

# The Socio-Legal Context of the Nigerian Legal System and the Shariah Controversy: An Analysis of Its Impact on Some Aspects of Nigerian Women'S Rights

Dr Maryam Ishaku Gwangndi<sup>1</sup>

Senior Lecturer, Department of Public Law, Faculty of Law, University of Maiduguri, Borno State, PMB 1069, Maiduguri

## Abstract

Nigeria operates a complex mixture of laws in its legal system and because of this and depending on the context, many a times the rights of Nigerian citizens are violated both locally and from international human rights perspectives. This cannot be unconnected with the operative mechanisms of English law, customary and Islamic laws within the same structure of the Nigerian legal system. The article examines the effect of the introduction of the Shariah Law into the Nigerian Legal System as it affects some aspects of women's rights in Nigeria. It is argued that women's rights to reproductive freedom, freedom from discrimination based on gender and religion together with their right to human dignity and respect should be upheld and respected irrespective of the introduction of the Shariah law in the Northern part of Nigeria.

## Introduction

In order to understand the various laws affecting women's rights in Nigeria, I will analyse the socio legal context of the Nigerian legal system. This is limited to the criminal legal system. In most countries in Europe, Latin America and East Asia, it is the legislature that enacts laws and in some countries the laws are promulgated by civil authorities, and then subsequently enforced by the state. Laws enacted on specific issues encompass broader fundamental principles or doctrines, for example, right to privacy under Article 8 of the ECHR. Yet in some countries, the principles upon which the laws are based adopt language similar to international human rights documents<sup>2</sup>. And although this system of secular law is meant to govern most aspects of family life, it is not uncommon to see religious influence on issues such as birth control and abortion<sup>3</sup>.

However, in Muslim countries, in South Asia and in Sub-Saharan Africa, of which Nigeria, the focus of discussion, is a part of, there is a complex interplay of State, Religious and Customary law. The complexity of these legal systems came about as a result of colonialism. Thus with the imposition of colonial powers, the colonial masters also imposed their own legal codes on these countries. These legal codes were basically made to govern public life on matters such as government administration, finance, labour markets, and crime. In order to enforce these legal codes, western-style of court systems was established for that purpose<sup>4</sup>. For social and economic purposes, the laws were imposed by centralised authorities and they were utilitarian in character<sup>5</sup>. However, regarding conduct of private lives such as family relations, social status, religious duties of the colonised people, the colonial masters had little interest and so most of the rules governing such issues were left untouched by official enactments<sup>6</sup>. As a result, questions pertaining to personal status which were governed by religious and customary laws for centuries before colonial administration over these countries came to be imposed, were left intact. Unlike the laws introduced by the colonial powers which were utilitarian in character, personal status law was grounded in religion and custom with the religious laws' sources deemed divine and sacred. Thus personal status law was thought to encompass values that are regarded important. And so, in theory at least, such law could not be manipulated for the purpose of achieving social goals<sup>7</sup>.

At independence, these countries continued to operate the imposed statutes governing public life but over a period of time, they enacted their own set of laws. However, in almost all former colonies, the basic dichotomy between these laws has persisted. This is even so in Nigeria. I show that this dichotomy has important consequences especially with regard to women's rights. For instance as has been rightly pointed, even if a country through the legislature adopts a secular constitution which makes provision for non-discrimination on the basis of sex, if on the other hand the most fundamental aspects of women's private lives are governed by

<sup>1</sup> Teaches the Law of Evidence, Criminal Procedure, Civil Procedure, International Humanitarian Law & Human Rights, Administrative Law. Has Published Many Articles on Women'S Rights and Empowerment. Interested in Studies Relating to Law and Gender, Company Law and Secured Credit Transactions.

<sup>2</sup> Freedman L, and Isaac S, 'Human Rights and Reproductive Choice', (1993) 24 Number 1 *Studies in Family Planning* p.27.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Mayer A, 'Law and Religion in Muslim Middle East', (1987) 35 *American Journal of Comparative Law* P.130.

<sup>7</sup> Freedman L, and Isaac S, 'Human Rights and Reproductive Choice', (1993) 24 Number 1 *Studies in Family Planning* p.27.

separate set of laws based on religion or custom of the people, the secular constitutional principle of non-discrimination will have little impact on their lives<sup>1</sup>. The article concludes that the supremacy of the constitution must be upheld and fundamental rights of women should be upheld and respected.

### The Nigerian Legal System

Nigeria operates a plural legal system. The laws are derived from English, Customary and Islamic Laws. As a result of this complex mixture of laws operating within the same system, it makes the implementation of laws difficult as it is sometimes not always clear which law should apply in a given situation. The received English law<sup>2</sup> and enacted statutes apply to all Nigerians as public law, but when it comes to matters that are personal, citizens have a choice as to which law they want to apply to regulate their conduct<sup>3</sup>. In any case, this will either be Customary or Islamic law depending on individual's personal status. It has been established that customary law is the body of rules accepted as binding by a community<sup>4</sup>. It is defined in the Evidence Act<sup>5</sup>, as a 'rule which, in particular district, has, from long usage, obtained the force of law'. In the case of *Eshugbayi Eleko v Officer Administering the Government of Nigeria and Another*<sup>6</sup>, the Privity Council held that 'it is the assent of the native community that gives a custom its validity, and therefore... it must be shown to be recognised by the native community whose conduct it is supposed to regulate'. Customary law derives its legitimacy from tradition. Thus the salient features of customary law consists of the following: first, it must be unwritten<sup>7</sup> and second, it must be flexible as held in the case of *Lewis v Bankole*<sup>8</sup> where Osborne CJ held that 'one of the most striking features of West African native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character and evolutionary'<sup>9</sup>.

In any given situation, the appropriate customary law that is considered applicable more often than not depends on the interpretation of the person enforcing or advocating the application of the custom. However, it should be noted that when customary law cases go on appeal to a higher court of law, it is the higher court in the circumstances that determines what it considers appropriate as to what the custom is to be, and so from that point, judicial notice may be taken of that custom. It is through this process that some form of concretisation of the practice is established<sup>10</sup>. However, when customary law is an issue before the courts, the custom asserted must pass the 'repugnancy test'. The origin of the repugnancy clause in Nigerian legislation is based upon the Supreme Court Ordinance of 1876, through which some provisions of English law were introduced into the then colony of Lagos. It also found judicial approval in *Eshugbayi Eleko v Officer Administering the Government of Nigeria and Another* where it was held 'if it (the custom) still stands in its barbarous nature, it must be rejected as repugnant to natural justice, equity and good conscience'<sup>11</sup>. This test provides a standard for the application of customary law and it is to the effect that customary law must not be repugnant to natural justice, equity and good conscience; contrary to public policy, incompatible, either directly or by implication, with any law in force<sup>12</sup>.

With regard to Islamic law in Nigeria, prior to 2000, Islamic law was primarily personal law which was applied as customary law to Muslims limited to civil matters such as marriage and succession. Islamic law was applied to crime on a limited scale when the British took control over the administration of Nigeria. Criminal matters were handed in accordance with the provisions under the Penal Code<sup>13</sup>. However, 12 of the 19 states in Muslim dominated Northern Nigeria have since adopted Shariah (Islamic Law) as the primary legal system, contrary to the provision of the Nigerian Constitution which states that Nigeria is a secular state and

<sup>1</sup> Ibid.

<sup>2</sup> In Nigeria, the received English law, is applicable as part of the legal system, consists of the Common law, the rules of Equity and Statutes of General Application in force in England on the 1<sup>st</sup> of January 1900.

<sup>3</sup> See Obilade A, 'The Relevance of Customary Law to Modern Nigerian Society', in Oshinbanjo O, and Kalu A, (eds.), *Towards a Restatement of Nigerian Customary Law*, (Lagos: Federal Ministry of Justice, 1991) p.93.

<sup>4</sup> See Obilade A, *The Nigerian Legal System*, (London: Sweet & Maxwell, 1979) p.83.

<sup>5</sup> Evidence Act 2011.

<sup>6</sup> [1931] Appeal Cases p.662 at p. 673.

<sup>7</sup> Attempts to codify customary law are of little value because of its ability to evolve in response to changing conditions or times. See Oyebanji A, 'Codification of Customary Law: Prospects and Problems', in Oshinbanjo O, and Kalu A, (eds.), *Towards a Restatement of Nigerian Customary Law*, (Lagos: Federal Ministry of Justice, 1991) p.93.

<sup>8</sup> [1908] 1 Nigerian Law Report p.101.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> [1931] Appeal Cases p.662 at p.673.

<sup>12</sup> Similar expressions for repugnancy test are also included in the following statutes: Section 1 (1) of the South African Law of Evidence (Amendment) Act 1998; and Article 3, Chapter 8 Judicature Act of Kenya 1987.

<sup>13</sup> The Penal Code, Laws of Northern Nigeria, Chapter 89 (1963) (hereinafter The Penal Code).

therefore states are prohibited from adopting official religion<sup>1</sup>. On the 25<sup>th</sup> of October 1999, Sani Ahmed the then governor of Zamfara State was the first to proclaim Shariah law as the primary legal system for the state. The Zamfara State House of Assembly passed the Shariah Courts<sup>2</sup>. As a consequence of this, it has led to the full implementation of Shariah law in these states. It has also led to the imposition of sentences which are either more severe than one provided for under the Penal Code, or in some cases provisions that have never been made under the Penal Code. Furthermore, it has led to the establishment of offences that are not found in any penal law in Nigeria. For example, adultery carries the penalty of death by stoning instead of two years imprisonment, fine or both under the Penal Code<sup>3</sup>.

Saffiyya Hussiani Tungar and Amina Lawal were the first and second women to be sentenced to death by stoning for adultery by a Shariah court in Sokoto and Katsina states respectively<sup>4</sup>. Saffiyya's sentence was however quashed by a higher court. Amina on the other hand struggled for her life in a higher court; Shariah Court in Katsina state affirmed the death sentence imposed by a lower court amidst international condemnation and outcry until 25<sup>th</sup> September 2003, when the Katsina State Shariah Court of Appeal quashed the sentence. Despite the overturning of the sentences, problems of this nature still remain<sup>5</sup>. In addition, Bariya Ibrahim Magazu, a 17 year old girl was charged under the Zamfara Shariah law for engaging in pre-marital sex which resulted in pregnancy. She was convicted and sentenced to 100 lashes<sup>6</sup>. From the foregoing, these cases clearly indicate the impact of religious norms derived from religious doctrine and practices embedded in the legal system on women in Nigeria. These doctrines stand as hindrances to women's reproductive rights and freedom. These doctrines and religious norms which have found their legitimacy through the legal system have the tendency to subjugating women while the men involved in these cases were not punished by the male dominated courts. The men who were responsible for these pregnancies were not questioned by the courts which delivered the judgments. It is submitted that such judgments were discriminatory and arbitrary and therefore totally unacceptable.

Furthermore, the penalties imposed on the women involved in the cases mentioned could be said to be in conflict with article 5 of the African Charter which has been domesticated as part of Nigerian law. Article 5 of the African Charter states, "Every individual shall have the right to respect of the dignity and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited". By virtue of this provision, the punishments are clearly degrading, cruel, inhuman and contrary to the dignity of human person. These women are clearly exploited because they are women and had no say in the matters. These cases indicate that when the personal life of a woman is governed by religious law, the Constitution seems to have no effect in protecting the rights of women against discrimination based on sex. Therefore, the Shariah Courts should as a matter of urgency, in the future, uphold the supremacy of the Constitution of the Federal Republic of Nigeria by abiding by its provisions<sup>7</sup>. And since the African Charter has been made part of Nigerian law, there is no reason why the courts should not uphold its provisions.

Given the introduction of the Shariah Legal system and the emerging legal implications and the consequences as they impact on the lives of women more particularly with regard to reproductive rights and freedom within the context under consideration, it is necessary to give brief explanation as to the reason why it was re-introduced. The case of Northern Nigeria with regard to penal law was peculiar, for up till 1960 this was the only place outside the Arabian Peninsula in which Islamic law, both substantive and procedural, was applied in criminal litigation and sometimes even in capital offences<sup>8</sup>. Until 1960 when Nigeria gained her

<sup>1</sup> See section 10 of the Constitution of the Federal Republic of Nigeria 1999 as amended, Decree No.24, 5<sup>th</sup> May 1999 (Constitution); For further reading on the introduction of the Shariah and the controversy surrounding it, see Iwobi A, 'Tiptoeing Through A Constitutional Minefield: The Great Shariah Controversy in Nigeria', (2004) 48 Issue 2 *Journal of African Law Quarterly* pp. 817-821.

<sup>2</sup> See The Administration of Justice and certain Consequential Changes Law (1999). The House of Assembly later passed the Shariah Penal Code Law in 2000. For more information on the specific laws and titles of similar laws in the other Northern States of Nigeria who have adopted the Shariah Legal System, see Rudolph P, 'Islamic Criminal Law in Nigeria', (2003) 51-53 *Human Rights Quarterly*, p.1.

<sup>3</sup> Ibid.

<sup>4</sup> Kalu O, 'Saffiyya and Adamah: Punishing Adultery with Shariah Stones in Twenty-First Century Nigeria', (2003) 102 *African Affairs* pp. 389-408; Barrow S, 'Nigerian Justice: Death-by-Stoning Sentence Reveals Empty Promises to state and the International Community', (2003) 17 *Emory International Law Review* pp.1203-1249. See also Amina Lawal case (unreported, referenced in Barrow S, op. cit. pp. 1204-08).

<sup>5</sup> See Vincent N, Sanctity of the Nigerian Law Under Threat, Sunday Independent, 28 September, 2003 at p.7 (an editorial on the judgement of the Shariah Court of Appeal, quashing Amina Lawal's death sentence).

<sup>6</sup> See "Nigerian Flogging Condemned", (2001) BBC News, available at <http://news.bbc.co.uk/1/hi/world/africa/1132168.htm> (last accessed 17 May 2007).

<sup>7</sup> Section 46 of the Constitution of the Federal Republic of Nigeria 1999 as amended provides for non-discrimination based on sex, religion, race, place of birth etc.

<sup>8</sup> Ostein P, (ed.), *Shariah Implementation in Northern Nigeria 1999-2006: A Source Book*, (Ibadan Nigeria: Spectrum Books

independence from the British, Islamic law and procedure was widely applied in the Native Courts of Northern Nigeria<sup>1</sup>. In addition there was also a Nigerian Criminal Code-corresponding in general terms to English Criminal law administered in the Magistrates' Courts and in the High Court, but it should be noted that even with this arrangement, it was a fact that more than ninety percent of all criminal cases were tried in the indigenous or 'native' courts<sup>2</sup>. The situation was more complicated than this, for besides Islamic Criminal law and the Nigerian (i.e. English) Criminal Code, in the parts of the North not dominated by Muslims, vague bodies of 'native (criminal) law and custom' of the local ethnic groups were applied in the Native Courts serving their territories; but in ethnically and religiously mixed places heterogeneous amalgams of Islamic and native law and custom were applied. None of these except the Nigerian Criminal Code administered in the Magistrates' and High Courts was codified. In Muslim areas the *alkalis*, did not have any judicial precedent to work with, and so they were finding Islamic criminal law afresh from the basic sources (the Qur'an, the Hadith and the books of *fiqh*) on each occasion of judgment<sup>3</sup>. In cases where Islamic law was not applicable, the judges of the non-Muslim 'mixed' courts were taking the advice of tribal leaders as to what the law and custom applicable in a given case might be. However, there were some limitations on the applications of Islamic law and the native law and custom, particularly on forms of punishment:

(F)rom the very beginning of British rule it was clear to the local rulers that their customary penal structures would be brought under close scrutiny of the administration. Some customary penalties were therefore specifically abolished by statute. Prohibitions on mutilation and torture appeared at once... The remaining penalties were made subject to the requirement that they should not be repugnant to "natural justice and humanity"... The humanity of the various forms of corporal punishment was apparently not questioned until 1933, but restrictions introduced in that year limited the use of weapons to rattan canes and single tailed whips of prescribed dimensions<sup>4</sup>.

In the early days of colonial rule, before the different ethnic groups began to mix, this extreme form of legal pluralism worked without much difficulty. With the passage of time, when people from different ethnic and religious backgrounds began to disperse into different parts of the country, inequalities were felt among Muslims and non-Muslims because of the administration of the criminal laws in the Northern Region which became intolerable and therefore people started to clamour for change with regard to the criminal laws<sup>5</sup>. Among other reasons which contributed for the need for change from the Northern view was the Nigeria's independence, as a self-governing federation of three regions. The British were soon to leave and Eastern and Western Regions, supported by the British, were demanding for the inclusion of an enforceable chapter on fundamental human rights in the Federation's new Independence Constitution, which would, among other things, require that all criminal law be enacted as written law in which all criminal offences were defined and the penalties prescribed. In other words all criminal law [was] to be codified<sup>6</sup>, that no person be discriminated against by any agency of government solely on the basis of his or her religion or ethnic affiliation among others; and that no person is to be subjected to torture or inhuman or degrading punishment or other treatment. The chapter on fundamental human rights was ultimately included in Nigeria's independence Constitution and today it is also contained in chapter four of the Constitution of the Federal Republic of Nigeria 1999 as amended. It was derived primarily from the European Convention on Human Rights of 1950<sup>7</sup>.

To achieve these objectives, the Government of the Northern Region which was mostly dominated by Muslims saw the need to keep pace with the East and West in the race for independence even though it was less 'ready' than they. They therefore agreed to reform the legal and judicial systems of the Region, especially all the non-prevailing systems of criminal law, including Islamic criminal law in favour of a new single Penal Code applicable in all courts of the Region to all classes of persons without regard to religious or ethnic affiliation. This was the Penal Code of 1960 discussed further in the next section, and along with it came the new Criminal Procedure Code. However, even with this argument put in place prior to 2000, for Muslims generally and for

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Limited, 2007) Chapter 4, p.3.

<sup>1</sup> Ibid.

<sup>2</sup> Anderson J, *Law Reform in the Muslim World*, (London: Athlone Press, 1976) pp.27-28.

<sup>3</sup> Unlike English common law, but like Roman law, in its form as *fiqh*, was worked out by jurists the *fukaha* –not by judges-the *qadis*. In Islamic lands in former times there was no hierarchy of courts, and so there was no doctrine of judicial precedent or *stare decisis* developed.

<sup>4</sup> Milner A, 'Sentencing Patterns in Nigeria' in Milner A, (ed.), *African Penal Systems*, (London: Routledge and Kegan Paul, 1969) pp.263-264.

<sup>5</sup> Ostein P, (ed.), *Shariah Implementation in Northern Nigeria 1999-2006: A Source Book*, (Ibadan Nigeria: Spectrum Books Limited, 2007) Chapter 4, p.3.

<sup>6</sup> Ibid.

<sup>7</sup> For further discussion on this, see Elias T, 'The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms', (1959-60) 2 *Journal of International Court of Justice* pp.30-46.

scholars in particular, there is no distinction between the religious and the secular, between legal, ethical, and moral questions, or between the public and private aspects of a Muslim's life<sup>1</sup>. A Muslim's life is regulated by the Shariah. This includes prayer, dietary regulations, wills and contracts among many other things. As a divine law, its authority or validity cannot be questioned because it is based upon 'the revealed word of God or Allah'<sup>2</sup>. The Shariah derives its basis from four sources: the Koran, Sunna (traditions of Prophet Mohammed), Qiyas (reasoning by analogy) and Ijma (Consensus)<sup>3</sup>.

The Koran is the primary source of Shariah, and it is regarded as a revelation from God and therefore it is the 'central fact of Islamic religious experience'<sup>4</sup>. In other words, the Koran takes primacy in determining a rule under the Shariah, followed by the Sunna which is based upon guided action of the individual persons and the community who lived in accordance with that revelation and tradition. The Qiyas and Ijma are subsidiary sources of the Shariah law<sup>5</sup>. Thus the Shariah sets down duties and principles by which all Muslims must live and conduct themselves<sup>6</sup>.

From the above context therefore, proponents of the Shariah in Nigeria argue that 'Muslims in Nigeria truly believe that the profession of Islamic faith for the group and individual, even in modern state, is inchoate, if it is not accompanied by submitting totally to dictates of Allah as expressed and embodied in the Shariah legal system'<sup>7</sup>. Kharisu<sup>8</sup> is of the view that, political leaders of Northern Nigeria then, when Britain was about to give independence to Nigeria knew that they had to come to a compromise by abandoning the Shariah for the Western-based Penal Code to govern crime. He reasons that they must have reached the conclusion that 'an independent Nigeria must have its Criminal Justice System administration modelled along what the Western World could live with for the nation to hope to continue to attract Western capital and investment, which were desperately needed for the young Nigerian economy'<sup>9</sup>. He regrets that this historical truth is today acknowledged but most times misinterpreted by Northern Nigerian elites, 'many of whom shout Islamic slogans for reasons that are anything but religion'<sup>10</sup>. Furthermore, Muslims in the North felt that their lives must be guided totally by Islamic doctrines thus they contended that: 'having one's life governed in part by certain aspects (referring to the recognition given to Shariah in civil matters) of the Shariah and another by secular laws, many believe amounts to shirking, an abhorrent form of belief'<sup>11</sup>.

However, it has been argued that the introduction of the Shariah legal system in the Northern part of Nigeria goes contrary to section 10 of the Nigerian Constitution of 1999 as amended. As pointed out by Vincent, by virtue of the provision of section 10 of the Constitution, the point still remains that Nigeria is not a theocratic nation, either at the centre or in any part of its component states, and therefore no state is allowed constitutionally to adopt a particular legal system derived from a particular religious faith as the basic law for the state<sup>12</sup>. He goes further on to say that there is no machinery of government whether at the state or at the federal level which is founded on a particular religious faith so as to form the basis for the introduction of a particular religion's law or tenets<sup>13</sup>. The above arguments which are based on religious belief are not the only reasons given for the sudden change of mind from preference for Penal Code-based Criminal Law System to an Islamic Criminal Justice System in Northern Nigeria. The other reasons as postulated by Yadudu<sup>14</sup> are: 'the zeal and determination of the twelve Northern Governors to provide the necessary leadership; overwhelming popular

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<sup>1</sup> Bharathi A, 'Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shariah and Convention Compatible?', (1995) 44 *American University Law Review* p.1964.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.p.1965.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Yadudu A, Shariah Implementation in a Democratic Nigeria: Between Defence to Popular will and Libertarian Challenges, unpublished manuscript submitted to the 3<sup>rd</sup> Annual Conference of the Centre for the Study of Islam and Democracy, Arlington, VA, USA, 6-7 April 2002, p.4. See also Anderson R, 'Conflict of Laws in Northern Nigeria', (1957) *International Journal of African Law* p.36; Kharisu C, The Application of Islamic Criminal Justice in Zamfara State: Problems and Constitutional Implications, in Nwauche A, and Isograph U, (eds.), *Essays in Honour of Professor Okonkwo C*, (2000) P.74.

<sup>8</sup> Kharisu C, The Application of Islamic Criminal Justice in Zamfara State: Problems and Constitutional Implications, in Nwauche A, and Isograph U, (eds.), *Essays in Honour of Professor Okonkwo C*, (2000) P.75

<sup>9</sup> Ibid.

<sup>10</sup> Ibid. p.75.

<sup>11</sup> Ibid.

<sup>12</sup> Vincent O, 'Shariah Law in the Northern States of Nigeria: To implement or not to implement, the Constitutionality is the question', (2004) 26 Number 3 *Human Rights Quarterly*, p.738.

<sup>13</sup> Ibid.

<sup>14</sup> Yadudu A, Shariah Implementation in a Democratic Nigeria: Between Defence to Popular will and Libertarian Challenges, unpublished manuscript submitted to the 3<sup>rd</sup> Annual Conference of the Centre for the Study of Islam and Democracy, Arlington, VA, USA, 6-7 April 2002, p.4.

support in these states and beyond; popular disenchantment with the prevailing judicial system, especially the Criminal Justice System, which in the view of the ordinary Muslims (did) not work, (was) not rooted in the norms (they) cherished most, (was) bedevilled by endless delays and encumbered by incomprehensible forms, processes and procedures; which particularly at the grass-root levels, (was) not a model of impartiality or freedom from corruption<sup>1</sup>.

It was also the 'Northern Muslims' response to a situation whereby everyone else in Nigeria was busy reasserting group or ethnic rights in a democratised Nigeria, and so they see it as a reason to reactivate their agitation for the implementation of the Shariah legal system. The reason being that the Shariah had been in operation for a couple of centuries in Northern Nigeria before being eroded and finally displaced by the English common law system<sup>1</sup>. As a result of the introduction of Shariah law to cover crimes and punishments in these states, there was a huge public outcry, but even then, the Federal Government did nothing in the circumstances to prevent the breach of the Nigeria's Constitution<sup>2</sup>. In addition, the introduction of the Shariah (Islamic Legal System) also led to a number of violent ethnic and religious riots and communal clashes and disturbances in many states, resulting in huge losses in terms of human lives and properties. For example, the proposed hosting of Miss World beauty pageant in Nigeria led to protests in the name that it was un-Islamic and consequently there was disturbance and killing of people in Kaduna State of Nigeria. This made headlines in newspapers in many parts of the world<sup>3</sup>.

### **The Impact of the Introduction of English Law into the Nigerian Legal System**

One of the primary issues this article seeks to address is the law as it affects family planning and the reproductive choices of women in Nigeria and therefore it touches on some of the reproductive rights of women within the Nigerian legal system. The Criminal law system in Nigeria is represented by the Criminal code<sup>4</sup> for the Southern States of Nigeria and the Penal Code for the Northern States<sup>5</sup>. It should be noted that the Penal Code Act is a Federal legislation that supplemented the Penal Code in respect of matters within the exclusive legislative competence of the National Assembly, and for the purpose ancillary thereto such as treason, sedition, Custom Offences, Offences relating to Copy Right, Offences relating to Ships and Wharfs, Offences relating to Weights and Measures and Offences relating to Posts and Telecommunications and these are made part of the Penal Code.

The Penal Code provisions governed Criminal Law in the Northern part of the Nigeria as federating units of the country and it covered offences for which the States had concurrent legislative competence with the Federal government. When the British took control of administration over Nigeria as already stated in the preceding section, they classified both Customary Laws and Islamic Law as local customs or local statutes regarded as inferior to English law and therefore subject to the repugnancy doctrine<sup>6</sup>. The profound effect of this classification by the British administration as far as criminal law was concerned was that, the British enacted the Criminal Code to govern criminal conduct. This Code was applied both in the South as well as the North. However, the North became uncomfortable with the Criminal System under the Criminal Code and so they agitated for a criminal system that would be compatible with their way of life based on Islamic principles<sup>7</sup>. In the circumstances, it was analysed that passing of wholesale Islamic legislation would have put the large population of non-Muslims in the North in the same position that the Muslims had rejected the provisions of the criminal code as incompatible with their culture<sup>8</sup>. Thus there had to be a compromise – a compromise in the interest of what has been described as 'reflecting not only the heterogeneous populations that inhabited the region, but also to meet what the then departing colonial masters considered to be humane and acceptable

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<sup>1</sup> Vincent O, 'Shariah Law in the Northern States of Nigeria: To implement or not to implement, the Constitutionality is the question', (2004) 26 Number 3 *Human Rights Quarterly*, p.738.

<sup>2</sup> See Ojielo A, 'Human Rights and Shariah Justice in Nigeria', (2003) 9 *Annual Survey of International and Comparative Law* p.135; Aka O, 'Nigeria Since 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo', (2003) 4 *San Diego International Law Journal* p.209.

<sup>3</sup> See Violence Rocks Kaduna, Sultan sues for Peace, This Day News Papers, 22 November, 2002, available at [www.thisdayonline.com/archive/2002/11/22/2002\\_1122newsol.html](http://www.thisdayonline.com/archive/2002/11/22/2002_1122newsol.html); Elsa Esposito, Miss World in Nigeria: Was it a Good Idea, available at [xoomer.virgilio.it/pieraroc/42k/Nigeria.PDF](http://xoomer.virgilio.it/pieraroc/42k/Nigeria.PDF)

<sup>4</sup> Criminal Code Act, Laws of the Federation of Nigeria, Chapter 17, 1990

<sup>5</sup> Penal Code Act, Laws of the Federation of Nigeria, Chapter 89, Laws of Northern Nigeria 1963.

<sup>6</sup> Anderson J, 'Conflict of Laws in Northern Nigeria: A New Start, (1959) 8 *International and Comparative Law Quarterly* p.442.'

<sup>7</sup> See Nannguhan M, 'The Judicial System of Nigeria', (1987) 20 Number 20 *Nigerian Criminal Review* p.27; Justice Kayode Eso, 'The Place of Law in a Democracy', Lecture Delivered at the First Taslim Elias Annual Lecture held at the University of Ibadan, Nigeria, reported in the Guardian News Paper (Nigeria) Guardian Law Reports, 2<sup>nd</sup> February 2000.

<sup>8</sup> Nannguhan M, 'The Judicial System of Nigeria', (1987) 20 Number 20 *Nigerian Criminal Review* p.21.

systems to the international community'<sup>1</sup>. The compromise was referred to by Okokwo and Naish as 'one between the reformers and traditionalists'<sup>2</sup> and hence the Penal Code was adopted for Northern Nigeria.

The new Penal Code that was introduced<sup>3</sup> was derived from the Sudan Penal Code 1899, itself derivative of the Indian Penal Code of 1834, both of which had been enacted by the British for populations similar to Northern Nigeria's in their proportions and mixtures of Muslims and non-Muslims. The contents of the Penal Code were negotiated at length with Northern politicians and legal scholars of various schools, particularly the North's leading *ulama*. The Penal Code took into consideration the British experience in other parts of the world, such as India, where the English Criminal Law had been modified by taking into consideration local circumstances. In the same vein, the Indian experience had successfully been applied in Sudan, which had a large Islamic composition and cultural similarities with Northern Nigeria<sup>4</sup>. The resulting Code although basically English in derivation also incorporated various principles of Islamic Law. For instance, seduction and enticement which are mere torts in England, were made crimes under the Penal Code under section 389, so also 'insulting the modesty of any woman' under section 400. The Penal Code became the exhaustive legislation for states in Northern Nigeria and eventually after the Northern Region was divided, the various component states enacted various penal codes<sup>5</sup>. The Criminal Code remained in place for states that originally were part of the Western and Eastern Nigeria and were collectively referred to as the South. The Criminal Code was closely based on the Queensland Criminal Code of Australia which in turn was a derivative of a Code drafted by a prominent English Lawyer, Sir James Fitzpatrick, in 1878. The draft was intended to replace the Common Law of Crime in England but it was not enacted by the British Parliament. However, this was introduced into British colonies of the time. The Nigerian Criminal Code served as a basis upon which the East and Central Africa Codes are based<sup>6</sup>.

Alongside the old Penal Code we now have in place also in all the Shariah States except in Niger State, new Shariah Penal Codes running in parallel. The Shariah Penal Codes have in consequence brought back Islamic Criminal Law into more or less full force within the Shariah States with regard to persons who are tried for crimes in the new Shariah Courts. At the same time still in existence are all the clones of the Penal Code of 1960 which are applicable to persons tried in Magistrate or High Courts. This means that the criminal law system in place reflects once again what was in place during the colonial days, whereby penal law applied to a person depended on which court he or she was tried in. Therefore to a large degree there is uncertainty and inequality, which includes discrimination based solely on religion as a result of the reintroduction of the Islamic Criminal Law to govern crimes in the criminal justice of the Shariah States. Thus in summary, in Nigeria, many different laws and systems of law abound, ranging from Nigerian legislation, customary law, and Islamic law to the Common law of England, general doctrines of equity and English Statutes of general application in force before the 1<sup>st</sup> of January 1900. Thus therefore the Criminal Code and Penal Code are basically English in derivation but the Penal Code incorporated various principles of Islamic law.

## Conclusion

In this article, it has been shown that Nigeria operates a pluralistic legal system. There is interplay between Customary law, Islamic law and the received English Law as a result of colonialism. And because Islamic religious norms have resurfaced and have been incorporated into the legal system, this has produced negative impact upon the fundamental rights of women especially in the Northern part of Nigeria where the Shariah legal system was introduced in 2000. This fact is buttressed by the cases discussed. This is because the personal lives of women are governed by religious and customary laws which seem to render the constitutional provisions of the Nigerian Constitution of 1999 as amended on the rights of women especially regarding non-discrimination on the basis of sex, religious inclination, among many others, toothless and therefore ineffective as the case may be. The reproductive rights of women are being abused and neglected which should not be so in view of the fact that the Nigerian Constitution is the ground norm and all other laws derive their validity from it. Additionally, the reproductive rights of Nigerian women especially rights to equality, privacy and health, should and ought to be respected given the fact that they have the right to exercise their reproductive freedom.

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<sup>1</sup> Kharisu C, The Application of Islamic Criminal Justice in Zamfara State: Problems and Constitutional Implications, in Nwauche A, and Isograph U, (eds.), *Essays in Honour of Professor Okonkwo C*, (2000) P.74.

<sup>2</sup> Okonkwo C, and Naish M, *Criminal Law in Nigeria*, 2<sup>nd</sup> edition, (Sweet & Maxwell, 1980) pp.9-10.

<sup>3</sup> Northern Region No.18, of 1959 which became Cap.89 of the Laws of Northern Nigeria 1963.

<sup>4</sup> Anderson J, 'A Major Advance', (1961) 24 *Modern Law Review* pp.616-25 at p.618. See also Richardson S, *Notes on the Penal Code Law*, (Kaduna, Government Printer, 1960) and Gledhill A, *The Penal Codes of Northern Nigeria and Sudan*, (Lagos: African University Press, 1963).

<sup>5</sup> Nannughan M, 'The Judicial System of Nigeria', (1987) 20 Number 20 *Nigerian Criminal Review* p.21.

<sup>6</sup> Read J, 'Criminal Law in Africa Today and Tomorrow', (1963) 7 *Journal of African Law* pp.5-17.