

## THE INDEPENDENT SHARIA PANEL OF LAGOS STATE

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### INTRODUCTION

In 2002, Muslim activists in Lagos State took it upon themselves to set up what amounts to a private arbitration tribunal—the Independent Sharia Panel (“ISP”) of Lagos State—to which Muslims are invited to submit their disputes for adjudication under Islamic law. The ISP was established to fill what the activists regard as an urgent need: for *some* forum in Lagos State that administers Islamic law.<sup>1</sup> Over a number of years, Islamic law has effectively been eliminated as a choice of law option in the regular courts. Accordingly, the divorces, inheritance cases, and other civil matters even of Muslims who would choose to go under Islamic law if they could are handled according to Yoruba customary law or “English” law.<sup>2</sup> The population of Lagos State in 2006 was recorded as above nine million.<sup>3</sup> About half of this large number is Muslim.<sup>4</sup> The petitions of Muslim activists over many years for separate Sharia courts for all these Muslims to use have fallen on deaf ears. Tired of waiting, the activists have at last decided to provide a Muslim forum of their own.

The primary aim of this Essay is to describe the Lagos ISP itself: who is behind it, what it is, and how it is getting along in the world. The larger setting must remain in the background: Lagos State as part of Nigeria’s predominantly

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<sup>1</sup> AbdulFatah Olajide, *Nigeria: Sharia in Lagos at Last*, DAILY TR. (Nigeria), Jan. 18, 2003, <http://allafrica.com/stories/200301180161.html>.

<sup>2</sup> Yemisi Dina, John Oluwole A. Akintayo & Funke Ekundayo, *Guide to Nigerian Legal Information*, GLOBALEX (Feb. 2005), <http://www.nyulawglobal.org/Globalex/Nigeria.htm>.

<sup>3</sup> See NAT’L BUREAU OF STATISTICS, FED. REPUBLIC OF NIGERIA, 2006 POPULATION CENSUS (2006), available at <http://www.nigerianstat.gov.ng/nbsapps/Connections/Pop2006.pdf>.

<sup>4</sup> The 1952 and 1963 censuses, the last that gathered data on religious affiliation, gave the percentages of Muslims in the then Colony Province, now Lagos State, as: 1952: 48.3%; 1963: 56.0%. For the data on all states, see Philip Ostien, *Percentages by Religion of the 1952 and 1963 Populations of Nigeria’s Present 36 States* (Nigeria Research Network, Oxford Dep’t of Int’l Dev., Univ. of Oxford, Islam Research Project—Abuja: Background Paper No. 1) (forthcoming).

Yoruba southwest; how Islamic law was squeezed out of the southwestern courts over many years, despite the large percentages of Muslims among the Yoruba; and the long history of failed attempts by activists to persuade the authorities *pro tem* to correct this anomaly by establishing Sharia courts for the use of Muslims.<sup>5</sup>

A more recent part of the background can only be described briefly. This is the bold program of “Sharia implementation” embarked on by Zamfara State in Nigeria’s far north in 1999.<sup>6</sup> The following quotation well captures the thoughts and feelings this stirred up in Muslims all over the country:

The declaration of the implementation of Sharia in Zamfara State, done with fanfare and huge celebration at Gusau [on October 27, 1999], obviously put all the other States with substantial Muslim populations on serious alert. The Gusau declaration was attended by prominent representatives of almost all Muslim organisations in Nigeria. All the leading *ulama* from all over the country were also in attendance. Speeches were delivered by the scholars and finally by the Governor, Ahmad Sani, ushering in a new era in the application of the Sharia in Nigeria. It must be appreciated that what Governor Sani did was a revolution hitherto unthinkable. What the colonial masters removed after intensive negotiations based on the reports of so many committees, Governor Ahmad Sani restored by a single simple declaration. The expectations of the people were high; the support was total and absolute in the belief that Sharia would quickly

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<sup>5</sup> As to elimination of Islamic law as a type of “native law and custom” applied in the colonial Native Courts in the southwest, and the history of failed attempts of Muslim activists to persuade the authorities to establish Sharia courts there, see Abdul-Fatah Kola Makinde, *The Institution of Shari’ah in Oyo and Osun States, Nigeria, 1890–2005*, at 66–78, 78–86 (Mar. 2007) (unpublished Ph.D. dissertation, University of Ibadan), available at <http://www.sharia-in-africa.net/media/publications/the-institution-of-sharia-in-oyo-and-osun-states-nigeria/makinde-thesis.pdf>. As to the current inapplicability of Islamic law in southwestern courts, see AA Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT’L & COMP. L.Q. 817, 825 (2002), and authorities cited therein. See also *Afinni v. President & Members of Grade “B” Customary Court*, [2003] Suit No. ID/852M/2007 (High Court of Lagos State, Ikeja Div.) (unreported) (holding in effect that Islamic law is no longer even theoretically applicable in the Lagos State courts) (on file with authors).

<sup>6</sup> From 2000 through 2002, eleven other northern states followed Zamfara with Sharia implementation programs of their own. The programs of all twelve “sharia states” are documented in the six-volume *Sharia Implementation in Northern Nigeria 1999–2006: A Sourcebook*. See generally 1-5 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK (Philip Ostien ed., 2007); 6 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK: ULAMA INSTITUTIONS (Philip Ostien ed., forthcoming) [hereinafter ULAMA INSTITUTIONS], available at <http://www.sharia-in-africa.net/pages/publications/sharia-implementation-in-northern-nigeria.php>. For an overview of Sharia in Nigeria, see Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 553, 553–612 (Jan Michiel Otto ed., 2010), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1766431](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1766431).

bring about the much-needed security, social and economic justice and morality that have eluded the society for too long. It was also firmly believed that corruption in all facets of life including nagging delays in judicial proceedings would soon come to an end.<sup>7</sup>

Yorubaland was not left out:

[Among the speakers] was the Aare Musulimi of Yorubaland, Alhaji Abdulazeez Arisekola Alao [who] said he was the happiest man on earth having been alive to witness the historic occasion.

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... [He] thanked the Governor and the members of the State House of Assembly who, according to him unanimously passed the bill on Shariah into law, thereby making it possibly [sic] “for Allah’s law to be operative in Zamfara State instead of man-made law forced on us by our colonial masters.”<sup>8</sup>

The Gusau launching filled Muslims in all parts of Nigeria—the Yoruba southwest included—with new zeal to push Sharia implementation ahead in their own states as far as local political realities might allow.

## I. THE ACTORS

### A. NACOMYO

The leaders of the effort in Lagos State were members of the Lagos chapter of the National Council of Muslim Youth Organizations (“NACOMYO”).<sup>9</sup> Muslim “youth” groups—in Nigeria one is still a youth until about the age of forty—are common in Nigeria. Among their express purposes, one is always to advance the cause of Islam however they can. Often they link together as networks of groups with state and national secretariats that try to coordinate the kinds of things their chapters do and the positions they take on issues of public importance.<sup>10</sup> One example is the Federation of Muslim Women’s

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<sup>7</sup> Ibrahim Na’iya Sada, *The Making of the Zamfara and Kano State Sharia Penal Codes*, in 4 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK: THE SHARIA PENAL AND CRIMINAL PROCEDURE CODES 22, 25 (Philip Ostien ed., 2007).

<sup>8</sup> Fidel Agu, *The Birth of Sharia*, WEEKEND VANGUARD (Nigeria), Oct. 30, 1999, at 4, 28, *reprinted in* THE DEVELOPMENT OF ZAMFARA STATE AND THE INTRODUCTION OF SHARIAH LEGAL SYSTEM 119, 123 (2002) (emphasis omitted).

<sup>9</sup> *About Us*, NACOMYO, <http://lagosnacomyo.org/about.html> (last visited Aug. 20, 2011) [hereinafter NACOMYO].

<sup>10</sup> *See, e.g., id.*

Associations in Nigeria (“FOMWAN”).<sup>11</sup> Another example is the Council of Muslim Youth Organizations (“COMYO”). COMYO is

an umbrella body for all youth associations in Oyo State in south-west Nigeria [that] came into existence by the end of the 1970s and was particularly active in the call for respect for the fundamental rights of the Muslims, including the right of Muslim children to religious instruction in public schools. The composite associations in COMYO individually and collectively were spectacularly active in the *shari’ah* debate that spanned the latter half of the 1970s till the early 1980s.<sup>12</sup>

NACOMYO—the *National Council of Muslim Youth Organizations*—came later: “[A] youth camp held at Ilorin in 1987 under the auspices of the World Assembly of Muslim Youth (WAMY) with participants from Southern Nigeria and the north transformed this organization [COMYO] into the National Council of Muslim Youth Organizations.”<sup>13</sup> NACOMYO has replicated COMYO all over the country, in the form of state chapters of NACOMYO itself that are more or less active and effective from state to state. There is a very strong chapter in Lagos State.<sup>14</sup> Much of the information in this Essay is based on interviews with members of the Lagos chapter of NACOMYO and those with whom they are working in the cause of bringing Sharia law more fully into the lives of Lagos Muslims.<sup>15</sup>

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<sup>11</sup> See FOMWAN, <http://www.fomwan.org> (last visited Aug. 20, 2011); Jamila M. Nasir, *Sharia Implementation and Female Muslims in Nigeria’s Sharia States*, in 3 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK: SANITIZING SOCIETY 76, 91–96 (Philip Ostien ed., 2007).

<sup>12</sup> Amidu Sanni, *The Shari’ah Conundrum in Nigeria and the Zamfara Model: The Role of Nigerian Muslim Youth in the Historical Context*, 27 J. MUSLIM MINORITY AFF. 117, 122 (2007).

<sup>13</sup> *Id.*

<sup>14</sup> See NACOMYO, *supra* note 9.

<sup>15</sup> Interviews were conducted in Lagos by Abdul-Fatah Kola Makinde. Interview with Alhaji Mustafa Babatunde Balogun, Nat’l Vice-President, NACOMYO, in Lagos, Nigeria (Apr. 2, 2008); Interview with Alhaji Abdul-Hakeem Kosoko, Special Adviser to the Governor on Religious Matters, in Lagos, Nigeria (Apr. 2, 2008); Interview with Shakirullah Muhammad Obale, Barrister, Indep. Sharia Panel of Lagos State, in Lagos, Nigeria (Mar. 13, 2008); Interview with Muhammad Iskil Lawal, Barrister, Indep. Sharia Panel of Lagos State, in Lagos, Nigeria (Aug. 22, 2007); Interview with Musadiq Adele Sanni, Vice Chairman, Lagos Branch of the Supreme Council for Sharia in Nigeria (SCSN), in Lagos, Nigeria (Aug. 21, 2007); Interview with Abdur-Raheem Ahmad Sayi, Barrister, Indep. Sharia Panel of Lagos State, in Lagos, Nigeria (Aug. 21, 2007). Further interviews were conducted in Lagos by Abdul-Fatah Kola Makinde and Philip Ostien. Interview with Adeyinka Aroyewun, Deputy Dir., Lagos Multi-Door Courthouse, in Lagos, Nigeria (Apr. 13, 2010); Interview with Abdur-Raheem Ahmad Sayi, Barrister, Indep. Sharia Panel of Lagos State, in Lagos, Nigeria (Apr. 12, 2010); Interview with Muhammad Iskil Lawal, Barrister, Indep. Sharia Panel of Lagos State, in Lagos, Nigeria (Apr. 12, 2010); Interview with Abdul-Hakim Kosoko, Special Assistant to the Governor of Lagos State on Religious Matters, in Lagos, Nigeria (Apr. 2, 2008). We thank all these people for giving not only their time, but also many pertinent documents.

### 1. *Initial Push for Sharia Courts*

Inspired by the Gusau launching, the chapters of NACOMYO from all states of the Yoruba southwest, together with other groups, held a meeting at the University of Ibadan Central Mosque in early 2000 to strategize how they could advance the cause of Sharia in their own states. Among other things, broad-based engagement of all possible elements of local Muslim communities was strongly recommended. Activists in predominantly Muslim states like Lagos State were encouraged to push once again in the new democratic context for establishment of Sharia courts.<sup>16</sup> On its return home, the Lagos chapter of NACOMYO accordingly convened a meeting at the Lagos Central Mosque, to which many Muslim organizations and communities active in Lagos State were invited, including Ansar-ud-Din, Nawair-ud-Deen, Anwar-ul-Islam, Nasrul-Lahi-l-Fatih Society of Nigeria (“NASFAT”), Muslim Students Society of Nigeria (“MSSN”), The Muslim Congress (“TMC”), and the Muslim Lawyers Association of Nigeria (“MULAN”). This group met periodically for more than a year. They agreed their first step would be to try to persuade the newly elected governor (a Muslim) and House of Assembly of Lagos State (majority Muslim) to enact a Sharia Courts Bill. A draft bill was prepared, spelling out the proposal in detail. Muslim members of the House of Assembly were approached and asked to introduce the bill into the House for debate and hopefully enactment. There were also discussions about the bill with members of the executive branch, including the governor.<sup>17</sup>

A variety of arguments was made for the idea that Lagos State should establish Sharia courts. Other Nigerian states have them, serving far fewer Muslims than those in Lagos State.<sup>18</sup> Even in states without Sharia courts, in the northern and eastern parts of the country, Islamic law is routinely applied in civil matters if the parties so elect. Only in the Yoruba southwest is Islamic law excluded.<sup>19</sup> There, Yoruba Muslims must go either under Yoruba custom in the Customary Courts or English law in the Magistrate’s and High Courts.<sup>20</sup> In other words, the activists say, the pagans and Christians of Lagos State have their own courts (Yoruba custom being closely associated with Yoruba traditional religion, and English law allegedly being “Christian”), but the

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<sup>16</sup> Interview with Musadiq Adele Sanni, *supra* note 15.

<sup>17</sup> Interview with Alhaji Mustafa Babatunde Balogun, *supra* note 15.

<sup>18</sup> See *supra* note 4 for population and demographic figures.

<sup>19</sup> Rotimi T. Suberu, *Religion and Institutions: Federalism and the Management of Conflicts over Sharia in Nigeria*, 21 J. INT’L DEV. 547, 553 (2009).

<sup>20</sup> Dina, Akintayo & Ekundayo, *supra* note 2.

millions of Muslims have none. This is not only unfair to Lagos Muslims, but also unconstitutional discrimination against them, under Article 42(1) of the Nigerian Constitution, which provides in part that:

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person—

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places or origin, sex, religions or political opinions are not made subject.<sup>21</sup>

A second constitutional argument is founded on the right to freedom of thought, conscience, and religion. Article 38(1) of the constitution provides in part that:

Every person shall be entitled to freedom of thought, conscience and religion, including . . . 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.<sup>22</sup>

The activists say that it is a duty of their religion that they must practice Sharia in all of their affairs; that under Article 38(1) they have the right to do so, at least in their private affairs, including litigating their civil disputes under Sharia; and that Lagos State is unlawfully interfering with that right by not establishing Sharia courts. The activists disavow any aim of bringing Sharia criminal law to Lagos State, as their brothers in the Sharia states have done. They only want Islamic civil law applied, but in proper Islamic courts. Non-Muslims would not be subject to the jurisdiction unless they freely consented in writing.<sup>23</sup> The activists imply, without really providing support, that if Sharia courts were established for Lagos Muslims, many would actually use them to the exclusion of the Customary and English courts. The thinking is: build it and they will come. They imply, again without providing support, that if Sharia courts were established, the costs to the State would be small and the

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<sup>21</sup> CONSTITUTION OF NIGERIA (1999), § 42(1).

<sup>22</sup> *Id.* § 38(1).

<sup>23</sup> It is perhaps worth observing that this rule applies in the Sharia states: non-Muslims are not subject to the jurisdiction of the Sharia courts or to prosecution under the Sharia Penal Codes unless they consent in writing. This is honored, and non-Muslims in the Sharia states do not complain of being dragged before the Sharia courts. See Ostien & Dekker, *supra* note 6, at 601–02.

social and economic benefits would be large; certainly the benefits must outweigh the costs. Hence even if Lagos State did not have a constitutional obligation to set up Sharia courts, it would still be wise policy to do so. At small cost, the lives of large numbers of people, Muslims and non-Muslims, would be improved. These are the sorts of arguments—not always so clearly articulated and certainly not well-supported in detail—that the Lagos State chapter of NACOMYO made in 2000 when it approached the House of Assembly of Lagos State with a draft Sharia Courts Bill and asked the House to enact it into law.<sup>24</sup>

The text of the draft Sharia Courts Bill submitted is reprinted elsewhere.<sup>25</sup> It is a pastiche of ideas and formulations drawn from other courts' statutes from the southwest but also from the north—the Sharia states in particular.<sup>26</sup> It would establish Sharia courts of first instance, at least one in each Local Government Area (of which there are twenty in Lagos State) but as many as some unspecified official might deem were needed.<sup>27</sup> All appeals from the lower Sharia courts would go to a new Lagos State Sharia Court of Appeal, which the draft bill would also establish.<sup>28</sup> The territorial jurisdiction of each lower Sharia court would be defined in the warrant establishing it.<sup>29</sup> As to their subject-matter jurisdiction, the bill is ambivalent. Section 7(I) says that “[t]he courts shall derive their jurisdiction from section 277(1) (2) (a) (b) (c) (d) and (e) of the 1999 constitution of the Federal Republic of Nigeria,” which implies what is known as “Islamic personal law”—the law of the family and of inheritance.<sup>30</sup> Section 7(II) gives the courts jurisdiction over “civil proceedings in Islamic law in which the existence or extent [of] a legal right, power, duty, liability, privilege, interest, obligation or claim due to an individual or individuals is in issue.”<sup>31</sup> This is broader: it would extend subject-matter jurisdiction, for instance, to matters of contract and tort as well as family and

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<sup>24</sup> Interview with Abdur-Raheem Ahmad Sayi (Aug. 21, 2007), *supra* note 15 (discussing the ISP being a private solution for Sharia implementation).

<sup>25</sup> Makinde, *supra* note 5, at 290–302. Makinde actually reprints the text of the bill submitted to the Oyo State House of Assembly, but substantially the same text was submitted in Lagos State, with only the name of the state being changed.

<sup>26</sup> For the Sharia courts legislation enacted in the Sharia states, see Philip Ostien, *The Sharia Courts and Their Judges*, in ULAMA INSTITUTIONS, *supra* note 6, ch. 7, pt. II [hereinafter *Sharia Courts and Their Judges*].

<sup>27</sup> Makinde, *supra* note 5, at 277.

<sup>28</sup> *Id.* at 279. Sharia Courts of Appeal have long existed in all northern states except Benue, which shares with Plateau.

<sup>29</sup> *Id.* at 277.

<sup>30</sup> *Id.* at 279.

<sup>31</sup> *Id.*

inheritance law. As to personal jurisdiction, each court would have jurisdiction over "a. All persons professing the Islamic faith; and b. Any other persons who do not profess the Islamic faith but who voluntarily consent to the exercise of the jurisdiction of the Sharia Courts under this law."<sup>32</sup> This raises an interesting question unresolved in the statute: could any Muslim be dragged into the Sharia courts, even if he or she would prefer to litigate, say, in the Customary Courts under Yoruba law and custom? As to the law to be applied, the draft statute says this:

5. (I) The applicable laws and rules of procedure for the hearing and determination of all [matters] and proceedings before the Sharia Courts shall be as prescribed under Islamic law which include:

- a. The Holy Qur'an
- b. The *Hadith* and *Sunnah* of Prophet Muhammad (S.A.W.)
- c. *Ijmah*
- d. *Qiyas*
- e. *Masalaha*
- f. *Istishab*
- g. *Istihsan*
- h. *Al-urf*
- i. *Mashabul-shabi*; and
- j. *Shar'u Man Kablana*[.]<sup>33</sup>

This comes from Sharia court laws in the Sharia states. Another feature of the bill, drawn from the same source, is its creation of a third institution, an official state Council of Ulama, which would have a role in the appointment and discipline of judges of the Sharia Courts, in the drafting of their rules of procedure, and even in advising the judges on questions of Islamic law when requested to do so. The Council of Ulama would also have power "to codify all the relevant Islamic personal laws and where applicable their corresponding rewards for easy reference."<sup>34</sup> There are other interesting details of the draft statute, but enough sense of it has been given. Altogether it puts forward an interesting set of proposals, based on an interesting set of arguments, all deserving of more detailed discussion and analysis than they have yet received.

We may assume that the Lagos chapter of NACOMYO put its proposals forward as subject to discussion and negotiation. But they were not well-received, even by the Muslim officials of Lagos State. When Muslim members

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<sup>32</sup> *Id.* at 279-80.

<sup>33</sup> *Id.* at 278.

<sup>34</sup> *Id.* at 282. For the Councils of Ulama and related bodies set up in the Sharia states, see Philip Ostien, *Councils of Ulama and Related Bodies*, in *ULAMA INSTITUTIONS*, *supra* note 6, ch. 8, pt. II.



of the House of Assembly were approached and asked to sponsor the Sharia Courts Bill in the House, no member was willing to do so.

[W]e couldn't find any of the legislators that is bold enough to accept the Bill and present it for the House whether or not it will be accepted or rejected. Initially, we were disappointed in some of them . . . . [W]e felt that by virtue of the Islamic high profile they bear, we think they should be able to do some assistance in that regard but later we came to realize that politicians are always politicians and whatever they see could be detrimental to their political ambition. They all want to leave that place for a higher place, they all have aspirations, political aspirations they have. So, all of them gave one reason or the other to dodge it.<sup>35</sup>

A large part of the reason for this was that the most powerful politician in the state, Governor Tinubu, was not sympathetic to the idea of Sharia courts. Speaking in 2002, he said that although he had been under "intense pressure" to do so, "he has rebuffed all attempts to introduce the Islamic law in the state."<sup>36</sup> No one in the House of Assembly would want unnecessarily to cross him; and anyway, "it could be a futile exercise [to introduce the bill] because the governor was . . . hostile to it."<sup>37</sup> In sum, the Sharia Courts Bill went nowhere in Lagos State. The same thing happened in Oyo State with a very similar bill proposed for consideration there, and later in Osun State as well.<sup>38</sup>

## 2. *Plan B: Establishment of a Private Sharia Arbitration Tribunal*

The next-best option was establishment of a private tribunal—the ISP—that Lagos Muslims themselves would maintain and to which Muslims who wished to do so could bring their civil matters for adjudication under Islamic law. This course had been proposed to the Lagos Muslims as long ago as 1894, but never before implemented.<sup>39</sup> Now at last it would be tried. The hope was that the ISP would gradually attract increasing numbers of Muslim litigants and financial support from the Muslim community, thus demonstrating a growing desire among Lagos Muslims for serious Islamic adjudication of the sort the ISP would provide. Then perhaps political momentum would build for

<sup>35</sup> Interview with Abdur-Raheem Ahmad Sayi (Aug. 21, 2007), *supra* note 15.

<sup>36</sup> Tokunbo Adedaja, *I'm Under Pressure to Introduce Sharia—Tinubu*, THIS DAY (Nigeria), Sept. 9, 2002, <http://allafrica.com/stories/200209110149.html>.

<sup>37</sup> Interview with Abdur-Raheem Ahmad Sayi (Aug. 21, 2007), *supra* note 15.

<sup>38</sup> Makinde, *supra* note 5, at 226.

<sup>39</sup> See Abdul-Fatah Kola Makinde & Philip Ostien, *Legal Pluralism in Colonial Lagos: The 1894 Petition of the Lagos Muslims to Their British Colonial Masters* (forthcoming).

establishing Sharia courts at state expense. This was Lagos NACOMYO's Plan B, which in 2002 it proceeded to implement.

### B. SCSN

It was agreed that the ISP would sit at the Abesan Central Mosque in Lagos's Ipaja Estate, based on the premise that the Abesan Muslim Community had already stated in its constitution that Sharia is to be applied among its members. Permission was secured to use that mosque. A second location was added later, at the Central Mosque of the 1004 Estates on Victoria Island, a large housing project, to cater to Muslims from that side of the city.

At some point another important decision was made: to affiliate with the then very new Supreme Council for Sharia in Nigeria ("SCSN"). This was done for two reasons. First, a more inclusive body was needed because elders were becoming more involved in the ISP effort and NACOMYO is a body for Muslim youth organizations. Second, SCSN was quickly establishing itself as the national umbrella body for Sharia affairs in Nigeria. Accordingly, a Lagos chapter of the SCSN was formed. It was this organization, under the leadership of Barrister Ishaq Bamidele Adeshina and Barrister Musadiq Adele Sanni, that in 2002 took over the task of establishing and managing the work of the Lagos ISP.<sup>40</sup>

SCSN was established in 2000 by northern Muslims. Its founder and national president is Dr. Ibrahim Datti Ahmed, a medical doctor from Kano.<sup>41</sup> Although its two national vice presidents are Sheikh Abdur-Rasheed Hadiyyatullah, a Yoruba,<sup>42</sup> and Sheikh Adam Abdullah Idoko, an Igbo,<sup>43</sup> its secretary-general, the man running the national secretariat in Kaduna, is also a

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<sup>40</sup> Interview with Alhaji Mustafa Babatunde Balogun, *supra* note 15; Interview with Musadiq Adele Sanni, *supra* note 15.

<sup>41</sup> For more information about Kano, see Ibrahim Ado-Kurawa, *Inuwar Jama'ar Kano: A Great Leap in Philanthropy*, KANO ONLINE (May 25, 2003), <http://www.kanoonline.com/inuwarkano>.

<sup>42</sup> Sheikh Hadiyyatullah, from Iwo in Osun State, now lives in Ibadan. Among other things, he is the proprietor of Shariah College in Iwo, about ten years ago renamed Sheikh Abdul-Azeez Bin Baaz Shariah College, after the late Grand Mufti of Saudi Arabia. See SHARIAH COLLEGE OF NIGERIA, <http://www.shariahcollege.com> (last visited Aug. 22, 2011).

<sup>43</sup> Sheikh Idoko is the Chief Imam at the University of Nigeria, Nsukka. He is also a member of Nigeria's National Inter-Religious Council ("NIREC"), whose co-chairs are the Sultan of Sokoto and the chairman of the Christian Association of Nigeria ("CAN").

northerner, Nafi'u Baba-Ahmed from Zaria—a lawyer with a long career in Nigeria's financial sector.<sup>44</sup>

The national body was formed in 2000, partly to add a sharp authoritative Muslim voice to the great outcry that rose up after Zamfara State announced in late 1999 that it was going to implement Sharia and then did so, cutting off the first thief's hand in March 2000. The din in Nigeria and abroad was deafening.<sup>45</sup> SCSN rose up to speak up in defense of what Zamfara State was doing and to keep up the pressure on the reluctant governors of other northern states to do the same. SCSN has subsequently been critical of the governments of nominally Sharia states for not sincerely seeing Sharia implementation through.<sup>46</sup> In addition, SCSN undertook to promote Sharia implementation outside the north, to the extent allowed by local circumstances. To this end, state chapters of SCSN were formed. In the southwest, at any rate, their "membership[s] are drawn largely from Muslim Lawyers, Graduates of Shari'ah from various local and Arabian Universities, members of the local branches of the National Council of Muslim Youth Organizations (NACOMYO) and other Muslim activists."<sup>47</sup>

In addition to establishing the Lagos ISP, the Lagos chapter of SCSN has also continued the struggle for public Sharia courts maintained by the state. In 2003, it called on Lagos Muslims not to vote for any gubernatorial or House of Assembly aspirant in that year's elections who was not willing to support the establishment of civil Sharia courts for Muslims.<sup>48</sup> This call was not heeded: in the 2003 elections, Tinubu won a second term as governor and the new House of Assembly was no more friendly to the proposed Sharia Courts Bill than the last. The same seems to be true of the new governor (Babatunde Fashola, another Muslim) and House of Assembly elected in 2007. In August or September 2009, the Lagos chapter of SCSN, already operating its ISP at two locations in the city, made plans to launch a third division at another location.

<sup>44</sup> See *Board of Directors*, JAIZ INT'L (2006), [http://www.jaizinternationalplc.com/www.jaizinternationalplc.com/board\\_of\\_directors\\_management\\_staff.html](http://www.jaizinternationalplc.com/www.jaizinternationalplc.com/board_of_directors_management_staff.html).

<sup>45</sup> See Philip Ostien, *Preface to Volumes I–V*, in *1 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK: HISTORICAL BACKGROUND*, at vii, vii–xi (Philip Ostien ed., 2007).

<sup>46</sup> Musa Umar Kazaure, *Nigeria: We'll Campaign Against Non-Sharia Compliant Governors—Dr Datti Ahmed*, DAILY TR. (Nigeria), Jan. 18, 2003, <http://allafrica.com/stories/200301180166.html>.

<sup>47</sup> Abdur-Raheem Adebayo Shittu, *Reviewing the Prospects and Challenges of Private Initiative in Implementing Shariah in South-Western Nigeria (2006–2009)*, 3 AL-FITYAH MAG. 17, 18 (Apr. 2010). Al-Fityah Magazine is a bi-annual publication of NACOMYO.

<sup>48</sup> Olumide Bajulaiye, *Nigeria: 2003: Muslim Community Vows to Dump Tinubu*, DAILY TR. (Nigeria), Nov. 13 2002, <http://allafrica.com/stories/200211140600.html>.

They sought and apparently received permission from the commissioner of police to hold the launching on a certain date. The venue was reserved, invitations went out, and costs were incurred. But when they got to the venue on the appointed day, they found it blocked by the police and the launching was not allowed to take place; everybody was sent away.<sup>49</sup> In October 2009, the Lagos SCSN again approached the House of Assembly with a draft bill for the establishment of Sharia courts and a written petition supporting it. This too has gone nowhere. "The government [still] doesn't want to have anything to do with sharia,"<sup>50</sup> and perhaps the government does not want Sharia to grow too large in the private sector either.

## II. THE ISP

### A. *Its Personnel and Operations*

In the meantime, the Lagos chapter of SCSN, established in 2002, has since been managing the Independent Sharia Panel of Lagos State, sitting so far in only two locations within metropolitan Lagos. Applications were invited for the position of judges to sit on the panel. From the applicants, six judges were chosen based on their academic and professional credentials, their integrity, and the virtuous character they had displayed as active members of various Islamic groups for over a decade.<sup>51</sup> One of the six is a northerner: Imam Sulaiman Ibrahim, perhaps the nominee of the Hausa community in Lagos State. He has an LL.B. in Islamic Law from Ummul Qura University in Mecca and is the Chief Imam of the Central Mosque of the 1004 Estates on Victoria Island, where the second division of the ISP sits. But he is apparently not admitted to the bar in Nigeria, so he has not practiced law there, except perhaps privately among the Muslim community. The other five picked as judges were all Yoruba, all educated in the Faculties of Law of Nigerian universities and all practicing lawyers called to the Nigerian Bar as solicitors and advocates of the Supreme Court of Nigeria.<sup>52</sup> Each of these five possessed

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<sup>49</sup> Interview with Abdur-Raheem Ahmad Sayi (Apr. 12, 2010), *supra* note 15; Interview with Muhammad Iskil Lawal (Apr. 12, 2010), *supra* note 15; *see also* Shittu, *supra* note 47, at 20 (explaining that the police "disrupted the inauguration programme when [they] forcibly dispersed the organizers and the invited guests by firing canons of tear-gas into the gathering").

<sup>50</sup> Interview with Muhammad Iskil Lawal (Apr. 12, 2010), *supra* note 15.

<sup>51</sup> Interview with Musadiq Adele Sanni, *supra* note 15.

<sup>52</sup> Interview with Muhammad Iskil Lawal (Aug. 22, 2007), *supra* note 15; Interview with Shakirullah Muhammad Obale, *supra* note 15. The past tense is used because one of the five Yoruba panelists has died and has not yet been replaced.

an LL.B. in "Civil Law and Sharia"—a curriculum pioneered at Ahmadu Bello University and now offered there and at four other northern universities. The students study both English and Islamic law, so they are theoretically learned in both.<sup>53</sup> The five had then all gone on for the one additional year at the Nigeria Law School, which all LL.B. graduates must do before they are permitted to take the national bar exam and, if successful, be called to the Nigerian bar, qualified to practice anywhere in the country. They had all then been practicing law in Lagos State in the English and Customary Courts for some years before they were named additionally as judges of the ISP there.<sup>54</sup>

Given the legal backgrounds of its judges (and of the leaders of the SCSN chapter that appointed them), it is not surprising that the Lagos ISP has imported many formalities from the English law that they have studied, practiced for such a long time, and understand very well. At the judges' official swearing-in at the Abesan Central Mosque in Ipaja Estate, the upper floor of the mosque was occupied and configured like a conventional English court with witness boxes and some other court paraphernalia,<sup>55</sup> and this sort of setting is recreated for sittings of the ISP. The judges are split into two divisions of three (now two at Abesan because one member died). They sit to hear cases at their two locations on Fridays from 10 a.m. to 1 p.m. (in other words, just before Friday prayers). At first there were sittings every week, but this was later changed to every fortnight. Both panels have registrars with offices—the ISP secretariats—at the two locations, which are open for business more or less all the time to take in cases and perform other important functions. Complainants (*mudda'un*) must fill out forms stating their claims or, if they are illiterate, the registrar fills it out for them. Complainants pay no fee to the ISP at any stage of the proceedings, nor do respondents (*mudda'a alayhim*): everybody litigates in these forums for free. Before the hearing commences, the respondent must be served with the complaint and a summons to appear on a specified date, confirmed by the registrar whose responsibility it is to see that this is done. The respondent then may or may not appear: the ISP has no authority to compel anyone's appearance as a party or attendance as a

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<sup>53</sup> SYED KHALID RASHID, *ISLAMIC LAW IN NIGERIA: APPLICATION AND TEACHING* 285–91 (1986) (providing details of the curricula as of 1986 at Ahmadu Bello University, Bayero University Kano, University of Sokoto, and University of Maiduguri). The fifth northern university to offer the combined LL.B. in Civil Law (or sometimes Common Law) and Sharia is the University of Ilorin. For comparison of the LL.B. curricula at these Nigerian universities, as a group, with those at universities in Saudi Arabia, Egypt, Morocco, and Sudan, see ABDUL-QADIR ZUBAIR, *SHARI'AH IN OUR CITADELS OF LEARNING* 15–18 (2003).

<sup>54</sup> Interview with Muhammad Iskil Lawal, *supra* note 15.

<sup>55</sup> Interview with Alhaji Mustafa Babtunde Balogun, *supra* note 15.

witness, and if the respondent does not voluntarily appear, the ISP cannot proceed. If the respondent does appear, there is a "consent to arbitration" form the parties are then asked to sign,<sup>56</sup> but even if the form is not signed, the ISP apparently considers a party's appearance and participation in the proceedings sufficient indication of his or her consent to its jurisdiction. This was the ruling in an interesting case to which we turn to give a few details.

*B. Ruling as to Personal Jurisdiction in Ibrahim O.K. Lawal v. Alhaji G.O. Fatoyinbo*<sup>57</sup>

The complainant, Lawal, had sued seven separate respondents. According to the ruling in the case on which we rely here,

The Claims of the plaintiff Alhaji Ibrahim O. K. Lawal are

1. Wrongful dismissal from the [Zumratu Islamiyah Society of Nigeria ("ZISN").
2. Disenfranchisement from contesting elective post at the National level.

Thus, he prays the court to direct the defendants to withdraw the letter of dismissal with apology and to order fresh election that will include the members dismissed/suspended.<sup>58</sup>

Most respondents, including one G.I. Kadiku, appeared before the ISP in response to its summonses and took part in the proceedings. Kadiku also retained his own lawyer, who sent a letter to the ISP "emphasizing their intention not to submit to the Court."<sup>59</sup> The letter was subsequently disowned by Kadiku before the ISP, and the ISP accordingly asserted its jurisdiction over his person, the lawyer's letter notwithstanding, emphasizing Kadiku's continuing voluntary participation in the case knowing that in law he did not have to.<sup>60</sup> This is one point of interest.

The other point of interest is the rebuke the ISP gave to Kadiku's lawyer, himself a Muslim:

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<sup>56</sup> Interview with Abdur-Raheem Ahmad Sayi (Apr. 12, 2010), *supra* note 15. No copy of the form was available at the time of the interview.

<sup>57</sup> Lawal v. Fatoyinbo, Suit No ISP/IEM/0057R/1427AH, Rulings on the Defendants' Attorney Letter (Lagos ISP, Aug. 7, 2007) (on file with authors). To avoid distractions, some spelling errors have been corrected in the quotations.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Defendant's Attorney has made up his mind not to submit to the Panel but [rather] the State law . . . in flagrant disregard to the fact that the law that will be so enforced in the court is unislamic . . . and in flagrant disregard and slight to the Islamic option obtainable at the Panel.

However, it is obligatory on the Panel to explain in detail the consequence and effect of the stand being held by the Defendants' Attorney vis a vis his faith as a Muslim. This is because Islamic law being Allah's law, which He obliges on Muslims[,] goes to the root of their faith, it goes beyond jurisprudential dispositions or jurisprudence but includes Taoheed i.e. It has bearings on his faith in Allah.

Thus, Imam bn Taimiyah and his student Imam bn Qayyim Al Jawziyah explains in detail the [two] categories a Muslim may fall to by virtue of his disposition to Islamic Law. He said and I quote

"If one abandons Allah's law[,] the Shari'a considering it permissible or that Allah's law is not suitable to look after the affairs of men or that other than Allah's law is more suitable for them, he is a disbeliever who has left the fold of Islam . . . See also the Qur'an: 5:44-47

If he abandons, ruling by Allah's law due to desire or some benefit, fear or interpretation-along with his affirmation and certainty of his error and violation, he has fallen into minor disbelief, committing a sin greater than sin of Riba i.e. eating interest, graver than adultery and more severe than drinking alcohol".

....

However, much as serious caution has to be taken by the Defendants' Attorney not to fall into the error of those described as Kaafir above, the court has been very careful in declaring what position his undaunted objection to submit falls.<sup>61</sup>

This Essay returns below to the ISP's readiness to make accusations of unbelief (*kufir*) against Muslims who choose not to submit to the body of law it administers.

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<sup>61</sup> *Id.*

### C. Further Details of the ISP's Operations

Once the parties are before the ISP, the proceedings then go on in mixtures of the Yoruba and English languages and of Islamic and English legal forms. The law applied appears to be Islamic law as much as possible within the boundaries set by the Nigerian constitution and laws, in which the judges are well versed. The proceedings are open to the public except, presumably, in very sensitive matters. As is apparent from the case just discussed, legal practitioners are permitted to appear and represent their clients, even if they have no qualification in Islamic law.<sup>62</sup> Objections, applications, or motions based on Nigerian law may be made and argued and are ruled on in writing. Once the case proceeds to hearing on the merits, Islamic law and procedure take over and all the complex rules of procedure and evidence laid down in the Maliki books of Islamic jurisprudence (*fiqh*) for the disposition of various types of cases are now used.<sup>63</sup> The judges are active participants in the fairly informal hearings, questioning the parties and witnesses to get full views of all versions of the facts. There is no court reporter or stenographer—the judges make their own hand-written records as the case unfolds before them, as still happens in most courts in Nigeria. After hearing the case, the judges confer, generally reach agreement on proper disposition of the matter, and one of them is assigned to produce the lead judgment. This is in writing, formally explained and reasoned, with citations to appropriate authorities, typed up, captioned, signed, certified, and delivered to the parties, just like a judgment of the High Court.<sup>64</sup> The other judges generally concur, although dissent is possible. A book of selected judgments of the ISP has been published, showing well the work they do.<sup>65</sup>

The ISP is open to all types of civil cases including divorce, custody of children, inheritance, land matters, election petitions from Islamic associations, contracts, and moneylending. Among other things, divorces are granted—private dissolutions of private marriages contracted and ended under Islamic

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<sup>62</sup> Interview with Abdur-Raheem Ahmad Sayi (Apr. 12, 2010), *supra* note 15; Interview with Muhammad Iskil Lawal (Apr. 12, 2010), *supra* note 15.

<sup>63</sup> For an annotated bibliography of Islamic texts in use in northern courts, see Ahmed S. Garba & Philip Ostien, *Bibliography of Islamic Authorities Cited in the Judgments and Elsewhere in This Work*, in 5 SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK: TWO FAMOUS CASES 108, 108–21 (Philip Ostien ed., 2007). A sense of the substance of the rules may be gained from the draft rules of Islamic civil procedure for Sokoto State. See *Sharia Courts and Their Judges*, *supra* note 26.

<sup>64</sup> See, e.g., Makinde, *supra* note 5, at 291–97.

<sup>65</sup> LAGOS STATE CHAPTER OF SUPREME COUNCIL FOR SHARI'AH IN NIGERIA, SELECTED JUDGMENTS OF THE LAGOS STATE INDEPENDENT SHARI'AH PANEL (2005) [hereinafter SELECTED JUDGMENTS].



law of which the state takes no notice at any stage. In a case in which a self-confessed fornicator came to them asking to be punished with the *hadd* of *zina*—100 lashes for the evidently never-married applicant—the ISP declined jurisdiction, saying that “this panel may not be vested with the necessary powers to execute criminal punishment.”<sup>66</sup>

If one of the parties to a civil case refuses to comply with the judgment, what then? The ISP is a private tribunal: its judgments cannot be enforced directly. But, presumably they can be taken to the High Court for enforcement on the ground that they are the outcomes of arbitration to which the parties agreed. We are informed that there is an enforcement case now pending in the High Court of Lagos State; everyone awaits the outcome.<sup>67</sup>

#### D. Two Problems

It all sounds fine. But there are problems. The main one is funding. Most seriously, the judges are paid nothing. All the time they take and the work they do is *fi sabil Allah*, in God’s cause, not their own—*pro bono publico* as common lawyers would say. The two ideas are not so far apart: personal sacrifice for a higher cause. For a young man with a family to support, this sacrifice can become a heavy burden, especially if it must be borne over many years with no indication that the Muslim community he seeks to serve is willing to help support him. In any case, there are unavoidable costs of running the ISP. The registrars must be paid, secretariats maintained, forms printed, files and other court records properly made and kept, respondents found and served with process, and miscellaneous other costs incurred to keep the ISP going. As the ISP is generating no income of its own, this all must come from

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<sup>66</sup> *In re Hamzat Ayeni*, LISP/IEM/005 FH/1424/A.H, in *SELECTED JUDGMENTS*, *supra* note 65, at 39. This contrasts with the stance taken by the Independent Sharia Panel in Ibadan, which in a similar case duly administered the culprit’s 100 strokes. See Abdulfattah Olajide, *Sharia Gains More Ground in Yorubaland*, WKLY. TR. (Nigeria), Nov. 15, 2002, <http://allafrica.com/stories/200211150139.html>. The notoriety of the Ibadan case may have informed the Lagos ISP’s subsequent decision to the contrary, and the Ibadan ISP likewise has subsequently declined to repeat the performance.

<sup>67</sup> Interview with Muhammad Iskil Lawal (Apr. 12, 2010), *supra* note 15. Whether the proceedings of the ISP will be viewed by the High Court as arbitration under Nigeria’s Arbitration and Conciliation Act, ch. 18A, Laws of the Federation 2004, or as “customary arbitration,” the outcomes of which have long been enforceable under certain conditions, remains unclear. For a sample of the literature on customary arbitration see Virtus Chitoo Igbokwe, *The Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikewibe and Applicable Law Issues Revisited*, 41 J. AFR. L. 201 (1997); Oluwafemi A. Ladapo, *Where Does Islamic Arbitration Fit into the Judicially Recognised Ingredients of Customary Arbitration in the Nigerian Jurisprudence?*, 8 AFR. J. CONFLICT RESOL. 103 (2008); Adulmumini A. Oba, *Juju Oaths in Customary Law Arbitration and Their Legal Validity in Nigerian Courts*, 52 J. AFR. L. 139 (2008).

benefactors. Some money was raised at the launching of the volume of *Selected Judgments of the Lagos State Independent Shari'ah Panel*, and some is coming in the form of alms (*zakat*). However, funding remains a problem. The Lagos chapter of SCSN has tried to remind people that if the ISP is to succeed, "charity must begin from home."<sup>68</sup> It has also been suggested that charity from farther north would not come amiss:

[T]he success or otherwise of Shari'ah Implementation in the South-West must be seen as a challenge to the entire Muslim Ummah in Nigeria. . . . As a means of popularizing the Shari'ah and consolidating . . . its achievements in the South-Western States, the national body of The Supreme Council for Shari'ah in Nigeria, in collaboration with Shari'ah-practicing States in the North, should establish a special Fund for the smooth-running of the private Shari'ah Panels in the relevant States.<sup>69</sup>

At the time of writing it seems these pleas have not borne much fruit.

Another problem is perhaps related. The Lagos ISP is not generating much business. In August 2007, almost five years after its work began, it was said to have handled about 150 cases.<sup>70</sup> That works out to about fifteen cases a year per division. That number is consistent with Shittu's information: "Each of the Lagos Panels have handled an average of about fifteen cases between 2006 and 2009."<sup>71</sup> In a metropolis of eight or ten million people, half of whom are Muslim, these numbers are miniscule. The wealthy Muslims of Lagos State still do not seem ready to put up the money needed to support a credible, private Islamic tribunal, and most Muslims still do not seem ready to patronize one even when they could do so for free.

### III. THE WAY FORWARD

What might the Muslim activists promoting the establishment of Sharia courts in Lagos State do now to move their project forward? They seem to have two main options.

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<sup>68</sup> Bajulaiye, *supra* note 48.

<sup>69</sup> Shittu, *supra* note 47, at 17, 22.

<sup>70</sup> Interview with Musadiq Adele Sanni, *supra* note 15.

<sup>71</sup> Shittu, *supra* note 47, at 20.

### A. *Approaching the Courts*

The Muslim activists could approach the courts with their legal arguments: that by not providing them with Sharia courts in which to litigate their civil disputes under Islamic law, Lagos State is unlawfully infringing fundamental rights guaranteed them under the Nigerian constitution—the right to practice freely their religion and the right not to be discriminated against, based on their religion, expressly by or in the practical application of any law in force in Nigeria. As far as we know, these arguments have never been tested in the courts. Suit could be filed in the High Court of Lagos State. The defendants could be the House of Assembly and the governor. The prayer could be that the High Court order the defendants to establish Sharia courts along the lines the activists have proposed, because only by so doing can the illegalities now being practiced against Muslims be removed. If they won, and if the governor and House of Assembly complied with the court's directive, the activists would have accomplished their aim of getting Sharia courts established without having to go through the much more difficult process of persuading the political branches of government to act on their own.

But are these legal arguments likely winners in the courts? Because if the activists sued and lost, the courts holding that their constitutional rights are not being violated, their position would be even worse than it is now. If that happened, the political branches would be even less inclined than they have so far shown themselves to be to set up Sharia courts on their own.

It is doubtful, for example, that the courts would hold that by not providing civil Sharia courts for Lagos Muslims to use, Lagos State is violating their undoubted constitutional right to freely practice their religion. The right allegedly being denied them is the right to perform fully an act which they regard as obligatory under their religion, namely to practice Sharia in every aspect of their lives—or at least in the civil aspects. The obvious difficulty with this argument is that they *are* free to practice civil Sharia, privately, to whatever extent they wish. They are even free to set up their own private tribunals before which litigants can bring their civil cases for adjudication under Islamic law. That, in fact, is what they have done. The state will even enforce the judgments of their tribunals if it is convinced they are the outcomes of “arbitration” agreed to by the parties. It does not appear that the religious right the activists claim is being in any way infringed.

The other constitutional argument is perhaps stronger. It is that Lagos Muslims are being discriminated against by the practical effect of the court

system as it presently exists in Lagos State. To put it starkly: Christians and pagans have courts available to them, in which their preferred laws are being administered at the state's expense, but Muslims have none. As Shittu puts it, "[o]nly the pro-Christianity Common Law and the pro-paganism Customary Law have been established and are being adequately funded by the various South-Western State Governments."<sup>72</sup> This, so the argument goes, is discrimination on the ground of religion. It is unlawful under the constitution and the courts should say so and somehow put it right.

This argument has difficulties of formulation, which this Essay passes over to get straight to its main weakness, which is that the unlawful discrimination, if the courts found it to exist, could be abated without the state having to set up a whole separate system of Sharia courts. The courts, not wanting to make policy themselves, will always impose the least onerous burden on the state consistent with remedying any illegality. In this case the courts' statutes could be amended to expressly provide for application of Islamic law in "appropriate" cases: what those cases would be would be negotiated and spelled out. Then, in time-honored Nigerian tradition, a body of Muslim "assessors" could be appointed, perhaps on the advice of the Muslim community, to advise the Customary and English courts, when needed, as to what the applicable principles of Islamic law might be in any given case. This would remove any unlawful discrimination now existing and would be much less expensive than setting up a whole new system of courts all over the state each with its own personnel and infrastructure. So even if the constitutional argument—that Lagos Muslims are being unlawfully discriminated against based on their religion—was a winner, the remedy might not be all the Muslim activists are looking for.

#### *B. Convincing the Political Branches*

So how might the activists strengthen their argument to the political branches—the House of Assembly and the Governor—that establishing separate Sharia courts for Muslims to use would be wise policy, even if not strictly speaking required under the constitution? Here there is one clear answer: they need to develop the ISP they already have into an ever more popular and busy private forum, sitting in many divisions to which an increasing number of Muslims from all over Lagos State voluntarily bring their affairs for adjudication or administration under Islamic law. Only thus, it

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<sup>72</sup> *Id.* at 21.

seems, could it be demonstrated that substantial numbers of Lagos Muslims really want Sharia courts to adjudicate their civil matters and would actually use them if they were established by the state. At this point these propositions remain very much in doubt. If the Lagos ISP does not thrive and grow, the doubts will be confirmed and political support for Sharia courts will never build.

But the ISP faces many hurdles. The root of the problem is the attitude of Lagos Muslims themselves. The truth of the matter is that most of them do not seem to want the sort of Sharia that is administered in the ISP and that would be administered in Sharia courts if they were established. One interviewee said that "if the government introduces it the first antagonist will be the Muslims themselves, you understand."<sup>73</sup> This attitude is reflected in the lack of support the ISP has experienced so far. What accounts for this? The considerations are many, of which this Essay brings out a few in conclusion.

One factor often mentioned by the activists is the ISP's lack of coercive power. As Shittu notes, "the inability to compel attendance of Defendants to answer complaints made against them, due largely to the absence of an [enabling] state legislation is a key problem to the effective operation of the private Shari'ah Panels."<sup>74</sup> In short, starting a case in the ISP can be an act of futility; therefore, few complainants do it. It may be true that if there were Sharia courts in Lagos State with coercive powers over defendants, more complainants would use them than use the ISP—as opposed, presumably, to taking their cases to the Customary or Magistrate's Courts. One may still ask why Muslim defendants, if they must litigate, should be so unwilling to submit voluntarily to the jurisdiction of the ISP for the sake of being judged under Islamic rather than Yoruba or English law. However, the main point here is the subject of coercion. The very idea that any Muslim, whoever he or she may be, could be compelled to submit to the jurisdiction of Sharia courts is what many people find most objectionable about the whole idea. Perhaps most Lagos Muslims would prefer to keep the practice of Sharia private, open to those who want it but not forced on anyone. This attitude, variously rationalized, certainly exists among many Lagos Muslims, educated and uneducated. It is a powerful factor standing in the way of progress with the politicians on the subject of Sharia courts.

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<sup>73</sup> Interview with Abdul-Hakim Kosoko, *supra* note 15.

<sup>74</sup> Shittu, *supra* note 47, at 21.

Again, “[one] fear of the people is the criminal aspect, the *hudud* which anyone who goes against it is guilty of it.”<sup>75</sup> No one is suggesting that Islamic criminal law be applied in Lagos State. Nevertheless, this quotation contains an important insight. The Muslim activists behind the ISP seem ready to brand Muslims who choose not to subject themselves to the sort of Sharia they propose to administer, as unbelievers subject to potentially serious consequences: “anyone who goes against it is guilty of it.” As has been seen, this idea was used in *Ibrahim O.K. Lawal v. Alhaji G.O. Fatoyinbo* against a lawyer objecting to ISP jurisdiction on behalf of his client: he could be regarded as “a disbeliever who has left the fold of Islam.”<sup>76</sup> To many Lagos Muslims, this is an unwelcome tendency that should not be encouraged, namely, bringing accusations of *kufur* against those who see or do things differently, which can cause dissension and strife. This has not been the custom among the Muslims of Lagos State, where a wide tolerance of all shades of belief has long been practiced.

The concern about *hudud* has another facet. The punishments are theoretically fixed, with no tolerance:

Because if they say that somebody who stole cow his hands must be chopped up[,] why do you want to spare somebody who deny and defy people of their valuables[?] . . . If they say anyone who commits zina—adultery must be stoned to death, why do you want to have sympathy with the person who sleeps with another man’s wife?<sup>77</sup>

Why do you want to spare? Why do you want to have sympathy? But most Lagosians do: a wide tolerance of all shades of behavior is also part of the culture. This they do not want to give up.

And then who are the aggressive young men behind the ISP anyway? “Most [ISP] Panelists . . . belong to the same Islamic group, orientation or association which engenders in some mischievous elements to brand such Panels as belonging to the respective Muslim group [NACOMYO or SCSN] rather than being acceptable to all Muslims.”<sup>78</sup> Association with SCSN might be a particular liability because its northern national body has taken a number

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<sup>75</sup> Interview with Abdul-Hakim Kosoko, *supra* note 15.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Shittu, *supra* note 47, at 21.

of controversial stands suggesting a radicalizing and polarizing tendency perhaps not very welcome in Lagos State.<sup>79</sup>

Then there are the more traditional Islamic authorities who have long lived and more or less prospered among the Yoruba Muslims, represented at the top by state Leagues of Imams and Alfas.<sup>80</sup> In Oyo State they have actively opposed the ISP:

In the particular case of Oyo State the traditional *Ulamah* or [League] of Imams and Alfas found it difficult to accept that any crop of people other than they themselves should run and adjudicate in such Shari'ah Panels. These *Ulamah* would rather sabotage the scheme than have some "rivals" usurp their exclusive traditional rights.<sup>81</sup>

This is also an important, if less explicit, factor in Lagos State, where a large population of imams and *alfas* have long earned their livings by administering their own personal brands of Sharia among the people. This is Sharia enough for most people, and the imams and *alfas* have no interest in teaching them to ask for more.

These are some of the factors that stand in the way of the growth of the ISP among the Muslims of Lagos State. No doubt others could be suggested, for example, the apparently still strong attachment of the Yoruba, Muslims, and non-Muslims, to their own ethnic law and custom, demonstrated over many years and much discussed in the literature.<sup>82</sup>

The Muslim activists promoting Sharia courts in Lagos State are well aware of the social forces arrayed against them. They attribute some of the

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<sup>79</sup> For instance, SCSN opposed and actually brought vaccination against polio in Kaduna, Kano, and Zamfara States to a halt in 2003 and for some years thereafter, alleging it was a Western plot to reduce the Muslim birth rate. This resulted in new outbreaks of the virus in the north when it had almost been eradicated. See *Nigeria: Muslim Suspicion of Polio Vaccine Lingers On*, SCI. AFR. (Mar. 2004), <http://www.scienceinAfrica.co.za/2004/march/polio.htm>. National SCSN has vociferously opposed ratification or adoption of the national Child Rights Act (based on the United Nations Convention on the Rights of the Child) by Nigeria's states, pointing to a number of allegedly un-Islamic or anti-Islamic provisions in it. See, e.g., Sani Babadoko, *Sharia Council Kicks Against Child's Rights Act*, DAILY TR. (Nigeria), Aug. 22, 2005, <http://allafrica.com/stories/200508230090.html>. Lagos State, on the other hand, ratified the Child Rights Act several years ago and is among the leaders in its implementation. See UNICEF, FACTSHEET ON THE CHILD RIGHTS ACT IN NIGERIA (Aug. 2007), [http://www.unicef.org/wcaro/WCARO\\_Nigeria\\_Factsheets\\_CRA.pdf](http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf).

<sup>80</sup> *Alfa* means what in Hausaland is called a *malam*, an Islamic scholar trained in the traditional way. The etymology is disputed.

<sup>81</sup> Shittu, *supra* note 47, at 21–22 (emphasis omitted).

<sup>82</sup> See generally T.G.O. GBADAMOSI, *THE GROWTH OF ISLAM AMONG THE YORUBA, 1841–1908* (1978); DAVID D. LAITIN, *HEGEMONY AND CULTURE: POLITICS AND RELIGIOUS CHANGE AMONG THE YORUBA* (1986); J.D.Y. PEEL, *RELIGIOUS ENCOUNTER AND THE MAKING OF THE YORUBA* (2000).

Muslim opposition to ignorance of what they are actually proposing at the moment (not the imposition of *hudud* as many seem to fear) and especially of the actual content of the law they do want to apply. Shittu states: “[most] Muslims in the state still cannot distinguish the beauty and beneficence of Islamic ideals from the oppressive and inequitable practices of Yoruba Customary Laws and its courts.”<sup>83</sup> Some opposition they attribute to what fundamentally must be unbelief in some form. One interviewee said that “most *conscious* Muslims in these States have accepted the Shari’ah Panels as more viable and more spiritually fulfilling alternative platforms.”<sup>84</sup> Another said that “though we have Muslims but some of the Muslims that are there are not *convinced* Muslims that can readily champion this course.”<sup>85</sup> What the activists perhaps do not acknowledge or accept is the view apparently taken by most Lagosians—that they can be fully Muslims, even pious Muslims, even though they do not follow the classical Sharia in all they do. Most Lagos State Muslims, along with virtually all non-Muslims, seem to think that in the modern world, in a cosmopolitan metropolis where all shades of ethnicity and religiosity and political opinion are represented, the practice of religion, including the administration of Sharia among consenting parties, is best left in the sphere of the private at least for now. If private adjudication of civil matters according to Sharia becomes widely popular, if the ISP thrives and grows, then the question of further use of Sharia law may be revisited. “Like they say in democracy,” one interviewee concluded, “people would have to demand for things they want and the Muslims themselves are not really pushing, not pushing by word of mouth but [also] in our character. Let the people see in us what we [will] do.”<sup>86</sup>

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<sup>83</sup> Shittu, *supra* note 47, at 19.

<sup>84</sup> *Id.* at 22 (emphasis added).

<sup>85</sup> Interview with Muhammad Iskil Lawal (Aug. 22, 2007), *supra* note 15 (emphasis added).

<sup>86</sup> Interview with Abdul-Hakim Kosoko, *supra* note 15.



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