Shari'a as Customary Law? An Analytical Assessment from the Nigerian Constitution and Judicial Precedents

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Abstrak: Dalam hukum Nigeria, hukum Islam atau syariah diklasifikasikan sebagai hukum adat. Premis itulah yang menjadi agitasi upaya penerapan syariah secara penuh oleh umat Islam. Usaha untuk mendeklasifikasi hukum adat selalu digagalkan dan dianggap "inkonstitusional" oleh penentang syariah. sementara sebagian Muslim dan pendukung syariah memandang masalah tersebut sebagai salah tafsir yudisial dan ketidaksesuaian hukum. Dalam penelitian ini, dengan memakai pendekatan analitis, syariah dan hukum adat dinilai untuk mempertegas dalam ketentuan Konstitusi Nigeria berdasar beberapa preseden yudisial untuk mengungkap posisi syariah yang sebenarnya. Kemudian ditemukan bahwa, meskipun klasifikasi di bawah sistem hukum Nigeria, syariah tidak bisa menjadi hukum adat karena beberapa faktor yang meliputi sumbernya, keilahian, keabadian, dan universalitas.

Kata kunci: Hukum Adat dan Syariah; Pluralisme Hukum; Konstitusi Nigeria

Abstract: Under the Nigerian legal classification, shari'a, the Islamic legal system is classified as customary law. It is on these premises that the Muslims' agitations for full-fledge shari'a applications and declassification from being a customary law are always thwarted and termed "unconstitutional" by the shari'a antagonists. Meanwhile, the Muslims and protagonists viewed the problems as judicial misinterpretations and legal incongruity. In this study, with the adoption of an analytical approach, shari'a and customary law are assessed from the provisions of the Nigerian Constitutions and some judicial precedents to unravel the actual position of shari'a. It was then discovered that, despite the classification under the Nigerian legal system, shari'a could not have been a customary law due to some factors which include its sources, divinity, permanency, and universality.

Keywords: Customary Law and Shari'a; Legal Pluralism; Nigerian Constitution

Introduction

Shari'a is categorized as one of the customary laws in Nigeria which could be activated in the jurisdiction, practice and procedures by the governments and the citizens of all the federating units and the federal capital territory, Abuja, as enshrined in the 1999 Constitution as amended in Sections 260-264 and 275-279 respectively. This, without much ado, has generated repudiations from Muslims and legal experts who see the categorisation as gross misinterpretation of shari'a from the altar of the Constitution. The uproars generated by shari'a classifications as customary law and the agitations for its full implementation in Northern and Southern parts of the countries could not be underestimated. Though Nigeria is often referred to as "Secular State" (Ogoloma, 2012: 63-74) but, ironically, the country is populated, administered and governed by the adherents of various religions most especially Islām, Christianity and African Traditional Religions who profess their faiths in both private and public lives. The adherents of Islām, Muslims are believed to constitute about 52% of the population (Pew Forum, 2010: 60-64), with a huge population in the northern region and less adherents in the southern region except for the southwest geo-political zone, which has the largest population of Muslims than other southern regions, and as such, matters of Muslims family law are always brought to scrutiny in the scheme of legal adjudication and enforcement for decades.

Prior to the invasion of the colonialists, the southern and northern Nigerians had devised means of governance where predominantly, shari'a was adopted in most of the northern region and part of the south-west enclave, and in contrast, other regions are administered under customary laws which are affiliated with people's customs and norms. The advent of these imperialists also ushered in Christianity, which was propagated under the garb of colonialism and subsequently brought about missionary works and western education into the country. Aside from the Islamic law, which replaced the core kernel of Hausa/Fulani's custom in the north, the foremost customary laws in Nigeria include that of the Bini people (Sagay Itse, 2006: 267-268), the Igbo tribe (Okpalaobi and Okaphor, 2017: 84-98), and the Yoruba people (Ajibola, 1982: 4-5) which were all operated distinctly because of differences in cultures, languages and geopolitical entities. However, due to different colonial

machinery used in governing the northerners where the indirect rule was introduced and the direct rule adopted in the south, coupled with the usages of shari'a and customary law under different atmospheres, there have been legal altercations on the true position of shari'a either as a religious law or a customary law under Nigerian legal system.

The successive constitutional changes from the colonial to post-colonial eras have brought about resentment over Shari'a restriction and classification as customary law despite its constitutional recognition as a source of law under Nigerian legal system (see Ostien and Dekker, 2010: 553-612). It is, therefore becomes an inevitable *expressis verbis* that this study intends to unravel the composition of the Nigerian legal system, its intrigues under legal pluralism and assessment of shari'a as a customary law as inferred from the Nigerian Constitution and judicial precedents.

The Nigerian Legal System and Legal Pluralism

The legal system connotes whims and caprices on which laws are pronounced, adjudicated, interpreted and enforced by the government, judicial personnel and the law enforcement agencies within a definite territory or a State to maintain law and order for the enthronement of peace, equity and justice. According to Yadudu (2001:146), quoting Merryman, a legal system is an operating set of legal institutions, procedures, and rules. In essence, the legal system is the procedure or process for interpreting and enforcing the law. This operational legal system as pronounced in the Nigerian Constitution serves as an embodiment of laws and orders which recognises a standard legal system with a plurality of laws such as the English law, shari'a and Customary laws.

According to Oba Abdulmumini and Ismael Saka (2017: 82), the Nigerian legal system is pluralistic, with common law, Islamic law, and customary law as the major tripartite legal traditions. Jadesola Lokulo-Sodipe *et al* (n.d,: 2) also reiterated that Nigeria is a "Constitutional Federal Republic" with a legal system majorly based on English laws and traditions by virtue of legal transplant through colonization. They argued that English law has an unassailable influence on the Nigerian legal system with the pronouncement of Section 45(1) of the Interpretation Act, which was in force in England from January 1900 when it declared:

> The common law of England and the doctrines of equity and statutes of general application which were in force in England on 1st January 1900 are applicable in Nigeria, only in so far as local jurisdiction and circumstances shall permit.

This assertion was corroborated by Obilade Olusegun (1979: 41) when he stated that:

> One of the most notable characteristics of the Nigerian Legal System is the tremendous influence of English law upon its growth. The historical link of the country with England has left a seemingly indelible mark upon the system.

Though, as Jadesola Lokulo-Sodipe *et al* (n.d,: 3-5) further affirmed, Nigerian legal system adopted "almighty federal constitution" which allows division of powers between the constituents of the federation; the supremacy of the Constitution was spelt out *inter alia* in Section (1) of the 1999 Nigerian Constitution, which states that:

> This Constitution and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria". It further says in Section 1(3) that "If any law is inconsistent with the provisions of this constitution, this constitution shall prevail and that other law shall to the extent of the inconsistency be void. (the 1999 Amended Constitution of the Federal Republic of Nigeria (2011: 19-20)

Consequently, the Nigerian Constitution is a product of legislation made by the State Houses of Assemblies, the received English law, customary law, which include shari'a, judicial precedents and international laws. In his view, Justice Igbokere sees the legal system as the laws, courts, personnel of the law and the administration of the system in a given state or geographical entity. He however opined that the Nigerian legal system is plagued with "Duality" of law enforcement and operation with the effects of English law imposition and customary law adjudication. His assertion of the duality of law was premised on his legal resolves that shari'a is part of customary law; hence, he jettisoned the notion of "legal pluralism" in the Nigerian legal system (Justice Igbokere: n.d,: 32).

In lieu of the above stance, Yadudu (2001: 147, 151) rejected the notion of the term "Nigerian Legal System" which he termed "misnomer" but affirmed that there is only plural legal system in Nigeria which ushered in legal pluralism, which has been a cloak militating against the

smooth adjudication of justice in the country. Legal pluralism means the existence of variance but interwoven laws in a legal system acceptable and enforceable within a geographical entity at a particular period (see Niki, Tobi, 2006: 153 and Tamanaha, 2018: 375).

These laws usually emanated from different sources, which has bred the existence of multi-legal system under a single jurisdiction. Nigerian legal system is therefore pluralistic with the proliferation of laws coupled with the constitutional enforcement upon the country from the Clifford Constitution of 1922 to the current 1999 Constitution, (Ilesanmi, 2001, 535). This concept of legal pluralism often leads to the conflict of laws which is not peculiar to Nigeria alone; but as noted by Paolo and Ido (2012: 641), the phenomenon is prevalent in almost newly conquered territories by the imperialists.

According to Baudovin, legal pluralism has become a major theme in socio-legal studies and as he argued, the concept of legal pluralism in every legal system emanated from the existence of plural sources, and many practices and what people considered as law and instead of looking at the hypothetical pluralistic model of law, there should be a mechanism and the processes through which people orient to something legal which they identify as pluralistic (Baudovin: 2007: 2).

Surmising from the above, Oba Abdulmumini (2011: 881-883) sees Nigeria as a complex pluralistic nation in terms of ethnicity, laws and religion which is premised on the legal pluralism coming from the multifarious legal `traditions, which as he concluded will continue to generate heated debates, differences and controversies under Nigerian legal system. His position was corroborated by Idris Dalhat (2018: 2-6 and 23-33), who hypothesized that the legal pluralism syndrome has affected all spheres of Nigeria legal administration, especially in the area of succession procedure, administration of the estate, application of customary law and the administration of criminal justice.

It is now crystal clear that the Nigerian legal system is intertwined in legal pluralism with the existing modes of law as enshrined in the Constitution. The differences in applicable laws within Nigeria legal system, according to Isaac Agbede (1991: 42-50) has also brewed problems of every conceivable dimension in the area of inter-local conflicts of law, territorial and personal systems of law, application of

customary law, application of Islamic law and others. Incessantly, the situation has been beclouded with the country ethno-religious conflicts often fuelled by political elites, ethnic bigots, uncensored media and corrupt judiciary.

Is Sharīʿa a Customary Law?: An Assessment

The Nigerian Constitution recognises shariʿa as "Moslem Law" either in usage as "Islamic law" or "Islamic personal law" and as a branch of customary law practiced in Nigeria; and as such, there have been counter and counter-repudiations of this notion by different authorities for decades. However, in explicating the problematic state of Islamic law in Nigeria as an appendage to English law which has affected the application of shariʿa in Muslims' affairs, we shall look at the submission of Yadudu (1988: 5), who succinctly stated the status of Shariʿa in Nigeria thus:

> Islamic law, as other customary law in the country exists as an appendage of the English common law. It does not exist as an autonomous and self-regulating legal system. It is defined in terms of common law. It applies subject to the standard of the common law. Its courts are established, and its personnel trained and appointed in the same way and using virtually the same criteria as those of the common law courts and justice

His submission had been three decades earlier lamented by J.N.D Anderson (I960: 437), whose statement could be paraphrased *inter alia*:

> British territory in Africa is divided in the context of Islamic law application into territories where juridically, shariʿa is regarded as a variety of "native law and custom" and those territories where shariʿa is regarded as the third, distinct system alongside English and Customary laws. Surprisingly, Nigeria is a perfect example of the countries where shariʿa is administered as a form of native law and custom

Therefore, the above submissions were astute about the status of Shariʿa in the scheme of the Nigerian legal system. It has been affirmed that Islām and Shariʿa thrived in the northern part of Nigeria (Gwandu Abdullahi, 2001:81-108) long before the *Jihād* of *Shaykh* Uthmān Dan Fodio (Ismail Balogun, 1975: 1-112; Lawal Raheem, 1999: 140-152) and before the inclusion of Shariʿa as a recognised law in the Nigerian Constitution (Olatoye, 2005: 56).

As further chronicled by Ishaq Akintola (2001: 93), shariʿa adjudication among the Muslims of the northern Nigeria dated back

to the advent of Islam in Kanem-Borno in 1085 C.E during the reign of Mai Hume Jilmi and was reinforced in the reign of Idris Alooma (Hiribarren, Vincent: 2016: 1-6); while other historians and authors such as Nzomiwu (1989: 64) as quoted by Kingsley Okoro (2017: 474) observed that Islam came to Hausaland earlier, particularly in the second half of the fourteenth century during the reign of Sarki Yaji Ali (1349-1385 C.E) when Muslim merchants from Wangarawa in the Mali Empire preached Islam in Kano and built mosques in the ancient city. Thus, the institutionalisation and implementation of Islamic law in local courts in northern Nigeria took place between the 9th and 15th centuries in which *Qāḍī* or an *Al-Kāli* (Judge) were appointed in Kano, Zaria, Katsina and Borno noticeably in the reign of Sarki Muhammadu Rumfa, the first acknowledged Muslim Emir of Kano (1463-1499 C.E).

Anderson (1970: ix) also affirmed that up till 1959, shari'a was more extensively applied in northern Nigeria than anywhere else in the world outside the Arabian Peninsula or Afghanistan, and as he concluded, this was premised on the fact that even the British Protectorate, Lord Lugard found many of the Muslims' Emirates administering justice in a way superior to the condition which prevailed elsewhere. This shows that Shari'a has been in practice in Nigeria before the British invasion and as Akintola (2001: 95-96) posited further, the British colonialists met shari'a in both southern and northern parts of the country to the extent that Lugard attested to this in his Supreme Court Ordinance, Section 20 of 1900 when he proclaimed that the court shall always apply "shari'a laws" in all Muslim matters relating to marriage and succession. Thus, as Justice Mohammed Bello (2001: 8-9) also affirmed, the British imperialists did not interfere with Islamic civil law but did the same with shari'a criminal law such as the abolishment of payment of *Diyya* (Blood Money), imprisonment as the punishment for theft in place of hand amputation and death by hanging for the tort of homicide in place of beheading and so on.

In the view of Lord Hailey as cited by Anderson (1970: ix), despite the relative absence of autonomous Islamic legal order in Africa, African Muslims in which Nigerian Muslims are inclusive (like other Muslims worldwide) possessed certain characteristics that other religious groups lacked; they have their own system of law which is an integral part of their religion. However, as Gbadamosi Tajudeen (197: 109) lamented,

the arrival of the British in many Muslim dominated enclaves in Africa including Nigeria forestall the attempt at developing Islamic law to its fullest. As Ambali Muritala (2003:17) further bemoaned, Islamic law was reduced to mere "Native and Custom Laws" based on the Lord Lugard's "*political memoranda*" of 1918 in a manner where shari'a courts were made to be adjudicative venues for minor criminal matters and offences, family and personal laws. (Obe, A, 2005: 108).

According to Chinedu Ubah (1982: 74), as enshrined in the Native Courts Ordinance of 1914 and the 1918 *Political Memoranda,* there was no provision in any of these instruments for the enforcement of *Sharī'a* as pronounce by shari'a courts' judges; hence, Native and Custom Laws (as indicated in Sections 24 and 25 of Cap 78 of the Native Court Law) came to be understood in the Muslim courts as if it were synonymous with Islamic law.

In clipping the jurisdiction of shari'a courts, the then *Alkali* courts were changed and known as Area courts in order to achieve the sinister of demeaning shari'a and equate it with customary courts, especially in adjudication on both Muslim personal and other Shari'a matters. Hence, since then, whenever an Area court decides a case on shari'a matter, all the appellate courts (High Courts, Courts of Appeal and the Supreme Courts) have unfettered appellate jurisdiction over the judgement whenever it is appealed either by the litigants or the appellant. However, these appellate courts are constitutionally bound to apply Shari'a with the presence of learned justices who are vast in Islamic law as enshrined under Section 288 of the 1999 Constitution as amended; the damage of relegating the shari'a courts is unmatched (Makinde, Abdul Fatai, 2017:85-87).

Akintola (2001, 97) also claimed that there was shari'a adjudication in the southern part of the country as early as the nineteenth century in places such as Ede, Iwo and Ikirun while it is also believed in some quarters that the southern Muslims appeared content to follow the religion of Islām more or closely in matters of doctrines and rituals but no specifically Muslim court nor any formal application of Islamic law was found. Ambali (2003:15) also affirmed that shari'a was neither the official legal system nor was Islam the state religion among Muslims of the south as the case was in the north. However, these claims of shari'a not being applied anywhere in Nigeria except in the northern part have

been repudiated by scholars such as Sanni Amidu (2007:117-132; 2008: 88-89) and Muritala Okunola (1993: 25-29). It is not doubtful that the colonialists met a substantial populace of Muslims in the southern part of Nigeria; even if as affirmed by Yasir Qadir (2000 : 11-13), the Islamic law was not officially institutionalised nor was the enforcement sustained.

Furthermore, according to Ambali (2003: 17), right from 1979 to date, the jurisdiction of Shari'a Courts of Appeal has been restricted mainly to Muslim law matters while appeals go to the Court of Appeal for the determination of civil matters and other family law cases as affirmed in Section 244 (1) of the 1999 Constitution as amended. By this provision, the Court of Appeal is saddled with the power to entertain an appeal against the decision of the Shari'a Court of Appeal of a State and the Nigerian federal capital territory. The Section provides thus:

> An appeal shall lie from the decisions of a Shari'a Court of Appeal to the Court of Appeal as of right in any civil proceedings before Shari'a Court of Appeal with respect to any question of Islamic personal law which the Shari'a Court of Appeal is competent to decide.

Though, as enunciated further by Oba Abdul Mumini (2004: 131-132), the Nigerian Constitution in Section 288 (1) of the 1999 Constitution makes it compulsory that the Court of Appeal must have on its appeal panels at least three justices who are learned in Islamic law. This, according to him, is purely a judicial impropriety because the majority of these judges are common law practitioners with generally no more than a modicum of the knowledge of shari'a*;* and in many instances, these judges are not conversant with Islamic law and sometimes are non-Muslims Also, the High Courts in Nigeria have unrestricted jurisdictions over the Shari'a Courts of Appeal in Islamic matters, and this has been the norms exclusively of the courts at the detriment of the Muslim courts; despite the fact that the 1999 Constitution as amended in Section 262 grants Shari'a Courts of Appeal juridical power to adjudicate on questions of Muslim personal matters such as cases on marriage, guardianship, inheritance and succession. (Ubah, Chinedu, 1982: 69-93). With this provision, the Shari'a judges are appointed by the judicial council while the courts are strictly restricted as Appeal Courts to demean the tenets and enforcement of shari'a further.

In his submission, Oba (2002: 824-825) observed that, the adjudication with Islamic law has been regionally based in Nigeria (as found and recognised by the colonialists in the northern region) until it was incorporated as a national law into the 1979 Constitution in Section 242, with the same provision made in 1999 Constitution in Sections 260-4 and 275-79 respectively where it was both termed "Islamic Personal Law". By the creation of Shari'a Courts of Appeal by these Constitutions, Islamic law in Nigeria become a creation of Constitution rather than universal incorporation of the law as enshrined in the precepts of Islām and abided to by Muslims globally. This, as rightfully enunciated by Justice Bello (2001: 13-14), brewed some obstacles directly from the Nigerian 1999 Constitution as amended against the enforcement of Shari'a in Nigeria. These include: (1) The provision of Section 1 of the Constitution states that the Constitution is "Supreme", and its provision is binding on all authorities. any law is inconsistent with the provision of the Constitution, the law is void, and the Constitution shall prevail; (2) Provision of Section 36 (12) which stipulates that a person shall not be convicted of criminal offences except it is prescribed in a written law approved by an Act of the National Assembly or the Law of a State, and (3) section 38(1) which ensures right of freedom of thoughts, conscience and religion, negates the shari'a provision of *al-Riddah* (apostasy) capital offences as unconstitutional.

The Categorisation

From forgoing, it is crystal clear that the availability of shari'a as a system of law under the Nigerian legal system is unquestionable, but its categorisation as a customary law has for long brewed legal and literary debates and repudiations. Firstly, as observed by some analysts, the promulgation that initiated the classification of shari'a as a customary law was the sheer ignorance of the British imperialists who through their legal dualism, failed to distinguish between the northern Nigerian native laws and customs and shari'a provision. They based their verdict on the general practices of the then northern Nigerian citizens who are mainly Muslims and as such, they fail to distinguish between their culture and Islamic law provision; hence, the adoption of Shari'a as customary law (Oba Abdulmumini, 2002: 845-846).

The situation of demeaning shari'a was also linked in some quarters

to unwholesome acceptance of Islām and holistic application of its law devoid of material and leadership inclinations even after Dan Fodio's *Jihād*. This led to weaknesses witnessed during British imperialism, and as Karibi-Whyte Adolphus (1993, p.130), affirmed could be deduced from Fredrick Lord Lugard's description of the fell of Sokoto Caliphate to the organised amalgamation of both southern and northern protectorates in 1914. He was quoted to have said *inter alia*:

> The administration of Muslim law is modified by local law and custom in pagan districts, provided that by so doing, the judge does not directly oppose the teaching of the Koran. There is no doubt that even in Muslim districts, the law, as administered today especially in the Emir's judicial councils, is often modified by recognition of the native law and customs which has been influenced by system the Fulani found in operation at the time of their conquest.

According to Badaiki (2001 : 11-12), the categorisation of shari'a as a customary law is a "fallacy"; and succinctly, he traced the origin of such inappropriate pronouncement to the provision of Section 2, Cap. 42 of the High Court Law of Northern Nigeria of 1963 which provides that "*native law and custom include Moslem law*". He claimed that the enactment which made the distinction between customary law and shari'a was that of the Customary Court of Appeal of old Plateau State in 1979, and this was upheld in the case of *Ahmadu Usman v. Sidi Umaru* (1997) when the Supreme Court made it clear that "….*within the meaning of Section 2 of the Customary Court of Appeal law of old Plateau state, "customary law" does not include "Moslem law"*.

In the same vein, Oba Abdul Mumini (2002: 826-827) further opined that the classification was done during the colonial era through legislation (as in Section 2, Native Courts Ordinance, Cap 142, Revised Edition of the Laws of Nigeria, 1948) and was not limited to Nigeria alone, it was the same in all British colonies where Muslims were the majority. In most of these colonies, Shari'a was made incompatible with the so-called modern laws in the area of codification and implementation in order to degrade the legal jurisdiction of shari'a to Muslim family matters alone. (See Anver, M. Emon, 2016: 275-309; Oba Abdul Mumini, 2002: 826-827) For example, in Indian and Sri Lanka, Islamic law governs only Muslim family life (marriage, divorce, inheritance and child custody) while some aspects of crime and commerce are codified

and extended upon the provisioned family matters in Pakistan and Nigeria (Subramanian, 2008: 634).

Furthermore, this judicial anachronism was expressed in the submission of Peters and Maarten (2003: 56) who were astounded at the pronouncement of Justice Ademola CJN in the case of *Adesubokan* v. *Yinusa* (1971) NNLR 77 at 80), who held that Islamic law is a customary law when they (Peters and Maarten) said "*Muslim Law as it is profoundly called under Nigerian legal system is sought not to be grouped as customary law.*"

However, as further enumerated by Oba (2002:827-836), the classification of Shari'a had some advantages to the colonialists; these include:

a. It relegated and retarded the growth of Islamic law.
b. It allowed the colonialists to impose their values and customs on their Muslim subjects by allowing shari'a (as a customary law) to go through repugnancy test, incompatibility with statute test and public policy test before it can become applicable by Courts in Nigeria. In this regard, Oba quoted the verdict of Justice Mahmud who aptly posited thus:

   When it became impossible for the British to abrogate shari'a by an express provision; they resort to making use of their courts which were given unlimited jurisdiction on all matters and persons and the ambiguous repugnancy clause to negate shari'a to the extent that even if it was in existence it would be weakened.
c. Common law judges who had not been trained in Islamic law were appointed to adjudicate on Islamic matters.
d. The classification limits the Islamic law application; hence, shari'a was not applied as universal law but rather as law binding only two parties. Even in some cases, they argued that being Muslims of the two litigating parties (plaintiff and defendant) is not enough to apply the Muslim law in court, they have to be shown to have regarded themselves as being bound by Islamic law, otherwise, the Islamic law will not apply as in the case of *Mariyamu v Sadiku Ejo* (1961)NNLR 77.
e. Treating Islamic law and customary law differently in many respects to create distinction between Islamic personal law and other aspects of Islamic law. He believed that it was an attempt by the colonialists to retard the growth of Islamic law; hence the creation of the term "Islamic Personal Law" which was alien to classical Islamic jurists and could not be found in any classical texts of Islamic jurisprudence.

f. Finally, he lamented the restriction on the jurisdiction of Islamic law. The Section 11 of the Shari'a Court of Appeal Law (Cap 122, laws of Northern Nigeria, 1963) restricted the jurisdiction of Islamic law to matters relating to divorce, marriage, guardianship of infants, succession, and endowment and had no jurisdiction at all on land matters even if all the parties involved are Muslims and their *lexus situs* is Islamic law. (See Subsection (e) in Section 242(2) of 1979 Constitution and Subsection (e) in Section 262(2) and 277(2) of 1999 Nigerian Constitution as amended, 2011). He opined that limiting the jurisdiction of Shari'a Court of Appeal to "personal law" was an injustice and could be decided as such from the lead judgement given in the case of *Maida* v. *Modu* (2000) 4 NWLR (pt.659),99) as decided by Court of Appeal which lamented the injustice in this arrangement.

The Declassification

Many legal luminaries have argued that shari'a is not and could not have been a customary law. As they believed, shari'a as customary law in Nigeria is therefore a contradiction; for example, there was a pronouncement in which the sacredness of shari'a as non-customary law was admitted by the Supreme Court of Nigeria itself. This was in the case of *Ila Alkamawa v. Alhaji Hassan Bello and Another* (1998) 6 SCNJ 127) where Honourable Justice Bashir Wali JSC pronounced that:

> The Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English common law. (See Yusuf, A.R and Sheriff, E. E. O: 2011 : 26)

Furthermore, Justice Niki Tobi (2006:137) enumerated the differences between Nigerian customary laws and shari'a thus:

> Islamic law, unlike customary law, is not flexible, Islamic law, unlike customary law, is written. Islamic law is rigid, precise with divine ossification and rigidity. There is no basis for any speculation or conjecture as in the case of customary law. The acceptability of Islamic law is a divine command by the Almighty Allah and therefore spontaneous on the part of all Muslims. Islamic law is therefore does not depend on its acceptability by Muslims because that is taken for granted. Any person who disobeys the divine words of the Qur'an cannot call himself a Muslim. Such a person is not with Allah and he will be regarded as an unbeliever.

In his other submission, Justice Niki Tobi (2006:136) further claimed that classifying Islamic law as customary law was motivated by religious intolerance and prejudices when he concluded that:

> One other issue we would like to take by way of introduction is whether Islamic law is customary law. Colonial legislation generally regarded and treated Islamic law as "native law and custom" which had no separate and distinct existence. For example, Section 2 of the Native Courts Ordinance 1914 provided that "Native Law and Custom includes Islamic law." This resulted from their negative and uncompromising approach to Islamic law particularly as a distinct and separate religion from Christianity, based on the Qur'an and not the Bible. The Colonial approach merely reflected their Christian background.

Accordingly, Kolajo (2002:2 and 10) argued that by the virtue of pronouncement in the case of *Lewis v. Bankole* (1908) in which customary law was defined as an "*unwritten law of an ethnic group*", the Islamic law can never be called a customary law because the Muslim law is written in the Holy Qur'ān and other sources. Also, the universality of Muslim law as reported by Ambali (2003:17-18) was acclaimed by non-Muslim legal practitioners such as Chief F.R.A Williams, a renowned Nigerian legal luminary who pronounced Shari'a law as a law with no territorial boundaries. In the same vein, Justice Karibi-Whyte (1993:125) emphatically said:

> It is important to point out for our purposes that this equation of Mohammadan law with customary law is demonstrably wrong and clearly misleading. It is submitted that the two systems of law are not indistinguishably similar. And the fact that the *Māliki* School of Shari'a has taken local customs into consideration and consequently modified some aspects of strict Islamic law is not sufficient justification for the assertion. Admittedly, native law and customs has been statutorily defined to include "Moslem Law", their distinguishing features nevertheless remains.

Also, Sections 261 (3) and 276 (3) of 1999 Constitution has separated Islamic law from customary law by making separate provisions for the administration of Islamic law and customary law in which the Shari'a Court of Appeal and the Customary Court of Appeal are created separately while with distinction, the qualifications of Shari'a Court of Appeal's judges (*Qādis*) and the judges of Customary Courts of Appeal are quite different.(Oba Abdulmumini, 2002: 829). Analogous to this, the notion of categorizing Islamic law as customary law was put to rest in

the case of *Alhaji Ila Alkamawa* v. *Alhaji Hassan Bello and Alhaji Malami Yaro* as delivered by Justice Wali, the then Justice of the Supreme Court in the concluding part of his judgment when he says:

> Islamic law is not the same as customary law as it does not belong to any particular tribe. It is a complete system of universal law, more certain and permanent and more universal than the English common law (See Oba, Abdulmumini, 2002: 837-840).

Premised on the above submissions, it could be ascertained that shariʿa is not and could never be a customary law because unlike customary law which is largely man-made and unwritten, shariʿa is divine and largely written in the Qur'ān and other Islamic sources. shariʿa also has no territorial delimitation, it transcends national, tribal, racial and language barrier with universal application as one of its hallmark. Furthermore, Shariʿa is permanent and rigid being a divine law while customary law is flexible and prone to incessant changes once inhabitants of a given community agreed to any new native laws and customs.

It is also interesting to mention that customary law (*ʿurf* or *ʿādah*) itself is a source among the sources of Shariʿa. This is largely applicable to non-Muslims who are under the protection of Islamic State (*Ahl al-Dhimmī*) in tandem with their customs, and also applicable to Muslims if there is no provision in Qur'an and Sunnah (Oba Abdulmumini, 2002: 829, 836). Muslims are also obliged to follow the precepts of shariʿa in faith and practice in any part of the world; while invariably, the users of a particular customary law are not under any obligation to adopt or be answerable to other alien customary law except if such person agrees to subject himself to the provisions of such native laws and customs.

Lastly, classifying shariʿa as a customary law denies Muslims their fundamental human rights of organizing their lives according to the dictates of their belief in Islamic law. This, as upheld by Muslims is in violation of their right to practice their religious duties as enshrined in section 38 (1) of the 1999 Constitution which guaranteed freedom of thought, conscience and religion.

Conclusion

The categorisation of shari'a as part of customary laws under the Nigerian legal system has been established as a gross legal impropriety. Though the damage was done by the colonialists, it retention after the Nigerian independence unravels the hypocritical nature of the administrators and the citizens; especially the Muslims who neither understand their religion and the non-Muslims who profoundly abhor shari'a application.

The limitation, sources and flexibility as inherent among the natures of customary law made it naturally distinct from shari'a and this in all ramifications suggests that, for decades to come, the Shari'a issues and altercations in Nigeria will be an unending battles literarily, legally, politically and religiously among the Muslims and non-Muslims of both the northern and southern parts of the country.

As a matter of urgency, there should be constitutional amendment pronouncing Shari'a as a distinct legal system, and not as an appendage of English law nor a branch of customary law in Nigeria due to its sources, permanency and universality. In achieving this and more, Nigerian Muslims should agitate for the establishment of Federal Shari'a Court as the final arbiter for all Islamic personal laws involving Muslims through genuine advocacy and peaceful engagements..

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