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Joseph Schacht`s Role In Changing The Status of Islamic Law In Nigeria

Nijerya'da İslam Hukukunun Statüsünü Değiştirmedeki Joseph Schacht'in Rolü

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Abstract: This work looks into the historical and empirical links between Schacht's theories of the origin of Islamic law and the transformation of its status and epithet in Nigeria. The end of the nineteenth and the dawn of the twentieth centuries witnessed extensive activities of colonialism that shaped the quintessence of the contemporary paradigm at all levels. Islamic law is no exception. British colonialism met some established institutions in the Northern States of Nigeria such as a multifaceted system of Sharia Courts, which was being manned and administered by an Alkali, an Islamic law judge. At its inception, nothing was done to alter the established law institution. This was accompanied by the introduction of "indirect rule" in the northern part of the country. This period also witnessed intensive activities of orientalists such as Joseph Schacht who worked vigorously on the provenance and development of Islamic jurisprudence. He came up with some theories such as "living tradition of schools ", and "popular practice" among others. He concluded that Islamic law did not stem directly from Al-Quran, but developed out of popular and administrative practices under the

Umayyads. By that, he tried to cut the link between Islamic law and its primary sources namely Al-Quran and Hadith. These theories were well communicated to colonial authorities who took them as the basis for the assessment and evaluation of Islamic law. It is from this point that; the status of Islamic law was utterly changed from that of religious law to customary law. It is concluded that Schacht`s theories permanently influenced the status of Islamic law in the constitution of Nigeria.

Keywords: Schacht`s theories, Islamic law in Nigeria, living practice, Alkali Courts, Nigeria.

Öz: Bu çalışma, Schacht'ın İslam hukukunun kökenine ilişkin teorileri ile Nijerya'daki statüsü ve sıfatının dönüşümü arasındaki tarihsel ve ampirik bağlantıları incelemektedir. On dokuzuncu yüzyılın sonları ve yirminci yüzyılın başları, her düzeyde çağdaş paradigmanın özünü şekillendiren kapsamlı sömürge faaliyetlerine tanık oldu. İslam hukuku bir istisna değildir. İngiliz sömürgeciliği, bir İslam hukuku yargıcı olan Alkali tarafından yönetilen çok yönlü Şeriat mahkemeleri sistemi gibi Nijerya'nın Kuzey Eyaletlerinde bazı yerleşik kurumlar gördü. Başlangıçta, yerleşik hukuk kurumu değiştirilmemiş, ülkenin kuzey kesiminde "dolaylı yönetim" sistemi getirilmiştir. Ayrıca bu dönem, Joseph Schacht gibi İslam fıkhının doğuşu ve gelişimi üzerinde canla başla çalışan oryantalistlerin yoğun faaliyetlerine sahne olmuştur. Schacht, diğerleri arasında "yaşayan gelenek", "popüler uygulama" gibi bazı teoriler ortaya attı. İslam hukukunun doğrudan Kur'an'dan kaynaklanmadığı, Emeviler dönemindeki popüler ve idari uygulamalardan geliştiği sonucuna vardı. Bununla İslam hukuku ile onun temel kaynakları olan Kuran ve Hadis arasındaki bağı kesmeye çalıştı. Bu teoriler, sömürge otoritelerine iyi bir şekilde iletilmiş olup İslam hukukunun değerlendirilmesi için temel vezin oluşturdu. Bu noktadan hareketle; İslam hukukunun statüsü, dini hukuktan örfi hukuka doğru değiştirilmiştir. Schacht'ın teorilerinin Nijerya anayasasında İslam hukukunun statüsünü kalıcı olarak etkilediği sonucuna varılmıştır.

Anahtar Kelimeler: Schact teorisi, Nijerya'da İslam Hukuku, Yaşam pratiği, Alkali Mahkemeleri, Nijerya

Introduction

The British colonization in Nigeria met Islamic law functioning in all ramifications in northern Nigeria. In the beginning non-interference with religious activities policy was adopted. As such immediately after the arrival of the Governor-General, Lord Lugard 1903, Muhammad Attahiru II was appointed as the leader of the Muslims and Mr. Burdon as the Resident and in charge of administration in Sokoto (Sodiq 1992, p. 97). This marked the beginning of the introduction of "*Indirect Rule*" which permitted the emirates that were to administer Islamic law in the North to keep their various positions and manage the affairs of their people (Sodiq 1992, p. 97). Although, well this arrangement was abolished and Islamic law was later, subjugated and confined to the circle of family law only. This change took a series of meticulous steps and approaches to retain the confidence of the Muslim population. One of those was the consultation of

existing theories about the Origin of Islamic law postulated by the Western Orientalists.

Joseph Schacht is regarded as a major personality in European and American scholarship on Islamic studies. Schacht who was born on the 15th of March 1902 in Upper Silesia, then in Germany and now in Poland (Racibórz), made his way to fame by describing and explaining the origins and early development of Islamic law (Wakin, 2003, p.1). In 1947, he became a British subject and upon the completion of his most significant work "*The Origins of Muhammadan Jurisprudence* " in 1948 he was invited by the Colonial Office to Northern Nigeria in 1950, to give his technical opinions on Islamic law (Schacht, 1957, p. 123; Wakin, 2003, p. 7). This was the time when the British colonial administration was looking for a way to put the final nail in the coffin regarding the status of Islamic law in Nigeria.

Status of Islamic Law During Pre-colonial Nigeria

It is historically undisputed that Islam made its existence known in much of African soil as early as the eighth and ninth centuries. Trade and migration were the key instruments in an expansion of the Islamic call to the region of sub-Saharan Africa. Berbers tribe, mostly members of Khārijī sects from North Africa, plied their trade activities through the trans-Saharan trade routes and were involved greatly in preaching Islam to their African clients (Chande, 2005, p. 9).

In the same way, Islam continued to spread in the nooks and crannies of West Africa until the nineteenth century using means of the peaceful settlement of Muslim merchants in urban centers and the missionary influence of nomadic Muslim groups in rural areas as they wandered in search of pasture. Even less is known about the influence of the latter than the former (Hunwick, 1965, p. 114). Similarly, Islam reached the Kanem-Bornu Empire and began to make headway in the eleventh century when the state had its first Muslim ruler, Hummay, in Kanem (Sodiq, 1992, p. 86). However, Islam began to thrive in the public doming during the reign of Mai Idris Alooma (15 71-15 83 CE), who attempted to establish a comprehensive Islamic law throughout the empire. It was during this period Bornu empire invigorated its Muslim identity by opening many learning centers and having diplomatic links with other Muslim centers like Tripoli and Turkey (Sodiq, 1992, p. 86). Although there is no substantial proof suggesting that Islamic law was implemented as the state law, intrinsically, non-Islamic beliefs and practices were never abolished (Sodiq, 1992, p. 86). However, many records have proven that the religion of Islam was widely entrenched among the ruling class of the empire before changing its name to the Borno Empire in 1386 CE (Ali, 2017, p. 54). The contribution of Mai Idris Alooma (15 71-15 83 CE) to the

progress of Islam in the Borno Empire cannot be overemphasized. During his reign, Islamic law gained an impetus that was unparalleled in the history of the empire. However, the religion was adulterated until a further reform came in the nineteenth century through Muhammad al-Amin al-Kanemi who had studied for five years each in al-Madinah (Arabia) and Cairo (Egypt), and for three years in Fez (Ali, 2017, p. 56).

It is utterly necessary to point out that in pre-colonial days, the country, now known as Nigeria was generally referred to as one of the countries in Western Sudan. This reference was adopted by early Arab writers like Al-Bakri, Ibn Khaldun, Attimbukti, and As Sa`adi. Others identified the country as Bilad Tukrur. When the Europeans came they imposed the name Nigeria (Olayiwola, 2007, p. 7).

Before the British annexation of Nigeria, Islamic law was considered the prime law in most of what would later become the northern states of the country (Kumo, 1988, p. 47). There were three types of courts: Alkali's courts, Emir's courts, and an appeal court. (Sodiq 1992) Emir courts were empowered to see and decide criminal matters concerning adultery (*Zina*), theft (*Sarqa*), robbery (*Hirāba*), and apostasy (*Ridda*) (Chukkol, 2005, p. 193). Abu Abdullah, Muhammad bn Muhammad Abdulkarim al-Maghīlī, a learned scholar of the eleventh century, reportedly appointed his students, Mohammed Al-Tazakhit, as the first Qadi of Katsina, and Abdullah as the first qadi of Kano (Gwarzo, 1985, pp. 3–4). Al-maghili wrote a book titled *Risalatul-Muluk* which contained a code of procedure for both civil and criminal matters and the book was regarded as the first Kano constitution (Abdullah, 1998, p. 84). In the same context, the book of *Diyā-ul hukkām* written by Abdullah bin Fodio embodies a compendium of sharīah injunctions for all facets of Islamic administration as such it was regarded as the second Kano constitution(Abdullah, 1998, p. 84).

After the jihad of Uthman dan Fodio in 1808, the *Alkali* courts were introduced. The Alkali courts were placed in charge of fully enforcing Islamic law in the Northern States of Nigeria, while the Emirs still retained the power to try, appoint and dismiss the Alkalis (Ostien, 2003, p. 2).

The Colonial Era

When the British colonial forces occupied Northern Nigeria in 1900, Islamic law had already flourished in the North as a well-structured and steadily formidable legal system. "It was the Golden Age of the application of sharīah in Nigeria as the law was being applied in all its ramifications"(Belgore, 2000: 6).

In the early stage of colonialism, the British had a policy of not interfering in the legal field unless their authority was threatened or their interests such as tax collection were hindered. This policy was even maintained after the 1857 revolt, although the entire administrative and legal mechanism was reformed. In the field of family law for a significant population of Muslims, an "*AngloMuhammadan*" law emerged during the first century of British rule, allowing the use of the Hanafi version of the sharia (Vikør, 2012, p. 324).

In Northern Nigeria, the approach of the British in handling Islamic law passed through phases namely: the accommodation phase, the domination, and control phase, and the living under the shadow phase (Oba, 2002, p. 825). The accommodation phase began when they occupied the north. At that stage, they maintained the policy of non-interference with religious exercises such as an "*indirect rule*" policy was introduced. By this means colonial administrators were ruling through the existing organizational institutions and personnel. However, Oba (2002, p. 826) concludes that the adoption of "indirect rule" bore out the fear of stiff resistance and provocation of a mutiny if the "firmly entrenched" and sophisticated Islamic administrative machinery was tampered with. He argues that such policy was never introduced in the west nor in the east where such an Islamic system never existed. The policy of indirect rule also meant the preservation of the old judicial institutions which signifies the domination and control stage of Islamic law during colonization. However, the decisions made by *alkalis* were subject to administrative scrutiny by Resident and District Officers(Mahmud, 1988, p. 44). Consequently, the limitation was placed on the jurisdictions of the sharīah Courts in punishment. The powers of each court will be contained in an order that appoints it and death sentences shall not be executed without the consent of the Resident (Yadudu, 2016, p. 23). There was a total abolition of mutilation and torture and "*other penalties were subjected to the requirements that they were not repugnant to natural justice and humanity*"(Milner, 1962, p. 263). As such jurisdiction of the courts in Islamic law matters was steadily reduced, and the English common law was gradually introduced into the content of the law administered by the alkali. When it became clear that Nigeria would eventually attain independence, the British struggled to attain a situation whereby Islamic law would, if it still exists in Nigeria, live forever under the shadow of common law. Finally, Islamic crime was abolished in favor newly enacted Penal code which was based essentially on English common law despite significant objections from Muslims. Thus the civil aspects of Islamic law were reduced to mere customary law applicable only as a personal (Oba, 2002, p. 826).

Schacht`s Theories

The twentieth century saw serious efforts of some western scholars to completely dismantle Islamic jurisprudence from one of its fundamental sources namely, hadith. These efforts were intensified in 1848 by Gustav Weil (1808-1889 AD) and Aloys Springer (1813-1893 AD) who challenged the authenticity of Sahih Bukhārī and made a bold suggestion that the European Scholars should discard without any hesitancy at least half of Sahih Bukhārī and concluded that "*many of hadith material cannot be considered authentic*"(Khan, 2016, p. 109) However the modern Islamic studies in Europe started with Ignaz Golziher(Khan, 2016: 109) who "*penetrated where others were afraid to tread*"(America Oriental Society, 1922: 190). Nevertheless, Joseph Schacht followed the path of his predecessors and even went deeper to divest Islamic jurisprudence of its core source. "*These revolutionary achievements*"(Maghen, 2003: 277) by Joseph Schacht are applauded by Norman Calder, who is principally in agreement with Schacht's basic approach(Calder, 1993, p. 137).

On the other hand, one of the big critics of Schacht`s views, Harald Motzki, calls his work "*a reversal of the traditional historiography and a severance of the direct tie between sunna and fiqh*" (Maghen, 2003, p. 277).

Schacht focuses on the aspect of Islamic jurisprudence as a whole, from its origin, birth, and authenticity related to the emergence of the Sunnah (Isnaeni et al, 2021, p. 35). He proposed theories on the origin of Islamic jurisprudence to establish a critical historical account of the early development of Islamic jurisprudence. He concludes that the beginnings of fiqh are not traced back to the era of the prophet in the 7th century, but rather to different sources of juristic thought such as "*customary practices and administrative regulations of the Umayyad administration as well as the letter and spirit of the Qur'an and other recognized Islamic religious norms*"(Schacht, 1950**)**. And from these several local schools emerged in various centers of the early Islamic Empire, of which we know about the Iraqi, Hejaz, and Syrian schools (Talmon, 1987, pp. 33-34). Schacht adopts several techniques such as the analysis of *isnad*, the use of c*onclusion e silentio* (that is to prove that a particular doctrine does not exist at a particular moment)(Maghen, 2003: 277), the study of the development of legal terminology, etc to conclude that there had not been any authentic hadith of the Prophet with legal matters at all (Forte, 1978: 3; Maghen, 2003, p. 278; Powers, 2010, p. 135).

Popular Practice

The word "*practice*" appears to be the pivotal point of most of the contradictory concepts reported by Joseph Schacht. This can be traced back to his extensive use of the same word in different contexts as follows:

1. Schacht sometimes uses the word "practice" to refer to "the popular and administrative practice of the late Umayyad period," which developed from the adoption of the ra'y method by the first official qadis or judges, appointed by the Umayyad dynasty. (Maghen, 2003, p. 282)

2. Also, he uses the term in question to denote the "popular practice" or "recognized practice" (of the inhabitants of a given region? of the Muslims in general (Maghen, 2003, p. 282).

3. The "idealized practice" ultimately became the "living tradition" of the ancient schools of law. (Maghen, 2003, p. 283)

4. Schacht also uses "practice" to refer to "*amal ahl al-Madinah*" (the practice of Madinans) or "*ijma' ahl al-Madinah"* the Medinan scholarly consensus which embodies a key source in Maliki school (Maghen, 2003, p. 283).

5. Schacht uses the term "*practice*" to signify Pre-Islamic sunna " i.e *jahiliyyah*"(Maghen, 2003, p. 284).

He concedes the pre-Islamic Arabian origins of numerous fiqh norms specifically the ones concerning inheritance law(Maghen, 2003, p. 284). Contrary to the classic principles of fiqh, Schacht also believes that most of the Islamic law, including its sources, stemmed from a process of historical development (Isnaeni et al, 2021, p. 36; Forte, 1978, p. 4). Schacht claims that pre-Shāfi'ī (d.204/819), the legal schools of thought would give importance to the 'living tradition' instead of fully connected traditions attributed to the Prophet (Chaudri, 2017). He alludes to the claim that the Prophet Muhammad was never seen as a lawgiver and he states: "*Generally speaking, Muhammad had little reason to change the existing customary law. His aim as a Prophet was not to create a new system of law"*(Schacht, 1950).

However, many scholars have criticized Schacht`s theories. Mustofa Azami, concludes that Schacht`s theories on the origin of the hadith and its development are false. He argues that these theories are based on some of Schacht's misapprehension of the theory and terms formulated by the classic scholars of hadiths since these theories contradict the historical realities prevalent in the early Islamic world (Isnaeni et al, 2021, p. 36). Azami regards the e silentio method employed by Schacht as '*unscientific'* and mere '*unwarranted assumptions'*(Chaudri, 2017). Among the Western scholars who disapprove of Schacht's theories is Harald Motzki who raises concerns over the methodology adopted by Schacht and the limited sources, he deployed to reach his conclusions (Chaudri, 2017).

Appendage Status of Islamic Law During Colonialism

Islamic law and other customary laws were being implemented side by side in some regions of Nigeria even before the imposition of English common law (Yadudu, 2016, p. 33). However, following the imposition of the common law the nature of this harmony in the legal systems altered. Consequently, Islamic law was not allowed to exist either as a comprehensive legal system or as an independent partner of English common law. Rather, Islamic law has been domesticated as an appendix and tolerated nuisance to the preeminent "received" English laws and subjugated by the "*Nigerian*" legal system first introduced by the colonial administration and now operated remotely by firmly anchored institutions that survive as a colonial legacy (Yadudu, 2016, p. 34). The superimposed English legal system, its ideas, and institutions, have not only ejected the application of certain functional rules of the Shari'ah law but also condemned the retained rules to exist as appendages. The appendage status of Islamic law has made the substantive and procedural rules and the principles of Islamic law to be judged in academic spheres and by the judiciary not on their terms but through the lenses of the Englishman being repackaged as "*Nigerian law*" (Yadudu, 2016, p. 31).

The foremost step toward absolute repositioning Islamic law as an appendage was branding it a customary law. Anderson states that the British territory in Africa is divided in the context of the application of Islamic law into territories where legally Sharia law is considered a variety of "native law and customs" and the territories where Sharia is considered the third system distinct from English and customary laws. Surprisingly, Nigeria is a good example of a country where Sharia law is administered as a native form of law and custom (Anderson, 1960: 438). Legislative power was invoked to classify Islamic law as customary law during the colonial era (Oba, 2002, p. 826). It is clearly stated in the draft constitution vol I page (VII) that "*Rules of Islamic or customary law would or should eventually give way to the "deals of equality' as understood in the English law*"(Sulaiman, 1981, p. 12). The major determinant here is the statement, " *as understood in the English law*". This had put sharia under the shadow of English common law. Similarly, this marked the beginning of a new status assumed by Islamic law, the all-comprehensive law in northern Nigeria before colonization. Ever since then Islamic law is recognized in the Nigerian Constitution as "*Moslem Law*" either in usage as "Islamic law" or "Islamic personal law" and as a branch of customary law practiced in Nigeria; and as such, there have been counter and counter-repudiations of this notion by different authorities for decades. (Busari, 2021, p. 31) Yadudu(2016, p. 33) suggests that as a result of the colonial encounter, Islamic

law has been transformed in several ways: Islamic jurisdiction has been ousted totally in some areas and seriously curtailed in others, while in still other areas, it has been subdued and rendered subservient to the English-cum-Nigeria statutory laws.

However, in 1998 the supreme court of Nigeria made a breakthrough pronouncement in making a crystal clear differentiation between Islamic law and customary in the case of ALKAMAWA V BELLO & ANOR[4] when Wali JSC says: "*Islamic law is not the same as customary law as it does not belong to any particular tribe, it is a complete system of universal law most certain and permanent and more universal than common law*."(Nwafor, 2020) In the same vein, Justice Niki Tobi stresses the importance of Islamic law in the development of the Nigerian legal System and declares that Islamic law has a separate and distinct identity from customary law. As such equating the two or giving the impression that Islamic law is either an offshoot of or appendage of customary law is, to say the least an ignorant assumption or conclusion (Alkali et al., 2014, p. 8). Despite a clear difference, one could imagine the motive behind labelling Islamic law customary. Oba (2002, pp. 826-829) enumerates some ostensible motives of the colonialists as thus:

a. to relegate and retard the growth of Islamic law in Nigeria.

b. to permit the colonialists to impose their customs and values on their Muslim subjects by subjecting Islam (as a customary law) through repugnancy test, inconsistency with statute test, and public policy test before it can become applicable by Courts in Nigeria.

c. to justify the appointment of Common-Law judges who had not been trained in Islamic law to adjudicate on Islamic matters.

d. to outline the application limits of Islamic law; hence, Islamic law is not applied as universal law but rather as law binding only to two parties. Even in some cases, they argued that being Muslims of the two litigating parties (plaintiff and defendant) is not enough to apply the Muslim law in court, they have to be shown to have regarded themselves as being bound by Islamic law, otherwise, the Islamic law will not apply.

Cryptic Hands

British colonial administrative saw that Islamic law was well entrenched in northern Nigeria and it seemly impossible to be easily abrogated. As a result of that, they resorted to making use of their courts which were given unrestricted

jurisdiction on all matters and persons, and the ambiguous repugnancy clause to negate Islamic law to the extent that even if it was in existence it would be weakened. This could be done by making it customary law. In the same context proclamation of Islamic law as customary law requires substantiating proof and evidence. That is where Schacht and his theories on the origins of Islam came in. Schacht who worked for the British colonization provided the necessary proof as he presented his views on Islamic law in northern Nigeria to the colonial administration. Schacht says:

"*When I visited the region under the auspices of the Colonial Office, between February and April of 1950, to report on the position of Muhammadan law in Northern Nigeria, I could not fail to be struck by the remarkable features of Islam there…..*" (Schacht, 1957, p. 123).

This is an unblemished suggestion that he was invited to give a meticulous elucidation as they were trying to put all hands on deck to subdue Islamic law in the region. Schacht makes account of his visit and points out the significance and nature of Islamic jurisprudence in the region when he says:

"*In contrast with the wealth of information available on all aspects of Islam in French West Africa, little has been known so far of the part played by their religion in the life of the most numerous group of Muslims in that neighborhood the Muslims of Northern Nigeria, who comprise two-thirds of its more than 15 millions of inhabitants. Scattered items of information can be found in various works on the anthropology, the administration and so on of Northern Nigeria, but I do not know a single publication that treats Islam in Northern Nigeria as such"*(Schacht, 1957, p. 123).

Perhaps, Schacht's visitation to different Shariah courts and various *Alkalis* (Schacht, 1957, p. 125) was geared towards conversing his theories with them to minimize the tension when the new status of Islamic law materialized.

Lugard the British colonial administrator made a clear declaration about the nature and how the change they planned to effect would be when he says: "*The time is now, in my opinion, ripe for a change, but the changes must be gradually introduced if they are to be effective, and not alienate the confidence of the people"*(-Sodiq 1992, p. 97) Yes, the change was gradual, it took several steps by colonialism to subjugate Islamic law in the norther Nigeria such as, abolition of caning and capital punishment and limit was made to Islamic law enforcement under the umbrella of Native law and custom until 1946 when it was made a regional legislation on the recommendation of Brooke Commission,(A. B. Mahmud, 1988) but all in all the Schacht views gave the British a clear impetus and direction to

achieve their aims, and relatively retain the confidence of some credulous Nigerian Muslims as Islamic law is reduced to the narrow confine of Islamic personal law as it is contained in the constitution of Nigeria(*Constitution of the Federal Republic of Nigeria*, 1999, p. 288).

Conclusion

This study traces the historical antecedent of Islamic law in Nigeria before the British colonization and after colonization. It is found that the Islamic legal system, experienced much deprivation towards the end of the colonial era in Nigeria. Its powers were truncated and its jurisdiction was curtailed. It was made appendage to English common law. The status that makes Islamic law a subject to repugnancy test. It is established that there is a role played by the Schachtarian theory on the origins and development of Islamic law in making the Islamic law in Nigeria customary law. The effect of this has changed the status of Islamic law in the constitution of Nigeria until days.

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