1999 Constitution Sharia And Public Order

By

Sebastine Hon

Sudan As An Empirical Case Study:

Sudan, a central African State, has an estimated landmass of 500 square kilometres. A former British colony, it regained independence in January 12956. The independence constitution was a federal one which took care of the varying interests of the predominantly Muslim north and the predominantly Christian south of the country. Not long however, the Arabs who took over the region of government from the British started executing a deliberate Islamisation policy. This led to a civil war that was temporarily stopped in 1972, due to a peace accord. This accord itself was possible only with the ascension to the throne of General Numeri, a moderate. However, in 1983, Southern Sudan was divided into three regions, with the federal government slamming Islamic theocracy on them. IN 1989, a fundamentalist government led by General Al Bashir took over and pursued with more zealotry the principles of sharia, thereby aggravating the war situation.

In 1993 alone, 30,000 southern Sudanese died from famine. In year 2000, the figure rose to 2 million, while 4 million were forced into exile. The Arab north, constantly raids the south for slaves. Some Arabs from the north, in the Newsweek of 3/5/99 justified slave raiding as an action allowed by the Quoran against black Africans! Today, oil has been discovered in South Sudan, and the Arab north, has a sharp eye on this oil. Aerial raids with the use of helicopters, fighter jets, random use of chemical weapons, etc, are characteristics of the war arsenals being released on a daily basis by the north against the south.

The Sudanese example is relevant to Nigeria in the following ways:-

i) Both were colonised by Britain

ii) Both became federal governments at independence

iii) Both have Muslim populations in the north while the southern areas are predominantly Christian - dominated. The only slight difference is that in Nigeria, there is a Middle Belt, which, like the south is Christian dominated.

iv) Both southern territories have crude oil in commercial quantities. In Nigeria, the Middlebelt (Benue and Kogi) have crude oil in commercial quantities - a fact not recognised by successive governments.

v) In both countries, the northern parts are arid deserts while the southern regions enjoy certain natural endowments.

Shall the Federation of Nigeria allow itself to slide into a constitutional disorder like the Sudan?

Sharia in Nigeria: A Constitutional Débâcle:

The battle for and against the introduction of sharia into Nigeria, especially northern Nigeria is as old as Nigeria itself. It was the intendment of the dan Fodio jihad of 1804. Since then, pressure has been mounting on successive governments to introduce sharia into the body of laws governing (Northern) Nigeria. It was this same pressure that saw Sir Ahmadu Bello inviting Muslim clerics from Sudan, Pakistan, etc to come to Nigeria and fashion an acceptable body of laws to the heterogeneous peoples of Northern Nigeria. This effort yielded results in the compromise Penal Code. The code took care of Islamic, Christian and animist juxtapositions.

Sir Ahmadu Bello was to, in 1962, express profound happiness over the successes that attended this experiment. According to him, "any doubts felt at the time in any quarter have been dispelled by the results of this initiative."

This position, however, became shaky with the brutal murder of Sir Bello in the January 14th - 15th coup of 1966. Since then, religious thinking has not been the same again, especially in the north. In the 1978 Constituent Assembly preparatory to handover to a civilian government, debates over the inclusion or non-inclusion of the sharia into the constitution became heated to a near-explosion. Being a sensitive issue, the government threaded carefully by adopting a middle course: the civil aspect of sharia (the mu'amalat) was incorporated into the 1979 constitution. Similar serious debates attended the promulgation of the aborted 1989 constitution.

The 1999 constitution, which was tutored and tinkered with by the military regimes of Generals Sani Abacha and Abdulsalami Abubakar, largely threaded the path of the 1979 constititon in spite of its patent and latent shortcomings, the 1999 constitution, by section 10, expressively prohibits the adoption of state religion. The section is to this effect. "The Government of the Federation or of a State shall not adopt any religion as State Religion". This is the section sued by most antagonists of the sharia project, including my humbleself. I shall come to this later. For the sharia protagonists, mention is made of sections 38, 4(7) and 6(2) and (5) (k) of the 1999 constitution. For clarity of purpose, all these sections/subsections will be reproduced hereunder verbatim.

Section 4(7):-

"The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say:

(a) Any matter not included in the exclusive legislative list set out in part 1 of the second schedule to this constitution;

(b) Any matter included in the concurrent legislative list set out in the first column of part 11 of the second schedule to this constitution to the extent prescribed in the second column opposite thereto; and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of this constitution."

Section 6 (2) is to this effect:

"(2) The judicial powers of a state shall be vested in the court to which this section relates, being courts established, subject as provided by this constitution, for a state."

Subsection 5 (a) - (f) lists the types of courts, and in subsection 5(k), this provision is made: "such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a house of assembly may make laws."

Section 38 of the constitution is to this effect:-

"(1) 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 public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction, or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society."

Let us take a quick look at some salient rules of interpretation of documents and laws, including the constitution.

A subsidiary legislation derives its validity from the enabling or parent law. Its provisions must, therefore, be in conformity with the provisions of the enabling or parent law. See Odeneye V. Efunuga (1990) 7 NWLR (Pt. 164) 618 S.C.; Din V.A. - G (Federation) (1988) 4 NWLR (Pt. 87) 15 S.C; Kaycee Ltd. V. Prompt Shipping Corp. (1986) 1 NWLR (Pt. 15) 180 S.C. The Latin maxim is:

derivative potestas non potest esse major primitiva meaning: "the power derived cannot be greater than that from which it is derived." It is hereby noted that the 1999 constitution is the enabling law backing the governors, as the governors themselves have always admitted. The constitution, will, therefore, be the hanger on which the sharia edicts will float. A snappy response at this stage is that the edicts are unconstitutional, being in violation of section 10 of the constitution quoted above.

In interpreting a statute, it is necessary to discover the intention of the legislature or law-maker; and this intention is discoverable from the language used in the statute. See Utih V. Onoyivwe (1991) 1 NWLR (Pt. 166) 166 S.C. The question is, did the framers of the 1999 constitution intend that Sharia be adopted as a state religion by any of the component states of the federation? The answer is no, otherwise, the provisions of section 10 thereof would not have been drafted in the language they are couched.

The words shall not are used, meaning that the act of adopting a state religion is sternly prohibited. Section 38, 4 (7) and 6 (5) (k) are merely permissive in nature. The framers of the 1999 constitution could not have intended permitting certain things it has strongly prohibited by section 10 thereof. This is the only perceivable intention of the legislature that promulgated the 1999 constitution.

To interpret a statute, it is necessary to consider what was the law before the enactment of the statute to be constructed. In other words, what was the mischief or defect, which the old law did not provide for and what remedy does the new law intend to use to cure the defect? See Osadabey V. Attorney-General of Bendel state (1991) 1 NWLR (pt. 169) 525 at 200; Ifezue V. Mbadugha (1984) 1 SCNLR 427. The question is: is there any radical departure in the 1999 constitution from what the 1979 and the 1989 constitutions had on freedom of worship and related matters? The answer is no, hence the new sharia is political rather than constitutional.

Where specific provisions of a statute are opposite to general provisions, the specific provisions shall prevail. See Orubu V. N.E.C. (1988) 12 SCNJ 254 at 248; Schroder V. Major (1989) 2 NWLR (Pt. 101) 1 S.C. In respect to the issues in contention, it is hereby submitted that while section 10 of the constitution is specific on what the 1999 permits or does not permit, sections 38, and the others relied upon by sharia protagonists are general, hence they rank inferior to the said section 10.

Although it is settled that a broad and liberal spirit should prevail while interpreting the constitution, care must be taken not to destroy the objectives which the provisions to be interpreted were meant to serve. See Bronik Motors Ltd. V. Wema Bank Ltd. (1983) I SCNLR 296. In respect to the present argument, it is hereby submitted that no matter how clear section 38 of the constitution is, on freedom of worship, that section should not be interpreted in such a way as to destroy the objective sought to be achieved by the said provision. That section guarantees freedom of worship and thought for all hence any interpretation to give it a wider connotation will destroy the constitution itself.

In interpreting the constitution, due regard must be had to its history prior to its promulgation, although the court in doing so, should not extend or stretch its provisions beyond the legislative intendment. See Bronik Motors Ltd. V. Wema Bank Ltd., supra. It is hereby submitted that as far as sharia is concerned in Nigeria, the issue has been most contentious right from pre-independence to neo-colonial periods. As the most contentious issue in Nigeria, therefore, the framers of the 1999 constitution, it is submitted, could not have wished a disintegration of the country by in one breath prohibiting state religion in express terms; and in another breath, latently allowing same. The history of constitution drafting in Nigeria, as shown above has been very hot on sharia - related issues. The framers of the 1999 constitution could, therefore, not have intended to clash the heads of Christians and Muslims - by prohibiting sharia in some places and allowing it in others.

A provision of the constitution should not be read in isolation where such provision is qualified by some other considerations. See Okhea V. Governor of Bendel State (1990) 4 NWLR (Pt. 144) 327 C.A. In the present argument, although Muslims are free to practice their religion as guaranteed under section 38 of the constitution, other Nigerians are also free to move and trade freely (even in alcohol), because same rights are guaranteed under the same constitution. As a prominent jurist once put it, Mr. A's rights stop where Mr. B's rights start. Thus, even though Mr. A has the right to stretch his hand, Mr. A should be mindful of the fact that such stretched hand does not strike Mr. B's nose!

In the case of Attorney-General of Bendel State V. Attorney General of the Federation (1981) 10 S.C.I., Obaseki, J.S.C. promulgated the famous 12-point rule on constitutional interpretation. Since most of those rules have already been addressed above, we shall now discuss the remaining ones.

They are:-

(i) A constitutional power should not be used to attain an unconstitutional result. In the present discuss, it is hereby submitted that even if the sharia were backed by the 1999 constitution (but it is not), the act of forcing women to enter a specific bus, the act of harassing apparent sharia non-conformists, and the act of pulling and burning down of churches, beer parlours, hotels, etc, in the name of sharia are enough unconstitutional results to make the sharia project unconstitutional. Similarly, the use of sharia enforcement armies instead of the police in these obviously obnoxious operations that do not have judicial backings is another unconstitutional result.

(ii) The constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety, hence a particular provision can not be deserved from the rest of the constitution. It is hereby submitted that for a proper and an objective understanding of the sharia discuss, there should be a community reading of both the anti and pro-sharia provisions of the constitution listed above. And as shown above, such a community reading will prove that the same constitution that has guaranteed some rights is aware that all rights are not the same, hence the provisions in section 10 prohibiting the use of secular tax payers' money to fund a particular religion.

(iii) The principle upon which the constitution was established rather that the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions. In this present case, the preamble of the 1999 constitution would be of help. The preamble runs thus:-

"We the people of the Federal Republic of Nigeria: Having firmly and solemnly resolved: To live in unity and harmony as one indivisible and indissoluble sovereign nation under God dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding: and to provide for a constitution for the purpose of promoting the good government and welfare of all persons in our country on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people: Do hereby make, enact and give to ourselves the following constitution."

The preamble has in clear terms spelt out the principles for which the constitution was established, which include "unity and harmony", promotion of world peace, promotion of "good government and welfare of all persons" be they Igbo, Hausa, Tiv, Angas, Idoma, Jukum, Ijaw, etc "on the principles of Freedom, Equality and Justice." At a time when the whole world was sympathising with America over the terrorist attacks on the World Trade Centre and the Pentagon, some Sharia zealots poured out into the streets to celebrate! Is that promotion of world peace? See Kano. And let us face reality: are Christians truly enjoying "Freedom, Equality and Justice' in the sharia North? What about the unity of Nigeria: is it enhanced by sharia or it is endangered by it? The answers to these posers are not far-fetched.

The use to which a preamble to a statute can be used is spelt out in Ogbonna V. Attorney-General of Imo State (1992) 2 SCNJ (Pt. 1) 26 at 41-42, per Nnaemeka-Agu, J.S.C. His Lordship, while delivering the lead judgment of the Supreme Court, stated:

"It is necessary to note that a preamble to an enactment is, as it were, its preface or introduction the purpose of which is to portray the interest of the framers and the mischief they set out to remedy. It may sometimes serve as a key to open the understanding of the enactment... A preamble needs not be looked at all if the enacting part is unambiguous. See: Powell V. Kempton Race Course (1899) A.C. 143, at p. 157; Olowosago V. Adebanjo (1988) 4 NWLR 755, p.769; Sowande V. Egba District Council (1985) 4 E.S.C.L.R. 592. It can only be resorted to as an aid to construction when there is an ambiguity or when there are two conflicting views as to the true meaning of the enactment in which case that view which fits with the preamble ought to be preferred," Emphasis supplied.

In the instant argument, it is the provision (section 10) which agrees with the preamble to the 1999 Constitution that "ought to be preferred" as against any other view that is capable of destroying not only the Constitution, but the country itself.

The Latin Maxim is: sempaer in dubis benigriora praeferenda - meaning: "in doubtful matters, the more beneficial construction should be preferred."

(iv) A constitutional provision should not be construed as to defeat its evident purpose. See, also, Rabiu V. State (1980) 8-11 S.C. 130; Ibrahim V. State (1980) 1 NWLR (pt. 18) 650. In the instant argument, section 38, even though guarantees freedom of worship, should not be interpreted to defeat its evident purpose which is that ALL Nigerians, wherever they may be, should be allowed the same freedom of worship and of thought.

The same section 38 which the sharia state governments are claiming gave them the right to slam the Islamic legal code in their domains ought, in proper constitutional circumstances, to also protect Christians lawfully living in those states. This, more than any thing to the contrary, is the intention of the lawmaker. The Latin Maxim, once again is: animus hominis est anima scripti - which means "intention is the soul of an instrument." The sharia north is tempering with the "soul" of the 1999 Constitution, I hereby firmly submit.

Before I conclude on this sub-topic, it is necessary to, go outside the general rules of interpretation, prove by statutory and judicial authorities that the sharia as introduced and practiced today in some states in northern Nigeria, is unconstitutional, null and void. Professor Auwalu Yadudu had in the ThisDay of 22/5/2001, argued that sharia is constitutional, inviting arguments against the ones canvassed by him to prove that the sharia is unconstitutional. He relied on the powers of the various state governments to make laws for peace order and good government and their further powers to establish courts of law. As shown above, such powers are allegedly derived from sections 4(7) and 6(2) and (5) (K) of the constitution. A community reading of these sections with other sections of the constitution will, however, prove that they are incapable of saving the situation for the sharia - adopting states.

Section 4(7) empowers the State Houses of Assembly to make laws AA "for the peace, order and good government of the state or any part thereof..." However, the same section 4 is sub-section (5) provides thus:

"(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall to the extent of the inconsistency be void."

As shown in an earlier article by my humble self, entitled 'OPC, Sharia Army, Egbesu et al and Public Order Act' (ThisDay of 8/5/2001) the various sharia edicts have empowered sharia enforcement committees to enforce the Islamic legal system in the states concerned. To that extent, such laws, as shown in the said article, are in conflict with the Public Order Act, Cap. 382, Laws of the Federation, 1990 and section 215 of the 1999 Constitution, which vests law enforcement only on the Nigeria Police. The ideas behind, and the operations of the various sharia

edicts also infringe on nearly all the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation, 1990 - which is an Act of the National Assembly. Last year, too, a Nigerian Army truck carrying beer was burnt in Kano. There are several other attempts to enforce sharia in the Army and Police barracks up north, thereby making security of life and property in those obviously federal government-owned areas risky. Federal civil servants, youth corpers, etc., posted to sharia - conscious states are either forced to observe sharia or are threatened on a daily basis. These practices, I submit, are unconstitutional null and void. Section 5 (2) (a) - (b) (3) of the 1999 Constitution is to this effect:

"(2) Subject to the provisions of this constitution, the executive powers of a state -

(a) Shall be vested in the Government of that state...

(b) Shall extend to the execution and maintenance of this constitution, all laws made by the House of Assembly of the State and to all matters with respect to which the House of Assembly has for the time being power to make laws.

(3) The executive powers vested in a State under subsection (2) of this section shall be so exercised as not to -

(a) Impede or prejudice the exercise of the executive powers of the Federation;

(b) Endanger any asset or investment of the Government of the Federation in that State; or

©, Endanger the continuance of a federal government in Nigeria."

These provisions, no doubt, have dealt a lethal blow on the sharia project in the core north. First, the Federal Government, headed by President Obasanjo, has shown at various fora that it is not comfortable with political sharia in the north. To that extent political sharia is promulgated and executed to "impede or prejudice the exercise of the executive powers of the Federation." Secondly, the burning of an Army truck because it is loaded with beer, incessant threats to enforce sharia in the barracks, harassment of youth corpers/federal civil servants in the sharia states, etc. are no doubt acts meant to "endanger any asset or investment of the Government of the Federation in that State" (Note: in law and in fact, human beings are "assets"). Finally, the whole sharia project, being political (apologies to Chief Obasanjo and even Governor Sani Yerima of Zamfara himself), is meant to "endanger the continuance of a Federal Government in Nigeria." Furthermore, the various sharia edicts violate, in several places, the "Fundamental Objectives and Directive Principles of State Policy" engraved in Chapter II of the 1999 Constitution. Being, therefore, unconstitutional in all respects, such edicts are null and void, vide section 1 of the constitution.

The other much - touted pro-sharia provision is section 6(2) and (5) (k) which empowers State Houses of Assembly to establish courts of law.

Therefore, that sharia criminal courts established are constitutional.

While it is true that State Assemblies have powers to establish courts of law, it is yet true that such

courts and the reasons for their establishment must be constitutional. As shown above, the whole sharia project is an illegality - so are courts established to take care of such an illegality. The Latin Maxim is ex nihilo nihil fit, which means "from nothing comes nothing." It is also the law that once an act is null and void, it remains so and no legal rights can be created on, or founded by it. Once a nullity, always a nullity.

Taking it from another angle, the sharia criminal courts are still unconstitutional because they do not fall into the appellate hierarchy of courts provided for in Chapter VII of the Constitution. Specifically, section 244 of the constitution guarantees a right of appeal from the Sharia Court of Appeal to the Court of Appeal and thence to the Supreme Court. Sharia Courts of Appeal established for Abuja (section 260) and the states (section 275) also can only litigate on Moslem, civil personal law.

See Usman V. Umaru (1992) 7 SCNJ (pt. II) 388. Where then would appeals lie from decisions of the sharia criminal courts to? The answer is that there is no right of appeal to the highest court of the land, that is, the Supreme Court, hence it is unconstitutional - by abridging Muslims of a right of appeal. As shown in the authority of A-G (Bendel) Vs. A-G (Federation), supra, it is wrong to use a constitutional right to achieve an unconstitutional result. Even if the sharia criminal courts were established constitutionally, (but they are not), since they have succeeded in abridging rights of appeal - even for Moslems, thereby achieving an unconstitutional result, they are unconstitutional.

Conclusion:

It can be gleaned from the above that the whole political sharia project is unconstitutional, null and void. Historical, theological, empirical, legal and constitutional facts have combined to make the project unlawful in Nigeria. Yet, from the utterances of General Buhari, Alhaji Datti Ahmed and a host of other Muslims, Nigeria is at the brink of a constitutional hysteria. Hear Governor Sani Ahmed Yerima in The Week of 3/9/2001.

"Some days back, I was invited to an appeal fund raising to assist the Izala aid group in Minna. While I was there, myself, the governors of Jigawa and Niger states felt that it was imperative to assist all Muslim associations and aid groups. Because of the situation we are now, these associations/aid groups are our soldiers. In Nigeria today, every body knows that we (Muslims) have no senior officers in the army. Even the junior officers we have in the army are being marginalised. God said every Muslim, whether he is a member of an aid group or not, is a soldier for Islam. Therefore, it is important for us to get working equipment." Emphasis supplied.

Remember, as shown above, the Izala group is the one that believes in jihad - "holy war." Who then is in doubt that a jihad is imminent in Nigeria?

Mr. Sebastine Hon Esq is a Port Harcourt-based legal practitioner, Chairman Movement for the

Emancipation of the Middle Belt, MEMB, and Lead Counsel for the Middle Belt at the just concluded Oputa Panel.

October 2001