

THE LEGAL IMPLICATIONS OF THE APPEAL SYSTEM FROM UPPER SHARI'AH TO THE HIGH COURT OF KANO STATE UNDER THE NIGERIAN LEGAL SYSTEM

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Abstract

Nigeria's court system is hierarchical with an appeal system from lower courts to the Supreme Court. Appeals could originate from Shari'ah Court to the Supreme Court through the High Court. All appeals from Upper Shari'ah Courts (USCs) except on Islamic personal law lie to the High Court. This remains the case despite the fact that the High Court applies principles of Common Law and the fact that Shari'ah rules of evidence are declared alien to the High Court. Adopting the doctrinal methodology, this paper critiques the traffic of appeal from the Kano State USCs to the High Court of Kano. The paper found that most High Court Judges are not learned in Shari'ah; some are not Muslims, and the High Court has no Shari'ah Division. The implication is that the system allows non-Muslims and persons not learned in Islamic law to preside over appeals on matters of pure Islamic Law. Additionally, the paper confirms that while Sharia places weight on the gender and religion of Judges, Common Law does not. The involvement of female High Court Judges in the determination of Shari'ah appeals contradicts the basic principles of Shari'ah. The paper therefore, recommends the reorganization of the appeal system from Kano State USCs to the High Court. The paper further recommends amendment to Sections 233, 234, 244, 247 and 277 of the 1999 Constitution (as amended) to allow the traffic of appeals from USCs to the Sharia Court of Appeal on all questions of pure Islamic Law. Alternatively, provisions be inserted mandating the appointment of High Court judges learned in Islamic law and/or administrative divisions to handle Shari'ah appeals.

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1.0 Introduction:

The Nigerian legal system grants constitutional right to litigants to appeal decisions from lower courts up to the Supreme Court. In fact, it devoted an organized appeal system by providing the traffic of appeal and how appeals are prosecuted. Detailed rules and procedure abound. At the superior appellate levels that is from the High Court, the Shari'ah Court of Appeal and Customary Courts of Appeal to the Supreme Court through the Court of Appeal for instance, a notice of appeal grounded on law or mixed law and facts and exchange of briefs of arguments are precondition for appropriate appeals. On appeals arising from the decision of the Shari'ah Court of Appeal for instance, a constitutional requirement on the minimum number of Justices of the Court of Appeal is made. This detailed procedure does not obtain for appeals from Upper Shari'ah Court to the High Court and from the High Court to the Court of Appeal. This paper examines the implications of the Appeal System on the decisions of the Upper Sharia Court of Kano State to the High Court.

To begin with, unlike appeals to the Court of Appeal and Supreme Court where notices of Appeal and all other processes must be filed together with transmission of Record of Proceedings, before the Appeal is assigned to a Panel of Justices, this is not the case at the High Court level. At the High Court of Kano State, for instance, appeals are heard on sessional basis of a bi-weekly period or a weekly basis as the case may be. Thus, irrespective of where the appeal comes from, there is a panel of two High Court Judges to hear and determine appeals from both magistrate courts and Upper Sharia Courts of Kano State. This sessional appeal system at High Court of Kano State, rotates among the judges so that in every legal year of the High Court of Kano State, appeals from the Upper Sharia Kano are assigned on the basis of an appeal Roaster whether the Judges at the panel are learned in Islamic law or not.³

Although as at now there is no single High Court Judge of Kano State that is a Christian, there was one in the recent past⁴ and by the Constitutional requirement of their qualification for appointment as High Court Judges,

³ The Kano State High Court of Justice Appeal Roaster for the Legal Year 2018-2019 and extract of the appeals heard by the High Court of Kano State in the 2016-2017 legal year provides an insight.

⁴ Hon. Justice Patricia Mahmoud now of the Court of Appeal of Nigeria

nothing will prevent having other Christian Judges in Kano State⁵. If this happens it violates one of the conditions prescribed by Muslim Scholars for a person to be appointed as a judge must fulfil. Abu-bakr Bn Hassan Al-Kashnawi for instance, made Islam the first among the twelve conditions precedent persons to occupy the office of a judge must meet.⁶ According to the learned scholar “verily twelve conditions abound before a person can assume the office of a judge: The first is that a judge should be a Muslim and it is not appropriate for him to be a non-muslim.”⁷ Similarly, the author of *Tabsirat al-Hukkam* equally made Islam among the ten conditions a person must satisfy before he can be appointed as a judge.⁸

Similarly, from the findings of this paper it is clear there are women judges of the Kano State High Court who have, are and will continue to preside over appeals from the Upper Sharia Court on pure Islamic Matters. This is against the position of Muslim scholars such as Khadi Burhanuddin⁹, Khadi Abubakar Muhammadu Bn Asim Al-Andulusiyy,¹⁰ Muhammad Muhammad Sa’ad¹¹ and Abi-bakr bn Hassan Al-Kashnawi¹² who made masculinity as a condition for appointment as a judge. The third condition set by Abi-bakr bn Hassan for instance, is that “a judge should be man.”¹³

It is equally true that although some of these Judges have obtained qualification in Islamic Law¹⁴ many of them have not. Below is the examination of the legal implication of the appeal system from Upper Shari’ah Court to the High Court of Kano State.

⁵ There are several lawyers who are Christians and are indigenes of Kano state from Tudun Wada, Rogo and Karaye Local Governments who cannot be prevented from becoming Judges in Kano State once they are qualified.

⁶ Abi-Bakr Bn Hassan Al-Kashnawi, *As’halul Madarik Commentary of Irshadis-Salik*, 196-197

⁷ Ibid.

⁸ Khadi Burhaniddin Ibrahim Bn Ali, *Tabsiratul Hukkam*, 1:40

⁹ Ibid.

¹⁰ Khadi Abubakar Muhammadu Bn Asim Al-Andulusiyy, *Ihkamul Ahkam*, 10-11.

¹¹ Muhammad Muhammad Sa’ad, *Dalilus Salik*, page 35

¹² Abi-Bakr Bn Hassan Al-Kashnawi, *As’halul Madarik Commentary of Irshadis-Salik*, 196-197

¹³ Ibid.

¹⁴ Lawan Wada and Aisha Mahmud obtained a combined law degree honors in Common and Islamic Law from Usman Danfodio University Sokoto and Bayero University Kano respectively.

2.0 The legal issues in the Appeals System from the Upper Sharia Court to the High Court on Pure Islamic Law Matters

It is undoubted that the High Court of Justice of Kano State like any High Court in Northern Nigeria does exercise jurisdiction over all appeals on Shari'ah issues from the Upper Shari'ah Court save appeals on the constitutionally termed Islamic personal law matters. Certain implications however arise from the said High Court's exercise of jurisdiction in entertaining appeals from the decisions of the Upper Sharia Court Kano. The implications are based on some textual and prophetic authorities, as well as opinion of the jurists concerning the position of Shari'ah that has a direct impact on the exercise. These implications include qualification of a Judge under Sharia; status of a female judge under Sharia; position of a non-Muslim judge under Sharia; right to religion and appeals from Upper Sharia Court to High Court; legal hybridity and appeal from Upper Sharia Court to High Court. These issues will be discussed seriatim.

2.1 Qualification of a Judge under Sharia

Under the Sharia, a judge otherwise called al-Qaḍī adjudicates over matters in a Sharia Court¹⁵ and is one with deep insight and profound knowledge of Shari'ah. He must be versatile in Islamic law, God fearing, honest, sincere and man of integrity. He must not be seen to be interested in the matter in dispute.¹⁶ A Qaḍī in Islam is one who is learned in Sharia and shall be versed in Hadith and Fiqh.¹⁷ Any judgment passed by a Qaḍī who is not learned in Islamic Law is void.¹⁸ Under Sharia therefore, a Qaḍī must have deep insight and profound knowledge of Shari'ah. In essence he must be versatile in Islamic law, he must also be God fearing, forth right, honest, sincere and man of integrity, he must not be seen to be interested in the matter in dispute.¹⁹

Under the Nigerian Legal System, however, a judge, for the purposes of administration of Islamic Law, is one learned in Islamic Law. By section 276 of the Constitution²⁰ a person shall be deemed to be learned in Islamic Law if he has attended and obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the

¹⁵Section 2, Kano State Sharia Courts Law 2000.

¹⁶ Quran Ch. 4 verse 135 and Ziza v. Mamman (2002) 5 NWLR (pt.760)243.

¹⁷ Abdullahi A.M., Guide to Advocates (Translation and Commentary on Tuhfatul Hukkam) Part one, Zaria, Sankore, Educational Publishers Ltd, 2008, P5.

¹⁸ ibid.

¹⁹ Quran 4:135. See also Ziza v. Mamman (2002) 5 NWLR (pt.760)243.

²⁰ Constitution of the Federal Republic of Nigeria 1999 (as amended).

qualification for a period of not less than 10 years, and if in the opinion of the National Judicial Council, he has considerable experience in the practice of Islamic law or he is a distinguished scholar of Islamic law.²¹

In Kano State and under the Kano State Sharia Courts Law, an Alkali or Sharia Court Judge or in this context a judge learned in Sharia in relation to the Upper Sharia Court is one who is a Muslim, Adult, of sound Moral character and that he must either be a person who obtains a recognized qualification in Islamic law from an institution acceptable to the Kano State Judicial Service Commission or he is a Legal Practitioner in Nigeria with sound Knowledge in Islamic Law and has been so qualified to practice (Law in Nigeria) for a period of not less than 7 years.²² For the purpose of this law, a degree in Islamic law from a recognized university, diploma certificate in Shari'ah and civil law from a recognized university, college or Institution and a certificate from former (Kano) Islamic School, qualify as a recognized qualification in determining a person learned in Islamic Law.

Critically speaking, it needs to be stressed that holding a qualification or rather a certificate from an institution approved by National Judicial Council or approved by the state Judicial Service Commission is not a guarantee of knowledge, learning and/or versatility in Islamic law. Ability to read and interpret relevant Arabic text of Shari'ah legal materials is a fundamental quality of any person to be appointed as Shari'ah Court judge or a Khadi of Shari'ah Court of Appeal.

Judges of the High Court by their qualification as contained under the Constitution as earlier discussed in this paper, are not learned in Islamic law, as such, they do not or may not appreciate the law in comparison to their counter parts in the Sharia Court of Appeal. In essence, Islamic law requires expertise in its application. High Court Judges, who by their training and practice are not learned in Islamic law, do not possess the requisite knowledge of Islamic principles to adequately and justly handle appeals from the Upper Shari'ah Courts on Islamic principles.²³ If they must handle Islamic law matters they need assessors to hand down valid decisions. This arrangement

²¹ Op.cit. Ziza v. Mamman (2002)5 NWLR (pt. 760)243.

²² Kano State Sharia Courts Law 2000, section 11(1).

²³ Bappa Mahmud's comment on **Ado v. Dije's** case in Oba, A.A., Lawyers, "Legal Education and the Shariah Courts in Nigeria, *Journal of Legal Pluralism*, "Vol.49 (2004). <http://commission-on-legal-pluralism.com/volumes/49/oba-art.pdf> (accessed November 21, 2018).

is however not accommodated by the Constitution of the Federal Republic of Nigeria as interpreted by the Appellate Courts.²⁴

The problem of judges of superior courts of Records without the requisite Islamic law knowledge handling complex Islamic law issues could occasion misinterpretation and misapplication of law even at the Supreme Court without a chance to correct the situation. This much is acknowledged by the National Policy on Justice 2017. According to the Policy:

Trial of Islamic and customary law cases by non-specialist judges: Although the Constitution requires the inclusion of persons learned in Islamic and Customary law in appointing justices of the Supreme Court and the Court of Appeal, there is often no adequate number of such specialized justices in the two apex courts. Moreover, there is no similar provision for appointment of judges of the High Courts which also administer Islamic and customary laws. In the event, many cases of Islamic and Customary law, raising complex issues, are handled without the participation of a judge who possesses special knowledge of the subject. *This practice could lead, and has sometimes led to, misinterpretation and misapplication of the law, at a stage, in the case of the Supreme Court, where no opportunity for appeal and correcting the error is available, in relation to the case at hand.*²⁵(Emphasis added).

The above position was reiterated by the Court of Appeal in the recent decision of the court in **Gado Bungudu V. Sarkin Fulani Ibrahim**.²⁶ According to the Court, if a person is ignorant of Islamic Law, his decision on it, unaided by an assessor who is learned in the law, is a nullity. This decision accords with “the Sunna of the Holy Prophet Mohammed (SAW) which constitutes the second primary source of the Shari’ah. The Sunnah made definite stand on that issue by insisting that only a man well versed in the Science of Islamic Jurisprudence should be made a Qadi (Judge)”²⁷

²⁴ Federal Ministry of Justice, National Policy on Justice, 2017, Theme 7: Legal Pluralism, 15

²⁵ Federal Ministry of Justice, National Policy on Justice, 2017, Theme 7: Legal Pluralism, 15

²⁶ (2016) 4 SQLR (Pt. III) 571 at 573-574 R1.

²⁷ Ibid., R 3 at page 575.

Thus, no doubt most Judges of the High Court are not learned in Islamic Law, in fact some of the Judges are not even Muslims and some are even females.²⁸ And this same High Court Judges in some states such as Kano sit and determine appeals from the Upper Sharia Court in Kano State. Clear lack of expertise can be seen in the Judgment of the High Court in most, if not all appeals determined by the High Court on the decisions of the Upper Sharia Court of Kano State. There is no proper evaluation or review of the law applied by the Upper Sharia Court. In **ALHAJI MUNIR SAGAGI VS ALHAJI MUHAMMAD NASIRU**,²⁹ the Upper Sharia Court Rijiyar Lemo delivered a Judgment ordering the appellant to pay a Judgment sum to the Respondent in CV\164\2015 on the 22\12\17. Dissatisfied with the judgment, the Appellant naturally appealed against the Judgment of the lower Court to the High Court of Kano State. The Kano State High Court held that on the Authority of **AMADI VS A.G IMO STATE**³⁰ the appellant having been given the opportunity to bring his witnesses but failed could not complain of denial of fair hearing. Similarly on pages 10 and 14 of the record of the lower court after the judgment was delivered the Appellant appeared and informed it that he brought the sum of **₦30,000.00** and that there was a settlement on the matter, the Appellant made Iqrar (confession) on pages 2, 5, 6 and 7 of the record transmitted which is an admission as provided by sections 20 and 21 of the Evidence Act 2011. Appeal failed and is refused.

With due respect, apart from the mentioning of the word “*Iqrar*” there is nothing from the Judgment of the High Court to show that Islamic Principles administered by the lower Upper Sharia Court were evaluated.

Similarly in the following cases³¹ which were appeals from Upper Sharia Court to High Court of Kano State similar problems could be clearly seen: In

²⁸ In Kano State Hon. Justice Patricia Mahmud JCA (was once a High Court Judge in Kano State now Justice of the Court of Appeal) who is not a Muslim. There are Justice Aisha .Rabiu Dallami, Justice Aisha Mahmud, Justice Dije Aboki and other female Judges of the Kano State High Court.

²⁹ Unreported case, Suit NO. K\77^A\2018 which was determined by the Kano State High Court sitting on Appeal on the decision of Upper Sharia Court Rijiyar Lemo Kano on the 11th June, 2018 by justices A.T. Badamasi and Ibrahim Umar.

³⁰ (2017) LPELR 4213 SC; **INEC VS MUSA** (2003) LPELR

³¹ Alhaji Umar Sale vs. Musa A. Mohd & Ors unreported case, Suit No. K\6^A\18 presided over by Justices Usman Na’abba and Hadiza Suleiman, and Haj Maryam Ibrahim Sayyada & Ors VS. Kano State Government, unreported case No. K\46^A\2015 delivered on the 19\5\2016 which was an appeal against the decision of Upper Sharia Court Rijiyar Lemo in CR\41\2015 which was a very controversial case of Blasphemy against the Holy prophet, the learned High Court Justices on appeal relied much on the provisions of the penal code and the constitution in their judgment, they however cited two verse of the Holy Quran but no review of law applied by the Upper Sharia Court was done in the appeal.

USAINI MOHAMMED KUNYA VSALHAJI BALA MOHD RITOLA³² the entire judgment of the appellate High Court is reproduced thus:” after having looked at pages 8, 12, 18 and 23 of the trial court’s record and pages 2 and 3 of the Upper Sharia Court of Appeal Gyadi-Gyadi it is our observation that there was a sale of land between the Respondent and the deceased’s Brother of the Appellant which was shared among the heirs of the Appellant’s deceased Brother. It is our opinion that the heirs ought to have made search and investigation on the property of the deceased, in case of any encumbrance before instituting an action on the distribution of their late father’s estate Consequently, the decision of the Upper Sharia Court of Appeal sitting at Gyadi-Gyadi in appeal NO. CV\429\14 is hereby affirmed”.³³ These of course are the results of the nuances of Islamic Law which only persons learned in Sharia can master and correctly apply, a fact which is lacking in High Court Judges. The High Court ought to have reviewed and evaluated the reasoning of the trial and Upper Sharia Courts (the lower Shari’ah court) on the Islamic principles and textual authorities relied upon by lower Shari’ah courts but only glossed over the Islamic law principles relied upon the lower Shari’ah Courts whose judgment was before it on appeal.

2.2 Status of a Female Judge under Sharia

There is no specific provision in the Holy Qur’an or Sunnah of the Holy Prophet Mohammed (peace and blessings of Allah be with him) prescribing or prohibiting the appointment of a female Qadi (Judge) under sharia. Although in Muslim countries such as Jordan, Malaysia, Palastine, Tunisia, Sudan and the United Arabs Emirates women were appointed Judges (Qadis) there is disagreement among the Muslim jurists on the issue. According Maliki, Shafi’i, Hanbali Schools of law and distinguished scholars from the Hanafi scholars, Zofar, Shiite Jafari, Ibn Qudama, Imam al-Qurafi and al-fayruz Abadi, appointment of a woman to Judgeship is prohibited under sharia.³⁴ Similarly, it is clear from many texts that the position of a Qadi is

³² Unreported case, Suit No. KA\29\18, Presided over by the same Justices, delivered on the 9\10\18.

³³ *ibid.*

³⁴ Bin Ali, *Tabsiratul Hukkam*, *ibid*, 1: 40; Al-Andulusiyy, *Ihkamul Ahkam*, *ibid*, 10-11; Muhammad Muhammad Sa’ad, *Dalilus Salik*, 35; Abi-Bakr Bn Hassan Al-Kashnawi, *As’halul Madarik Commentary of Irshadis-Salik*, 196-197; Zahalka, I. A Female Qadi Appointment in the Sharia Courts: Religious Law and Public Opinion, 2017, <https://dayan.org/content/female-qadi-appointed-sharia-court-religious-law-and-public-opinion> October 2017 last visited 23\11\2018.

for men³⁵. In the letter written by Sheikh Uthman Danfodio to all his flag bearers which was quoted by his, Sheikh Abdullahi Danfodio in his book *Diya ul-Hukkam* it is said that “Judgeship is for a man who is truthful and administers justice honestly and truthfully.....but such men are rare”³⁶

Some Scholars while prohibiting the appointment of a woman as Qadi relied on *Al-Nisai* verse 34 and *Al-Baqrah* Verse 228 and a tradition of the Holy Prophet (S.A.W.). *Quran* 4 Verse 34 provides: “Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means.” From this verse, some of the jurists argued that since men are made in charge of women, to appoint women as judges would contradict the above verse as the appointment will place them in charge of men.

Quran 2 Verse 228 on its part provides “but men have a degree (responsibility) over them”. Some of the jurists also relied on this verse to opine that for a judge to adjudicate between parties before him, he must have a degree over them. So appointing woman a Judge will be to accord her a degree of responsibility contrary to this verse, it is therefore prohibited to appoint woman a judge.

It was equally narrated that Abu Bakrah (R.A.) said when the Messenger of Allah (S.A.W.) heard that the people of Persia appointed the daughter of Chosroes as their ruler, he said: “No people will ever prosper who appoint a woman in charge of their affairs”³⁷ Some Scholars equally relied on this authority of the Holy Prophet as evidence that it is not permissible to appoint a woman judge, because lack of prosperity is harm the causes of which must be avoided. Similarly, since this authority is generally applicable to public affairs judgeship being a public affair is equally covered by the hadith.³⁸

Moreso, some jurists based their prohibition of appointing woman a judge on the fact that a judge is required to be present among men’s gatherings and to mix with disputants and witnesses and may need to be alone with men which Islam prohibits in order to protect the honor and dignity of women. Similarly,

³⁵ Ibn Ali, *Tabsiratul Hukkam*, ibid, 1:40; *Al-Andulusiyy*, *Ihkamul Ahkam*, ibid, 10-11; Muhammad Muhammad Sa’ad, *Dalilus Salik*, 35; *Al-Kashnawi*, *As’halul Madarik*, ibid, 196-197

³⁶ Yakubu, A.M. (eds), *Understanding Shari’a in Nigeria*, (Spectrum Books Limited, Ibadan, 2001) 32

³⁷ *Al-Bukhari*, Hadith No. 4425.

³⁸ Ruling on appointing a woman as a Judge-Islam Question and Answers, <https://islamqa.info/en/answers/71338/ruling-on-appointing-a-woman-as-a-judge>, last visited Friday 15 Rabi’alawwal 1440-23/11/2018.

the position of a judge requires a high level of intelligence, insight and reason and women have less of these qualities than men and they have little experience about the affairs of life and disputes.³⁹ According to Muhammad Muhammad Sa'ad a person to be appointed as a judge must be knowledgeable in the judicial rulings on Shari'ah issues for which he is appointed to decide."⁴⁰ In fact, Abi-Bakr Bn Hassan Al-Kashnawi requires a judge to be knowledgeable to the status of a *Mujtahid*."⁴¹ For Abubakar Muhammad Bn Asim, for instance, "a judge should be knowledgeable and prudent and should have knowledge of fiqh (knowledge of the school of thoughts and Islamic jurisprudence)."⁴²

Thus, from the discussions so far, it is evident that under the Maliki Muslim law, which is observable in Kano, it is prohibited for a woman to be appointed a judge of Sharia Court that is why throughout the history of Sharia Courts in Kano State (as gathered by the research work), no woman was appointed a Shari'ah court judge in the state. However, some jurists allow the appointment of a woman as a Judge in all cases of property, except that she cannot be a judge in *Hudud* or *Qisas* punishments.⁴³ This is however the minority view and it is not the view of Maliki School of law which is the law in Kano State (as per sharia law).

It is, therefore, clear that if a woman is appointed a judge, as is the case in Kano State High Court, she cannot preside over cases on pure Islamic Law on appeal from Upper Sharia Court because according to the jurists from Maliki school of law, a woman's term as a judge would be null and void hence her rulings have no legally binding validity.⁴⁴ Therefore, the practice of appealing against the decisions of the Upper Sharia Court to High Court Kano is from the Sharia perspective unacceptable due to its allowance of female judges to handle generally matters concerning Sharia.

³⁹Ibn Ali, *Tabsiratul Hukkam*, ibid, 1:40; Al-Andulusiyy, *Ihkamul Ahkam*, ibid, 10-11; Sa'ad, *Dalilus Salik*, ibid, 35; Al-Kashnawi, *As'halul Madarik*, ibid, 196-197

⁴⁰ Sa'ad, *Dalilus Salik*, 35

⁴¹ Al-Kashnawi, *As'halul Madarik*, ibid, 196-197

⁴² Al-Andulusiyy, *Ihkamul Ahkam*, ibid, 10-11

⁴³ Abdullahi A.M., *Guide to Advocates (Translation and Commentary on Tuhfatul Hukkam) Part One*, (Zaria, Sankore, Educational Publishers Ltd, 2008), 6.

⁴⁴ Op cit., Zahalka, I. A Female Qadi Appointment in the Sharia Courts: Religious Law and Public Opinion, 2017, <https://dayan.org/content/female-qadi-appointed-sharia-court-religious-law-and-public-opinion> october2017 last visited 23\11\2018, Op cit, Abdullahi A.M., P6.

2.3 Position of a Non-Muslim Judge under Sharia

A judge or qadi under Sharia is a Muslim who renders decisions in accordance with Islamic Law. In the 7th and 8th centuries the Qadi was expected to be capable of deriving the specific rules of law from their sources as recognized in Fiqh. Later, in practice, Muslim States began to appoint Qadis on the condition that they issue judgments according to a specific school of law in order to guarantee predictability in the judiciary.⁴⁵

It is to be noted, however, that religious pluralism existed even in medieval Islamic law and ethics. The religious laws and courts of other religions, including Christianity, Judaism, and Hinduism were usually accommodated within the Islamic legal framework as exemplified by the caliphate Al-Andalus, Ottoman Empire and Indian sub-continent.⁴⁶ The Qadi in medieval Islamic societies could not usually interfere in the matters of non-Muslims unless the parties voluntarily chose to be judged according to Islamic law.⁴⁷ The non-believers (*dhimmi*) communities living in Muslim communities or states usually had their laws independent from Sharia law. The non-believers were allowed to operate their courts in accordance with their legal system.⁴⁸

This can be likened to what is obtainable in Kano State which operates or apply Sharia law but only to Muslims living in the state while non –Muslims have the option of being judged by a Qadi in the Sharia Court,⁴⁹ Magistrates and High Courts exist in the state and apply a variety of customary and even Christian (English) laws (such as the Marriage Act). However, despite these arrangements, it is specifically prohibited under Sharia for a non-Muslim to be appointed Sharia Court Judge (*Qadi*). Although educational qualifications play a vital role in the modern appointment of Qadis, the requirement of being a Muslim is still not ruled out, (in Kano State).⁵⁰

Under the 1999 Constitution of the Federal Republic of Nigeria, anybody who qualifies for appointment as High Court Judge may be appointed despite his

⁴⁵ <https://www.britanica.com/topic/qadi> last visited 20th November, 2018.

⁴⁶ Weeramantry, Christopher Gregory. Justice without Frontiers: Furthering Human Rights. Vol. 2. (Martinus Nijhoff Publishers, 1998)

⁴⁷ Abdullhussain, A. The Islamic Roots of Democratic Pluralism, (England, Oxford University Press, 2001).

⁴⁸ Ibid.

⁴⁹ Kano State Sharia Courts Law 2000, Section 5.

⁵⁰ Ibrahim, D.A.B. Position of the Shari'ah Courts in the Administration of Justice, 1986, retrieved from [eprints.um.edu.my/13689/1/000/pdf](http://eprints.um.edu.my/13689/1/000.pdf) last visited 21st day of November, 2018, Kano State Sharia Courts Law 2000. Section 11.

religious belief, even in Kano State.⁵¹ Thus, where a non-Muslim is appointed High Court Judge in Kano State nothing stops him or her from entertaining appeals from the Upper Sharia Court of the state on pure Islamic law cases both civil and criminal despite the position of Sharia on non-Muslim sitting as a judge to determine Islamic law matters.⁵²

2.4 Right to Religion and Appeal from the Upper Sharia Court to the High court

Religion is related or connected to a belief and worship of a Supreme being. There are many definitions attributed to religion most of which are related to Christian understanding or western perception of religion. Islam is different from any other religion as it does not separate worldly activities from others⁵³. All aspects of Muslims' lives are regulated and connected to Islam. Administration of Justice is one of the most important segments of Sharia. The Holy Qur'an provides:

So judge among them by what Allah has revealed, and follow not their vain desires, diverging away from the truth that has come to you. To each among you we have prescribed a law and clear way⁵⁴

As it is under the Nigerian Constitution and the respective laws of Kano State, although Islamic law is administered and applied both under civil and criminal laws of Sharia by the lower courts (sharia courts), appeal under the Constitution on Islamic personal law is the only aspect of Islamic law that is recognized and administered by the courts of record,⁵⁵ leaving the other aspects of Islamic civil and criminal cases in an indefinable state of confusion. Section 38(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) for instance provides as follows:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in

⁵¹ Constitution Federal Republic of Nigeria 1999(as amended) Section 271(3).Hon. Justice Patricia Mahmud was once a High Court Judge of Kano State who is not a Muslim.

⁵² as was the case when Hon. Justice Patricia Mahmoud (JCA) was a High Court in Kano State..

⁵³ Op cit. Ambali M.A., Challenges of Shari'ah Implementation in Nigeria, In Oyeyipo A.T.(ed) Judiciary and Democracy in Nigeria: Essays in Honor of Hon. Justice Alfa Belgore,Enugu,Snaap Press Ltd.,2007,pp.203-204.

⁵⁴ Op cit. Quran chapter 5 verse 48.

⁵⁵ Sections 277, 244 and 247, Constitution of the Federal Republic of Nigeria 1999 (as amended).

public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance⁵⁶

The framework for understanding the scope of the right to freedom of thought, conscience and religion was by a unanimous decision set out by the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo*.⁵⁷ According to Ayoola JSC, the right to freedom of thought, conscience or religion implies a right not to be prevented without lawful justification from choosing the course of one's life, fashioned on what one believes, and the right not to be coerced into acting contrary to one's belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy ... Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component. The courts are the institutions society has agreed to invest with the responsibility of balancing conflicting interests in a way to ensure the fullness of liberty without destroying the existence and stability of society.

Right to religion under the 1999 Nigerian Constitution is a fundamental right which cannot be taken away. The establishment of the Sharia Court of Appeal and the allowance by the Constitution for Kano State to establish courts of Sharia and make laws under section 4(7) for the peace and good governance of the state, clearly exemplifies the intention of the Constitution as to "observance" of Religion by Nigerians (Muslims in this aspect) as contained under section 38 above. Thus, for a Muslim litigant to approach Upper Sharia Court for his case to be determined under Sharia justice system means he wants his legal tussle to be regulated by Islamic Law and is therefore exercising his right to freedom of thought, conscience and religion, so, to create a helpless and hopeless situation in the appeal system under administration of Islamic law, such as from the Upper Sharia Court to the High court, is with respect, an unjustifiable infringement of the fundamental rights to religion of such Muslim Litigants(in Kano State).

The Constitution is clear on fundamental rights in the sense that a person need not wait until the substantive right is itself breached before he complains⁵⁸. The slightest likelihood of a threat to such a right is enough ground for such a complaint. Thus, if a non- Muslim judge, a judge not learned in Sharia or even a female judge can by the exercise of the right of appeal from the Upper

⁵⁶ Section 38, Constitution of the Federal Republic of Nigeria 1999 (as amended).

⁵⁷ (2001)FWLR (PT.44)542.

⁵⁸Section 46, Constitution of the Federal Republic of Nigeria 1999 (as amended).

Sharia Court to High Court contradict these important principles of Islamic Law, then the appeal system is itself an infringement of a Muslim's right to religion.

Similarly, assuming High Court that hears and determines appeal from the Upper Sharia court in Kano state is manned by a Muslim male Judge learned in sharia, the court he mans is regulated by manmade law and should there exist any contradiction by Islamic principles and the provisions of the Constitution or Evidence Act, the Constitution or the Evidence Act (manmade law) prevails over the principles of Shari'ah⁵⁹. In other words, Shari'ah principles in the High Court apply subject to manmade law which is a contravention of the foundation of Sharia. In essence, it is forbidden under whatever circumstances to choose manmade law over Shari'ah principles⁶⁰ and appeal from the Upper Sharia Court to the High Court creates this opportunity.

2.5 Legal Hybridity and Appeal from the Upper Sharia Court to the High Court

It is clear whenever sources of law are discussed in Nigeria; Islamic law is always on the list. Shari'ah legal system is also always recognized in Nigeria as a legal system separate from any other legal systems. There are three sources of law in Nigeria, these are: the Common law, the Shari'ah (Islamic law) and customary law and each should continue to grow and develop.⁶¹ Similarly, "any reform of Nigerian law must recognize the existence of the parallel systems of law in the country, namely, the Common law, Islamic law (Sharia) and Customary law".⁶² In **Usman v. Usman**⁶³ it was held that "Islamic law like any other law is a reasonable and rational law, it grows with the living society". It is equally the decision in **Alkamawa v. Bello & Anor**⁶⁴ that "Islamic law is not the same as customary law as it does not

⁵⁹Section 1, Constitution of the Federal Republic of Nigeria 1999 (as amended)

⁶⁰Supra note 39, PP 115.

⁶¹ Communiqué of the conference of Nigeria Judges held between 4th to 11th September 1988, organized by the National Judicial Institute Abuja, and Tabiu, M. *Comparative Laws: Nature and Scope of the Application of English Law, Customary Law and Islamic Law*, 1997 All Judges' Conference Papers, Lagos, National Judicial Institute, 1997, p.52.

⁶²Communiqué of the National Conference on Law, Development and Administration in Nigeria, organized by the Federal Ministry of Justice at Nigerian Law School, Victoria, Lagos, between 21st to 25th September, 1987.

⁶³ (2003)11 NWLR (PT.830) p.109.

⁶⁴ (1998)6 SCNJ 127 at 136.

belong to any particular tribe. It is a complete system of Universal law, more permanent and more Universal than English common law”.

It has already been highlighted in this paper that the High Court applies Common law while Upper Shari’ah Court applies Islamic law, hence appeal from upper Sharia court to High Court unnecessarily compounds the problems inherent in the application of Islamic Law side by side with common law. The principles of Islamic law are distinct from those of the common law and by their training and qualification most Judges of High Court are of common law orientation and do not even know or appreciate Islamic law. In fact, the appellate Courts have held ⁶⁵that the principles of Islamic law are alien to High Court, yet the same Court entertains appeal on those alien rules from Upper Sharia Court. In **Alhaji Umar v. Bayero University, Kano**⁶⁶ it was held while under Shari’ah a judge is entitled to use all relevant facts and apply all relevant laws whether or not those were canvassed by the parties or not, this is not so under the Common law. Justice Gwarzo (a former Grand Qadi of the Sharia Court of Appeal of Kano State) Court of Appeal Judge said in **Chamberlain v. Abdullahi Dan Fulani** ⁶⁷ had this to say:

Notwithstanding that the appellant’s counsel did not argue ground 2, but I observed in the proceedings of the trial court that certain questions which should have attracted the attention of the learned Upper Area Court Judge’ while Justice Kalgo (who had no training of Shari’ah law) in the same case rejected the argument that issue not conversed can be considered by any judge. Justice Gwarzo justified his action by relying on an Islamic Civil procedure deduced from a prophetic tradition which says ‘whoever observes evil he should remove it with might, if he cannot, he must do that with the tongue, if he could not than he must hate it at heart.’⁶⁸

Thus, this situation can be avoided once the Sharia Court of Appeal is empowered to hear appeals from Upper Sharia Court on all aspects of Islamic law. Especially if the relevant provisions of the Constitution are amended to accommodate the system. In the words of Sambo, “in the federal system of government for a multi-religious and multi-ethnic nation like Nigeria, it is imperative that there must be a federal plural system of courts in order to see

⁶⁵Musa V. Kowa (2006)5 NWLR (Pt.972)1; Clement v. Iwuanwu (1989)3NWLR (Pt.107) 39.

⁶⁶(1988)7SCNJ380.

⁶⁷(1961-1989)1Sh.L.R.N. 54 at 61.

⁶⁸Ibid at page 62.

that genuine social justice is allowed to prevail for all the segments of the society. Sharia Courts should be controlled and supervised by the Sharia Court of Appeal".⁶⁹

The main concern here is that while some principles of Islamic Law cannot be administered by the High Court others are more detailed than those of the Common law, and through appeal from the Upper Shari'ah Court to High Court, certain principles of Islamic law will not be allowed to be applied to matters of pure Islamic origin. In some cases English principles automatically apply due to this appeal system. In **Maida v. Moda**⁷⁰ it was held that:

The parties are both Muslims and consented to be governed by Islamic law in Islamic courts and lastly that the subject matters and issues involved called for intensive application of Islamic law and procedure which are not available in Common law system. Moreover, the law to be applied in the High court is quite alien to the parties and Shari'ah court. I do not think that in such circumstances justice could be said to have been done to the parties and the subject matter

The High Court applies man-made law of western origin, Islamic law is divine law, it is not merely a religion but a complete way of life allowing no dichotomy between religious and mundane matters, though, it is viewed by others as a propagation of Islamic faith *per se*, rather than a legal system and the courts applying it as courts of law.⁷¹ In legal hybridity such as what is obtainable in Kano State, Shari'ah (Islamic law) applies subject to English law in the form of Constitution and other statutes of pure man made origin which contradicts the very foundation of Shari'ah i.e. sovereignty of Allah. It is a system where Islamic law applies in truncated form, where appeal from sharia courts go to the High Court, a court whose Judges may not be learned in Islamic Law and some may not even be Muslims.⁷² The expansion and implementation of Islamic Law in some states of the North, including Kano

⁶⁹Sambo B.M. *Sharia and Justice: Lectures and Speeches*, (Samaru Zaria, Kaduna State, Nigeria, Sankore Educational Publishers Ltd., 2003), P323.

⁷⁰See also (2000) 4 NWLR (PT. 659) 99 per Justice Muntaka Commassie.

⁷¹Op.cit. Ambali M.A., Challenges of Sharia Implementation in Nigeria, In Oyeyipo A.T. (ed) *Judiciary and Democracy in Nigeria: Essays in Honor of Hon. Justice Alfa Belgore*, (Enugu, Snaap Press Ltd., 2007), PP.203-204.

⁷²Op cit., Lawan Y.M : The Application of Islamic Law in Nigeria In Eugene C(eds): Year Book of Islamic and Middle Eastern Law, Vol. 4, Kluwer Law International, 1997-1998, 201.

merely affirms and reinforces legal hybridity in the states,⁷³ this is so because those states still operate under the Constitution of the Federal Republic of Nigeria which Constitution is supreme. The implication of this is that Sharia itself operates subject to the constitution⁷⁴ so much so that today appeal from Upper Sharia Court to High Court is the Law of the land no matter who presides over the courts. Thus, one of the most important objectives of Shari'ah after conveying it is to establish its authority, implement its rules, and promote its supremacy.⁷⁵

Findings

The paper, after carefully examining the relevant laws and judicial authorities on appeal from Upper Sharia Court of Kano State found as follows:-

- a. The appeal system allows Judges not learned in Sharia to determine Shari'ah cases,
- b. The appeal system allows female judges to determine Shari'ah matters,
- c. The appeal system has no regard for the religious status of judges,
- d. Right to religion is threatened by appeal from the Upper Sharia Court to the High Court.
- e. The current appeal system is an unnecessary promotion of the problems inherent in legal hybridity,

Recommendations

For a better Appeal System in the administration of Islamic Law in Kano State and all the States in the north that adopted Sharia Justice System, the following recommendations are offered:

- i. there is need to establish a Kano State High Court Division of Judges of the Court Learned in Shari'ah so that all appeals from the Upper Sharia Court of Kano State to the High Court of Kano State may be channeled to the division.

⁷³ Op.cit., Lawan M. Islamic Law and Legal Hybridity in Nigeria, Journal of African Law, Vol.58 No.2,2014,P.303

⁷⁴ ibid at pages 314-322.

⁷⁵ Al-tahir, M.A, Ibn Ashur Treatise on Maqasid al-Shari'ah, USA, International Institute of Islamic Thought, 2018, P.21.

- ii. Similarly, the Kano State Judicial Service Commission shall ensure that some legal practitioners, who satisfy the requirements of the Constitution regarding qualification for appointment as High Court judge, shall be learned in Shari'ah.
- iii. The High Court of Kano State civil and criminal appeal rules may be amended to give way for Shari'ah Rules and Procedure to be incorporated to cater for new arrangement.

This temporary arrangement will lessen the problems associated with the current appeal system from the Upper Sharia Court to the High Court of Kano State at least before the Constitution is amended.

3.0 Conclusion

This paper demonstrated that the traffic of appeal in Nigeria has a direct consequence on the Appeal system in Kano State especially in relation to appeals from the Upper Sharia Court to the High Court. The resultant effect of this Appeal System is that it created a hybrid system of appeal in Kano state judiciary which militates against proper administration of Islamic Law distorting Muslim litigants' right of appeal affecting the quality of justice they get from the system. It is also beyond doubt that right or freedom of religion and conscience as envisaged by Section 38 of the 1999 Constitution is threatened by appeal from the Upper Sharia Court. This is because cases on Islamic law from the Kano State Upper Shari'ah Courts are allowed to be appealed to the High Court of Kano State which is a court where Islamic rules of evidence applicable before the lower Shari'ah Court and the Upper Shari'ah Courts are alien to. This appeal system is a legacy of the British colonial rule and a clear indication of the influence of colonial antecedents on our judicial system. The appeal system from the Kano State Upper Shari'ah Court to the High Court of Kano State does not reflect the peculiarities of our nation, cultural diversities and the history of administration of Shari'ah in northern Nigeria in particular.