

Sharia Implementation in Northern Nigeria Over 15 Years.

Policy Brief No.1

The Sharia Courts



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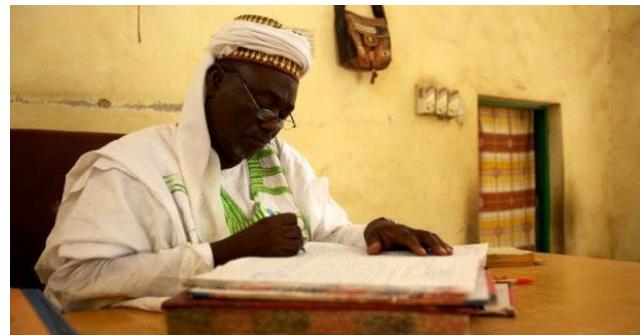
Background

As it affected the courts of the sharia states, the sharia implementation programmes enacted in 1999-2001 had three main aspects: (1) to replace the old Area Courts with Sharia Courts; (2) to bring back Islamic criminal law, abrogated since 1960, for application in the Sharia Courts to Muslims; and (3) to direct all appeals from Sharia Courts, in both civil and criminal matters, to the Sharia Courts of Appeal. The collaborative study on which this Policy Brief is based examines the main features of the enactments of the sharia states by which these changes were legislated, and many details, based on fieldwork and other research, as to how the legislated changes have developed over fifteen years. Data are presented and many details discussed regarding Sharia Court administration, the judges, civil caseloads and matters being litigated, the application of Islamic criminal law, and the failure of the attempt to direct all appeals from Sharia Courts to Sharia Courts of Appeal. This Policy Brief summarises the main findings of the study, and makes policy recommendations on how the challenges identified can be addressed.

Findings

Sharia Courts

The new systems of lower Sharia Courts put in place in 1999-2001 are reasonably sound and are working to the general satisfaction of the people they serve. The eleven sharia states display a healthy diversity in the details of the arrangements they have made to suit their varying populations. The people managing the Sharia Courts are serious, knowledgeable, hard-working public officials. Existing problems are being addressed: for instance, the need for alkalis to be better-educated, not only in the Islamic law they primarily apply but also in the broader legal framework within which they apply it. Systems are in place for dealing with irregularities and complaints. The Sharia Courts are more thoroughly Muslim than the Area Courts used to be, but they have not become isolated from the rest of the system, or



polarized within it. Large numbers of Muslims and some non-Muslims use them. Lawyers appear in them. Both the Sharia Courts of Appeal and the High Courts have important roles in supervising them.

There are, of course, challenges. Court facilities are often poor. Administration especially at the local level is not up to modern standards. Record-keeping and data-collection are inadequate, resulting in a lack of transparency as to the work of the courts. Some alkalis remain hostile to intrusions from the wider system, especially by lawyers. Alkalis are

1. Based on Philip Ostien, Ahmed Garba, and Musa Abubakar, 2016, 'Sharia Implementation in Northern Nigeria Over 15 Years: Nigeria's Sharia Courts'. The research for this report was conducted by the dRPC and NRN with the support of the Nigeria Stability and Reconciliation Programme (NSRP).

seriously underpaid. Some are lazy or corrupt. There are large backlogs of cases in some places. Dissonances between what the Sharia Courts Laws call for and what obtains on ground continue in some places: for instance failure to transfer control of the Sharia

Courts from the Chief Judges to the Grand Kadis in Borno and Katsina, and the lack of inspectorates in Kaduna and Niger. Respect for the rule of law would be better served if these dissonances were removed.

Transformation of Area Courts into Sharia Courts closed off convenient forums where non-Muslims had been able to take their matters for adjudication under their own customary laws. Kaduna State addressed this by establishing Customary Courts; Bauchi and Niger States explicitly expanded the jurisdiction of their District Courts to accommodate such cases; and in parts of Bauchi and Kebbi where there are large concentrations of non-Muslims cases under customary law are being adjudicated in Sharia Courts, conveniently for the indigenes but contrary to the Sharia Courts Laws, which direct Sharia Courts to apply Islamic law only. Elsewhere District Courts may somewhat questionably be adjudicating such matters

under their old statutes. Again, respect for the rule of law would be better served if inconsistencies between the letter of the law and practice under it were removed, and convenient access to justice were ensured for all.

Valuable justice-sector reform initiatives in some states, funded by international donors, are resulting in visible improvements to at least some pilot Sharia Courts and to other segments of the justice system; the hope of course is that new ideas and best practices will spread throughout the systems in those states, and to other states as well. Prominent among such initiatives are the 'Justice for All' (J4A) programme managed by the British Council, which has been working in Jigawa, Kaduna, Kano and Yobe States; the 'Support to the Justice Sector in Nigeria' programme of the UNODC, funded by the European Union and active in many aspects of the justice sector in many states; the 'Access to Justice for the Poor Project' implemented in Kaduna State by the World Bank and the Legal Aid Council of Nigeria (LACON); and the 'Security, Justice and Growth' (SJG) programme funded by DFID.

Box 1: Sharia Courts

Strong Points:

Display a healthy diversity within states; the people managing them are serious, knowledgeable, hard-working public officials; existing problems are being addressed; and systems are in place for dealing with irregularities and complaints.

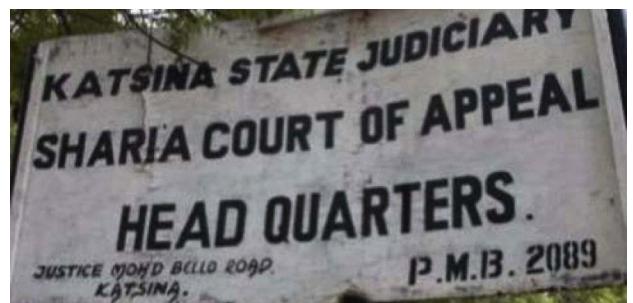
Weak Points:

Court facilities are often poor; administration is often not up to modern standards; record-keeping and data-collection are inadequate; lack of transparency as to the work of the courts; some alkalis remain hostile to intrusions from the wider system, especially by lawyers; alkalis are seriously underpaid, while some are lazy or corrupt; there are large backlogs of cases in some places; and dissonances between what the Sharia Courts Laws call for and what obtains on ground continue in some places.

Islamic Criminal Law

The reinstatement of Islamic criminal law in the sharia states, in the form of new Sharia Penal and Criminal Procedure Codes, has not been the problem that, in the beginning, many feared it would be. Islamic criminal law is not being imposed on non-Muslims against their wills. In fact even many Muslims are not being charged in the Sharia Courts under the Sharia Penal Codes, but are being taken instead to the Magistrate or High Courts under the old Penal Codes. Data on this are very incomplete, but it appears that in most sharia states criminal cases are being shared about equally between Magistrate and Sharia Courts, with only a small percentage going to High Courts. Borno, Niger, Yobe, and Zamfara are exceptions to this: Borno and Yobe because their Sharia Courts handle no criminal matters at all; Niger because it has only recently enacted Sharia Penal and Criminal Procedure Codes which have not yet come fully into operation; and Zamfara because it has tried to force most criminal cases involving Muslims into the Sharia Courts, by restricting the power of its Magistrate Courts to try them. Where criminal cases are tried in Sharia Courts, serious *hadd* and *qisas* punishments (amputations, stoning to death) are not being imposed often, and when they are imposed they are not being executed. Data on types of charges being brought with what frequencies in the different courts is lacking; this will not be known until record-keeping and data collection improve. The same is true of data on backlogs of criminal cases in the Sharia Courts, how long people charged may spend 'awaiting trial', what percentages of these are granted bail, or what percentages are represented by counsel.

Besides probable inefficiencies in the administration of criminal justice in the Sharia Courts, there are other problems. It is anomalous that Borno and Yobe States have Sharia Penal and Criminal Procedure Codes on their statute books, and that their Sharia Courts Laws call for the application of these codes in the Sharia Courts, but that this is still not happening. Once again, law and practice should



be brought into line, one way or the other. On a more practical note, criminal defendants often do not know their basic rights and no one, whether police or prosecutors or judges, is required by law to inform them. LACON and a number of NGOs – the Nigerian Bar Association (NBA), the Muslim Lawyers Association of Nigeria (MULAN), the International Federation of Women Lawyers (FIDA), the Women's Rights Advancement and Protection Alternative (WRAPA), and perhaps others – do what they can to provide legal assistance in some cases, but many defendants are still not represented by counsel even when life or limb are on the line, and no one is required to provide lawyers for them even if they are indigent and cannot afford it themselves. The few people who are still being sentenced to punishments that will never be executed, like amputation and stoning to death, still sometimes languish in prisons for long periods, serving time to which they were not sentenced, with no definite procedures in place to resolve such anomalies and give the convicts some certainty about their fates.

Key Features:

The new Sharia Penal and Criminal Procedure Codes have not been the problem that, in the beginning, many feared they would be. Islamic criminal law is not being imposed on non-Muslims against their wills; even many Muslims are not being charged in the Sharia Courts under the Sharia Penal Codes; it appears that in most sharia states criminal cases are being shared about equally between Magistrate and Sharia Courts, with only a small percentage going to High Courts.

Key Challenges:

Criminal defendants often do not know their basic rights and no one, whether police or prosecutors or judges, is required by law to inform them. Many defendants are still not represented by counsel even when life or limb are on the line, and no one is required to provide lawyers for them even if they are indigent and cannot afford it themselves. The few people who are still being sentenced to punishments that under current circumstances will never be executed, like amputation and stoning to death, still sometimes languish in prisons for long periods, serving time to which they were not sentenced, with no definite procedures in place to resolve such anomalies and give the convicts some certainty about their fates.

Sharia Court of Appeal Jurisdiction

Before sharia implementation started, Sharia Court of Appeal jurisdiction in all states was limited to questions of Islamic personal law (IPL) only. But in the court-related legislation they enacted in 1999-2001, the sharia states directed all appeals from their new Sharia Courts, in both civil and criminal matters, to their Sharia Courts of Appeal. This was arguably authorised under Constitution of the Federal Republic of Nigeria (CFRN) §277(1), which provides that

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

But in a series of rulings that began in 2002, a number of state High Courts and divisions of

the federal Court of Appeal have unanimously held that the language of CFRN §277(1), despite appearances, does not authorise the states to expand the jurisdiction of their Sharia Courts of Appeal, which is constitutionally limited to questions of IPL only, as enumerated in §277(2). Appeals from the lower Sharia Courts in all other matters must go to the state High Courts.

Notwithstanding the rulings of the High Courts and the Court of Appeal on this subject, the Sharia Courts of Appeal in six states are still entertaining appeals in criminal and other matters not involving IPL. In these states litigants continue to bring such appeals to the Sharia Courts of Appeal, and instead of declining jurisdiction and sending such cases over to the High Courts, as they constitutionally should, the Sharia Courts of Appeal entertain them and rule on them – *ultra vires* their jurisdiction. Mostly that ends the matter: the

parties accept the judgment and the case is finished. But sometimes the losing party decides to take the case further, to the Court of Appeal, which then quashes the Sharia Court of Appeal judgment and sends the appeal for rehearing to the correct court, the High Court sitting in its appellate jurisdiction. But beyond quashing the few such judgments that are brought up to it, and sending the cases to the High Courts for rehearing, the Court of Appeal is not doing anything about all the other non-IPL appeals going to the Sharia Courts of Appeal in six states and being entertained and ruled on by them, contrary to the constitution.

The vexed problem of the limitation of Sharia Court of Appeal jurisdiction to questions of IPL only, has been with us since 1979. This limitation was the outcome of the constitution-making process of 1976-78: of the national uproar over the proposed Federal Sharia Court of Appeal that was included in the draft constitution, the vote in the Constituent Assembly to eliminate it, and a hasty and careless redrafting of constitutional sections on state Sharia Courts of Appeal, including the ambiguous language of what is now §277.² The Sharia Courts of Appeal had previously been open to appeals in all civil proceedings involving questions of Islamic law. The limitation after 1979 to questions of IPL only was new. No justification was given for it. The same limitation was not put on the jurisdiction of state Customary Courts of Appeal, which extends to all 'civil proceedings involving questions

of Customary Law' (CFRN §282). Muslims felt victimised. A great deal of litigation and a number of attempts to amend the constitution have failed to solve the problem. This no doubt contributes to the willingness of some Sharia Courts of Appeal to take matters into their own hands, by entertaining appeals *ultra vires* their jurisdiction. The system is taking no steps to correct this irregularity, except as the occasional *ultra vires* judgment is brought up to the Court of Appeal and quashed by it.

The policy recommendation made below is that the constitution should be amended, to allow Sharia Courts of Appeal to exercise jurisdiction on all civil matters decided under Islamic law in the courts below them. Some Muslims argue that Sharia Court of Appeal jurisdiction should be expanded even further, to include criminal matters decided in the Sharia Courts under Islamic law. Our finding is that this would not be either wise or politically possible in today's Nigeria. Criminal appeals from all lower courts – Magistrate Courts, Area Courts in the north, and Customary Courts in the southern states – have always gone to the High Courts. Appeals in criminal matters, even those decided under Islamic law in Sharia Courts, will often involve constitutional and statutory questions more suitable for resolution by High Courts than by Sharia Courts of Appeal. Customary Courts of Appeal do not have such jurisdiction; to give it to Sharia Courts of Appeal would unbalance the equation again, in the other direction. Christians would never accept it.



2. Fully recounted in P. Ostien, 'An Opportunity Missed by Nigeria's Christians: The 1976–78 Sharia Debate Revisited,' in B. Soares, ed., *Muslim-Christian Encounters in Africa*, 221–55. Leiden and Boston: Brill, 2006. Also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464339.

Box 3: Proposed Constitutional Change

From:

CFRN §277, which currently provides that:

277. (1) The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide

- (a)
- (b)
- (c)
- (d)
- (e) — [specified questions of Islamic personal law, e.g. marriage, divorce, guardianship, inheritance]
- [any other question of Islamic personal law at the instance of Muslim parties to particular cases]

To:

New §277:

277. (1) A Sharia Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic law.

(2) For the purpose of this section, a Sharia Court of Appeal of a State shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.



Policy Recommendations

To the governments of all sharia states:

- Support to Sharia Courts should be increased. They handle most of the litigation in these states, especially for the poor. Additional support to Sharia Courts should include improved infrastructure, improved staff training and improved record-keeping and data collection to enable case-flows to be better understood and policy-making better informed. Remuneration for judges and staff should be improved to assure that all staff perform required duties and temptations of corruption are reduced.
- Amend the Criminal Procedure and Sharia Criminal Procedure Codes to require that persons who are arrested or detained on suspicion of having committed a crime be advised promptly of their constitutional rights, including the right to be represented by a legal practitioner and the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of their own choice (see CFRN §§35 and 36).
- Amend the Criminal Procedure and Sharia Criminal Procedure Codes to require that in 'serious cases' to be defined, including any case in which life or limb are in jeopardy, a legal practitioner be appointed to represent any indigent accused person.
- Continually review the status of persons sentenced to punishments like amputation or stoning to death that will never be executed. As long as your Sharia Penal Codes remain in effect and are being applied, such sentences may be imposed, and probably will be from time to time. But under current social conditions such sentences are unlikely to be executed. The convicts should not be left in prison indefinitely serving time to which they were not sentenced and never knowing their fates.

To the governments of sharia states which have not done so yet:

- Establish Customary Courts for the use of non-Muslims who wish to litigate their matters under their own customary laws; or amend your District Courts Laws to open the District Courts up for this purpose. Ensure that there are enough Customary Courts or Magistrate/District Courts in your states to meet the needs of non-Muslims.

To the governments of Bauchi, Borno, Katsina, Kaduna, Kebbi and Niger States:

- Bring your Sharia Courts Laws and your administrative and judicial practices into alignment:
 - In Borno and Katsina: either hand over control of the Sharia Courts to the Grand Kadis, or amend the Sharia Courts Laws to leave the Chief Judges in control.
 - In Kaduna and Niger: establish Inspectorates of Sharia Courts and get them working again.
 - In Bauchi and Kebbi: end the practice of having alkalis sitting with assessors to adjudicate cases under customary law, contrary to the statutes; but ensure at the same time that non-Muslim litigants continue to be adequately served.

To the National Assembly, and the President of Nigeria:

- Amend the Constitution of the Federal Republic of Nigeria, to allow state Sharia Courts of Appeal to exercise jurisdiction on all civil matters decided under Islamic law in the courts below them – Sharia Courts in the sharia states, Area Courts in other northern states. This will bring their jurisdiction into line with the jurisdiction the Customary Courts of Appeal are exercising all over the country. It will reduce tension between Nigeria's Muslims and Christians that has existed since 1979. This modest change will give new confidence to Muslims that they and their religion are duly recognised and respected under the country's constitution, and will in turn increase their respect for it. No segment of the population need feel threatened or offended.
- In particular, enact the following amendments to the constitution:
 - Amend §262 to make the jurisdiction of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, exactly parallel to the jurisdiction of the Customary Court of Appeal for the Federal Capital Territory, Abuja as laid down in §267, *mutatis mutandis*³.
 - Amend §277 to make the jurisdiction of the Sharia Court of Appeal of a State, exactly parallel to the jurisdiction of the Customary Court of Appeal of a State as laid down in §282, *mutatis mutandis*⁴.
- Amend other sections of the constitution, including §§237(2)(b), 244(1), 247(1)(a), and 288(1) and (2)(a), which are keyed to the current limitation of Sharia Court of Appeal jurisdiction to questions of IPL only. All these sections should be amended by replacing the words 'Islamic personal law' wherever they occur, with the words 'Islamic law'.
- Amend §273 of the constitution to require that panels of High Court judges that hear and decide appeals from Sharia Courts in criminal cases, include at least one judge who has 'a recognised qualification in Islamic law acceptable to the National Judicial Council'⁵. This will allay the fears of some Muslims that High Court judges lack knowledge of Islamic law, and give confidence to litigants that the law is being properly applied to them.

To international donor agencies and their administrators in Nigeria:

- Continue and increase your justice-sector reform initiatives, they are working and are having beneficial effects.

1. §262 would then read: 'The Sharia Court of Appeal of the Federal Capital Territory, Abuja shall, in addition to such other jurisdiction as may be conferred upon it by an Act of The National Assembly, exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic law.'

2. §277 would then read: '(1) A Sharia Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic law. (2) For the purpose of this section, a Sharia Court of Appeal of a State shall exercise such jurisdiction and decide such questions as may be prescribed by the House of Assembly of the State for which it is established.'

3. §273 would then read: 'For the purpose of exercising the jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that Court: Provided that in the exercise of its appellate jurisdiction in any matter emanating from a Sharia Court, it shall be duly constituted if it consists of at least two judges of the High Court, one of whom has a recognised qualification in Islamic law acceptable to the National Judicial Council.'

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Views expressed are those of the authors.

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