in Nigerian society, and while the Constitution maintains religious impartiality to maintain equilibrium, Christianity and Islam are *de facto* state religions. *Ibid.*, at 573.

⁷⁸ 1999 Constitution, s38(1).

⁷⁹ However, certain scholars contend that apostasy was in reference to treason against the Islamic state, rather than changing one’s religion. See F. Griffel, 'Toleration and Exclusion: al-Shafi’I and al-Ghazali on the Treatment of Apostates', (2001) 64 *Bulletin of the School of Oriental and African Studies* 3; see also A. Black, H. Esmaeili, and N. Hosen, *Modern Perspectives on Islamic Law* (2013), 226.

⁸⁰ 'Secularity is a Foreign Notion', *This Week*, 24 October 1988, 23.

⁸¹ Buba Bello Jangebe of Zamfara State had his right hand amputated on 20 March 2000 for theft; Lawail Isah of Zamfara State had his right hand amputated for theft on 3 May 2001; Umaru Aliyu of Sokoto State had his right hand amputated for theft on 5 July 2001. See G. Weimann, 'Islamic Law and Muslim Governance in Northern Nigeria: Crimes against Life, Limb, and Property in Shari’a Judicial Practice', (2010) *Islamic Law and Society* 17, 411.

⁸² Safiya Hussaini of Sokoto State was sentenced to death by stoning on 9 October 2001; Amina Lawal of Katsina State was sentenced to death by stoning on 20 March 2002. Both these cases were quashed on appeal by the Shari’a Court of Appeal. For an in-depth analysis of the cases, see P. Ostien, *supra* note 74, 'Vol. V: Two Famous Cases'.

⁸³ To date, the Shari’a judiciary has upheld one instance of the death penalty, of Sani Rodi of Katsina State. For further account on this case, especially the careful delineations around the *qasama* procedure and the laws of retaliation for intention murder under *qisas*; see G. Weimann, *supra* note 81, at 403-405. For a very detailed study of Shari’a criminal law in northern Nigeria, see C. Tertsakian, "'Political Shari’a"? – Human Rights and Islamic Law in Northern Nigeria', (2004) 16 *Human Rights Watch* 9.

first two years of the Shari'a implementation. The two adultery charges were eventually quashed on appeal; no one has ever been stoned in Nigeria under the Shari'a. This is partially due to the safeguard mechanisms that exist within the Shari'a Criminal Procedure Code, which requires the express consent of the state Governor before a sentence can be executed on a convicted individual.⁸⁴ Besides the inceptive cases which were supported by popular desires for Shari'a justice, the governors have since been reluctant to consent to the harsh Shari'a punishments to be carried out. As such, convicted individuals are left waiting in the prison system indefinitely, as the governor's refusal of consent does not equate to a legal pardon.⁸⁵ There are several reasons as to why the criminal practice of the Shari'a has evolved in this peculiar way. The overarching theme is the unwillingness of Shari'a stakeholders to unnecessarily provoke the common-law community by emphasising the punitive aspects of the Shari'a. According to Suberu, governors are political entities with aspirations for federal non-partisan offices, which discourage governors from adopting hard-line Shari'a stances.⁸⁶ Further, the Nigerian political landscape is fundamentally shaped by the necessity to operate through its 'federal character', which specifically discourages ethnic and religious mobility.⁸⁷

The Shari'a introduction was predictably resisted by the Christian community in Nigeria, leading to incidents of mass unrest and violence. They urged the then President Obasanjo, a Christian himself, to swiftly put an end to what they perceived to be the Islamisation of Nigeria. However, the federal government did not clamp down on the northern states, although this did not mean that it acquiesced to the Shari'a.⁸⁸ The then Attorney-General Agabi wrote to the Shari'a state governors, urging the reversal of the Shari'a. His plea emphasised the constitutional protection from discrimination. He wrote

A [Muslim] should not be subject to a punishment more severe than would be imposed on other Nigerians for the same offence. Equality before the law means that [Muslims] should not be discriminated against [...] A court which imposes discriminatory punishments is deliberately flouting the constitution." governors were urged to "take steps to secure modification of all criminal laws of your state so that the courts will not be obliged to impose punishments which derogate from the rights of [Muslims] under the Constitution."⁸⁹

The Shari'a states refused to concede their new gains; Zamfara Governor Yerima responded, "I wrote to tell the federal government that as far as Zamfara State is concerned, we have passed beyond the state of dialogue on Shari'a. We have adopted Shari'a and Shari'a has come to

⁸⁴ This mechanism is modelled after ss294-299 of the 1960 Criminal Procedure Code (as amended in 1979), where no capital punishments could be executed unless the High Court had reported to the State Governor, and the Governor had consented to the sentence.

⁸⁵ Human Rights Watch reports on this phenomenon of political hostages; *See* C. Tertsakian, *supra* note 83, 39.

⁸⁶ R. Suberu, 'Religion and Institutions: Federalism and the Management of Conflicts over Shari'a in Nigeria', (2009) 21 *J. Int. Dev.* 547.

⁸⁷ *See* 1999 Constitution, ss222-223; this can be directly seen in how the All Nigerian Peoples Party, a northern-dominated pro-Shari'a party, has explicitly refrained from endorsing the Shari'a at the national level, as it would antagonise non-Muslim constituents.

⁸⁸ For example, following the stoning sentence of Amina Lawal, President Obasanjo stated, "I do sincerely hope that we will get through it, that Amina will not die [...] But if for any reason she is killed, I will weep for Amina and her family, I will weep for myself, and I will weep for Nigeria." *See* 'Obasanjo Expects Judiciary to Overturn Stoning Case', *IRIN*, 28 August 2002.

⁸⁹ K. Agabi's letter to state governors titled "Prohibition of discriminatory punishments", 18 March 2002.

stay.”⁹⁰ The central issue of the Shari’a constitutionality, which may have at least legally resolved this development, was intentionally avoided. The federal government purposely evaded public calls to seek determination, and no court acted *suo motu* to provide clarity. This uneasy balance was reciprocated by the Shari’a judiciaries operating within the constitutional boundaries⁹¹, and quashing most Shari’a convictions at the appellate level. There have been lawsuits brought by non-Muslim associations to force the courts into action, but they were dismissed for failing to establish a nexus between the Shari’a and the claimant.⁹² As such, in 2003, the new Attorney-General Olujinmi stated that it was up to the aggrieved individuals to challenge the Shari’a in court, and that the government could not do it on their behalf.⁹³ To date, there has been no criminal appeal from the Shari’a Court of Appeal to the Federal Court of Appeal.⁹⁴ In *AG Kano v AG Federation*⁹⁵, the Attorney-General of Kano State attempted to invoke the original jurisdiction of the Supreme Court over an incident where the Inspector-General of Police had arrested the leaders of a state-sponsored *hisbah* group. *Hisbah* is a group tasked with enforcing Islamic values and principles. They do not enjoy police powers, as the police force is within the exclusive competence of the federal government. Instead of relying on volunteering vigilantes with no oversight, Kano State enacted a legislation to sponsor and direct these *hisbah* groups.⁹⁶ Upon the allegedly unconstitutional arrest of the *hisbah* leaders, the Kano Attorney-General requested the Supreme Court to rule that the Kano legislations on *hisbah* groups were legal and constitutional. This loaded proclamation would have effectively endorsed and approved the Shari’a developments. Instead, the Supreme Court dismissed the case on grounds that the dispute was between Kano State and the Inspector-General of Police, and did not actually involve the Nigerian Federation. The Court dismissed the argument that the Inspector-General of Police was an agent of the Federation. Therefore, original jurisdiction was not invoked, and confrontation was averted. The case was remanded to the High Court, where the leaders were compensated for their illegal detention.

4. Section III – Abubakar Faransi v Habsatu Noma

Arguably, a functional yet tenuous working relationship had been forged between the Shari’a system and the Nigerian federation. Shari’a law was mainly restricted to the Shari’a courts within the Muslims communities Shari’a states. Although it had jurisdiction to hear serious capital offences, practice has demonstrated that they have transferred these cases the High

⁹⁰ ‘Agabi’s judgement day in Zamfara’, *Daily Champion*, 29 April 2002.

⁹¹ Many cases, including the adultery cases, were overturned by the SCA on grounds that the lower Shari’a courts failed to observe the fundamental rights within the Constitution, such as the right of defendants to be informed promptly in a language that he or she understands, of the charges and nature of the offence. *See* 1999 Constitution, s36(6)(a).

⁹² *See Human Rights Law Service v Attorney-General of Zamfara State and Another*, No. ZMS/GS/M.36/2000 and *Shibkau, Shehu and Ishaya v Attorney-General of Zamfara State and Attorney-General of the Federation*, No. ZMS/GS/M.121/2000.

⁹³ ‘Why Federal Government will not test Shari’a in Court, by Kanu Agabi’, *This Day*, 27 June 2002.

⁹⁴ The closest incident in this regard was the case of Yahaya Kakale of Kebbi State, who was convicted for theft based on a confession extracted through torture. His conviction was upheld by the Shari’a Court of Appeal in 2002. The National Human Rights Commission has pledged to assist with his appeal to the Federal Court of Appeal, which would be the first of its kind. However, there have been no updates to this development. *See* Tertsakian, *supra* note 83, 44.

⁹⁵ SC/26/2000.

⁹⁶ Kano State Hisbah Board Law, No. 4 of 2003 and Kano State Hisbah Board (Amendment) Law, No. 6 of 2005.

Courts.⁹⁷ This is an extremely interesting insight beyond this paper, as it suggests self-censorship and internal restraint of the Shari'a system. Active political undercurrents have established and maintained this delicate equilibrium. The Shari'a application was aggressively expanded at first to firmly establish its legitimacy and existence,⁹⁸ and later refrained and moderated to avoid unnecessarily provoking the common-law community.⁹⁹ The federal government maintained its policy on avoiding the determination the constitutionality of the Shari'a. What is relevant for the current analysis is that the Shari'a system was permitted to take root in the northern states through the explicit inaction of federal entities.

This relationship has once again become strained following the FCA judgment in *Abubakar Faransi v Habsatu Noma*¹⁰⁰ in 2007. This appeal of a land dispute was originally heard by the Upper Shari'a Court in Gwandu, Kebbi State, and later appealed to the Kebbi State SCA. Although it had since been established that land disputes are not Islamic personal law¹⁰¹, the Kebbi State SCA had been granted full civil and criminal jurisdiction.¹⁰² Grounds of appeal from SCA included SCA's lack of jurisdiction to hear the land dispute in the first place. The FCA was finally confronted with a test case that would clarify the relationship between the Shari'a and common-law. The FCA held that the Kebbi State Shari'a legislation conferring additional jurisdiction to its SCA was inconsistent with s277 of the 1999 Constitution, and therefore was null and void to the extent of the inconsistency.¹⁰³ The judgment viewed s277 as establishing the Constitutional boundaries on SCA jurisdiction, with no possibilities for expansion. The Shari'a legislations were thus viewed as effectively amending the Constitution, which the House of Assembly of individual states had no powers to do. The Court dismissed the unique arguments that have supported the Shari'a restoration. In a concurring judgment, Ba'Aba, JCA stated,

Jurisdiction is defined as the power of the court to hear and determine the subject - matter in controversy between the parties. In other words - jurisdiction is the authority of the court to exercise judicial powers which is the

⁹⁷ P. Ostien and A. Dekker, 'Shari'a and National Law in Nigeria' in J. Otto, *Sharia Incorporated* (2010), 603-604.

⁹⁸ In the amputation cases, reports suggest that the defendants were persuaded to accept the Shari'a sentence without appealing it. After amputation, Jangebe of Zamfara State was given a job as a janitor in a state-owned school in Zamfara; Aliyu was given ₦50,000 as a 'gift' from the Sokoto government. See G. Weimann, *supra* note 81, at 415. This is corroborated by the Zamfara State governor Yerima, who stated that he had consented to the amputations for political reasons, as his reputation and promise depended on his ability to demonstrate the arrival of Shari'a law. See C. Tertsakian, *supra* note 83, 38.

⁹⁹ Several attempts at challenging the Shari'a system have been left in limbo without any progress or updates. The case of Yahaya Kakale of Kebbi State has been the first criminal appeal from the Shari'a Court of Appeal to the Federal Court of Appeal. This would set the Federal Court of Appeal on a course to directly confront the entire Shari'a system. Although an appeal was said to have been filed by the National Human Rights Commission, there have not been any updates. In addition to withholding potentially damaging appeal cases to the federal courts, the Shari'a courts have also refrained from creating appealable cases by overturning the majority of sentences on procedural and technical grounds. Even in the cases where the sentences are upheld, the state governors have withheld consent for the execution. In practice, sentenced individuals who have been detained indefinitely waiting for the governor to confirm their sentence, have either been pardoned by the state governor, or released by the Shari'a Court of Appeal on the basis that their detention has equated to the punishment. See 'Zaria 6' in G. Weimann, *Islamic Criminal Law in Northern Nigeria: Politics, Religion, Judicial Practice* (2010), 275; see P. Ostien and Dekker, *supra* note 97, 604.

¹⁰⁰ (2007) 10 NWLR (Pt. 1041).

¹⁰¹ *Baka-Jiji & Anor v Ibrahim Abare* (1999) 1 NWLR (Pt. 86) 243.

¹⁰² Kebbi State Shari'a (Administration of Justice) Law 2000, s14.

¹⁰³ *Abubakar Faransi v Habsatu Noma*, Judgment delivered by Abdullahi, PCA.

totality of the powers a court exercises when it assumed jurisdiction to hear a case. You must first have jurisdiction before you can proceed to exercise power. The courts derive their jurisdiction from the Constitution and statutes. A court cannot ... give itself jurisdiction by misconstruing a statute.¹⁰⁴

This position was supported by the leading cases during the military era, and did not distinguish the fundamentally different approaches between military decrees and constitutional legality. The FCA did not delineate on the combined ramifications of the states' ability to make internal laws for their good governance, to establish courts and confer jurisdiction, and the guarantee to freely practice religion. Simply, these arguments were rejected as having been "misconceived"¹⁰⁵. The ambiguous effect of "in addition to" within s277(1) was thus clarified as additional matters that may attach to the existing enumerations of Islamic personal law in s277(2). As such, the appeal was sent for retrial in the Kebbi High Court.

This landmark authority, which the existing legal scholarship has not explored, is significant in setting the tone for a new era of tensions between the plural communities. The stakes have been raised much higher than those during the military era. The Shari'a infrastructure has been in operation for almost two decades, and it will be extremely resistant to reverting to any previous position that marginalises the Shari'a. It is therefore difficult to understand why the FCA upset the balance by upholding such a view. The precedent set in *Abubakar Faransi v Habsatu Noma* has been followed in subsequent cases. In *Maishanu v Manu*¹⁰⁶, the case involved similar facts of a land dispute that allegedly should not have been heard by the Gombe State SCA. The FCA again confirmed the restricted jurisdiction of the SCA, explicitly relying on pre-1999 authorities.¹⁰⁷ Again, there was no consideration or acknowledgement of the ambiguous ramifications of 'in addition to' in s277, or the extent to which states can confer jurisdiction to their courts. In *Dare v Goma*¹⁰⁸ in 2016 over a land dispute in Sokoto State, the case was appealed first to the Sokoto State SCA, and then the FCA. The FCA predictably quashed the SCA judgment as being beyond the scope of Islamic personal law. The FCA held that since *Faransi v Noma*, it has become "well settled law now"¹⁰⁹ that the SCA is limited to Islamic personal law. In *Tudu v Hakimi*¹¹⁰ on similar facts, the FCA again confirmed SCA's restricted jurisdiction over Islamic personal law on the strength of newly developing precedence without much consideration of the Shari'a arguments. Interestingly in this case, however, the Court dismissed the other grounds of appeal involving the factual matters of the case. The FCA held that since an appeal from the court of first instance, which was a Lower Shari'a Court in this case, did not lie to the FCA, the FCA had no jurisdiction to determine the merit or claim of the first instance court. This worryingly creates a further disconnect and conflict between the court systems. Within the Shari'a states, Muslim matters beyond Islamic personal law continue to be brought to the lower and upper Shari'a courts, and finally to the SCA. However, on appeal

¹⁰⁴ *ibid.*, Judgment delivered by Ba'Aba, JCA.

¹⁰⁵ *ibid.*, Judgment delivered by Abdullahi, PCA.

¹⁰⁶ (2007) CA/J/240S/2002.

¹⁰⁷ The Court relied essentially on *Abuja v Bizi* (1989) 5 NWLR (Pt.1190) 120, where Mohammed JCA stated, "The Shari'a Court of Appeal has no jurisdiction to determine any matter which is not an issue of Islamic personal law."

¹⁰⁸ (2016) LPELR-41280 (CA), Suit No: CA/S/110S/2013.

¹⁰⁹ *ibid.*, Judgment delivered by Awotoye, JCA.

¹¹⁰ (2016) LPELR-4115(CA), Suit No: CA/S/12S/2011.

from the SCA to the FCA, the case is dismissed and sent for retrial at the common-law court of first instance. It will be interesting to see how this convoluted system affects real practice. It may encourage parties to bring claims to the High Court in the first instance, although this is unlikely if the parties seek determination in accordance with the Shari'a. Unlike instances of criminal law where the accused is willing to accept the Islamic punishment without appealing it further,¹¹¹ civil cases, especially over land claims, are very unlikely to settle.

The FCA development is disappointing, as it has revived antiquated restrictions without engaging neither the unique arguments of the Shari'a states nor the practical relationship that has been achieved in this difficult environment. For example, in *Abdulsalam v Salawu*¹¹², the Supreme Court entertained an appeal over a dispute involving the appointment of an Imam at a certain mosque in Kogi State. The appointment involved an intricate system of Imam rotation between two main clans of Igbioras in Okengwe and Obehira. The appellant contended that this matter involving mosque leadership was exclusively relevant for Muslims, and therefore should be determined per Muslim laws. The Supreme Court dismissed this appeal, as mosque leadership contestations did not fall within Islamic personal law. Far more interestingly, however, the Court articulated

Learned counsel did not refer us to any Kogi State law, which gave the Sharia Court of Appeal of the state the jurisdiction to deal, at first instance, with any dispute relating to the appointment of an Imam, Chief Imam or Naibi...¹¹³

This reasoning suggests favourably on the state powers to confer jurisdiction that is not inherently related to Islamic personal law, as defined in the Constitution.

5. Section IV – The New Position of the Shari'a

The recent developments following *Abubakar Faransi* have placed the Shari'a in a peculiar yet familiar position. The developments have not actually ruled the Shari'a, in either its civil or criminal jurisdiction, to be unconstitutional. It has merely called for retrials of specific cases that were deemed to have been beyond the SCA jurisdiction. It is therefore premature to suggest that this development comprehensively signals the end of the Shari'a revival. However, it does constitute the first post-1999 federal resistance to the parallel court system. What is perhaps most disappointing about this development is the FCA's lack of engagement with the legitimate arguments for the constitutional and legal construction of Shari'a law in Muslim communities. Pre-1999 authorities are less meaningful now as they were responses to the arbitrary Shari'a expansion by the military governments. Simple dismissals of Constitutional legislative prerogatives afforded to individual states fail to appreciate the federal and heterogeneous composition of Nigeria. In essence, the colonial legacy of legal subjugation has been revived with no real justification for it.

¹¹¹ These involve the amputation cases where the defendants accepted Shari'a punishments to atone for their crimes without appealing it to the common-law courts. However, as noted above, there have effectively been material rewards in doing so, for political reasons.

¹¹² (2002) 13 NWLR (Pt.785) 505.

¹¹³ *ibid.*, 398.

Fairly assuming that the Shari'a infrastructure is unlikely to be dissolved irrespective of the FCA judgments, alternative solutions should be explored. For example, the FCA and the Supreme Court can only hear appeals from the SCA on questions of Islamic personal law. While this provision has been taken to illustrate the contours of Shari'a jurisdiction, it is not inconceivable that the SCA once again operates as a court of final appeal for matters beyond Islamic personal law. This was the 'closed-loop' position before the 1979 Constitution. Within the Shari'a states, the SCA can continue to exercise expanded jurisdiction as conferred by the state legislature, including criminal jurisdiction. Shari'a courts at all levels operate on an explicit 'opt-in' basis, which means that the Shari'a system is virtually irrelevant for non-Muslims. Civil matters can be entertained, but the appellate procedure will differ on whether the matter is within Islamic personal law or not. Questions of Islamic personal law can be appealed ultimately to the Supreme Court, but will not be decided by Shari'a law. Civil matters beyond Islamic personal law would face a *de facto* limitation in the judicial hierarchy. Once appealed to the FCA, the case will be dismissed and sent for retrial in a common-law court of first instance. However, the federal courts will not get involved *suo motu* in matters within the SCA if there is no appeal. As such, there should be an inter-party agreement that SCA's judgment is final in these circumstances, although this cannot be legally enforced. The central problem to this exercise in judicial partitioning is that the Shari'a courts, especially the lower courts, have often committed errors in their judgments. These errors are partially related to the lack of training of judges and assessors, which originated from the hasty introduction of the Shari'a system to suit a political timeframe. While this is beyond the scope of this paper,¹¹⁴ such internal errors invite grievances that the Muslim parties may not find acceptable, which may lead to an appeal to the FCA.

6. Conclusion

The trajectory of Shari'a in Nigeria has embodied the struggle for federal recognition of self-governance. Rather than promoting secessionism, this community has attempted to conform to the supremacy of the constitution. This has often taken place at the expense of violating their internal principles, for the sake of peaceful co-existence. The contestations between the Shari'a and the post-colonial legacies of legal subjugation had culminated in the explosive response of full Shari'a reinstatement. Contrast to the fears of the anti-Shari'a community, the Shari'a had not led to the dissolution of the Nigerian state. After the initial cases to assert its jurisdiction, the Shari'a system had found its position in the legal hierarchy, and attempted to maintain the harmony. The lack of federal antagonism had allowed the Shari'a discussion to evolve from simple pro and anti-Shari'a positions to the more complex criticisms and queries on how to improve the system itself. These included intricate details such as rectifying certain procedural shortcomings, as well as wider reflections on the over-emphasised role of punitive aspects of the Shari'a in Muslim society. This organic process had brought to light some fascinating observations of seemingly incompatible pluralist systems operating in parallel, as well as the flexibility of the Shari'a in practice in Nigeria.

¹¹⁴ For a descriptive account of this process, see P. Ostien, *supra* note 74, Volume II: Sharia Implementation Committee Reports and Related White Papers.

Recent developments have reasserted the position of legal subjugation by reiterating the narrow jurisdiction of the SCA. This development will not mobilise fierce resistance, but also will devolve the inter-community studies into overly simplified caricatures of Shari'a proponents and opponents. Shari'a infrastructure has been firmly entrenched in the northern states, and is unlikely to be dissolved willingly. Future explorations will follow how this situation may be managed, now that the federal institutions have announced their position. Interesting paradigms may begin to develop in this new era between the SCA and federal courts, as well as the Shari'a community and the Nigerian federal in general. What is clear, however, is that this exercise in legal pluralism and peaceful co-existence reflects the multi-cultural atmosphere of Nigeria far more accurately than its colonial legacy of repression.