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THE LEGAL REGIME OF CUSTOMARY ARBITRATION IN NIGERIA REVISITED

I. INTRODUCTION

This paper examines the practice of arbitration in settlement of disputes under customary laws in Nigeria that is, Islamic law and the Native law and custom, the historical background, the legal status of the process under the Nigerian law and the effect of the award in dispute resolution, the advantages of effective utilization of customary arbitration, short comings and way forward shall be looked into..

The practice of disputes settlement through the process of arbitration is never a new phenomenon in Nigeria like it has been with man from creation. Arbitration had been with various indigenous communities in Nigeria before the advent and the introduction of the British legal system of court litigation into the country¹. It is instructive to submit that the invasion of the indigenous organized system of disputes resolution and the gradual and deliberate attempts of the colonialist had succeeded in relegating this customary system of disputes resolution to a second class status if not totally jettison for court litigation system in dispute settlement.

This paper becomes relevant at this point in time in view of the current upsurge and global acceptance of alternative dispute resolution mechanism as against litigation in dispute resolution. This is fast growing world over because of the problems associated with court litigation. The problems court litigation among which were identified include, delay in conclusion of cases, which has accounted for congestion of courts and prison of criminals awaiting trial, the technicality involved in litigation, expensive nature of litigation, and that litigation hardly bring about mutuality in dispute settlement, that is parties may not remain friends usually at the end of court litigation.

Customary law in Nigeria include Native law and custom administered in the Southern part as well as Islamic law administered in the Northern Nigeria which is predominantly Muslim community, therefore these two legal systems on arbitration shall be examined *mutatis mutandis*. It is important to give some definitions of the term arbitration. In Halsbury Laws of England² arbitration is define as;

The process of resolving disputes between people or groups by referring them to a third party either agreed on by them or provided by law, who makes a judgment.

¹ Gadzama J.K. (2004) Inception of ADR and Arbitration in Nigeria, a paper presented at NBA conference Abuja, Eunice R. O. (2004) Alternative Dispute Resolution and Dele P. (2005). What is Alternative Dispute Resolution? Dee Sege Nigeria Limited Lagos page 11

² Halsbury's Law of England 4th Edition vol. 2

Also in the case of *NNPC v Lutin Investment Limited*³ arbitration is defined thus;

An Arbitration is the reference of a disputes or difference between not less than two parties for determination after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The arbitrator who is not an umpire has the dispute submitted to him by the parties for determination. If he decides something else he will be acting outside his authority and consequently the whole of the arbitration proceedings will be null and void and of no effect. This will include any award he may subsequently make.

From these definitions, it can be deduced that arbitration whether customary or modern is a process of dispute settlement in a judicial manner by a third (neutral) party voluntarily appointed by the disputing parties with commitment to the binding effect of the outcome of the arbitration.

II. CUSTOMARY ARBITRATION

Arbitration as a mechanism of settlement of dispute has been with Nigerians from time immemorial as it has been with mankind from the beginning of its creation. The existence of the method as a means of dispute resolution is based on the fact that conflicts and controversies are inevitably a daily occurrence in society from time immemorial, this may be in the form of personal disagreements, religious crises, political, ethnic, marital disputes, chieftaincy matters, land and community boundary dispute and even economic conflict and which from time are settled one way or the other through an organized traditional dispute resolution mechanism like arbitration. Historically therefore arbitration and other mechanisms of dispute settlement is one of the processes used in dispute resolution in most ethnic groups in Nigeria like many other communities in African countries.⁴ Thus, arbitration is a traditional arrangement in Nigeria for resolution of dispute and abiding by the judgment of selected persons in the community, on disputed matters as opposed to reference to court for litigation. This is capture in the words of Ezediaro⁵; where he said:

Arbitration as a method of settling dispute is a tradition of long standing in Nigeria. Referral of a dispute to one or more layman for decision has deep roots in the customary law of many Nigerian communities. Such a method of dispute resolution was only reasonable one, for the wise men or the chiefs who were the only accessible judicial authorities. This tradition still persists in certain villages and communities, despite the centralized legal system and the attendant efforts at modernizing and reform of legal system.

³ *NNPC v Lutin Investment Limited* (2006) 25 NSCQR 77 at 111-112

⁴ Alfred Awala: (2005) *The Nigerian Magistrate*; Revised edition; Amstop Book Lagos page 1

⁵ Ezediaro. *Guarantee and incentives for foreign Investment in Nigeria* (1971) 5 *International Law* 770 at 775

The Supreme Court has in the case of *Ohiaeri v Akabueze*⁶ judicially affirmed the historical existence of customary arbitration as a process of dispute settlement in Nigeria where it defined customary arbitration thus;

Arbitration in dispute resolution is founded upon voluntary submission to the decision of the arbitrators who are either chiefs or elders of their community and the agreement to be bound by such decision and a freedom to resile where unfavourable.

Accordingly it safe to submit that customary arbitration process has for long being with Nigerian and is recognized as one method employed in the administration of justice. Significantly the use of customary arbitration in settlement of dispute is democratic in nature because of its characteristics feature particularly respect for tradition, fear of sanction and spiritual or legal effect of disobedience to decision. This position is evidenced by the observation of Webster J. B. and Bouhen A. A⁷, that;

Quarrels between individual of different families in the ward were settled before the people in the ward, elders acting as arbiter. Quarrels between wards comes before the full assembly ...A man might attempt to settle with the individual who had aggrieved him, if this failed he could ask a respectable elders to intervene or call members of the family together, he could also ask the ward or village head to solve the case.

The affirmation of the legality and validity of customary arbitration complemented the fact of its historical existence in dispute resolution in Nigeria even before the introduction of English litigation system through courts, inherited from the imperialist. This is equally captured by the Supreme Court pronouncement per Karibi Whyte⁸ JSC where he said;

Where a body of men be they chiefs or otherwise, acts as arbitrators over a dispute between two parties their decision shall have a binding effect, if it is shown firstly, that both parties submitted to the arbitration, secondly that the parties accepted the terms of the decision, such decision has the same authority as the judgment of judicial body and will be binding on the parties and thus create an estoppels.

It is instructive therefore to submit that the indigenous natives and communities in Nigeria have a well set of established and sophisticated mode of administering justice before the introduction of court litigation base of dispute settlement. One of such method is arbitration mechanism, designed to ensure

⁶ *Ohiaeri v Akabueze* (1992) 2 NWLR (pt 221) 1 at 7 see also *Agu v Ikewibe* (1991) 3 NWLR (pt 180) 385 at 407

⁷ Webster J. B. and Bouhen A. A: (1967) *The Revolutionary Years of West Africa since 1800*; Longman (Nig) page 102-103

⁸ *Egesimba v Onuzurike* (2002) 9:10 SC 1 at 19, and *Agu v Ikewibe* (1991) 3 NWLR (pt 180) 385.

stability and peaceful coexistence of people in society and the maintenance of the rule of law and equality among citizenry. Therefore the position of arbitration can be evidently buttressed by the observation of Niki Tobi JSC in the case of *Ufomba v Ahucahoagu*⁹ where he said:

A customary arbitration is essentially a native arrangement by selected elders of the community who is vast in the customary law of the people and takes decision, which are mainly designed or aimed at bringing some amicable settlement, stability and social equilibrium to the people and their immediate society or environment.

Reference of dispute for arbitration is usually made to, the family head, elders or chiefs of the community or to religious leaders such as Imam or pastor or to the mosques or to the church for settlement¹⁰. Their roles among others, in the community are, concerned for settlement of disputes or conflicts and upon subsequent acceptance of the arbitration, grant an award, which becomes binding on the disputing parties. If there is a disagreement as to whether arbitration is in fact a properly constituted arbitration between the parties the courts makes a specific finding of facts on the question, Dean CJ in the case of *Asampong v Kweku Amuaku*¹¹ says that;

... Where matters in dispute between parties are, by mutual consent, investigated by arbitrators at a meeting held in accordance with the native law and custom and a decision given, it is binding on the parties and the Supreme Court will enforce it.

III. ISLAMIC ARBITRATION

It is instructive to note from the onset and as rightly observed by Akanbi M. M¹², that there is no evidence of judicial pronouncement confirming the application of Islamic arbitration mechanism as a method of disputes resolution in Nigeria, neither was there any on its validity or even the legality or otherwise. This is because there has not being any reference of disputes relating to Islamic customary arbitration to court for adjudication or any dispute relating to or connected with or arising from arbitration.

The fact however remains that Islamic legal system is one of the three recognized and enforceable legal system in Nigeria and evidence abound in Shariah of arbitration as one of the practical method of dispute settlement. Historically it is established that in the early stage of Islam and after the death of Prophet Mohammed (PBUH) arbitration was employed in dispute resolution in Islam.

The arbitration that followed the battle of Siffin between Ali ibn Abi Tolib the fourth caliph and Muawiyyah ibn Abu Sufiyan, the rebel governor of Syria is a

⁹ *Ufomba v Ahucahoagu* (2003) 4 SC (pt ii) 65 at 90

¹⁰ *Odonigbi v Oyeleke* (2001) 2 SC 194 at 203 and *Njoku v Ekocha* (1972) 2 ECSLR

¹¹ *Asampong v Kweku* (1932) 1 WACA 192 at 201

¹² M.M Akanbi (2007): A Critical Assessment of the History and Law of Domestic Arbitration in Nigeria. Publish in "The Learned" a publication of LASA Kwara CAILS Ilorin page 39

classical example of arbitration in Islam. Two arbitrators were appointed, Abu Musa Asari for Caliph Ali and Amar ibn al As for Muawiyah.¹³

Thus Islamic customary law as applicable to the Northern Nigeria applies arbitration in line with the Islamic law laid down procedures in dispute resolution ever before the advent of the British imperialist.

The practice of customary Islamic arbitration in the Northern Nigeria has its legal basis and foundation from the primary source of law, that is, the Holy Quran, the Sunnah of the Holy prophet Muhammed (PBUH), Ijma'a, Qiyas, Ijtihad, Istihisan etc. more importantly, the Nigerian Muslims particularly the North where Muslims are predominant, follow the Maliki school of jurisprudence and where arbitration is regarded as Tahkim or sulhu as a form of contract where by parties agree to bring any dispute/conflict or disagreement arising from the terms of a contractual agreement before a hakim or arbitration for settlement¹⁴.

Islamic law in Northern Nigeria during the colonial rule was classified and is still being classified under Native Law and Custom and is enforced throughout Northern Nigeria¹⁵. This law is recognized and is enforced as binding by the Northern Muslims, because, according to Ambali M.A:¹⁶

It (Islamic law) had become their way of life, as the local native law and custom and was to the people of the Northern Nigerian origin who adhered to traditional religion.

It is hereby submitted that, arbitration practice and procedure as well as its legal basis in the North is predominantly based on the principles of Islamic Law as contained in the Quran and Hadith, and other sources of the Islamic law. It is therefore apposite to state some of the provisions of the Quran and Hadith relating to and evidencing arbitration as a mechanism for settlement of disputes;

If two parties among the believers fall into quarrel make you peace between them ...make peace with justice and be fair for God loves those who are fair (and just)¹⁷.

If you fear a breach between them twain appoint (two arbitrators) one from his family and one from hers if they wish for peace God would cause their reconciliation for God had full knowledge and is well acquainted with all things¹⁸.

God command you to render back your trusts to those to whom they are due; and when you judge between man and man that

¹³ Abdul Rahim Doi, (1981); Islamic History, Islamic Publication Bureau Lagos, pages 100-101 see also Akanbi M. M. ibid

¹⁴ ibid 37-38 see also Abdur-rahman Doi, (1990) Nigeria, Iksan Islamic Publication page 371

¹⁵ Anderson JND (1970) Islamic Law in Africa, Frank Cases & Co Ltd London page 4, Ruxton F.H (1918) preface of Maliki Law, Iuce C & Co London.

¹⁶ Ambali M.A (2003) The Practice of Islamic Family Law a Nigeria, Tamaza Publishing Co. Ltd zaria page 16-17

¹⁷ Quran 4 verse 35 Yusuf Ali, The Holy Quran Text, Translation and Commentary

¹⁸ Quran 49 verse 9 ibid

you judge with justice; verily excellent is the teaching which He gives for God is He who hear and see all things.¹⁹

We have sent down to you the Book in truth that you might judge between men as guided by God so be not used as an advocate by those who betray their trust.²⁰

Oh you who believe stand out for justice as witness to God even as against yourselves or your parent or your kin and whether it is (against) rich or poor; for God can best protect both. Follow not the lust (of your hearts) lest you swerve, and if you distort (justice) or decline to do justice, verily Allah is well acquainted with all that you do²¹.

Oh you who believe stand out firmly for God as witnesses to fair dealing, and let not the hatred of others to make you swerve to wrong and depart from justice. Be just; that is next to piety, and fear God for God is well acquainted with all that you do²².

The Holy prophet Mohammad (PBUH) had practice the mechanism of arbitration even before his call to prophet-hood and established it among the Muslims before his death. At the earliest time of the Holy prophet's life time the Meccans had great admiration for his wisdom, intelligence and uprightness and in critical moment they would seek his advice and refer their dispute to his judgment and would gladly accept his decision, because of this charismatic attitude, referred to him as *al amin*²³.

Islamic law is an all-encompassing law, which does not leave any aspect of human life untouched and makes adequate provisions to meet ever-changing nature of society and challenges therein. Islamic law being the personal law of the Muslim provide for arbitration in settlement of disputes.

IV. LEGAL STATUS OF CUSTOMARY ARBITRATION

Nigeria operates and recognized tripartite legal system, which includes customary law as earlier on explained, thus the application of customary arbitration as part of customary mode of settlement of disputes is legally recognized in Nigeria. This position is evidenced as distilled in plethora of judicial decisions²⁴ accepting customary arbitration in settlement of disputes as binding on parties if they voluntarily submitted to it. Customary arbitration is not regulated by Arbitration and Conciliation Act neither is it based on contractual agreement, which is concerned with written agreement but rather a traditional agreement based on

¹⁹ Quran 4 verse 58 ibid

²⁰ Quran 4 verse 105 ibid

²¹ Quran 4 verse 135 ibid

²² Quran 5 verse 9 ibid

²³ Abdul Rahim Doi, op cit page 4

²⁴ *Awosibe v Sotunbo* (1992) 3 NWLR (243) 514 at 532, *Ohicari v Akabeze* (1992) 2 NWLR (pt 221) 1 at 23, *Oparaji v Ohanu* (1999) 7 NWLR (pt 618) 290 at 308, *Odonigi v Oyetade* (2001) 6 NWLR (pt 708) 19 at 28 c. t. c.

respect for norms of a particular society (i.e. south) or based on religious obligation as an ordinance from God that must be adhere to.

The legality of customary arbitration in Nigeria either under the native law and custom as apply to the South or Islamic law as apply to the North, in other to have a binding effect on the disputing parties must be founded upon some basic ingredients. These ingredients/elements are set out by the Supreme Court and for instance in the case of *Okereka v Nwanko*²⁵ per Tobi JSC said that the Nigeria Law recognizes arbitration at customary level if the following conditions are satisfied;

- a) If parties voluntarily submit their dispute to non-judicial body i.e. their elders or chiefs as the case may be for determination.
- b) The indication of the willingness of the parties to be bound by the decision of the non-judicial body or a freedom to reject the decision where not satisfied.
- c) That neither of the parties has resiled from the decision so pronounced.

Therefore if a customary arbitral tribunal meets or properly adheres to the above stated essential elements of a valid arbitration, an award made after hearing and taking of evidence from the parties to the dispute becomes valid and binding. This position is distilled in a plethora of decisions²⁶ the Supreme Court affirming the application of customary arbitration in Nigeria, for instance in the case of *Okereka v Nwanko*²⁷ the Supreme Court citing the case of *Ohiaeri v Akabeze*²⁸ stated the preconditions for the binding effect of a customary arbitration to include the followings;

- i) That there has been a voluntary submission of the matter in dispute to an arbitration of one or more persons;
- ii) That it was agreed by the parties either expressly or by implication that the decision of the arbitration will be accepted as final and binding;
- iii) That the arbitration was in accordance with the custom of the parties or of their trade or business;
- iv) That the arbitrators reached a decision and published their award and;
- v) That the decision or award was accepted at the time it was made.

It can therefore be rightly posit that once these requirements of a valid customary arbitration are observed, the decision or an award made therein is valid and binding on parties to it. Significantly, however, settlement of dispute in land matters, family disputes, matrimonial conflicts, chieftaincy matters and religious crises are the bulk of disputes most often refer to customary arbitration for settlement. The practice of dispute resolution by customary arbitration is still very

²⁵ *Okereka v Nwanko* (2003) 4 SC (pt i) 16 at 29 and *Okere v Nwoke* (1991) 8 NWLR (pt 209) 311

²⁶ *Asampong v Amuaku* (1932) 1 WACA 192, *Njoku v Ekeocha* (1972) 2 ECSLR 199, *Idika v Erisi* (1988) 2 NWLR (pt 78) 573, *Okere v Nwoke* (1991) 8 NWLR (pt 209) 217, *Agu v Ikewibe* (1991) 3 NWLR (pt 180) 385.

²⁷ *Okereka v Nwanko* op cit

²⁸ *Ohiaeri v Akabeze* op cit

much in existence, practice and apply in Nigeria though, it is not well pronounced, practiced or resorted to due to the fact that people now preferred to go to court for settlement of dispute rather than the traditional arrangement of arbitration.

V. ADVANTAGES OF CUSTOMARY ARBITRATION

It has being observed and established by writers²⁹ of repute that courts litigation system in resolution of disputes has the disadvantages of being time consuming, expensive, less friendly to mention but few. These accounted for the global acceptance of the option of arbitration mechanism as an alternative dispute resolution of disputes.

In the realm of customary arbitration for instance, because it is part of the community and being the customary method of administration of justice, customary arbitration has the advantages of being quicker, not too technical, all the cumbersome procedures in litigation system are not usually applicable to customary arbitration, the disputing parties have the choice of choosing their arbiter, the venue of arbitration and determining the procedure to be followed, it is more friendly in nature and preserve personal relationship in community and less expensive, there is no requirement to hire a legal representation to stand for parties.

Additionally, customary arbitration is more susceptible to be respected and submitted to than modern arbitration because of the tendency or an obligation to respect customs and traditions and fear of sanction and or as in Islamic law respect and acceptance of arbitration is considered as religious obligations and or fear of sanction like banishment.

It is equally submitted that dispute resolution under the customary arbitration brings about an amicable settlement of dispute without creating further acrimony between the disputing parties.

VI. SHORT COMINGS

It is important to observe that despite the above listed advantages of customary arbitration it has some shortcomings. These include the fact that, the inherited English legal system in Nigeria has eroded its applications in dispute settlement. It is now the slogan of any citizen whose right has being, is being or likely to be infringe to say that he is going to court. Thus recourse to customary arbitration is very low if not totally forgotten.

Customary arbitration like all customary law is not codified except Islamic arbitration which has its laws contained in the Holy Quran, the traditions of the Holy Prophet Mohammed (PBUH) and other subsidiary Islamic legislations, this of course is disadvantageous to its application in Nigeria as same is considered personal law only limited to adherence of Islamic faith.

²⁹ Allfre A. op cit, Gadzama J. K. Inception of ADR and Arbitration in Nigeria, NBA conference Abuja (2004), Dele P. (2005) What is Alternative Dispute Resolution? Dec-Sege Nigerian Ltd Lagos, Aina K. (1997) Alternative Dispute Resolution (ADR): Solution to Court Congestion, The Guardian Newspaper page 24, Ghaus E. (1997) The Law of Arbitration in Nigeria, Longman Nigeria Plc, Akanbi M. M. op cit and Abdul A. Y. (2002) Arbitration in Nigeria: Problems, Challenges and Prospects, Ilorin Bar Journal vol. 1

Most people handling customary arbitration are not trained arbitrators, consequently therefore, the procedure and the award may be faulted if appeal against in court. Similarly a customary arbitration award cannot be enforced except upon the application of a party to court for it; this negates the advantage of customary arbitration as being quicker and less expensive.

It is instructive to note that one of the striking shortcomings of the binding effect of customary arbitration is the freedom parties enjoy not to accept the decision or the award at the time it was made. Any of the party who is dissatisfied with the decision of the arbitrators has the freedom to abandon it. This was what happened in *Awosibe v Sotunbo*³⁰ where the Supreme Court per Nnamacka Agu JSC (as he then was) observed,

...His (dissatisfied party) filing of a writ of summons was a positive demonstration that he never believed there was a binding arbitration and his abandonment of the gentlemen's agreement reached between them.

The Supreme Court per Edozie JSC fondly accepted the above position in *Okereke v Nwanko*³¹ where it was held that the legal implication of the evidence of appellant and respondent initiation of action against the arbitral award in Exhibit B is that Exhibit B (decision of a customary arbitrator) is not binding on the parties.

This position of the Supreme Court on customary arbitration is a sharp contrast to modern arbitration regulated by the Act³² and or contained in an agreement especially commercial agreement wherein once an award is made it is final and binding and parties has no right to rescind the gentleman agreement having subscribed to it, as rightly posited by the Supreme Court in the case of *Ras Pal Gas Ltd v FCDA*³³ per Katshina Alu JSC that,

A valid award on a voluntary reference no doubt operates between the parties as a final and conclusive judgment upon all matters referred. It should be remembered that when parties decided to take their matter to arbitration, they are simply opting for an alternative mode of dispute resolution. It must be emphasized that the parties have a choice to either go to court or refer the matter in dispute to an arbitrator for resolution.

The voluntary nature of the arbitration agreement which is validly conducted limit the jurisdiction of the court to either setting aside of an arbitral award or remitting same to arbitration for reconsideration³⁴ as opposed to the court attitude to customary arbitration where a party to a customary arbitration may abandon the arbitral decision.

³⁰ *Awosibe v Sotunbo* (1992) 5 NWLR (pt 243) 514

³¹ *Okereke v Nwanko* op cit

³² Arbitration and Conciliation Act Laws of Federal Republic of Nigeria ca 18 2004

³³ *Ras Pal Gas v FCDA* (2001) 6 NSCQR (pt i) 560 at 573

³⁴ *Sovia v Sonubi* (2003) 3 NSCQR 381 at 389; *African Energy Corporation Limited v Olieprodukten Nederland B. V.* (1983) 2 Lloyd's Rep, 419. *Owner of the M/P Lupex v N. O. C. S. Limited* (2003) 6 SC (pt ii) 62 at 70 and *NNPC v Lutin Investment Limited* (2006) 25 NSCQR 77 at 101-108.

VII. CONCLUSION

Conclusively, we have been able to establish from the generality of the discourse that customary arbitration in Nigeria includes the Native law and custom of various communities in Nigeria with its peculiar characteristic from one community to the other in the Southern Nigeria and Islamic customary arbitration applicable in the predominantly Muslim community in the Northern Nigeria. That customary arbitration enjoy the force of law if it meets the essential elements vis-avis its being voluntarily employ and party submitted themselves to the arbitration and are ready to abide by the final award of the arbitral tribunal.

Arbitration has become a globalized phenomenon in the world today and most importantly fondly resorted mechanism for settlement of international and domestic commercial agreement. This account for the need to revisit arbitration under the Nigerian Customary law as well as establishing how it can be a veritable tool in settlement of disputes out court litigation. It is our respective submission that if properly customary arbitration is well developed it will be of tremendous assistance in solving a number of conflict affecting the Nigeria polity, like the Niger Delta and insurgence of militia.

It is important to stress that there is need to properly enlightenment Nigerians on the significance of this old but long and well established customary system of arbitration in dispute resolution, If this is done it is capable of assisting in reducing or decongesting the bulk work of the judiciary especially trivial issues or dispute which can ordinarily be resolved at community level but taken to court can be amicably settled through customary arbitration.

Lastly is our respective suggestion that once a customary arbitration is voluntarily sought and properly conducted to logical conclusion (award), it should operate as final and binding. The court should enforce the awards and party should not have any right to abandon the gentleman decision or award of the arbitration tribunal. It is equally our respective suggestion that customary arbitration be included in the various window of ADR in especially in any State in Nigeria that has established multi-door courts³⁵.

³⁵ Lagos, Abuja, Kano and most recently Kwara have established multi-door court for ADR.

Every person shall be entitled to freedom of thought conscience and religion, including freedom to change his religious in belief and freedom (either alone or in commonly with others and in public or private) to manifest and propagate his religion or belief or worship or teaching and observation.

Thus, Muslims have constitutional right to demand for Shari'ah to fully comply with their religious obligation. According to Muslims' understanding, religion is a very fundamental aspect which cannot be divorced of law, politics or moral aspect of human life that deserve adequate and undiluted protection.

3. Christian Origin of the Nigeria Legal System

Another important justification for the Muslim demand for Shari'ah legal system in Nigeria cannot be divorced from the very historical antecedents of the country Legal System that is, the English Common Law. It is instructive to note that the Nigeria Legal System has its very foundation from a religion (Christianity) because England from where Nigeria inherited its legal system is officially a Christian state having particular affinity with religion¹⁰. This postulation is supported by the statement of Lord Summer in the case of *Bowman Vs Secular Society*¹¹ thus:

Ours is and always has been a Christian state. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities and its sections even in courts of conscience...

The antagonism of Shari'ah by some Christians¹² and their allies is thus a mischief to deny the Muslims of their right to Shariah legal system, especially when the

10 See Malik S.H.A., *Shariah Legal System and a Way of Life* in M.O AbdulRahman (ed) *Perspectives of Islamic Law and Jurisprudence* (NAMLAS Publication, 2000) 36-37. Y.A Quadri, *Sharish: The Islamic Way of Life* (2000) 7th Ramadan Lecture Organised by University of Ibadan Muslim Community. 27

11 (1917) A C 406

12 Sunday Mbang, CAN president in 1999 when Zamfara adopted Shari'ah Legal System said, 'we are worried about entrenching the shari'ah in the Constitution as it means Nigeria is an Islamic state, see Tell Magazine of 10th May, 1999, p. 1, Rev Peter Akinola, said shari'ah imbrogilio would lead to the conversion of many Muslims a...it is not the life style that anybody can live successfully in the 20th Century, see The Punch Newspaper of September 12, 2000 p. 1&2 and Sanya Onayode in his own statement said that shari'ah controversy is gradually becoming a time bomb to national unity

interests of the Christians have been adequately taken care of. Considering the above justifications, it is only fair that the Constitution should provide, protect and guarantee Muslims right to Shari'ah.

DEVELOPMENT OF SHARIAH LAW IN NIGERIA

It is significant to revisit the origin of dual legal system (i.e. Shariah and Nigeria Legal System) to drive home the intended discourse. Shariah as a practical religion and way of life had been a force to reckon with in many part of what today constitutes the Federal Republic of Nigeria. It has been a vehicle of development in the entire facet of human endeavors such as education, economic, arts of governance and administration of justice for long before the appearance of any British Colonial agent in any part of Nigeria¹³.

The application of Shariah as a legal system predated the popular amalgamation of the protectorate of Northern and Southern Nigeria in 1914 by Lord Lugard. The Protectorate of Northern Nigeria, virtually made up of Sokoto Caliphate, which was established in 1804, and the Borno Empire, the Islamic culture had been deeply rooted entrenched especially since the time of Usman Danfodio and Mai Idris Aloma. In all the places under the influence of the Sokoto and Borno Empire, the Shariah flourished because the Qadis courts were established to dispense justice in accordance with the Shariah.¹⁴

In the Western part of Nigeria it is on record that in towns like Epe, Iwo, Ikirun, Eko, Lagos and Ede Shariah legal system was in application shortly after the Sokoto jihad of the 19th century. In other words, Shariah in its entire ramification both civil and criminal aspects was observed and practised in these places. It was said that Qadis did held regular courts to administer Shariah in places of notable Yoruba Obas. It was even seen as a mark of civilization that, an Oba had somebody learned in Islamic law presiding over his court, the proximity in most Yoruba cities of the Mosque to the palaces of the Obas is a point in the direction.¹⁵

Oba Abibu Olagunju for instance, who was the first Muslim Timi of Ede in the present Osun State accorded Shariah Official recognition during his reign in the

especially if viewed in light of how non-Muslims live in shari'ah states. See the Punch Newspaper of 2nd November, 2000.

- 13 Obilade A.O., *The Nigerian Legal System* (Spectrum law Publishing, Ibadan 1979) 17,18 & 34,35 and A E W Park *The Sources of Nigeria Law* (Sweet and Maxwell, London 1963) 60-70
- 14 Anderson J.N., *Islamic Law in Africa* (Frank Cass and Co Ltd, London 1970) 3
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