

NATURE AND SOURCES OF NIGERIAN LEGAL SYSTEM: AN EXORCISM OF A WRONG NOTION

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ABSTRACT

Nigeria has a pluralized legal system which is due to the nature and sources of its law. Following the amalgamation of the northern and southern Protectorates in 1914 by the British Colonial administration, the entity Nigeria came into being. Before the coming of the colonial administration, Islamic law applied in most of the states of the northern part of Nigeria especially Kanem Borno Empire and the Sokoto Caliphate. In the Southern part of the country, customary law applied and each community was governed by its peculiar type of custom or tradition. After Nigerian became an independent state, the body vested with the power to make law made laws for the good governance of the country. Foreign laws equally form part of the body of laws that form the sources of the Nigerian law in addition to the English law, Islamic law, customary law and the local legislations. The paper intends to make an overview of the nature and sources of the Nigerian legal system and correct a wrong notion that Islamic law is the same with customary law.

Key words: Nigerian Legal System, Islamic law, Customary Law.

1. Introduction

The entity Nigeria was found by Britain following the amalgamation of the northern and southern protectorates in 1914.¹ Before the coming of the colonial masters, the Nigerian people existed as different, independent and unrelated entities. Muslims constitute the majority population in the northern part of the country.² Islam came to northern Nigeria through Kanem Borno Empire. The activities of Arab merchants who came to the region for trading were instrumental to the spread of Islam in Borno.³ Other parts of northern Nigeria (Hausa Land) also came into contact with Islam through trading.⁴ Though the Hausa community accepted Islam, they however mixed the practice of Islam with traditional idol worshipping. This resulted in the waging of jihad on the Hausa Kings by Sheikh Usman Dan Fodio in order to sanctify the practice of Islam in Hausa land. After the Sokoto Jihad, most part of the Hausa land embraced Islam and actively practiced Sharia.⁵ Some parts of the north have a significant population of Christians.

¹ It is argued that the reason for the amalgamation was not just political but also economic. There was need for £100,000 subvention annually to pay wages in the north and which was hoped to be generated from the £200,000 surplus of the southern protectorate. See Daniels, F.A., "Historical Survey of Amalgamation of the Northern and Southern Police Departments of Nigeria in 1930", (2012), Vol. 8 No.18, European Scientific Journal, at 211.

² Abdulkadir, M.S., "Islam in the Non-Muslim Areas of Northern Nigeria, C. 1600-1960", (2011), Vol. 1 No. 1, Ilorin Journal of Religious Studies (IJOURELS), at 2.

³ http://www.shsu.edu/2his-ncp/kanem-Born_o.html viewed on 24 October, 2013.

⁴ Available at <http://www.ascleiden.nl/?q=content/webdossiers/islam-nigeria> viewed on 24 September, 2013.

⁵ Mahmud A.B., (July, 2000), Adoption and Implementation of Sharia Legal System in Zamfara State. Paper presented at the Jamatul Nasrul Islam sponsored seminar on Sharia in Jigawa State.

Christianity reached the north through the activities of Christian missionary activities. The activities of the missionaries started from the North Western part of the North which borders the Southern part of the country. The presence of the colonial administration has significantly tamed the spread of Islam in Nigeria thereby giving a green light for the spread of Christianity in the north. The colonial administration through various policies stopped the implementation of sharia, especially Islamic criminal law in the northern states of the country.⁶ Though significant part of the north practice Islam, there is however a significant number of Christians and even idol worshippers in the north.

Before the arrival of the British conquerors, the Nigerian societies have a system of judicial and political administration. Mainly, there are chiefly and chiefless societies.⁷ In the north, Sokoto and Kanem Borno empires had a formal and rigid system of administration. The kingship was hereditary and a hierarchical order exists where the emirs were assisted by deputies.⁸ Islamic law was applicable in both private and public lives of the people and as such certainty in the administration of justice was pronounced amongst the people.

The western part of Nigeria was dominated by the Yoruba speaking people.⁹ In Yoruba land, Oba was the head of government and he was assisted by deputies like their northern counter parts. It has mainly a patriarchal outlook, customs and traditions were respected and put to practice in the administration of government and judiciary.¹⁰ Islam reached Yoruba land close to the 18th Century even before the Sokoto jihad.¹¹ Some learned Islamic scholars came to Yoruba land by 1830 through Ilorin.¹² Muslims constitute the majority population in Yoruba land up to this date.¹³ Christian missionary activities arrived in the south western part of Nigeria in the 18th Century. The activities of the Christian Missionaries in the region have significantly resulted in setting back the pace of the spread of Islam.

The South Eastern part of Nigeria on the other hand is dominated by the Ibos.¹⁴ The Igbos in the Southeast was chiefless in nature. It had institutions which were more republican in structure and function. The council of elders was charged with the administration of justice in accordance with the custom and culture of the people. The council of elders was seen as the fountain of justice and was assisted by officials in the enforcement of law and order.¹⁵ Islam reached the south eastern part of the country following the jihad of Usman Dan Fodio.¹⁶ A place like Auchi is dominated by Muslims.¹⁷ Generally, the south eastern Nigeria is dominated by non-Muslims.¹⁸ This is due to the activities of the Christian Missionary in the region that succeeded in converting most part of the region to Christianity.¹⁹

Nigeria became an independent state in 1960 and Lagos was made the Capital of Nigeria.²⁰ Nigeria suffered under military dictatorship for 16 years.²¹ Thirty months of civil war between Nigeria and South Eastern part of the Country resulted in the death of over 1 million people.²²

Nigeria is believed to be Africa's most populous country and the most populous black nation in the world with over 160 million people.²³ This population comprises of over 500 ethnic groups.²⁴ Muslims make up 50 percent of the population, Christians 40 percent and 10 percent traditional religion.²⁵ Nigeria is a secular state; the Constitution states that "The

⁶ Odeh, L.E., "The Resurgence of Sharia Issue in Contemporary Nigeria 1999-2009", (2010), Vol. 9 No. 1&2, Benue Valley Journal of Humanities, at 3.

⁷ Tobi, N., *Sources of Nigerian Law*, (Lagos: M.J. Professional Publishers Ltd, 1996), at 1.

⁸ Like Waziri, Kinandi, etc. see El-Yakub, K., "An Auto-Ethnographical Study of Integration of Kanuri Traditional Health Practices into the Borno State Health Care System" (Ph.D. Thesis, Durham University, 2009), at 52.

⁹ The Yoruba people now occupy the south western part of Nigeria. They are immigrants from a region where they came under the influence of Arabs, ancient Egyptians, Etruscans and even the Jews. The Arab movements were believed to have influenced their immigration to their present location. See Biobaku, S., *The Pattern of Yoruba History* available at www.disaukzn.ac.29/webpage/dc/asjan58.14/asjan58.14.pdf viewed on 25 September, 2013.

¹⁰ Tobi, N., n. 7, at 2.

¹¹ Fafunwa, A.B., *History of Education in Nigeria*, (UK: George Allen and Unwin Ltd, 1979), at 57.

¹² Like Ahmad Qifu and Uthman bin Abubakar who came to Ilorin during the reign of Oluyedun and established large Islamic schools. Ibid

¹³ Idol worship is still found in the south western part of the country. Unfortunately Muslims equally participate or combine idol worship with Islam for example the worship of *Osun* deity.

¹⁴ They are equally referred to as Igbos. They are one of the largest ethnic groups in Africa making up 17% of the Nigerian population. They are equally found in significant number in Equatorial Guinea and Cameroon. See <http://ucr.edu/egneref/igboz.htm> viewed on 26 September, 2013.

¹⁵ Ibid at 3.

¹⁶ Shehu Usman Danfodio is the leader of the Sokoto Caliphate. He led the Sokoto jihad on the Hausa emirs and succeeded in establishing an Islamic state. See Islahi, A., *Shehu Usman Dan Fodio and his Economic Ideas* http://mpira.ub.uni-muenchen.de/40916/1/MPRA_paper_40916.pdf. viewed on 25 January, 2014.

¹⁷ www.etsakoprogressive.org/web/index.php?option=com-content&view=article&id=63&Itemid=64 viewed on 28 September, 2013.

¹⁸ www.anglicanhistory.org/africa/dike_origins1957.html 20 September, 2013.

¹⁹ There is still the practice of idol worshipping in the south east, though not pronounced as in south west.

²⁰ www.historycentral.com/Africa/NigeriaIndep.html viewed on 4 October, 2013.

²¹ <http://www.freedomhouse.org/report/freedom-world/2013/nigeria> viewed on 4 October, 2013.

²² Ibid

²³ The north has around 60% of the total population of Nigeria which is around 100 Million people. See www.prb.org/Articles/2006/InTheNewsTheNigerianCensus.aspx viewed on 1 October, 2013.

²⁴ Hausa Fulani has the lion share with 29%, Yoruba 21%, Igbo 18%, Ijaws 10%, Kanuri 4%, Ibibio 3.5%, Tiv 2.5% see Miles, J., *Customary Islamic Law and its Development in Africa* (UK: African Development Bank, ND), at 105.

²⁵ www.nairaland.com/274676/nigerian-population-50-muslim-40 viewed on 2 October, 2013.

Government of the Federation or of a state shall not adopt any religion as state Religion.”²⁶ Following the democratization of Nigeria, some states have attempted to adopt sharia law as their state law.²⁷ This is in accordance with the right to religious freedom guaranteed by the Nigerian Constitution.²⁸

Similarly, part of the fundamental right provision on freedom of thought is the permission of religious instruction in schools and religious ceremonies.²⁹ The Constitution equally provides for the establishment of Sharia Court of Appeal with civil jurisdiction to determine matters of Islamic personal law.³⁰ All of these are pointers to the fact that the Nigerian Constitution has given the green light for states to adopt sharia law as their state law.

2. Nature And Sources Of Nigerian Legal System

Nigeria became a Federation in 1954 with the Introduction of a Federal Constitution by the Nigerian (Constitution) Order in Council 1954.³¹ There are presently 36 states and a federal Capital Territory.³² The National Assembly has the exclusive jurisdiction to legislate on matters in the exclusive legislative list and all laws promulgated by the National Assembly are termed Act. Nigeria operates a bicameral legislature consisting of the Senate and House of Representative. The Senate is the Upper House of parliament consisting of 109 elected members, 3 from each state of the federation and one from the Federal Capital Territory.³³ The Senate is headed by a Senate President who presides over the proceedings of the House and in his absence the Deputy Senate President presides.³⁴ Both of whom are elected by members of the Senate from amongst the members of the Senate. The House of Representatives is the Lower House with 360 members from all the states of the federation.³⁵ Membership of the House of Representatives is 4 years term and is headed by Speaker of the House. In the absence of the Speaker, the Deputy Speaker heads the House.³⁶ Both Federal and state Governments can legislate on matters in the concurrent list and laws made by the state governments are termed law. Where there is any conflict between a State law and the Federal law, the Federal law shall prevail and the State law shall be void to the extent of its inconsistency.³⁷

The Local Governments constitutes the third tier of government and laws made by the Local Government are called bye-law.³⁸ There are currently 774 local Governments in Nigeria.³⁹ The local government is headed by a Local Government Council Chairman who is assisted by councilors in running the affairs of the local government.⁴⁰

The influence of successive military administrations in shaping and defining the nature of Nigeria’s legal system needs not be over emphasized. The incessant intervention of the military in Nigeria’s political development has left indelible mark in its legal system.⁴¹ The attitude of the military has been that of dismantling of the structure of government and assuming both executive and legislative functions.⁴² It is commendable that the judiciary has survived the era of the military with least interference.⁴³ However the military administrations in Nigeria have a bad record of human right abuses with its decrees and edicts. For example under the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), the military administration is immune to any legal liabilities in respect of any action done pursuant to the Decree i.e. detention of persons without charging them to court if that person is a threat to state security.⁴⁴ Similarly, the Federal Military Government (Supremacy and Enforcement) of Powers Decree No. 12 of 1994 and Constitution (Suspension and Modification) Decree No. 107 ousted the jurisdiction of the Courts to entertain any civil proceedings that arise from anything done pursuant to the provisions of any Decree.⁴⁵

²⁶ Section 10 1999 Constitution Federal Republic of Nigeria

²⁷ Many states in northern Nigeria adopted the Sharia criminal law after Nigeria returned to a democratic government in 1999.

²⁸ Section 38(2) of the 1999 Constitution of the Federal Republic of Nigeria (FRN)

²⁹ Ostien P., and Dekker, A., “Sharia and National Law in Nigeria”, in *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries*, Otto J.M. editor, (Egypt: Leiden University Press, 2010), at 585.

³⁰ Section 275 of the 1999 Constitution FRN

³¹ Currently, there are 193 countries in the United Nations and many nations have adopted the federal system of government. see Anderson, G., *Federalism: An Introduction* (Canada: Oxford University Press, 2008), at 7.

³² Tobi, N., n. 7, at 59.

³³ Section 48 of the 1999 Constitution

³⁴ Section 5(1)(a) of the 1999 Constitution

³⁵ Section 49 of the 1999 Constitution

³⁶ Section 5(1)(b) of the 1999 Constitution

³⁷ Section 4(5) of the 1999 Constitution

³⁸ Mukoro, A., *The Interface Between Customary Law and Local Government Legislature in Nigeria: A Retrospect and Prospect* available at www.unpan1.un.org/introdoc/groups/public/documents/.../UNPAN029880.pdf viewed on 2 October, 2013.

³⁹ Section 3(6) of the 1999 Constitution

⁴⁰ Ladan, M.T., (May 2009), *Local Government System in Selected Countries:-Lessons for Nigeria*. Paper presented at a National Summit on Local Government in Nigeria:- A Tier or Parestatal ?-Issues on Constitutionalism, organized by The Leading Edge Academy in Collaboration with West African Development Dialogue, Accra at Shehu Musa Yar’adua Centre, Abuja.

⁴¹ Asien, J. O., *Introduction to Nigerian Legal System* 2nd ed., (Nigeria: Ababa Press Ltd, 2005), at 8.

⁴² Ibid

⁴³ Ibid

⁴⁴ Section 4 State Security (Detention of Persons) Decree No. 2 of 1984 (as amended)

⁴⁵ During the Buhari/Idiabon administration the Military administration was strongly criticized for its disrespect for human rights and the rule of law.

The military in Nigeria ruled by Decrees and Edicts and their laws are passed with dispatch because they are not subjected to political considerations and bureaucratic bottle necks hence been more active in the areas of law reforms than the civilian regime. The present day Nigerian Constitution is a product of the Military administration.⁴⁶ Similarly, all laws made by the military administration have received constitutional blessing by virtue of Section 315 of the 1999 Constitution which states that all pre 1999 laws are valid in so far as they are not in conflict with the provisions of the 1999 Constitution.⁴⁷ By this provision, decrees and edicts are presumed valid and enforceable in the present democratic Nigeria as if promulgated by the National Assembly or States Houses of Assemble. However, the word 'Decree' and 'Edict' will be replaced by 'Act' and 'Law' respectively.

Sources of Nigerian Legal System

Nigeria is a pluralized state due to its diverse multi-cultural, ethnic and religious diversity. That has substantially influenced the nature and sources of the Nigerian legal system. The nature of the Nigerian legal System is a microcosm of Africa at large.⁴⁸ Many factors have played significant role in shaping the present day Nigerian Legal System. Islamic law (especially in the north), local customs and traditions, English law, local legislations, court decisions and foreign laws are key players whenever discussion is to be made on the nature of the Nigerian legal system. The incessant interjection of the military in the administration of government by over throwing democratically elected governments, mostly for selfish reasons and the introduction of decrees that suspend the Constitution and usurp the powers of the courts to entertain matters that touch on the validity or otherwise of decrees passed into law by the military. All these play significant role in defining and shaping the present day Nigerian legal system. Basically, the sources of the Nigerian Legal system include the received English law, Nigerian Legislations, Islamic law, customary law and Case law. The stand of case law is however subject to debate. This is because the primary responsibility of the court is the interpretation of the laws made by the legislature and not to serve as a law making body.

Received English Law

Since Nigeria's historical link with Britain around 1861, English law has remained a major source of the Nigerian Law.⁴⁹ By virtue of the Colonial Laws Validity Act 1865, the Crown can legislate by Order-in-Council for any colony, protectorate or trust territory under the colonial Administration. And Nigeria being a Colony of Britain was subjected to the laws or enactments made by the Colonial Administration. Similarly, no local legislation could alter any common law provision. The umbilical connection between Nigeria and Britain has remained valid and strong up to this day. Section 45 of the Interpretation Act clearly states "Subject to the provisions of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1990, shall be in force in Lagos and in so far as they relate to any matter within the exclusive legislative competence of the federal legislature, shall be in force in elsewhere in the Federation."

Similarly, the High Court Laws of Eastern,⁵⁰ Northern,⁵¹ and Western Regions⁵² have provided for the application of English law in Nigeria. Nigerian judges are mostly trained along-side the English law style judicial system and that affection towards English law is glaring from their decisions. The Supreme Court in *Ibidapo V Luthansa Airlines*⁵³ held that subject to Section 315(1) of the 1999 Constitution dealing with existing laws, all the received English Laws, Multi-Lateral and Bi-Lateral agreements concluded and extended to the Federal Republic of Nigeria shall remain valid and enforced in Nigeria unless expressly repealed or declared invalid by a court of law or tribunal established by law. To that effect, the Carriage of Goods by Air (Colonies Protectorates and Trust Territories) Order, 1953 which is a Colonial Legislation was held to be part of the body of Nigerian Law even though it is omitted from the laws of the federation, 1990 since it had not been repealed nor declared invalid by any court of law.

Nigeria became an independent entity on the 1st of October, 1960.⁵⁴ The result thereof is that Nigeria has become a sovereign entity and as such the Crown could no longer legislate for Nigeria. Similarly, the Colonial Laws Validity Act 1865 was

⁴⁶ General Abdulsalam's administration established the Constitutional Committee that drafted the present 1999 Constitution. However, the preamble to the constitution states that "We the people..." this term has been hotly debated because the Constitution is a product of the military administration and as such is not a representation of the voice of the Nigerian people. Using the word "we" as if it was a product of the representatives of the people is a misrepresentation and a mockery of democracy.

⁴⁷ Decrees are laws made by the Military Administration at the central level while Edicts are those laws made by the Military at the state level.

⁴⁸ Mwalimu, C., *Nigerian Legal System* Vol. 1, (New York: Peterlang Publishing inc, 2007), at 5.

⁴⁹ Nwabueze, R.N., "The Dynamics and Genius of Nigeria's Indigenous Legal Order", (2002), Vol. 1, Indigenous Law Journal, at 155.

⁵⁰ sections 14 and 20 of the High Court Law, Eastern Region No. 27 of 1955

⁵¹ Section 28 and 28a of the High Court Law, Northern Region No. 8 1955.

⁵² Section 4 and 5 of the Laws of England (Application) Law, Western Region Cap 60, Laws of Western Region

⁵³ (1997) 4 NWLR 124

⁵⁴ Nigeria Independence Act, 1960 (8 and 9 EL.2.2, C55).

abolished by the Independence Act 1960. English laws are thereof applicable with persuasive influence in Nigeria except expressly declared void.⁵⁵

Most of the then English laws were promulgated into local legislations some with no changes in their structure and wordings.⁵⁶ Unfortunately, most of them remain unchanged in the present day Nigeria despite the fact they have been repealed or amended in England for been unsuitable for the present generation. These laws are obsolete and archaic and do not serve the purpose intended in the present day due to the changes and advancement in the world community. These and other factors largely contribute in making Nigerian laws and the Nigerian legal system unfit and not pragmatic in addressing contemporary challenges. The absence of a law on child's right which takes Islamic principles into consideration so that it could carry the Muslims along and enjoy public popularity is an example of the unfortunate scenario of the Nigerian *corpus juris*.

The received English law is mainly made up of the common law of England,⁵⁷ the Doctrines of Equity and the Statutes of General Application enforced in England on or before October 1, 1900. The common law is the basic law of the United Kingdom that was developed by the Common Law Courts. Its distinctive characteristics which differentiate it from other laws such as the Civil Code of France which is not in a comprehensive code but rather a development of judges and its principles are to be discovered in previous cases.⁵⁸ Equity on the other hand is a product of the Chancery Court that came into being to cushion the hardship of the common law.⁵⁹ In the earliest stage of its development, it operated purely on ad hoc ground of fairness but it has long ago developed into a well established and a reasonably ascertainable body of principles.⁶⁰ Equity generally exhibits its philosophy of fairness based on certain maxims for example equity acts in *personam*, equity follows the law, delay defeats equity, etc. In *Oil Field Supply Ltd. V Johnson*⁶¹ the court held that disagreement between the Chancery Court and Common Law Courts became apparent and litigants are sometimes caught in between. That was settled by King James I⁶² in favour of equity. The Chancery Court was developed by the Judicature Act of 1873 and 1875 and both equity and common law were administered concurrently in the same court subject however to the superiority of equity in the event of any conflict.⁶³

Statutes of General Application that were in force in England on or before the 1st day of January 1900 constitute the third part of English law that applies in Nigeria.⁶⁴ However, by virtue of the Law of England (Application law) of 1959, a Statute of General Application does not apply to the old Western Region. There are basically two requirements to be determined before a Statute of General Application applies in Nigeria. The former Federal Supreme Court in *Lawal V Younan*⁶⁵ reaffirmed the decision in *Young V Abina* that such statute must be applicable to the whole of the United Kingdom.⁶⁶ The second is on the date of the application (1st January, 1900). In *Young V Abina*,⁶⁷ the West African Court of Appeal held that it would still be applicable in Nigeria even if it has been repealed or amended in England after 1st January, 1900. However in *Lawal V Ejidike*⁶⁸ the Court of Appeal held that it will be ridiculous for Nigerian Courts to continue to apply a law of England even if that law has ceased to apply in England. Hence a Statute of General Application only applies in Nigeria only if it remains a valid and enforceable law in England on the date in question.

Nigerian Legislation

Legislation is a potent and formidable source of Nigerian law. Generally, Nigerian legislation is divided into primary and secondary legislation. Primary legislation refers to those laws made by a body or arm of government that is primarily responsible for law making. For example laws made by the National Assembly, State Houses of Assembly or Military Administration during Military era.⁶⁹

All the Federal laws made by the federal government of Nigeria were published in a series of 24 volumes document in 1990.⁷⁰ This was revised in 2004 in a 16 volume document containing all Acts and subsidiary legislations that were in force on 31st December, 2002.⁷¹ This has significantly helped all those involved in the practice of law especially judges, lawyers and academicians to have an easy grasp of almost all the laws in Nigeria.

⁵⁵ *Ibidapo V Luthansa Airline* (1997) 4 NWLR 124

⁵⁶ E.g. Evidence Act CAP E 14 LFN 2004.

⁵⁷ The common law is developed by the common law courts made up of the common law courts of kings Bench, Courts of Common Pleas and Courts of Exchequer

⁵⁸ Park, A.E.W., *Sources of Nigerian Law* (Lagos: African Universities Press, 1963), at 6.

⁵⁹ Common law is the law applicable to the four realms of the United Kingdom i.e. England, Ireland, Scotland and Wales.

⁶⁰ Park, A.E.W., n. 58, at 9.

⁶¹ (1987)2 NWLR 625

⁶² 1605-1625

⁶³ Judicature Act 1873, Section 25(1), (it is now Supreme Court Judicature (Consolidation) Act, 1925) Section 44

⁶⁴ Available at <http://www.motherlandnigeria.com/legal.html> viewed on 29 September, 2013.

⁶⁵ (1961) 1 All NLR 245 per Brett J

⁶⁶ United Kingdom consists of Great Britain and Northern Ireland. Britain comprises of England, Wales and Scotland

⁶⁷ (1940) 6 WACA 180

⁶⁸ (1997) 2 NWLR 319

⁶⁹ This is because the primary responsibility of these bodies is law making. The legislature in a civilian administration is responsible for making laws, while under military dispensation, the Supreme Military Council is both the legislature and executive arm of government.

⁷⁰ Referred to as Laws of the Federation of Nigeria, 1990

⁷¹ Referred to as Laws of the Federation of Nigeria, 2004

Case Law

Like most countries colonized by Britain, Nigeria operates the common law system.⁷² Ordinarily the primary duty of the judiciary is not the making of laws but rather interprets and applies the laws made by the legislature. However, the pronouncement by the courts over the years governing specific legal situation constitutes case laws. If a judge is faced with issues not governed comprehensively by the existing law, the judge is therefore advised not to remain helpless but act on the maxim that says whenever there is a wrong, there is always a remedy to make fresh rules or to extend the existing laws to deal with novel cases. This positive move adds to the corpus of existing laws and is sustained by the operation of the doctrine of judicial precedent.⁷³

In Nigeria, the Supreme Court is the highest court and its decision is binding on all other courts in the federation.⁷⁴ Next to the Supreme Court is the Court of Appeal.⁷⁵ The Court of Appeal is followed by the Federal High Court⁷⁶, State High Court⁷⁷, Sharia Court of Appeal⁷⁸ and the Customary Court of Appeal⁷⁹.

Islamic Law

Islam is a religion and a complete way of life. It is predicated on total submission to the wills of Allah as reflected in the Glorious Qur'an and taught by Prophet Muhammad (PBUH). Its scope covers *ibadat* (relationship between made and his creator) and *muamalat* (relationship between man and other creations). It is comprehensive, organic and all embracing.⁸⁰ Islamic law has the Qur'an and sunnah as its primary source, *ijmah* and *qiyas* as secondary source and *istihsan*, *istihlah* and *masalih almursalah* and *adat* as subsidiary source.

Islamic law is part of the sources of Nigerian law. The 1999 Constitution recognizes Islamic law of the Maliki School of jurisprudence in respect of Islamic personal law and it established the Sharia Court of Appeal.⁸¹ It states that there shall be a Sharia Court of Appeal for every state that requires it. This goes to establish the existence of Islamic personal law under the Nigerian Constitution. It is important to mention that the Constitution states that the Sharia Court of Appeal shall be for state that requires it. That goes to show that it is not every state in Nigeria that has the Sharia Court of Appeal. The Court exists in States where there is a substantial number of Muslims. In the Northern States, Sharia Courts of Appeal are found due to the Muslim population in those states. However, no Sharia Court of Appeal exists in the South Eastern States because the population of these states is predominantly non-Muslims. The Constitution of Nigeria first recognized or established the Sharia Court of Appeal under the 1979 Constitution. This however does not mean that Islamic law does not exist under the Nigerian Constitution before 1979. This is because under the former Constitutions the right to religious freedom is recognized and that by extension means recognition of Islamic law. The constitution provides

“(1): Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

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

(3): No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.”⁸²

There was attempt to establish a Court of Appeal which will stand next to the Supreme Court in hierarchy to entertain cases from Sharia Courts of Appeal under the 1979 Constitution.⁸³ That would have saved the delay faced by sharia cases when appeal reaches the Court of Appeal. Due to the number of appeals and the numerous responsibilities of the justices of the Court of Appeal, sharia cases last long without been disposed of and that poses a serious challenge to sharia cases today. Presently, a memorandum has been submitted by the *Kadis* of the Sharia Court of Appeal and the judges of the Customary Court of Appeal of the north eastern states to establish a Court of Appeal to entertain cases from the Sharia court of Appeal and to extend the jurisdiction of the Sharia Court of Appeal to include Islamic criminal law. If this positive move succeeds, it will go a long way to relief the challenges facing the administration of Sharia in Nigeria today.

As at present, the hierarchy of the Courts with respect to sharia related cases are as follows Sharia courts, Upper Sharia Courts, Sharia Court of Appeal, Court of Appeal and Finally the Supreme Court.

⁷² Nwabueze, R.N., n. 49, at 115.

⁷³ Ibid

⁷⁴ Section 231 of the 1999 Constitution

⁷⁵ Section 240 of the 1999 Constitution

⁷⁶ Section 249 of the 1999 Constitution

⁷⁷ Section 270 of the 1999 Constitution. The National Industrial Court was also established under Section 254C of the 1999 Constitution Third Alteration Act, 2011

⁷⁸ Section 275 of the 1999 Constitution

⁷⁹ Section 280 of the 1999 Constitution

⁸⁰ Bennette, C., *Muslims and Modernity: Current Debates*, (New York: Continuum, 2005), at 56.

⁸¹ Section 275 1999 Constitution

⁸² Article 35 of the 1979 Constitution

⁸³ Article 240 and 241 of the 1979 Constitution

With respect to Islamic criminal law, that has been a subject of debate over the years. The Constitution did not categorically mention Islamic criminal law nor does it categorically mention the application of Islamic law of crime. In 2001, Zamfara state promulgated Islamic law of crime which was followed by many other states in northern Nigeria. This has led to opposition from non-Muslims, NGOs and the Western world.⁸⁴ The bond of contention was that adoption of Islamic criminal law amounts to adoption of state religion which is expressly prohibited by the Nigerian Constitution.⁸⁵ This argument is unfounded in view of the fact that the Constitution has guaranteed the right to religion to every citizen of Nigeria and by extension the practice of Islamic criminal law. Islamic law is by its nature organic and Muslims are urged to practice Islam in *toto*.⁸⁶

Customary Law

According to the Evidence Act, custom is “a rule which in a particular district, has from long usage, obtained the force of law.”⁸⁷ Custom guides in solving practical question such as those related to moral principles.⁸⁸ Custom is therefore the practices and usages of district communities which are seen as a source of obligation and contemporary legal culture.⁸⁹ Before the coming of the colonial masters, parts of Nigeria that are non-Muslims acted on customary law in their day to day activities.⁹⁰ It was used both in their public and private lives like punishment and marriage ceremonies. In *Oyewunmi Ajagunbade III V Ogunsean*, Obaseki JSC observed that customary law is

“The organic and living law of all indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people.”⁹¹

For the courts to accept any customary law, it must contain certain characteristics the absence of which indicates that the practice falls short of being described as custom. First of which is that the custom must be in existence at the time the issue in question is brought before the court. In *Lewis V Bankole*, Speed Ag said “existing natural law and custom and not that of bye gone days.”⁹² Secondly, a custom must be a custom as well as law. The element of law in custom is important because it is that which in reality carries sanction in the event of breach.⁹³ While the point is conceded that disobedience of a custom may attract some form of societal punishment, it lacks that instrumental sanction which is definite and precise.⁹⁴ Similarly, a custom must enjoy acceptability from the people before it enjoys recognition of the court. By its nature, customary law originates from the practice of the people and it is not codified in a document form. It therefore follows that a custom is unwritten and flexible in nature. A custom practiced a century ago may not be applicable today because with time, circumstances and development, people develop their customs to agree with reality on ground. Osborn CJ observed in *Lewis V Bankole*, thus

“...indeed, one of the most striking features of West African native custom to my mind is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its individualistic characteristics.”⁹⁵

Universality of application in the substance of the customary law is the last feature of the Nigerian customary law. Though local variations exist to differentiate between different customs depending on the tribe or ethnic group but the form and content may be similar.⁹⁶

Generally, customs are subjected to validity tests before it becomes applicable. It must not be repugnant to natural justice, equity and good conscience or incompatible directly or by implication with any law.⁹⁷ It must equally not be contrary to public policy.⁹⁸ The problem however is the parameter to determine whether a custom does fall contrary to any of the validity tests. There is no defined rule or guideline to determine the validity of a custom. The colonial administration simply introduced these tests to sideline or otherwise make inapplicable customs which they feel does not satisfy their test or are unfit to be applicable. In the southern region, many customs were tagged repugnant to natural justice equity and good conscience during the days of colonial administration.⁹⁹ Though the tests were introduced by the colonial administration, it continues to apply even after independence. Hence for a custom to apply in Nigeria, it must pass the validity tests. In *Mariyama V Sadiku Ejo* the customary law of the area was that a child born within 10 months after divorce belonged to the former husband. On appeal to the

⁸⁴ Okpanachi, E., “Between Conflict and Compromise: Lessons on Sharia and Pluralism from Nigeria’s Kaduna and Kebbi States”, (2011), Vol. 25, Emory International Law Review, at 897.

⁸⁵ Section 10 of the Constitution

⁸⁶ This is based on the teachings of the Qur’an and sunnah of the Prophet (PBUH). See Qur’an 22:11

⁸⁷ Onokah, M.C., *Family Law*, (Nigeria: Spectrum Law Series, 2003), at 69.

⁸⁸ Saussine, A.P. and Bernard, J., *The Character of Customary Law: Legal, Historical and Philosophical Perspectives*, (USA: Cambridge University Press, 2007), at 1.

⁸⁹ Bederman, D.J., *Custom as a Source of Law*, (USA: Cambridge University Press, 2010), at ix.

⁹⁰ Yakubu, A., *Harmonization of Laws in Africa*, (Lagos: Malthouse Press Ltd, 1999), at 25.

⁹¹ (1990) 3NWLR 182 at 207

⁹² (1908) 1NLR 81

⁹³ Tobi, N., n. 7, at 106.

⁹⁴ Ibid

⁹⁵ (1908) 1NLR 81

⁹⁶ Tobi, N., n. 7, at 110.

⁹⁷ Section 27(1) High Court of Lagos Act

⁹⁸ Section 14(3) Evidence Act

⁹⁹ Onuoha, A., “Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue”, (2008), Vol. 10, Issue 2, The International Journal of Not-for-Profit Law, at 6.

High Court, the decision was reversed on the ground that the law was repugnant to natural justice and the child should be returned to its natural father.¹⁰⁰

The Evidence Act has clearly designed the manner of establishing that a custom really exists. It states that a custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or proved to exist by evidence.¹⁰¹ The burden of proving a custom shall lie on the person alleging its existence. By this provision, a custom can be judicially noticed or be proved to exist by evidence through witnesses and texts.¹⁰²

3. Exorcising The Wrong Notion

The wrong notion that Islamic law is the same as customary law originated from the British Colonial Administration. This can be seen from the laws put in place by the colonial administration. The Native Courts Ordinance 1914 provided that "Native law and custom includes Islamic law."¹⁰³ It is worthy to mention that the intention of the colonial administration in making Islamic law the same as customary law is aimed at taming Islamic law hence subjecting it to the validity tests.

A cursory look at the features of customary law will reveal that Islamic law is indeed not the same as customary law. Customary law originates from the long practice of the people but Islamic law originates from Allah the lord of mankind. The Qur'an speaks "And we have made for you a law so follow it and not the fancies of those who have no knowledge."¹⁰⁴ Imam Tabri commenting on this verse stated that the sharia in the verse means the path or law of Allah which he has put in place for generations that came even before us.¹⁰⁵ Similarly, customary law applies to a particular group of people, meaning each community has its custom which is distinct from that of other community. On the contrary, Islamic law is universal in nature. The Qur'an provides "We have not sent you but to the whole of mankind"¹⁰⁶ Ibn Kathir opined this verse has shown that the message of the prophet (Islamic law) is a universal message.¹⁰⁷ The Qur'an states further

"Say, [O Muhammad], "O mankind, indeed I am the Messenger of Allah to you all, [from Him] to whom belongs the dominion of the heavens and the earth. There is no deity except Him; He gives life and causes death." So believe in Allah and His Messenger, the unlettered prophet, who believes in Allah and His words, and follow him that you may be guided."¹⁰⁸

Furthermore, customary law is flexible but Islamic law is not because the revelation of the Qur'an has been completed and no person is allowed to make any changes to the Qur'an or traditions of the Prophet (PBUH). The Qur'an states "...This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion..."¹⁰⁹ It is however important to mention that Islamic law is relative elastic because it allows scholars to use their reasoning based on the sources of Islamic law to make rulings on new issues.¹¹⁰

The Nigerian courts have commendable debunked the notion that Islamic law is the same as customary law. For example, in *Alkamawa V Bello*¹¹¹ Wali JSC stated that Islamic law is not the same as customary law for it does not belong to any particular tribe, it more rigid and universal than even the English law. In the words of Justice Niki Tobi, the place of Islamic law in the development of Nigerian legal System cannot be over emphasized. Islamic law has a separate and distinct identity from customary law. To equate the two or to give 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.¹¹²

It is undoubtedly clear that Islamic law and customary law are indeed distinct and any attempt to say otherwise only leads to absurdity and contradiction. It is therefore appropriate to state that this long held misconception needs to be cleared by our lawmakers by stating clearly that Islamic law and customary law and not the same.

4. Conclusion

The Nigerian legal System is pluralized in nature due to the nature of its people with different cultures and beliefs. The colonial administration has significantly succeeded in redefining the nature and concept of the Nigerian legal system. Culture and traditional practices of the people were made less significant through the instrumentality of the validity tests. Islamic law equally suffered a similar humiliation in the hands of the colonial administration first by making it part of customary law and secondly by subjecting it to the validity tests. Though Islamic law of crime no longer applies in Nigeria, but Islamic law of personal status remains applicable up to this day and has been given constitutional recognition by the 1999 Constitution. With the democratization of Nigeria in 2001, many states in northern Nigeria have attempted to break the chain by putting into place the

¹⁰⁰ (1961) NRNLR 81.

¹⁰¹ Section 14(1) Evidence Act

¹⁰² Tobi, N., n. 7, at 130.

¹⁰³ Section 2 of the Native Courts Ordinance 1914 provided that "Native law and custom includes Islamic law"

¹⁰⁴ Qur'an, Jathiya:18.

¹⁰⁵ Tabri, M.J., *Jamiu al-Bayan Fii Ta'wiil al-Qur'an*, Vol. 22, (KSA: Muassisat al-Risala, 2000), at 70.

¹⁰⁶ Qur'an, Saba'i:28.

¹⁰⁷ Ibn Kathir, I., *Tafsir al-Qur'an al-Azim*, Vol. 6, (KSA: Dar al-Tabi li al-Nazri wa al-Tawzi'I, 1999), at 518.

¹⁰⁸ Qur'an, al-A'araf:158. See also Qur'an, Furqan:1.

¹⁰⁹ Qur'an, al-Maida:3.

¹¹⁰ Doi I.A., *Sharia the Islamic Law* (London: Taha Publishers, 1984), at 27.

¹¹¹ (1998) 8 NWLR (pt 561) 173

¹¹² Tobi, N., n. 7, at 151.

Islamic law of criminal justice. This laudable effort however died a natural death due to politics and pressure from anti sharia components from home and abroad.

Islamic law was described as the same with customary law by the colonial administration and which position continued even after Nigeria attained its independence. The features of customary law do not agree with Islamic law in every respect. Luckily, the Nigerian courts have taken the giant step of clearing the air to the effect that Islamic law and customary law and not the same. It is therefore The legislators both at the state and federal levels need to make it clear that Islamic law and customary law are different so that this ill position will be put to rest for good.

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