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Shari'ah *Hudud* and Northern Nigerian Penal Code

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Abstract
The administration of Justice in accordance with Shari'ah was given highest priority in all Islamic emirates of Northern Nigeria. As a result, Islamic Law gradually became a pervasive feature and the widely enforced legal system within Northern States. The Maliki school of Law is applied generally whenever a case is brought before Alkali Courts. A wider recognition and enforcement of Islamic Law in Northern Nigeria can safely be said to have started from the nineteenth century Jihad of Sheikh Usmanu Danfodiyo. In 1805 there were about 25 metropolitan Alkali within the states, an indication of the operation of Shari'ah in its totality in the Northern part of this Country. When the British conquered Nigeria, they introduced for their administrative convenience, series of measures that would earn them effective control of the country. One of these measures was designed to give them control of the country's legal system. The first step towards this was that, the British government in 1863 introduced into this country its common law including common law of crime which was put into practice in Lagos colony as an experiment and it continued to operate in Lagos for nearly forty-one years before it was introduced to the Northern part of the Country. This paper focuses on the investigation about the rise and disintegration of Islamic Law with special reference to *hudud* before and during the invasion of Nigeria by the British imperialists.

Keywords: Shari'ah *Hudud*, Penal Code

Introduction

This paper intends to focus on the investigation about the rise and disintegration of Islamic Law with special reference to *hudud* before and during the invasion of Nigeria by the British imperialists.

To do this more appropriately, it is necessary to recapitulate the historical background of Shari'ah law in Nigeria. The Muslims in Northern Nigeria have been adequately enjoying the benefit of Shari'ah. By the arrival of the British in Nigeria, the application of Islamic Law, as well as Native and Customary Law, were made redundant. This destructive step of the colonial masters needs further scrutinization in order to discover the extent of its justifiability. The best period for this investigation, I presume, is that a Shaikh Uthman Dan Fodiyo. This with be followed by some accounts of the British antagonistic approach to the Shari'ah after which the introduction and application of penal code is to be reviewed.

Historical Background

Since nineteenth century, the administration of Justice in accordance with Shari'ah has been given highest priority in all Islamic emirates of Northern Nigeria, as a result, Islamic Law gradually becomes a pervasive features and the widely enforced legal system within Northern State.

The Maliki school of Law is applied generally whenever a case brought before Alkali Courts. It is also applied whenever non-Muslims voluntarily bring a case to the Alkali's Court.

Muslim Courts have been consistently administering the Malik code when there is no conflict between Islamic and Customary practice.[1] The promulgation of Islamic law in the Northern Nigeria is a product of historical circumstances and per during system of belief, value and social relation looking at the concept of Islamic law during Usman Danfodio's Jihad, it would be clear that Islam appeared to have been firmly rooted in to urban Centre's like Kano, Katsina and Sokoto by the sixteenth century.

In Kano, the application of Shari'ah by some Judges was already evident by the fifteenth century and in Katsina a format court of Alkali had been in existence before 1949.

A wider recognition and enforcement of Islamic Law in Northern Nigeria can safely be said had started from the nineteenth century Jihad of Sheikh Usmanu Danfodiyo as was mentioned earlier. In 1805 there were about 25 metropolitan Alkali within the state, an indication of the operation of Shari'ah in its totality in the Northern part of this Country.

There are many factor which contributed to the Jihad of Sheikh Usman, the first and foremost is the attitude of the people to the tenants of Islam. After thirty years of his intensive advocacy for Islamic reform and his disciplines around the state of Gobir, he was forced to launch Jihad against them, haven been expelled from Degel through teaching and preaching, he gradually succeeded in building up a Muslim community (Jema'ah). By the late eighteenth century, his influence had become strong enough to pose a serious threat to the kings at Gobir. The growing strength of Shekh Usman Danfodiyo's supporters, together with the scholar's persistent attack on the excesses of Hausa Kingdoms of the time, resulted in an open rift between the Muslim community and the Kings of Gobir Muhammad Yunfa.

In 1804 Sheikh Usman Danfodiyo declared an open Jihad against all pagan kings and pagan practices starting with Gobir. By 1820 the Jihad forces had successfully captured the area of Kebbi, Gobir, Zamfara, Sokoto, Katsina, Zazzau now Zaria) Nupe, Kano, Gwandu, Adamawa and Bauchi, in other words, the geographical area representing the present Northern States of Nigeria except Borno, part of Gongola State and parts of adjacent Countries.

The initiation of Sheikh Usman was to bring Islamic reform and to guide the Societies and Chiefs along the lines of Islamic ideals. Thus, with conquest of most of Hausa land he replaced all the Habe leaders of the Kingdom with eminent scholars from among his disciples. The new leaders were instructed to follow closely the rules of the Shari'ah. As a guide to the running of the caliphate according to Islamic ideals, Sheikh Usman, together with his brother Abdullahi and his son Muhammad Bello wrote many works and letters most of which were specifically directed against (1) eradication of the evil things in connection with religious and temporal affairs of the caliphate, (2) forbidding all iniquities is approved by the Shari'ah. [2] The application of the foregoing confirms Islamic Law this area and as a result, the area at that time enjoyed peaceful life and tranquility irrespective of the religion of the citizens. This was the result of the application of Shari'ah, which was to strangulate later by the British colonial Masters. For them in attempt to kill all the existing laws they met, they introduced same codes as a substitute under the pretext of administrative convenience. A great number of people were punished under the criminal law which was operated in the Northern and Southern parts of this country. E.g. the Southern part of the country operated relatively simple system of social norms based on the units of family especially (Islamic Law) of crime. To strengthen the system many schools" of jurists, that is to say the four Sunni Schools of Law were introduced. Although differences did arise between then for the mere fact that each of the schools of law interpreted the law according to its understanding and environments but they based their ijtihad on the same principles, thus they all applied Shari'ah Law. The dominant school of law in West Africa however is Maliki.

Colonial Rule

When the British conquered Nigeria, they introduced for their administrative convenience, series of measures that would earn them effective control of the country. One of these measures was designed to give them control of the country's legal system. The first step towards this was that, the British government in 1863 introduced into this country its common law including common law of crime which was put into practice in Lagos colony as an experiment and it continued to operate in Lagos for nearly forty-one years before it was introduced to the Northern part of the Country.

In 1904, the Colonial ruler of the then Northern Region of Nigeria sir, F. Luggard" introduced the common law into the North in disguise, through a proclamation which aims at declaring, consolidating, and amending the criminal law. The criminal law by this measure he had succeeded in paving the way for introduction of the colonial legal system to replace various legal system existed in the country even though he had earlier promised that he would not tamper with Shari' ah. Colonial master's came and introduced their own system, though their promise was not to interfere with the conquered. Two years after the amalgamation of the Southern and Northern protectorates 1914, the Luggards proclamation was extended to cover the country as a whole. With their extension the colonial master's succeeded in taking the first major step to victory on its way to impose the type of legal system it wanted for the colony.

Meanwhile, the application of the Northern Criminal Code at the first stage was strictly restricted. Section 4 of the proclamation expressly exempted 'Native Tribunals' which was actually dealing with the vast bulk of Criminal cases. [3]

After 1916 most of Nigerian Criminal cases were still operating under Native Law and Custom Islamic Law remains not as a district legal system, but special variety of Native and Custom. In fact the colonial masters were not happy especially with situation in Northern Nigeria where two or more systems of criminal Law were in operation juxtaposed in the same locality. This is because the Maliki School of Law which was firmly in operation was in many respects contrary to their Law.

In 1933, the criminal code was amended, that is the amendment of section 4 of the Criminal Code ordinance which provides that:

No person shall be liable to be tried or punished in any court in Nigeria other than a native tribunal. For an offence except under the express provision of the code or some other ordinance or some law, or of some order in council made by His Majesty for Nigeria or under the express provisions of some statute of the imperial parliament which is force in, or forms part of the Law of Nigeria. [4]

The amendment only takes care of the words in italics which seems to abolish unwritten customary Criminal Law. In order to make it more explicit the section must be read in conjunction with the Native Courts Ordinance of 1933 and to be specific section 10(1) and (2).

The leading cases of Gubba V. Gwandu N.A of 1947 and Maizabo V. Sokoto N.A of 1957 were the main factor that finally removed any possibility of colonial law for its indifference remaining indifferent to both Islamic and Customary law in Nigeria. Prior to those cases Native Courts (including Islamic Court) had the power to try native off not covered by the criminal code. But where the offence is also a crime under both laws (Native Laws and Criminal Code) punishment was inflicted in accordance with the punishment laid down in the criminal code of Nigeria. The outcome of the above mentioned cases shows not Only the supremacy of the common law but also confirms the British desire to sweep away criminal native law and custom except with regard to some offences not covered by the code in favour of its own system subsequently both the cases and the power of all traditional courts (including the Islamic law court) were drastically reduced.

Finally, in 1958, the Northern Nigeria Government commissioned a judicial survey panel to recommend the legal system that would suit the region. The outcome of the panel was the existing penal code of Northern Nigeria, which finally became operative from 30th September 1960. The code is fashioned on the pattern of the Sudan Pena Code, which was itself modelled closely on the Indian Penal Code drafted by Lord Macaulay. [5]

***Hudud* Punishment in Penal Code**

The Committee which was constituted by the Northern Nigeria Government in 1958 recommended the implementation of the present penal code. The committee tried to incorporate Islamic penal code in their recommendation to entice the agitators. The members of the committee were the Muslim from the North which was headed by the then Chief Justice of Sudan Mr. Muhammad Abu Rannat as it should be borne in mind that, almost all offences in Islamic law were incorporated as offence in penal code of the North; and they are:

1.	Seriqah	theft
2.	Zina	adultery or fornication
3.	Shurb al-Kharnr	taking of the intoxicant
4.	Qadhf	false allegation of Zina
5.	Al-Hirabah	Armed Robbery etc.

These are the offences included in the Penal Code, but they are a bit at variance with the law of Almighty Allah as prescribed in the Holy Qur'an and Sunnah. For example the punishment for the theft in Penal Code, 7 section 287 says *"whoever commits theft shall be punished with imprisonment for a' term which may extend to five years or with fine or with both"*. This is the punishment prescribed for the theft under the Penal Code, which I believe is far from the clear injunction of the Qur'an which reads:

As to the theft male or female cut off his or her hands: A punishment by way of example, from God for their crime. [8]

However, examining this verse we would see that the purely Islamic punishment has been prescribed for the crime in question, that is to say, the hand of the thief is to be cut off. However, resort could be made to ljtihad when the Qur'an and Sunnah are silent over such a case. It is also clear that certain circumstances must be taken into consideration before the hand is to be cut off. For a theft of, if stolen goods that does not reach "Al-Nisab", i.e. the minimum value of the stolen property, is not a penal crime.

With regard to Zina (Adultery), or fornication Khamr, defamation and Armed Robbery or Highway robbery, according to section 387(9) of Penal Code says that:

Whoever, being a man subject to any native law or custom which extra-marital sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

This means that the punishment prescribed for the adultery is two years imprisonment. Whereas Zina, (Adultery) according to Islamic law, means unlawful sexual intercourse between man and woman not married to each other, the actual law promulgated by God prescribed flogging or stoning to death, depending on the status of the perpetrator-married, or unmarried, i.e. Muhsan or gheri-muhsan.

The punishment for Ghari-Muhsan/Muhsanah i.e. unmarried man and woman who commits Adultery or fornication is prescribed by the Gloriou Qur'an. Allah says:-

The woman and the man guilty of Adultery or fornication flog each of them with hundred stripes. [10]

The above Qur'anic verse prescribed flogging punishment for unmarried man and woman who commits adultery or fornication. The verse implies that the one or both of the parties are married to other man than the one in question. If one of them is married and the other is not, the former is quality of adultery while the latter is guilty of fornication and therefore the verse is directly applied to the later.

While the punishment for Muhsan/Muhsanat i.e. married man and woman who commits adultery is being prescribed by Hadith of Ubada that is stoning to death, which even made everything clear by emphasizing the punishment of unmarried man and woman again. 'Ubada bin as-Samit reported: Allah's Messenger (May peace be upon Him) as saying Received (teaching) from me, received (teaching) from me. Allah has ordained way for those (women) when an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of the married they should receive one hundred lashes and be stoned to death. [11]

In fact, there has been unanimous view in all social systems from the earliest e to this day that this act (adultery) is normally callous religiously sinful and socially evil and objectionable.

For the above reasons and others, Almighty Allah prescribed a severe punishment for it, to deter people from committing this immoral act.

Moreover, the penal code also prescribes the punishment for defamation and alcoholic consumption as well as armed robbery. Section 39 Penal Code says that:

Whoever defames another shall be punished with imprisonment for a term which may extend to two years or with fine or with both. [12]

Section 401 of the same code dealt with the punishment for taking of alcoholic drink.

Whoever is found drunk in a public place or in any place by entering which he committed a trespass, shall be punished.

A. With imprisonment for a term which may extend to three months or with fine which may extend to fifty pounds or with both; and
B. If person so found conducts himself in such place in a disorderly manner or is incapable of taking care of himself, with imprisonment for a term of six months, or with fine of one hundred pounds or with both.[13]

These are the punishments prescribed for the aforementioned two offences, defamation or slander and alcoholic consumption. Of course, the two offences happened to have a definite punishment either from the authority of the Holy Qur'an or the Sunnah of the prophet (PBUH). In case of slander Allah says:

And those who launch a charge against chaste women and produce not four witnesses (to support their allegations) flog them with eighty stripes (Qur'an 24; 4)". [14]

And punishment for drinking wine is about forty lashes according to the tradition of the Prophet.

It was reported that the Holy Prophet (PBUH) caught a drunkard person and beat him with shoes about forty times, Abubakar following the tradition he caught a drunkard and he did the same. Then Umar bin Khattab caught him and asked the opinion of people on the Hadd, i.e. punishment, and Abdul-Rahman B. Awl said the minimum of Hadd is forty (lashes).

The offence of armed robbery is not left out undisclosed in the Penal Code section 298 "whoever commits robbery shall be punished, if the robbery is committed by any person armed with any dangerous or offensive weapon or instrument to imprisonment for life or any less term and shall also be liable to life" [15]. The Holy Qur'an also is not silent on this type of offence. Allah has decreed that;

"The punishment of those who wage war against God and His apostle, and strive with might and main for mischief through the land; is execution or crucifixion or the cutting off of hands and feet from opposite sides, or exile from the land. [16]

It is now clear that there is a great disparity between Islamic Penal Code and the Penal Code of Northern Nigeria.

In fact the people had been assured that the Penal Code would suit them regardless of one's religion or tribal affinity, hence the attempt to strike a balance though compromising is tantamount to deviation from the Qur'anic injunctions. The

assurance that the Penal Code must favour both Muslims and non-Muslims had a great bearing on the minds of the Muslims. So, they did not bothered assuming that their mundane and accordance with promise, would take care of their mundane and religious affairs. Unfortunately they were at last deceived for they cannot derive any benefit religiously or worldly from the Penal Code, which the Penal Code is not Islamic Law because it does not be in conformity with tenants of Shari'ah. The present alarming rate of crime in our society is a result of in adequate of English law to wipe up or uprooted the crime in the society.

Concept of Crime in Islam

In accordance with the theoretical and practical Muslim jurisprudence, the Islamic penal code had been comprehensively worked out. It has specific functions prevailing over other systems of law. Being part of the general public, law on violation of the public rights. The law grants a remedy by virtue of prescribing punishment, which is eventually called 'Uqaba'. However, the main purpose of Islamic criminal law is to deter the public from committing the crime 'and at the sometime protect the interest of the individual in particular and the public at Iarge. [17] By protection, I mean in-respect of severe punishment that would be enforced on any culprit that violates the injunctions of Allah. The punishment would be in accordance with the law of Allah in respective of the social status of the culprit. In Islam the judiciary is controlled by the executive, drives the authority directly from Shari'ah and is answerable to Allah and Him alone. The judges should no doubt be appointed by the Government but once a judge has occupied the bench he will have to administer justice impartially among the people and according to the law of Allah. The organs and functionaries of the Government should never be placed above the judiciary like. The law should be administered in such a way that the highest executive authority of the government should be subjected to the law and could be summoned to appear in a court of law as a plaintiff or defendant like any other citizen of the state when the situation demands, and there should no discrimination on the basic of position, power or privilege.

Islam stands for equality and scrupulously sticks to this principle in social, economic and political spheres of human life. [18]

Basic Differences between Islamic Law and Penal Code

By taking all the aforesaid into consideration everybody would agree with me that, Islamic law in general differs from man-made law. These differences could be viewed from three aspects:

1. Islamic law is derived from Allah's injunction inspired by Allah, while penal codes are product of human efforts, which is mainly creation. Each constituent of Islamic legislation reflects with clarity, the attributes of its author. Penal Codes bear the limitations, weaknesses and shortcomings of human beings, and accordingly Penal Codes are always subject. To what could be turned as legislative evolution that had not been apprehended by the laws. Incidents that had not foreseen always interfere with the law whenever they occur. Therefore, Penal Code is permanently defective, incomplete, and never take care of future occupancies completely, even though it can to some extent comprehend the past.

   However, Islamic law is Allah made, it bears the mark of His Omnipotence, His perfection, His magnanimity and His illimitable knowledge of all these creatures. That is, it was compiled by the All-knowledgeable the All- capable Allah in such a manner that it suits present and future contingencies alike.
2. Penal Codes are temporary rules enacted by the society to cater for current occurrences and meet its proximate needs. Thus, they are actually below the standard of advancing societies, or at the best, they are at the same standard on their date of issue. Of course, they retrogress after a while as long as they do not change quickly to catch up with the evolution of society; which is the main purpose of establishing law reform commission in any country not adopting Islamic legal system like ours. Because temporarily, laws would Sui:

   The conditions of the society at or for a certain time, but they would have to be changed whenever the condition change.

   By contrast, Islamic law is the totality of permanent rules from Allah to organize the affairs of human societies. Both sets of laws have the same objectives, but Islamic laws are not subject to change or substitution. Logically speaking, this peculiarity necessitates:
   A. That the principles of legislation as well as the text of provisions must be of such elasticity and universality that they would embrace all the requirements of human society regardless of the lapse of time, societal evolution and the multiplicity and diversification of human needs.
   B. That these principles and texts must be so perfect and comprehensive that they would not fall short in matching the standard of the society at any point in time. [20]

3. The objective of the law in Islam is to organize and direct the society to cultivate right kind of individual and establish the ideal state and the ideal world. Allah says:
   Ye are the best of peoples, evolved for mankind, enjoining what is right, forbidding what is wrong and believing in God. [22]
   Because of this, its provisions are much more in advance of the standard of societies at the time they were inspired, they are still ahead of our contemporary condition.

Conclusion and Observation

It can be established that Islamic law in general and penal code in particular has been firmly operating in the North as far back as nineteen century where Sheikh Usmanu Danfodiyo and his followers were successfully able to establish a purely Muslim community in the North based on principles and injunctions of Qur'an and Sunnah.

The introduction of Islamic system of Government and law into the North by Sheikh was coupled with the economic, social and political aspect of Islam in order to make it acceptable to the society.

Sheikh Usmanu, his brother Abdullahi and his son Muhammad Bello wrote a number of books on most of Islamic subjects including the administration of Justice to educate the Muslims in the North, in a proper manner.

Despite the fact that Shari'ah was enforced at that time to be a governing law of the state, the non-Muslims were living there as dhimmis (protected Persons) applying their law according to their customs without any hindrance.

However, with the arrival of British government in Nigeria the colonial masters introduced by proclaiming a new system of criminal code into the North with the purpose of consolidating and amending the existing criminal law in the Northern Nigeria.

The amendment brought about the existence of penal code into life with the aim of suiting the Northern Muslim without either tribal or religious discrimination. But the reverse was the case, the Muslim felt at initial stage that the code was favorable to their in the North was intentionally discriminated against by gradual termination of real Islamic Penal Code substituted with a compromised penal code. They made Muslims sentiments. They appointed Justice Sayyad Muhammad Abu Rannat the Chief Justice of Sudan as the Chairman of Penal and retired Judge of Supreme Court of Pakistan, Mr. Justice Muhammad Sharif to serve in the committee as a member.

The colonial masters were perfectly enough to appoint the two Muslim judges to serve in the committee in order to induce the Muslims. And consequently, they would not have course to reject the code whenever it comes out. I believe that these have happened, but these people, to the best of my knowledge, might have a little knowledge about Shari'ah. Even then, that would have not favored the Muslims because the Chairman and all the members of the Penal except the Nigerians knew where they are heading to. For the fact that, the existing panel code of Northern Nigeria was a carbon copy of Indian Penal Code, which was imposed on Indian's by the same British in 1868.

Moreover, the same code was introduced into the Northern Sudan in 1899. Therefore, the appointment of the two Muslims Judges to me could have not brought anything remarkable to the Muslim than this (Penal Code).

Another aggregated thing was that, they claimed that the code would take into account the benefit of all the inhabitant of Northern Nigeria regardless of tribal and religious affiliation.

The British Government carefully deceived us as if the non-Muslim were not existing and living comfortably in the period of Sheikh Usmanu Danfodiyo. If you look at the punishment prescribed by the Penal Code and compare it with actual or pure penal code of Islam which had being operating during the Jihad of Sheikh, it would vividly appeared to you that the Muslims of this Country have lost their code.

These could be seen in the punishment for adultery according to the Penal Code in section 387 is two years; imprisonment for theft, for example five years; and even for armed robbery in section 298(l) life imprisonment. Islamic law generally prescribes 'punishment' for offence without exemption, and I could not remember where 'imprisonment' is prescribed for theft, adultery and even armed robbery. From the foregoing, it is now clear to everybody that, the penal code does not reflect the Muslims interest at all. It only represents the interest of our colonial masters.

Therefore there is no justification in continuing with the system which is contrary to our faith. So, I hope Shari' ah in general and its penal code in particular should be allowed to govern at least the Muslims of this Country only if not all. Because Shari' ah is the only solution to our economic, social and political predicament of this country. The Shari' ah has an everlasting solution to offer for our benefit in all aspects of our life. It has become obvious that the imported the law has disappointed the country not the Muslims alone but the all citizens at large.

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