

A RE-APPRAISAL OF THE CURRENT STATUS OF APPLICATION OF ISLAMIC LAW IN NIGERIA'S PLURI-LEGAL SYSTEM FROM THE LENS OF CONTEMPORARY JURISPRUDENCE

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Abstract

The place of Islamic law in Nigerian legal system still remains one of the burning issues that still haunts unity and development in Nigeria. Muslims in Nigeria, particularly in the southern part of the nation's hemisphere, have continued to demand for full application of Islamic law to their affairs. As a vestige of colonialism, Islamic law is yet to be fully recognised as an independent system of law under the Nigerian pluri-legal system. The application is still restricted in the constitution to some aspects of Islamic personal law. This position has created a long-standing debate between citizens, scholars and jurists. Although, since the return of democracy in 1999, efforts have been made by some states, primarily in the northern Nigeria, to institutionalise the full operation of Islamic law in their states, the attempts have not been widely accepted. This paper is conceived upon the premise that Islamic law will only be generally accepted as a system of law in Nigeria if the opponents are constructively engaged and adequately enlightened about the nature of Islamic law as a system of law even within the sphere of the contemporary jurisprudence. This paper, therefore, revisits the debate on the legal status of Islamic law as a system of law in Nigeria with a view to reappraising and explaining the nature of Islamic law as a system of law "properly so-called" even from the perspective of the contemporary jurisprudence.

Keywords: *Islamic Law; Shari'ah; Customary law; Application of Islamic law in Nigeria; Nigerian legal system.*

1.0 Introduction

Islamic law is one of the legal norms in Nigeria. Islamic law has been operating in the Nigerian territory long before the British arrived.¹ It operated side by side the indigenous systems of law. With the arrival of the British and their apparent intolerable attitude towards other systems of law that do not conform with their understanding of legal jurisprudence, Islamic law was subjugated alongside the indigenous customary law. Indeed, Islamic law was categorised as customary law notwithstanding the obvious fundamental differences in their respective features. This attitude was inherited and perpetuated by the Nigerian law and

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¹ According to Adetokunbo, the application of *shari'ah* came with the advent of Islam in Nigeria, which is believed to have occurred between 1085 and 1097 CE. See Adetokunbo, N. M., "The Shari'ah in the Nigerian Legal System in Perspectives" in *Islamic Law and Jurisprudence: Essays in Honour of Justice (Dr.) Muritala Aremu Okunola (JCA)*, edited by Oloyede, A. M. (ed) (Ibadan: Nigerian Association of Muslim Law Students - University of Ibadan, 2001), 197. See also Omotoso, S. S. and Sanni, A., *ISL 506: Islam in Nigeria*, (a courseware published by the National Open University of Nigeria, n. d.), 92.

policy makers long after independence from British colonialism. The Muslims have, therefore, been agitating for the introduction of full-fledged Islamic law in the country particularly by allowing mandatory establishment of Islamic law courts in all states of the country and giving jurisdiction to the courts over criminal matters that involve Muslims. The Muslims have argued that refusal to allow the Muslims to apply Islamic law to their affairs as required by their religion, Islam, has contributed to the myriads of social and political problems in the country among which include the ongoing *boko haram* security challenge, the pervading corruption, among others. Such agitations have, however, always been rejected by the non-Muslims who have always argued that the British were correct to have categorised Islamic law as a customary law and that acceding to the agitation of the Muslims would be unconstitutional as the Constitution of the Federal Republic of Nigeria does not envisage any religion for the country.

The position of the opponents of the recognition of full-fledged operation of Islamic law in Nigeria smacks of lack of understanding of Islamic law as a system of law. It, therefore, becomes pertinent to understand the nature of Islamic law in order to determine its status as one of the fundamental sources of law in Nigeria and explain its status *vis a vis* customary law. This study therefore focuses on the operation of Islamic law as a system of law both in the northern and south-western regions of Nigeria. The paper does not consider the other parts of southern Nigeria² because Muslims are negligible there and arguing for application of *Islamic Law* in those domains will be practically non-feasible at the moment.

2.0 Understanding the Nature of Islamic Law as a System of Law

Islamic law is used often synonymously with *Shari'ah*, an Arabic word, which barring its etymological and literal meanings has been defined as:

the path ordained by Allah – the Creator, Nourisher and Cherisher of every being and Knower of everything through the last of His messengers, the Prophet Muhammad (SAW) to be followed by every human being to earn His pleasure and to avoid His wrath in this world as well as in the hereafter. It is the law of Allah which He enacted for human beings in their beliefs, religions, moralities, socials, to regulate their affairs in all spheres of life for the purpose of achieving success in this world and the hereafter.³

From this description, *Shari'ah* is different in nature from the general conception of law by the orientalist, who generally conceive law as being man-made. One of the differences between Islamic Law and the Western systems of law is the width of its scope. According to the New Encyclopaedia Britannica, *Shari'ah* is much wider in scope in that it controls how man relates with his neighbours and the state, which is the maximum aim of most other legal

² By geo-political division, the other parts are the south-East and south-south.

³ Makinde, A. K., "The Institution Of *Shari'ah* in Oyo and Osun States, Nigeria, 1890 – 2005", (PhD Thesis, University of Ibadan, 2007), p.1. See also Rashid, S. K. (ed.), *Islamic Law in Nigeria: Application and Teaching*, (Lagos: Islamic Publication Bureau, 1986), 109; Houstma, M. TH., et al., *The Encyclopaedia of Islam*, (London: E. J. Brill Ltd. Publishers & Printers, 1934), 320; University of Chicago, *The New Encyclopaedia Britannica*, (Chicago: Helen Hemingway Publisher, 1981), vol.9, 938; Eliade, M., *The Encyclopaedia of Religion*, (New York: Simon and Schaster Macmillan, 1995), vol. 8, 431

systems, and importantly with his God and his own conscience.⁴ Thus Islamic Law encompasses the generality of man's existence including the terrestrial and the celestial. Islamic Law also focuses on both ethical and legal rules by prescribing both legal and moral duties for man. Therefore, Islamic Law deals with the law both 'as it is' and 'as it ought to be';⁵ which is also a fundamental departure from the positivists' idea of law.

Sharī'ah is the divine injunction applicable to every facet of the Muslim's state of affairs and dictates how he lives.⁶ This fact was buttressed by Judge, C. G. Weerammantry of the World Court when he explained that:

The civil aspects of *Islamic Law* include the notions of caring and sharing; trusteeship of property; brotherhood and solidarity; universalism; fair industrial relations; human dignity; dignity of labour; the ideal law; fair contract; commercial integrity; freedom from usury; rights of women; right of privacy; abuse of rights; and condemnation of anti-social conducts. Others are charitable trust; juristic personality; individual freedom; equality before the law; legal representation; presumption of innocence; notion of non-retroactivity; supremacy of law; judicial independence; judicial impartiality; limited sovereignty; tolerance; democratic participation and being one's brother's keeper.⁷

The acceptance of Islamic Law and its application towards the attainment of the foregoing will certainly engender harmonious living among men.⁸ The above statement by Weerammantry further reiterates the point that Islamic Law is a universal law that covers every aspects of man's life. Law is a vital feature of Islamic Law as a revealed religion. Thus, in Islamic Law, there is a very thin line between law and theology.⁹ It was therefore argued on this point that "wherever Islam spreads, it goes along with its system of law" (*Shari'ah*).¹⁰ But from the general purport of its nature, "*shari'ah* is not merely a system of law, but a comprehensive code of behaviour that embraces both private and public activities."¹¹ A Muslim is therefore obligated to apply its rules and its entire ramification to his life endeavours, whether public or private.¹²

⁴ Makinde, A. K., 2.

⁵ University of Chicago, 938.

⁶ Nasr, H., *Ideals and Realities of Islam*, (London: George Allen and Unwin (Publishers) Ltd., 1979), 95-96.

⁷ Quoted by Osho, S. "Who is afraid of *Shari'ah*?", *Nigerian Tribune*, 5 November, 1999.

⁸ Amin, S.H., *Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography*, (Glasgow: Royston Limited, 1985), 94. See also Anderson, J. N. D., "The Legal Tradition" in *Islam in Africa*, edited by Kritzeck J. and Lewis, W. H., (New York, 1969), 35.

⁹ Makinde, A. K., 20-21; Schacht, J., *An Introduction to Islamic Law* (London: Oxford University Press, 1964), 1.

¹⁰ League of Imams and Alfas on Behalf of the Muslim Community of Osun State, "Memorandum to Osun State House of Assembly on the Review of 1999 Constitution" dated December, 1999 annexed as Appendix II to

Makinde, A. K., 260-269.

¹¹ University of Chicago, 938; Sulaiman, I. K. R., "The *Sharī'ah* and the 1979 Constitution" in *Islamic Law in Nigeria: Application and Teaching*, edited by Rashid, S. K., 55-57.

¹² Makinde, A. K., 22; Seriki, I. A. A. "Sharī'ah Provisions in the 1963 and 1979 Constitutions of Nigeria: A Comparative Study", (Masters Dissertation, University of Ibadan, 1981), 6.

From the foregoing, it is apparent that the aim of Islamic Law (also describ'd as *Shari'ah*)¹³ like any other law is to regulate human conducts, and through it society to make it peaceful and habitable for all and sundry.¹⁴

3.0 Examining the Debates on the Position of Islamic Law viz a viz under the Nigerian Legal System

The position of Islamic Law in the Nigerian legal polity has always been a subject of debate. The debate centres mostly on whether this system of law is within the array of laws in Nigeria.¹⁵ The reason for such concern is primarily hinged on the arrival of the British, they encountered Islamic Law in Nigeria as an operative system both in the Northern and the South Western parts of the country.¹⁶ In the present day Northern region of Nigeria, the practices and transactions of Islamic Law are largely determined by and conducted in accordance with rules and principles. Therefore, the application of Islamic Law was pervasive as it governs the lives of the people in that part of Nigeria.¹⁷ In the South-Western part, the people regard Islamic Law as the religious law and customary law as their indigenous law. The Yoruba to Islamic Law was explained in the case of *Asiata v Goncallo*¹⁸.

Islam reached the Western Nigeria contemporaneously with Western influence and an attitude to religion has developed which is very different from that of the west i.e., religion is a matter between the individual and God rather than something which concerns the ordinary law of the country whereas in Northern Nigeria... Islamic law came centuries before western influence...

¹³ For general notes on *Maqasidul Shari'ah*, see Kamali, Mohammed Hashim, "Al-maqasid Objectives of Islamic Law" <www.aml.org.uk/cms/assets/Uploads/journals/3.1/Kamali-Maqasid.pdf> accessed on 23 November 2013; Auda, J., *Maqasid Al-shariah: An Introductory Guide* (Herndon, VA: 2008).

¹⁴ Makinde, A. K., 22. See also Crane, R. D., "Maqasid al Shari'ah: A Strategy to Rehabilitate Islamic Law in America" <www.iiit.org/Portals/0/pdf/Maqasid%20al%20Sharia.pdf> accessed on 23 November 2008).

¹⁵ Oraegbunam, I. K. E., "A Jurisprudential Review of the Controversies on the Nature of Islamic Law", Vol. 1 No. 2, *African Journal of Law and Criminology*, 106.

¹⁶ While the advent of the British into Nigerian geographical landscape was traced to around the 19th century (see Tobi N., *Sources of Nigerian Law*, (Lagos: MIJ Professional Publishers Ltd., 1997) record that Islam had been in existence and was being practiced by different groups of people in the northern part of Nigeria first between the 10th and 11th centuries CE (see Adetokunbo, N. M., "The Shari'ah in the Nigerian Legal System" in *Perspectives on Islamic Law and Jurisprudence: Essays in Honour of Justice (Dr.) Muritala Aremu Okunola (JCA)*, by O. O. Olatunji (Ibadan: Nigerian Association of Muslim Law Students, University of Ibadan, 2001), 197) reconfirmed the existence in the now western part of Nigeria was traced to around 18th century (see Lawal, M. O., *Islam in Nigeria* (Ibadan: Saki Branch" (NCE Project. Oyo State Chapter of the Organization of Ansar-ud-deen Society of Nigeria, 2003), 81; Gbadamosi, T. G. O., *The growth of Islam among the Yoruba, 1841 - 1908* (London: Longman Group Limited, 1978), 4-5; Doi, A. R. I., *Islamic Jurisprudence* (Zaria: Gaskiya Corporation Ltd, 1984), 109 - 111).

¹⁷ Agbade, *Legal Pluralism* (Ibadan: Shaneson C. I. Ltd, 1991) 4.

¹⁸ (1900) 1 NLR 41.

The British, however, had a pact with the leaders, especially the northern leaders not to tamper with the practice of Islam and Islamic law. The High Commissioner stated this to the then Sultan and people of Sokoto¹⁹ thus:

Government will in no way interfere with the Mohammedan religion. All men are free to worship God as they please. Mosque and prayer places will be treated with respect by us...²⁰

This position was further reiterated by Lord Lugard when he stated that:

The British Empire... has only one mission... for liberty and self-development on no standard lines... Such liberty and self-development can be best secured to the native population by leaving them free to manage their own affairs through native rulers, proportionately to their degree of advancement... subject to the laws and policy of the administration.²¹

It is apparent from the foregoing that the original policy of the British was to allow the indigenous people to administer their affairs in accordance with the laws that have become indigenised to them, and that could only be feasible by allowing the "native rulers" to dispense justice among the people. The policy did not, however, last long as the British realised that law and religion are inseparable under Islamic Law.²² The British thus tactfully reneged on their position and adopted the western attitude of separation of law and religion.²³ The colonial administration thus classified Islamic law as one of the customary laws of the country.²⁴ This was done through the instrumentality of Section 2 of the Native Courts Law of the Northern region,²⁵ which provides that "native law and custom includes Moslem law".²⁶ This position has been maintained in many of the subsequent similar legislation²⁷ until the recent enactment of Shari'ah Penal Codes in some Northern states. Some of the Shari'ah Penal Codes contain some provisions that have effectively removed Islamic Law from among the customary laws in the states where those laws are applicable. For instance, the Kano State Shari'ah Penal Code Law 2000 provides in section 29(3) that: "Islamic and

¹⁹ Sokoto is a Fulani hegemonic empire that controlled many other cities and towns in the northern part of Nigeria at the time of British invasion. It was the administrative headquarters of the northern part of Nigeria at the time.

²⁰ See *Report of the Native Courts (Northern Provinces) Commission of Enquiry* (Lagos: 1952), 10.

²¹ Lugard, F. D., *The Dual Mandate in British Tropical Africa* (London: W. Blackwood and Sons, 1926), 94.

²² Agbede, *Legal Pluralism*, op. cit., 7.

²³ The law of the west is generally believed to be canonical (i.e. religious in origin) and based on Christianity. And according to Agbede, Jesus Christ distinguished between civil obligations and moral duties. He cited verse of St. Mathew Ch. 22 v. 21 in support of his argument. See Agbede, op. cit., 161.

²⁴ Park, 65; Yakubu, J. A. "Colonialism, Customary Law and Post-Colonial State in Africa: The case of Nigeria" (Paper prepared for CODESRIA's 10th General Assembly on 'Africa in the New Millennium', Kampala, Uganda, 8-12 December 2002); Ladapo, O. A., *African Traditional Dispute Management: Customary Arbitration in Nigeria* (Germany: Lap Lambert Academic Publishing, 2012), 107.

²⁵ Ordinance No. 6 of 1956.

²⁶ See also Anderson J.N.D. "The Future of Islamic Law in British Commonwealth Territories in Africa" (1962) 27 (4) *Law and Contemporary Problems*, 617-631.

²⁷ For example, section 2 of the Katsina State High Court Law of 1991 also provides that customary law includes Islamic law. See Ladapo, O. A., op. cit., 107.

Muslim laws shall be deemed to be statutory laws in all existing laws in the state." Section 29(4) further amplifies this position and provides that:

The provisions of existing laws in the state which define customary law to include Islamic or Muslim law are hereby accordingly amended and such provisions shall be deemed statutory laws wherever they occur.

It is worthy to point out here that Nigeria is a federated entity, thus, the law in Kano State does not bind other states. Therefore, other states still need to pass laws with similar import to effectively divorce Islamic law from customary law. It has, however, been argued that section 29 (3) and (4) of the Kano State Shari'ah Penal Code Law cannot be generalised, rather, it carries a narrow application in that the law itself deals only with criminal matters and must be treated in that light.²⁸ It is submitted that this argument is misplaced. This is because a statute can be used to repeal the provision or purport of another statute, hence, the essence of repeal and saving clauses in statutes.²⁹ With regard to the provision under examination, even though the provisions separating Islamic Law from customary law are contained in the Shari'ah Penal Code Law, their purport can still affect related provisions in other statutes. The provisions are clear and the principle is that where the language of a statutory provision is clear, it must be given its direct and literal interpretation.³⁰ Moreover, the provisions of the Shari'ah Penal Code Law are only applicable in the Islamic Law courts and not in the conventional courts. Therefore, their application is in relation to the matters upon which the Islamic Law courts have jurisdiction, and if the provisions are limited to criminal matters, then how does the court decide civil matters that are brought before it? It is also submitted that if the provision of section 2 of the Northern Region Native Courts Ordinance could be generalised to argue that Islamic law is customary law in Nigeria, then the same principle applies to the provision under consideration.

Some other jurists also believe that customary law in Nigeria is made up of indigenous law and Islamic law³¹ although Islamic law could be further categorised as a non-indigenous and non-ethnic customary legal system, which unlike the indigenous and ethnic based customary law is written (i.e. *lex scriptum*).³² This position finds support with Okany who further argues

²⁸ Ladapo, O. A., op. cit., 107-108.

²⁹ The Indiana Law Blog, "Saving Clauses and Exceptions"

<<http://indianalawblog.com/1Chistory/Code%20history/IC%20History%20-%2011.pdf>> (accessed 23 November 2013); National Conference of State Legislatures,

"Severability, Saving, and Nonseverability Clauses as described in Legislative Drafting Manuals"

<http://www.ncsl.org/documents/lss/saving_clauses.pdf> (accessed 23 November 2013).

³⁰ See *Ifezue v Mbadugha* (Unreported, S.C. 68/1982) delivered on 18th day of May 1984 by the Supreme Court

of Nigeria <<http://www.nigeria-law.org/Dominic%20Onuorah%20Ifezue%20%20V%20%20Livinus%20Mbadugha%20&%20Anr.htm>> (accessed 23 November 2013); *The Nigerian Army v Lt. Patrick Dodo* [2012] 6 SCNJ

<<http://nigeriansupremecourtreports.wordpress.com/2012/08/16/the-nigerian-army-v-lt-patrick-dodo-2012-6-scnj-sc-2902009-synopsis-of-a-judgment-of-the-nigerian-supreme-court-delivered-in-june-2012-reported-by-kodi-azuonye-esq-attorney-at-law/>> accessed 23 November 2013; *Ibrahim v Ojoma* (2004) 4 NWLR (pt. 862)

89; and *Ojokolobo v. Alamu* (1987) 3 NWLR (pt. 61) 37.

³¹ Emiola A., *The Principles of African Customary Law*, (Ogbomosho: Emiola (Publishers) Ltd., 2005), 175;

Adaramola F., *Jurisprudence*, (London: LexisNexis Butterworths, 2008), 94 – 95.

³² Adaromola, Ibid., 94-95.

that the legal basis for classifying Islamic law as customary law is Section 2 of the Northern Region Native Court Ordinance 1956 whose provision he argues is clear enough.³³ Concurring with this position, Ladapo argues that since the above provisions of Kano State Shari'ah Penal Code Law are limited to penal matters, then, all non-penal Islamic laws are still within the purview of customary law.³⁴ His argument is further anchored on the fact that some of the sources of Islamic law which he identified to include '*urf*'³⁵ and *istihsan*³⁶, are developed from the customary attitude of the indigenes.³⁷

Ojielo also posits that Islamic law is nothing but customary law in Nigeria. The reason given is that Islamic law has been interpreted to fall within the categories of customary law in the country and not as a religious law.³⁸ He believes that the categorisation was made after looking at the pervasiveness of Islamic Law in the lives of the Muslims who often use Islamic Law to administer their daily affairs.³⁹ He therefore contends that had Islamic Law been adopted as religious law in the country, its application would have been unconstitutional and invalid since the Nigerian Constitution has prohibited both the federal or state government from adopting any religion as state religion.⁴⁰ It is submitted that without prejudice to arguments against Islamic law being customary law in Nigeria, which shall be presented presently, the above submissions are faulty. They show that the scholar is not attuned to the nature of Islamic Law as a system of law and how it becomes retained as a source of law in Nigeria. It has been explained earlier that the colonialists met Islamic Law as an effective system of law, especially in the northern part of the present-day Nigeria, hence the High Commissioner was impressed and declared that the British colonial government would not interfere with Islamic Law as practised and administered by the people.⁴¹ It must further be stated that Islamic law itself is a received law in Nigeria. The revival wars fought by Uthman dan Fodio during the eighteenth century brought Islamic law into the northern parts of Nigeria in full fledged.⁴² The introduction of Islamic Law led to large scale extermination of customary laws that were in existence before the war. Thus, the introduction of Islamic Law

³³ Okany, M. C., *The Role of Customary Courts in Nigeria*, (Enugu: Fourth Dimension Publishers, 1984), 39.

³⁴ Ladapo, op. cit., 108.

³⁵ Non-Islamic customs which are not incompatible with the Shariah.

³⁶ Judicial precedent.

³⁷ Libson, G., "On the Development of Custom as a Source of Law in Islamic Law: Al-*rujû'u* ila al-'*urfi* ahadu al-qawa'idi al-khamisi allati yatabanna 'alayha al-fiqhu" (1997) vol. 4, No. 2, *Islamic Law and Society*, 131-155; see also Ladapo, op. cit., 108; Meek C.K. *The Northern Tribes of Nigeria: An Ethnographical Account of the Northern Provinces of Nigeria together with a Report on the Decennial Census*, vol. 1 (London: Oxford Univ. Press, 1925), 269.

³⁸ Ojielo, M. O., "Human Rights and Shari'ah Justice in Nigeria", (2003) vol. 9 no. 1, *Annual Survey of International & Comparative Law*, 6.

³⁹ Ibid.

⁴⁰ Ibid. See also section 10 of the Constitution of the Federal Republic of Nigeria, 1999.

⁴¹ *Report of the Native Courts (Northern Provinces) Commission of Enquiry* (Lagos: 1952), 6, 10.

⁴² Although Islamic law has been introduced and practiced in the various empires and cities in the North for many centuries before the Dan Fodio *Jihad*, its practice had been highly diluted with the indigenous practices, which were believed to be incongruous with the true application of *Shari'ah*. This was the reason for Usman dan Fodio's religious crusade that pervaded virtually all the Northern emirates and empires. The *jihad* was highly successful and the people started practicing Islam in its pristine form. See Aliyu, B. A., "Practical Approach to Harmonisation of Shari'ah and Civil Law: A Critical Analysis of the Nigerian Experience" <https://www.academia.edu/207313/Practical_Approach_to_Harmonisation_of_Shariah_and_Civil_Law_-_A_Critical_Analysis_of_the_Nigerian_Experience> accessed on 18 March 2021.

into Nigeria was in itself geared towards exclusive application of Islamic Law as a distinct system of law and outlawing of harmful and inhuman customary laws.⁴³ According to Schacht, the crusade was largely successful that when the British reached the north,

Islamic law... was still near its highest degree of practical application. Custom, if not entirely eradicated, had been pushed into the background, and the only existing tribunals were those of the *qadis* ... who were competent in all matters... Only customary land law remained valid and was enforced by the councils of the sultan and of the emirs.⁴⁴

The above shows that customary law is indigenous to Nigerian tribes but Islamic law is not. Islamic law, like the received English law, was imported to reform the customary law.

Also, contrary to the position that it is logical to categorise Islamic law as customary law in Nigeria due to its pervasiveness and the special position it holds among Muslims, it is submitted that being a Muslim is not restricted to any particular tribe or set of people in the country. Islamic Law is a trans-boundary law and attaches to professing of Islam by an individual. Thus, Islamic law is not indigenous to any tribe and is prominently practiced by indigenes in all the geographical areas of Nigeria.⁴⁵

Notwithstanding the above submissions, other scholars have contended that Islamic law in Nigeria is not customary law.⁴⁶ It has been argued that even though Islamic law operates in some countries as indigenous customary law, in Nigeria, it operates as a distinct legal system.⁴⁷ Ambali traced the evolution and application of Islamic law in Nigeria and concluded that despite different perceived obstacles to the application of Islamic law in the country, it still endures as a system of law thus leading to its being constitutionally recognized⁴⁸ in the country. He finally concluded that Islamic law applies as the personal law of Muslims in Nigeria.⁴⁹ Yakubu agrees with Ambali's position. He argues that even though *shari'ah* (Islamic law) is grouped under customary law, it is a distinct variant system of law. It operates as a major source of personal law for the Muslim adherents.⁵⁰ According to Tobin⁵¹, the categorization of Islamic law as customary law in Nigeria is a reflection of the negative and uncompromising approach of the colonial administration to Islamic Law. Therefore, categorising Islamic law as a customary law undermines its status as a system of

⁴³ Schacht, J., *An Introduction to Islamic Law*, (Oxford: Clarendon Press, 1964), 86.

⁴⁴ Ibid.

⁴⁵ Ambali M. A., *The Practice of the Muslim Family Law in Nigeria*, (Zaria: Tamaza Publishing Ltd, 2003, 2nd ed.), at 14 – 33.

⁴⁶ Tobin, op. cit., 136 – 140; Yakubu John Ademola, *Within and Without: The Relevance and Potency of the Law beyond our Frontiers*, (Ibadan: Ibadan University Press, 2006), 53-54; Agbede, *Legal Pluralism*, op. cit., 1;

⁴⁷ Agbede O. I., *Legal Pluralism*, Ibid.

⁴⁸ The application of Islamic law has been duly recognized by virtue of s.275 of the Constitution of the Federal Republic of Nigeria 1999 although it is limited to 'Islamic personal law', under which family law lies.

⁴⁹ This position was based on the decision in the case of *Khairie Zaidan v Fatimah Khalil Mohssen* (1973) 11 SC 1

⁵⁰ Yakubu, J. A., op. cit., 53.

⁵¹ Tobin N., op. cit., 136.

law on its own because 'custom' (*urf*) is just one of the many (secondary) sources of Islamic law as a legal system. Therefore, Islamic law, unlike the traditional customary law does not allow for conjecture and speculation in its application. The legal structure and nature of Islamic Law is enough distinction to separate it from indigenous customary law.⁵² Thus, while customary law is applicable territorially, that is, it applies only to people within certain territorial jurisdiction who shares the same culture; Islamic Law applies to Muslim faithful who are not restricted to a particular territory. Therefore, Islamic Law, like the English law, is also a received law and therefore would be wrong to straddle it with indigenous laws of the country since it could be applied to the Muslims wherever they reside in the country. Because Islamic law is distinguishable from indigenous customary law, Asein expressly excluded it in his explanation of the characteristics of customary law.⁵³ He, however, described the characteristics, nature and sources of Islamic law in contradistinction with the customary law when he explains that:

Moslem customary law, unlike the indigenous customary law, is based on the Islamic faith, largely written, relatively more rigid and uniform. Its original and primary source is the Quran although there are different schools brought about in the second century of the Hijira each with its respective interpretation of the law.⁵⁴

He further raised an important point regarding the last part of his explanation, that is, the existence of different schools with their respective interpretation of the law. He explained that the "... diversity is due largely to the allowance permitted for differences in opinions in Islam supposedly as a manifestation of Allah's grace"⁵⁵ and also to highlight another characteristic of Islamic Law as a receptive system of law that allows for pluralism. It is submitted that this position allays the concerns raised earlier by some scholars, who argue that the more reason why Islamic Law cannot be accepted as a religious law in the contemporary jurisprudence is the existence of different schools in Islam. They contend that the rulings of these jurists, especially during the classical period, form the crux of development of Islamic Law. Their argument was summed by Ozigbo that:

[a]s a legal system, the Shariah was not, like the Quran, a direct revelation from God. It is largely a human legal product. It had its history. It was produced by Muslim religious scholars and teachers (*ulama*) during the classical age of Islam – the first two centuries of the Abbasid Caliphate (c. 750 – 945 AD).⁵⁶

What Ozigbo means by Islamic Law being "produced by Muslim religious scholars and teachers (*ulama*)" is the juristic rulings that were made by great scholars of Islam, four⁵⁷ of

⁵² Elegido, J. M., *Jurisprudence*, (Ibadan: Spectrum Books Ltd, 1994), 136-137.

⁵³ Asein, op. cit., 117.

⁵⁴ Ibid., 118.

⁵⁵ Ibid.

⁵⁶ Ozigbo, I.R.A., *An Introduction to the Religion and History of Islam*, (Enugu: Fourth Dimension Publishers, 1988), 48.

⁵⁷ These are the four great Imams and scholars of Islam: Imam Malik bn Anas, Imam Abu Hanifah, Imam Shafii and Imam Ahmad ibn Hanbal. See Doi, A., *Shariah: The Islamic Law* (Kuala Lumpur: A. S. Noordeen, 2007),

whom have been constituted into schools of jurisprudence (*fiqh*). Ozigbo argues that the preponderance of human participation and contribution in the development of Islamic Law cannot be discarded.⁵⁸ The main point being driven at by Ozigbo is that Islamic Law, like customary law is largely a product of human reasoning and interactions.⁵⁹ It is, however, submitted that these positions have been succinctly addressed by Asein's explanation above. Notwithstanding, it needs to be stated that opinions such as that expressed by Ozigbo is an expose of the rudimentary approach adopted by some Nigerian positivistic legal scholars, particularly the non-Muslims to the proper understanding of the nature of Shari'ah as a functional, authoritative legal system.⁶⁰ A proper jurisprudential study of Islamic law would clarify to these set of scholars that even though the application of Islamic law to contemporary issues would have become ossified without analogical reasonings of Islamic law jurists, their contributions are by no means the law. Rather, the legitimacy and validity of the use of reasoning (which was a legal formulation instrument utilised by the leaders of the schools of thoughts) is anchored upon their exegetic contemplation of the divine sources - Qur'an and Sunnah.⁶¹ Therefore, the Qur'an is a legal document, a statute, in its own right as it contains several legislations on human activities (including tax matters, family law, criminal law, sexual violations, among others).⁶² So, as it was once posited,

one cannot alter a rule based on an explicit textual injunction and still characterize that rule as Islamic. Islamic law is not a law enacted by Muslims, rather, it is enacted by God, for Muslims. Human reason cannot make law; it only functions as the means by which law is discovered.⁶³

It must be noted that the latter position held by Asein, Tobi, Elegido and others is anchored mainly on the fact that Islamic Law is distinctively different from customary law. While customary law has custom as its main source and is shaped generally by the dynamics of the society, Islamic Law operates as a complete system of law that also derives its authority from certain interdependent and some autonomous sources. These sources include the *Qur'an*, *hadith* or *sunnah*, *ijma'* and *qiyas* as the major sources although the *Qur'an* and *sunnah* are the primary sources.⁶⁴ Even though other secondary sources such as *istihsan*, *istidlal*, *istislah*, *Istishab* and '*urf* could be countenanced when considering Islamic legal rulings, they will not be binding on the Muslims whenever any principle derived from any of them contradicts the

chapter 5, 85-111 for full discussion on the scholars and their schools of thoughts. See also Asein, op. cit., 118 for brief notes on these schools of thought.

⁵⁸ Ozigbo, op. cit., 47-48.

⁵⁹ Oraegbunam, op. cit., 103.

⁶⁰ Oba, A. A., "Islamic Law as Customary Law: The Changing Perspective in Nigeria" (2002) 51 (4) *The International and Comparative Law Quarterly*, 817-50.

⁶¹ Mumisa, M., *Islamic Law: Theory and Interpretation* (Maryland, USA: amana publications, 2002), 21.

⁶² Hallaq, W., *Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997), 3-6.

⁶³ Underline made by author for emphasis. Hallaq, W. B., "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and Common Law" (1985-86) 34 *Cleveland State Law Review*, 79 - 96 at 82. See also Hallaq, W. B., *Law and Legal Theory in Classical and Medieval Islam* (Aldershot, UK: Ashgate Variorum, 1994), 1 at 4.

⁶⁴ Makinde, op. cit., 14; Asein, op. cit., 118-119; Tobi, op. cit., 140-150.

primary sources – *Qur'an* and *sunna*.⁶⁵ Therefore, the position taken earlier by Ladapo is at variance with the true position of Islamic Law. Therefore, while custom is synonymous to customary law in the parlance of indigenous administration of justice, custom is about the last of the factors used to determine the application of Islamic Law to emerging issues that require Islamic legal rulings. It is submitted also that while human activities determine the direction of customary law, Islamic Law on the other hand directs the activities of humans.⁶⁶

Considering the differences from the perspective of their respective features, it is trite that customary law is unwritten and resides in the bosom of the guardians of the laws whereas Islamic law is a *lex scriptum*,⁶⁷ that is, a written law. The original principles of Islamic Law are contained in the Holy *Qur'an* and the recorded sayings and actions of the last prophet of Allah, Prophet Muhammad. Even the derivative rulings of scholars that form the bulk of *ijma'* and *qiyas* are written in various treatises. Therefore, while arguments are still raging on whether and how to ascertain the rules of customary law through codification or restatement;⁶⁸ principles of Islamic Law have always been codified right from the advent of the religion of Islam upon which the law is based.⁶⁹ Secondly, customary law is flexible and is often adapted by the law enforcers as they deem fit whereas Islamic law generally covers two activities of humans – '*ibadah* (religious rites and worships) and *mu'amalah* (human interpersonal relations and transactions).⁷⁰ While the rules of '*ibadah* are immutable and unchangeable, rules of *mu'amalah*, which admittedly are mostly covered by the other sources of Islamic Law could be adapted to suit the changes and developments in a given society but the adaptation must be in conformity with the rules contained in the primary sources of

⁶⁵ See generally Ambali, M. A., *The Practice of Muslim Family Law in Nigeria*, (Zaria: Tamaza Publishing Company Ltd., 1998) 4, 11; Doi, A. R. I., *Shari'ah: The Islamic Law*, (London: Ta-Ha Publishers, 1984) 21, 64, 70; Qadr, A. A. *Islamic Jurisprudence in the Modern World*, (India: Aligarh University Press, 1963) 188, 189-190, 199-200, 226-227; Amin, S. H. *Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography*, (Glasgow: Royston Limited, 1985) 9, 14, 94-96; Muslehuddin, M., *Philosophy of Islamic law and the orientalis* (London: TAJ company, 1988), 135, 148, 150.

⁶⁶ See Makinde, op. cit., 20 where he said "[t]o a Muslim, the *Shari'ah* represents his entire life, symbolizes his existence, and gives him his identity. His entire personality and character are shaped by the *Shari'ah*... It is therefore the guide of human action and encompasses every facet of human life."

⁶⁷ Adaramola, op. cit., 94-95.

⁶⁸ See generally, Osinbajo, Y. and Kalu, A. U., *Towards a Restatement of Nigerian Customary Law* (Lagos: Federal Ministry of Justice, 1991).

⁶⁹ In *suratul Baqarah* verse 2, Allah said: "This is the Book; in it is guidance..." It is also on record that before the descending and revelation of the *Qur'an* to Prophet Muhammad, Allah had revealed and given three other popular books of law and religion to some earlier prophets. These books include: *Zaburah* for Prophet Daud, *Taorah* for Prophet Musa and *Injil* for Prophet Isa. In *Suratul Maida* verse 48, Allah said: "To thee We sent the scripture in truth, confirming the scripture that came before it, and guarding it in safety" See also *Suratul Baqara* verse 87.

⁷⁰ Mahmud, A., "Marriage Contract, Dissolution of Marriage, Idda-Waiting Period, Maintenance and Custody of Children under the Sharia" in *The Marriage Laws of Nigeria*, edited by Aguda, T. A. and Adi, I. (Lagos: Nigerian Institute of Advanced Legal Studies, 1981), 92; Babajo, B., "Constitutionalism, Democratic Governance and Sharia in Nigeria" (2007) vol. iv – v, *Ahmadu Bello University Zaria Journal of Islamic Law*, 106-107; Ahmad, A. "Living with Conflict: Shariah and One Nigeria" (Being an address delivered at Sawyer-Mellon Seminar on Sharia and Conflict in Nigeria, Emory University, London, on 7 November, 2002), n.p. It must however be noted that there are other aspects of human endeavours that are covered by *shari'ah*. For general reading on the scope of *shari'ah*, see Aliyu, I. A., "Sharia Implementation in Nigeria 1999 – 2005: A Review of its Legal, Institutional and Social Establishments" (2007) vol. iv – v, *Ahmadu Bello University Zaria Journal of Islamic Law*, 162. See also Ladapo, O. A., op. cit., 109.

Islamic Law – *Qur'an* and *sunnah*.⁷¹ The distinctions between customary law and Islamic law lead to call for the recognition of the impact of Islamic law in the development of Nigerian legal system and its proper entrenchment as a proper and distinct source of Nigerian legal system.⁷² This will go a long way in solving the dichotomy raised by the application of Islamic law to the lives of its adherents alongside the received English law.

It is, however, worthy of note that the argument that Islamic law is not customary law in Nigeria has been receiving judicial support by the Supreme Court. The first case that divorced Islamic law in Nigeria from the customary law is the case of *Alkamawa v. Bello & Anor*⁷³ where the Supreme Court per Wali, JSC held that:

Islamic law is not the same as customary law as it does not belong to any tribe. It is a complete system of universal law, more certain and permanent and more universal than the English Common law.

The decision has been followed in the later case of *Wali v. Ibrahim*.⁷⁴ Elegido's position was derived from the pronouncements in these cases. Thus, he notes that although "... Islamic law is administered as if it were one more variant of customary law, this should not blind one, however, to the radical differences which exist between Islamic law and the traditional systems of African Customary Law". For him, Islamic law, unlike customary law, "is based on a sophisticated corpus of written legal sources".⁷⁵

4.0 Position of Islamic Law in Contemporary Nigerian Legal System

Notwithstanding the convincing arguments canvassed against classifying Islamic law as customary law in Nigeria, historically, when the British penetrated Nigeria's landscape, they met Islamic law operating pervasively in the North and passively in the Southern part of the country.⁷⁶ Due to the pervasiveness of Islamic law in the North, the effectiveness of its administration and the 'indirect rule' policy of the British colonial government; Islamic law was allowed to be applied by the courts in the North, which had been termed native courts. However, same position was not taken in the South, especially the South West, where Islamic law had equally gained considerable ground even before the advent of the British.⁷⁷ Showing the level at which Islamic law was already entrenched in the South Western part of the country among the Yoruba tribe, a colonial author, J. M. Lewis wrote that: "[i]n West Africa as opposed to East Africa, Islam strongly emphasise the Law in society".⁷⁸

⁷¹ Muamalat in Islam, "Muamalat" <http://muamalat-islam.blogspot.com/p/overview-of-muamalat.html> accessed 23 November 2013.

⁷² Tobi, op. cit., 151.

⁷³ (1986) 6 SCNJ, 127 at 136.

⁷⁴ (1997) 9 NWLR (Part 519), 160 at 167.

⁷⁵ Elegido, op. cit., 136-137.

⁷⁶ Makinde, op. cit., 78.

⁷⁷ Ostein, P. and Dekker, A., "Sharia and National Law in Nigeria" in *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries*, edited by Otto, J. M., (Cairo: The American University in Cairo, 2010), 555-560; Anderson, J. N. D., *Islamic Law in Africa*, (London: HMSO, 1954), 222.

⁷⁸ See Okunola, M. A., "The Relevance of Shari'ah to Nigeria" in *Islam in Africa*, edited by Alkali, N., et al., (Ibadan: Spectrum Books Ltd., 1993) 26.

Rather than establish courts with Islamic Law jurisdictions for the sizeable Muslims in the South West, the British government imposed the application of customary law on all and sundry. The implication of this was that customary law would be applied to disputes among the citizens even if the subject matter was of Islamic law import. Although the British failed to establish courts with Islamic Law jurisdiction in the South⁷⁹, they allowed the North to apply Islamic law, albeit as customary law, in all matters including criminal matters, though subject to the validity tests that had been introduced at the time.⁸⁰ This continued till around 1960 when political pressures arising from the urgency attached to the move towards independence by other regions in the country and fear of domination expressed by minority non-Muslims in the North forced the Northern Region government to secede criminal law aspect from the application of Islamic Law in the region.⁸¹

With this development, Islamic law became categorised into three in Nigeria for the purpose of adjudication.⁸² The first is 'the Islamic Personal law' covering marriage, succession, guardianship of minors, inheritance, and administration of estate of deceased persons. The second is 'other Islamic civil law' matters that cover contracts, tortious actions, etc, while the third category is the Islamic criminal matters. The exclusive jurisdiction for adjudication of the first category still remained in the (Northern) Native Courts, which had been styled Area courts since 1960 with appeal to the Shari'ah Court of Appeal⁸³. The Shari'ah Court of Appeal, though, was created with limited jurisdiction to hear appeals over such matters alone,⁸⁴ was made the final court in respect of Islamic personal law.⁸⁵ Its judgments were not subject to appeal to any other court at that time.

Jurisdiction over cases emanating from other Islamic civil law was also retained by the Native Courts but appeal over such cases went to the Native Courts Appellate Division of the High Court. To cater for proper administration of Islamic law in such matters,⁸⁶ the *qadis*⁸⁷ of the Shari'ah Court of Appeal were allowed to sit alongside the judges of the Native Courts Appellate Division of the High Courts.⁸⁸ Unlike the other two categories, matters of Islamic criminal law were taken totally out of the jurisdiction of the Islamic law oriented Area Courts

⁷⁹ Anderson, op. cit., 222; Makinde, op. cit., 78.

⁸⁰ Keay, E. R. and Richardson, S. S., *The Native and Customary Courts of Nigeria*, (London: Sweet & Maxwell, 1966), 233-238.

⁸¹ Ostein and Dekker, op. cit., 560-567. See also Richardson, S. S., *No Weariness: The Memoir of a Generalist in Public Service in Four Continents, 1919 – 2000*, (Wylde, Wiltshire: Malt House Publishing, 2001), 209; Ostein, P., "An Opportunity missed by Nigeria's Christians: The 1976-78 shari'a debate revisited", in *Muslim-Christian Encounters in Africa*, edited by Soares, B, (Leiden and Boston: Brill, 2006), 221 -225.

⁸² See generally, Ostein and Dekker, op. cit., 567 – 568.

⁸³ This court was first established in 1954 as the 'Moslem Court of Appeal' in order to address the concerns of the northern Muslim majority about how appeals over Islamic matters (especially criminal matters) were being handled by the British Magistrates and High Courts (to which the appeals lie earlier). During reforms that followed 'the settlement of 1960' that culminated from series of debates that started in 1958, the court was abolished and replaced with the 'Shari'ah Court of Appeal'. See Ostein and Dekker, op. cit., 567.

⁸⁴ Ostein and Dekker, op. cit., 567.

⁸⁵ Ibid.

⁸⁶ This is as a result of the general concerns that the judges manning the British courts at the time were either British or British trained and had little or no experience or knowledge of *shari'ah*.

⁸⁷ This means judges in Arabic and that is the official title with which they are also addressed in Nigeria.

⁸⁸ See generally Ostein P. (ed.), *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook*, (Ibadan: Spectrum Books Limited, 2007), vol. 1, 57-133.

and vested exclusively in the British established Magistrates and High Courts, which applied the newly enacted Penal and Criminal Codes applicable to both the Northern and Southern regions respectively.⁸⁹

The position described above remained generally extant, only with little variations in-between, from the independence period through the First Republic and the first military takeover till the notorious Shari'ah debate of 1976-1978. In 1975, a Constitution Drafting Committee (CDC) was set up. One of the issues that gained prominence in the CDC Report was the proposal to and recommendation by the Committee for the establishment of Federal Shari'ah Court of Appeal with parallel jurisdiction with the (Federal) Court of Appeal and the Supreme Court.⁹⁰ The rationale for this establishment was crisply explained by Ostein and Dekker thus:

The call for such institution was a by-product of the state creation exercises of 1967 and 1976. As we have seen, each new state inherited the laws and institutions of its parent region. In the North this meant (among other things) that in place of one original Sharia Court of Appeal for the entire Region, there would now be, first six Sharia Courts of Appeal, and then ten, one for each of the states into which the Region was divided. All these new Sharia Courts of Appeal were legal clones of the original one for the Region; hence the judgments of each were final and unappealable to any other court. This raised the problem the proposed Federal Sharia Court of Appeal was intended to solve: the possibility of conflicts between judgments of the Sharia Courts of Appeal of the states. They would all be adjudicating on the same classes of cases – Islamic personal law. Inevitably cases involving the same legal issues would come before the Sharia Courts of Appeal of different states, and they would decide them differently, thus creating a conflict. But since the judgments of each of the courts were final, any conflict that may arise would be unresolvable.⁹¹

The CDC report was published in 1976 and the creation of Federal Shari'ah Court of Appeal became a hotly debated issue for the next one year, and subsequently erupted in a full-scale crisis that rapidly took political, ethnic and religious dimensions.⁹² The Head of State intervened and a compromise was agreed for the retention of Shari'ah Court of Appeal for the states that already had one; and a clause allowing the creation of Shari'ah Court of Appeal for any other state that wishes to have one.⁹³ The development led to the creation of Shari'ah

⁸⁹ Ostein and Dekker, op. cit., 567.

⁹⁰ Adegbite, L., "Personal Reflections on the Shari'ah", (Presentation at the Conference of the Shari'ah Law Crisis held in Lagos in 2000). n.p.

⁹¹ Ibid., 571.

⁹² Hunwick, J. O., "An African Case Study of Political Islam: Nigeria" (1992) 524 (1) *The Annals of the American Academy of Social Science*, 149. See also Ostein, P., "An opportunity missed by Nigeria's Christians: The 1976-78 Shari'a debate revisited" in *Muslim-Christian Encounters in Africa*, edited by Soares, B. (Leiden and Boston: Brill, 2006), 238-243.

⁹³ Adegbite, L., "Personal Reflections on the Shari'ah", (Presentation at the Conference of the Shari'ah Law Crisis held in Lagos in 2000). n.p.

panel at the existing (Federal) Court of Appeal to which appeals now lie from the decisions of the State Shari'ah Court of Appeal up to the Supreme Court, which also has a *Shari'ah* panel. Therefore, the decisions of the Shari'ah Court of Appeal are no longer final and unappealable. This position was enacted in the 1979 Constitution of the Federal Republic of Nigeria. It is submitted that the position of Islamic law in Nigeria as defined in the Constitution, therefore, is that:

1. The scope of application of Islamic law is restricted to only "Islamic Personal law", which has been stated to be inclusive of matters relating only to marriage in accordance with Islamic law, divorce relating to Islamic marriage, *waqf*, gift or will where the endower, donor, testator or deceased person is a Muslim, foundling or guardianship of an infant, question relating to family relationship, questions relating to infant, prodigal or person of unsound mind where such person(s) is a Muslim.⁹⁴
2. The Shari'ah Courts of Appeal are only equivalents of the High Courts and their decisions are subject of further appeals to the Court of Appeal and Supreme Courts, which are not full Islamic Law courts. Their justices comprise Muslims and non-Muslims.⁹⁵
3. Establishment of the Islamic Law Court is not automatic for the Muslims but only subject to the whims of the state.⁹⁶
4. Islamic law, whether as personal law or otherwise operates only in the states carved out of the erstwhile Northern Region of the country due to their historical backgrounds.⁹⁷

It must be noted that between years 1983 - 1998 (during Babangida - Abacha military regimes) and 2000 (Nigeria's fourth democratic regime), some efforts were made to reclaim the general scope of Islamic Law to cover both civil and criminal law matters. In 1986, the military regime under General Ibrahim Babangida⁹⁸ promulgated a constitution that was decreed to take effect in 1989. The 1986 Constitution deleted the word 'personal' leaving the phrase to read 'Islamic law'. The position was subsequently endorsed by the Abacha regime through Decree No. 107 of 1993. These two promulgations were never applied because the courts insistently held that the deletion of the word 'personal' has no effect on the purport of the provision as contained in the 1979 constitution,⁹⁹ hence, application of Islamic law was

⁹⁴ See section 242 (2) of the Constitution of the Federal Republic of Nigeria, 1979. See also Obilade, A. O., *The Nigerian Legal System* (Ibadan: Spectrum Books Limited, 1979), 34-35; Ojielo, op. cit., 136.

⁹⁵ For general reading on the implication of the appeal of *Shari'ah* Court of Appeal to the (Federal) Court of Appeal and Supreme Court of Nigeria, especially in relation to the composition of the courts and their envisaged impact of application of Islamic law in the country, see Ajetunmbi, M. A., "Shariah Legal Practice in Nigeria: 1956 - 1983" (Ph.D. Thesis, University of Ilorin, 1988).

⁹⁶ Section 240 (1) of the Constitution of the Federal Republic of Nigeria, 1979. See also Salman, R. K., "Practice and Procedure of the Sharia Court of Appeal in Nigeria" in *Modern Civil Procedure Law*, edited by Afolayan, F. A. and Okorie, P. C., (Lagos: Dee-Sage Nigeria Ltd, 2007), 498.

⁹⁷ Asein, op. cit., 198 - 199.

⁹⁸ General Babangida toppled a military government in 1983 and ruled Nigeria till 1993.

⁹⁹ See for example the decisions in the cases of *Maidu v. Modu* (2000), 4 NWLR (pt. 651) at 99; *Muninga v. Muninga* (1997) 11 NWLR (pt. 527); *Gambo v. Tukuyi* (1997) 10 NWLR (pt. 526); *Garba v. Dogon Yaro* (1997) 1 NWLR (pt. 165); *Abuja v. Bizi* (1989) 5 NWLR (pt. 119); *Usman v. Kareem* (1995) 2 NWLR (pt. 37). See also, Ostein, "An Opportunity Missed by Nigeria's Christians: The 1976-78 Shari'a debate revisited", 243-244.

still restricted to personal law matters. Moreover, another Constitution made in 1999 reintroduced the word 'personal' to the cliché.¹⁰⁰

A dramatic turnaround occurred in 2002 when the governor of Zamfara State¹⁰¹ introduced a legal reform, which he tagged "Shari'ah implementation" through which the state exploited some lacunae in the Constitution to pass series of legislation with the main purport of redefining the scope of application of Islamic Law in the state. With the legislations in place, the state widened the scope of Islamic Law in its domain to cover criminal matters as it applies to Muslims only.¹⁰² Though met with stiff opposition and scepticism both internally and internationally,¹⁰³ the position remains as the courts recognised the power of the state as a federating unit empowered by the Constitution to create criminal offences.¹⁰⁴ The Zamfara State initiative had since been adopted by many of the northern states.¹⁰⁵

In the Yoruba states of the Southern part of Nigeria, there are also certain developments regarding application of Islamic Law to the Muslims. It must be stated that non-Muslims are the majority in Southern Nigeria though the Muslims are almost the majority in the South Western part where the discussion will be focused. Notwithstanding that Islam has been well entrenched in the Yoruba land when the British encountered the people therein, the British administration refused to recognise its official application like it did in the North. Rather it banned its application altogether.¹⁰⁶ However, with the resurrection of implementation of Islamic Law in the North, the Muslims in some of the Yoruba states¹⁰⁷ also established for themselves, 'Independent Sharia Panels' or 'Islamic Law Arbitration Panels'.¹⁰⁸ These panels were resorted to after some efforts at making the states to officially give application of Islamic personal law legislative backing failed at all fronts.¹⁰⁹ The panels are constituted as

¹⁰⁰ Ostein and Dekker, op. cit., 575.

¹⁰¹ Zamfara State is one of the states in the North Western geo-political zone of Nigeria. Other States in the region are Kaduna, Kano, Sokoto, Kebbi, Katsina and Jigawa. These states are also usually being referred to as 'core north' states. They are predominated by the Hausa and Fulani who are also mainly Muslims. The states notwithstanding have some pockets of non-Muslims.

¹⁰² Ostein and Dekker, op. cit., 575-576.

¹⁰³ Barends, M. G., "Fears of a civil war in Nigeria may not be unfounded" (2003) vol. 5 no. 1, *DevIssues*, 19; Ostein, P., "Ten Good Things about the Implementation of Sharia in some states of Northern Nigeria" (2002) vol. 90 no. 2, *Swedish Missiological Themes*, 172-173; Boer, J. H., *Nigeria's Decades of Blood 1980-2002*, (Belleville, Ontario: Essence Publishing, 2003); Ostein, P., "Jonah Jang and the Jasawa: Ethno-religious conflict in Jos, Nigeria" (2009) *Muslim-Christian Relations in Africa* <<http://www.sharia-in-africa.net>> accessed 25 July 2009.

¹⁰⁴ Ostein and Dekker, op. cit., 575-576.

¹⁰⁵ Other states that reformed application of Shari'ah in their domains include Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe.

¹⁰⁶ Mahmud, A. B., *Supremacy of Islamic Law*, (Kaduna: Hudahuda Publishing Company, n.d.), 2; Tobi, op. cit., 140; Makinde, op. cit., ii.

¹⁰⁷ Examples are Lagos, Oyo, Osun and Ogun states. See Makinde, op. cit., 210 and 227; Ostein and Dekker, op. cit., 577.

¹⁰⁸ Ostein and Dekker, op. cit., 577; Makinde, op. cit., 25 and 86; Makinde, A. K. and Ostein, P., "The Independent Sharia Panel of Lagos State" (2011) vol. 25 *Emory International Law Review*, 921-944.

¹⁰⁹ See Oral interview with Alhaji Ishaq Kunle Sanni (45 years), the National President of NACOMYO, on 28th October, 2000 cited in Makinde, op. cit., 227. See also an address read at the occasion of the launching of the Independent Shari'ah Panel of Oyo State on Wednesday 18th Safar, 1423 A. H. i.e. 1st of May, 2002 at the Central Mosque, Ibadan by the Chairman of the Launching Committee, Alhaji Ishaq Kunle Sanni cited in Makinde, Ibid.

private arbitration organisations with mandates to adjudicate (or mediate) over Islamic personal law matters among Muslims in the localities where they operate in accordance with the rules and principles of Islamic Law. Parties approach the panels on their own volitions. Records show that the panels have been accepted by the people as a very effective tool of justice, hence, "there is no week that one case or another will not be brought before the panel" rather than the government established "customary courts where their problems will be compounded".¹¹⁰ According to Makinde:

A number of matrimonial cases handled by the panel solved the problem of many families that would have broken. Rather than dissolving marriages, the panel explored all avenues provided by the *Shari'ah* to bring amicable settlement amongst couples that appeared before it. Many homes had therefore regained matrimonial peace and tranquillity.¹¹¹

It can therefore be said that application of Islamic Law as a distinct system of law is also gradually gaining pace in the South Western part of the country. It is on record that one of the panels has even imposed criminal punishment of caning on a self-confessed adulterer.¹¹²

5.0 Conclusion

Considering the above developments, it appears that the position of Islamic law (in general) in Nigeria is inconclusive as its application is polarised between states that still apply it as a 'personal law' as contained in the Constitution, states that implement it as a full-fledged system of law and other states that are yet to officially recognise its application. Notwithstanding this, Islamic law is a system of law that operates on a complete package - both as a religious law and transactional law. Therefore, understanding its nature will help the Nigerian non-Muslim populace who have always staunchly feared its introduction to accept its harmlessness to them if introduced because the subjects of Islamic law will certainly be the Muslims who by subscribing to the religion are bound by its laws. And its introduction also has the potential to help in the fight against many of the social, economic and political problems in the country. The basis for this conclusion as established in this study is that Islamic law is a functional legal system that satisfies all the features attributable to the other systems of law such as common law and civil law, and differs in its operation from customary law. While the latter is shaped by human behaviours and interactional activities; Islamic law shapes the human behaviours and their transactions. This places Islamic law in the ilk of positive law as espoused by the positivism school of thoughts. Therefore, if Nigerian legal scholars appropriately and objectively study the nature of *Shari'ah* from the perspective of contemporary jurisprudence, they will understand its true nature thereby reducing the phobia that fuels their undeserved evaluation of its application in Nigeria.

¹¹⁰ An interview with the court clerk of the Independent *Shari'ah* Arbitration Panel in Ibadan, Bro. Oyeniran Saheed (28 years), on 20th May, 2004 cited in Makinde, *Ibid.*, 210.

¹¹¹ Makinde, *Ibid.*, 210.

¹¹² Reported in Abdulfattah O., "Shariah Gains More Ground in Yorubaland", *Weekly Trust*, 15 November, 2002 <<http://www.corpun.com/ngj00211.htm>> cited in Ostein and Dekker, *op. cit.*, 577. See also an interview with the court clerk of the Independent *Shari'ah* Arbitration Panel in Ibadan, Bro. Oyeniran Saheed (28 years), on 20th May, 2004 cited by Makinde, *op. cit.*, 227.



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